

Digital Assets in Estate Planning

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Overview of Presentation

- ▶ What are digital assets?
- ▶ What is the current state of the law respecting digital assets?
- ▶ Challenges in dealing with the digital assets of a deceased person
- ▶ Pre-mortem planning opportunities

What are digital assets?

▶ There are two main categories of digital assets:

▶ **Category #1: Assets over which we have physical control**

These assets are controlled by the testator because the testator controls the storage device that contains the assets. For example, documents on a hard drive.

The testator usually has control over what happens to this category of asset.

▶ **Category #2: Assets that we have access to (but not control over)**

These assets are owned by the testator but controlled by an online service provider and accessible by way of a client identity authentication process such as a username and password. For example, a Facebook account.

The online service provider will typically state in its terms of use what restrictions there are to access or transfer accounts (on death or otherwise).

What are digital assets?

Here are just a few examples of common digital assets:

- ▶ A computer
- ▶ A cell phone
- ▶ Digital photos (stored on the computer or cell phone, or stored in the “cloud”)
- ▶ Bitcoin
- ▶ Online gambling chips
- ▶ Facebook/Instagram/twitter/LinkedIn
- ▶ Online banking accounts
- ▶ AppleID
- ▶ Points-based programs (e.g., Airmiles)

Why does it matter?

- ▶ These assets have value! (monetary, sentimental or both)
- ▶ Consider:
 - ▶ The person who has not printed any photos, but keeps them all electronically on the “cloud” or on their hard drive.
 - ▶ PayPal and Amazon users who may have credits on their accounts.
 - ▶ The person who has a savings account with an online bank, such as Tangerine.

Current state of the law in Canada

- ▶ Prior to 2016, there was no legislation or proposed legislation in any Canadian province on how to deal with digital assets on death.
- ▶ August 2016 - Uniform Law Conference of Canada introduces the “Uniform Access to Digital Assets by Fiduciaries Act” (the “Uniform Act”)
 - ▶ Defines a “digital asset” as: “a record that is created, recorded, transmitted or stored in digital or other intangible form of electronic, magnetic, or optical means or by any other similar means”

Current state of the law in Canada

- ▶ The full text of the Uniform Act can be found at this site:
https://www.ulcc.ca/images/stories/2016_pdf_en/2016ulcc0006.pdf
- ▶ This Act establishes the rights of personal representatives, guardians, attorneys acting in accordance with a power of attorney and trustees of an estate to access digital assets.
- ▶ It provides that if there is a provision in a service agreement that limits access to the asset, such limitation is contrary to the act and unenforceable.
- ▶ It also proposes to provide protection from liability for custodians of the assets, and allows for persons to apply to court for direction in dealing with the assets.

Current state of the law in Canada

- ▶ **ALBERTA:** The Schedule to the *Estate Administration Act* was amended in recent years to include as one of the “core tasks” of a personal representative,
 - “determining the full nature and value of property and debts of the deceased person as on the date of death and compiling a list, including the value of all land and buildings, a summary of outstanding mortgages, leases and other encumbrances and online accounts.”
- ▶ **SASKATCHEWAN** (and other provinces): No specific reference to digital assets exists in the legislation

What are the challenges in dealing with digital assets on death?

- ▶ Challenge #1: Need co-operation from the owner.
- ▶ Challenge #2: Service providers may not have a policy in place that allows an executor to access the digital asset on behalf of the deceased.
- ▶ Challenge #3: The service provider may have a policy, but it could be strictly enforced (i.e., requires probate prior to release of the asset).

Planning Tips for Specific Types of Digital Assets

- ▶ Social Media Sites:
 - ▶ Generally, social media companies will not allow anyone to access the account.
 - ▶ Typically, they permit a memorial page to be created, and the original account de-activated.

