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Death and the digital age

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With an increasing amount of personal and business assets residing in digital form and accessible only through electronic means, you and your clients need to be mindful of what will happen to those digital assets when a person dies.

Digital assets include financial accounts, documents, e-mail, social media websites, music and photographs, to name a few. These digital assets may include some very personal and private items such as medical and financial information, personal notes to loved ones, personal diaries or writings about loved ones, photographs or drawings of loved ones, business plans, trade secrets and other items not meant, nor appropriate, for public disclosure.

Access to the digital assets most likely may require, at a minimum, knowledge of the user name and password (or, in some cases, possession of a working security token used in conjunction with the user name and password). However, when the digital assets are encrypted, knowledge of the encryption key will be necessary to unlock the encryption and see and read the digital assets.

For small- to medium-size businesses where there is one individual in control of the business and that individual dies, the digital assets of that individual and his or her business may be at risk of not being readily known or, if known, readily accessible. Those who may have an interest in the existence of the business' digital assets (e.g., family members, employees, creditors and claimants to intellectual property rights owned or used by the business) may not even be aware of the existence and location(s) of all of the digital assets. A business could fail if timely access to the digital assets of the business is not obtained.

Some states passed statutes or are considering legislation to provide executors of a deceased person's assets a right to take control of certain digital assets. Examples of such statutes include Connecticut (§45a-334a, Access to decedent's electronic mail account); Idaho (§15-3-715(28), Transactions authorized for personal representatives — exceptions); Indiana (§29-1-13-1.1, Duty of custodian to provide electronically stored documents to personal representative); Oklahoma (§269, Executor or administrator — powers); and Rhode Island (§33-27-1, Access to Decedents' Electronic Mail Accounts Act).

However, these state statutes are not uniform in their language and scope. For instance, the Oklahoma statute (§269) provides: "The executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites." In contrast, the Connecticut statute (§45a-334a) only speaks to e-mail accounts.

In January, the Uniform Law Commission (nccusl.org) proposed a study committee to consider the drafting of uniform legislation concerning access to digital information by a fiduciary administering a decedent's estate. It will be a while before a proposed uniform statute, if any, is produced by the National Conference of Commissioners on Uniform State Laws and proposed for adoption.

Where the current, albeit limited, statutory resources available in this area fall short is in their approach to the contracts, licenses, intellectual property rights, privacy rights and the technologies that sit at the threshold to accessing many digital assets. Assuming that those who may have a legitimate need or desire to know about the digital assets of a decedent are even aware of the existence of the digital assets, how will they deal with the access and control of those assets?

Digital assets estate planning services have appeared on the Internet. These services offer a technology solution to handling digital assets. However, their terms of use are not all the same and may not present a comfortable legal risk model to individuals considering those services. Suffice it to say that before trusting the keys to one's digital life to a digital estate planning service, knowledgeable legal counsel should be consulted to review and discuss the terms of use with you.

Control over the digital assets may be stymied by the terms of use of the websites containing the digital assets. For instance, the social media website may not allow heirs to continue the decedent's social media presence as a memorial to the decedent. In some instances, the family or heirs may have valid reasons for wanting the decedent's social media presence to be promptly removed, but will have to work through the terms and conditions of the social media website provider.

What if the digital assets include a collection of e-books? Unlike traditional hardback or paperback books, which may be transferred pursuant to the first sale doctrine, e-books may be subject to license restrictions that prohibit or restrict copying or distribution. Since digital assets are (usually) very easy to copy, it may be an infringement of copyright rights if multiple copies of the digital asset are created and distributed to multiple heirs when the copyright rights are owned by a third party.

Like most things in life and in business, a little planning may go a long way in preserving and protecting one's digital legacy.