BY JESSICA G. GORDON

Legal Access to a Deceased Account-User's Digital Assets

GONE ARE THE DAYS when heirs identified the possessions of a late spouse, parent, or sibling by rummaging through their home and opening their mail. The safe deposit boxes of 15 years ago, as keepers of our most prized and sensitive items, have been replaced by password-protected smartphones and online accounts, as our lives migrate to the digital world. From vacation photos, e-mail, and musical collections to credit rewards programs, airline miles, and hotel points, ensuring access to a loved one's complete legacy requires advance preparation and comprehensive planning.

Until recently, heirs and fiduciaries were armed with little power to access the digital haven of invaluable information stored in a late loved one's smartphone and online accounts, that is, unless the decedent planned ahead and provided a list of vigilantly updated usernames and passwords in a secure yet accessible location—assuming access under the deceased's username is permitted. However, in practice, this was rarely the case. Heirs and fiduciaries were routinely "locked out" of digital accounts, leaving innumerable digital casualties (of both monetary and sentimental value) and causing additional grief to those already suffering from a loss. Given the widespread nature of the problem, Internet service providers and lawmakers agreed that a legal framework for accessing and collecting digital assets of the deceased (as has long been the case for physical assets) was necessary.

After more than a year of sparring among Facebook, Google, and other powerful Internet companies, on the one hand, and the ACLU and California lawmakers, on the other, a version of the Uniform Law Commission's Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) was enacted in September 2016. This law was added to the California Probate Code as Sections 870-83, which took effect on January 1, 2017. The RUFADAA seeks to ensure that a mourning family member will no longer be required to battle an Internet giant to find closure in settling the affairs of the loved one's estate. Nevertheless, the framework provided by the legislation fails to apply to the majority of situations it was supposed to address.

The recent change establishes a three-tiered approach to allowing fiduciary access to a deceased account-user's digital assets. Prevailing above all else is the user's direction via "online tool" (for example, within Facebook settings, one may select an authorized person to handle the account upon death). Next, if the user has provided no instruction, authorization to handle digital assets under the user's will or trust controls. In the absence of instruction, the terms of service for the platform control (the worst, and most common, scenario). When utilized, the first two tiers allow the user to identify and vest control in a designated person, either on the platform itself or in an estate plan—progress, in that designated fiduciaries gained certain rights to manage digital assets. However, neither of these options is the default, and both require action on the part of the user. Moreover, because the online tool is obscured in the array of available settings and far too few users have or maintain estate plans, account terms of service (which by and large favor privacy protection) will remain the most common authority under the three-tiered system, and the obstacles in accessing digital assets will persist.

While versions of the uniform law in other states apply during a user's incapacity, California's version applies only after the death of the user. This means, under current law, that an agent with a power of attorney is powerless with respect to managing the online affairs of an incapacitated California user. Consequently, it is even more important in California to plan ahead outside the four corners of the statute.

The Revised Uniform Fiduciary Access to Digital Assets Act seeks to ensure that a mourning family member will no longer be required to battle an Internet giant to find closure.

Taking into account the shortcomings of the three-tiered system, particularly as it only applies in California after a user's death, clients must articulate goals concerning their digital assets to minimize the challenges that their heirs and fiduciaries will face. Clients should specify what should be done with the asset, the level of fiduciary authorization granted with respect to each asset, and any privacy concerns, considering the differences between accounts with monetary value (online banking, airline miles, and credit rewards programs, for example) and accounts of a more personal nature such as social media with private messaging features.

Estate planners should be prepared to speak to these issues, offering alternatives to a sweeping grant of access for clients with privacy concerns (e.g., with respect to an e-mail account, the suggestion that a fiduciary may have access to a catalog of e-mail communications but not the content of these communications). Finally, it is essential that an inventory of digital accounts, along with usernames and passwords—ideally updated and with answers to security questions—is deposited with the estate plan in a secure location. In so doing, heirs and fiduciaries are provided the best opportunity of honoring the decedent's legacy of digital assets, as the management and value of the assets are passed on to them with minimal stress and heartache during a difficult time. ■

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