Social Media Accounts

- ▶ Facebook:
 - ▶ Will not transfer the account to a fiduciary (i.e., an executor)
 - ▶ Will allow a Facebook account to be deleted with a written request from the deceased's next of kin.
 - ▶ Facebook terms of service state:
 5. You may designate a person (called a legacy contact) to manage your account if it is memorialized. Only your legacy contact or a person who you have identified in a valid will or similar document expressing clear consent to disclose your content upon death or incapacity will be able to seek disclosure from your account after it is memorialized. [emphasis added]

See *Stassen v. Facebook* for an example of Facebook's strict policy regarding access to a deceased individual's account.

Social Media Accounts

▶ Instagram:

- ▶ Similar policy to Facebook - will not permit anyone to access the deceased's account.

▶ Instagram's Policy Statement

We'll memorialize the Instagram account of a deceased person when we receive a valid request. We try to prevent references to memorialized accounts from appearing on Instagram in ways that may be upsetting to the person's friends and family, and we also take measures to protect the privacy of the deceased person by securing the account.

To report an account to be memorialized, please contact us. We require proof of death, such as a link to an obituary or news article, to memorialize an account.

...

Verified immediate family members may request the removal of a loved one's account from Instagram. When you submit a request for removal, we require proof that you are an immediate family member of the deceased person...

Social Media Accounts

▶ Twitter

- ▶ Similar policy as Facebook and Instagram - not allow anyone to access the account. However, Twitter will deactivate the account if they are provided with proper documentation.

- ▶ Twitter's policy states:

In the event of the death of a Twitter user, we can work with a person authorized to act on behalf of the estate or with a verified immediate family member of the deceased to have an account deactivated.

After you submit your request, we will email you with instructions for providing more details, including information about the deceased, a copy of your ID, and a copy of the deceased's death certificate. This is a necessary step to prevent false and/or unauthorized reports. Be assured that this information will remain confidential and will be deleted once we've reviewed it.

We are unable to provide account access to anyone regardless of their relationship to the deceased.

Social Media Accounts

▶ LinkedIn

- ▶ Will close out an account once a verification of death form has been completed. This form requires:
 - ▶ The member's name
 - ▶ The URL to their LinkedIn profile
 - ▶ Your relationship to them
 - ▶ Member's email address
 - ▶ Date they passed away
 - ▶ Link to obituary
 - ▶ Company they most recently worked at
- ▶ See: <https://www.linkedin.com/help/linkedin/ask/ts-rdmlp> for the form.

Apple

- ▶ Apple has a very strict policy upon death.
- ▶ The “iCloud Terms and Conditions” document reads as follows:
 - ▶ D. No Right of Survivorship

Unless otherwise required by law, You agree that your Account is non-transferable and that any rights to your Apple ID or Content within your Account terminate upon your death. Upon receipt of a copy of a death certificate, your Account may be terminated and all Content within your Account deleted.

<https://www.apple.com/legal/internet-services/icloud/en/terms.html>

However, Apple Support has also previously advised our office that in addition to a death certificate, a “court document” is also required confirming that the person requesting cancellation is the “legal personal representative” of the deceased.

Apple - Further Considerations

- ▶ Why do we care?
 - ▶ Ongoing subscriptions
 - ▶ Credit in the Apple Account
 - ▶ Identity Theft
 - ▶ May need to access the device to remove photos/data
- ▶ Why is this problematic?
 - ▶ Consider the circumstance where probate is not otherwise required on an estate.
 - ▶ Still does not provide you with “access” - even if you meet the requirements, all you are accomplishing is closing down the account.

Canadian Privacy Law – Does it play a role?

- ▶ Do a person's privacy rights dissipate upon death?
- ▶ Keep in mind that certain privacy laws regarding health information maintain protected status of that information post-death.
- ▶ We know that there are also certain exceptions for the collection, use and disclosure of personal information solely for personal or non-commercial use.
- ▶ Consider jurisdictional issues - when dealing with online content, who has jurisdiction?

Ex. Deceased lived in Canada, and his computer resided in Canada, and all content was created in Canada. Do only Canadian privacy laws apply?

Bitcoin/Cryptocurrency

- ▶ What is it? (See K. Andy Chiang article, “Cryptocurrencies: A Primer for Lawyers” (Bar Notes Spring 2018 issue) for an excellent summary)
 - ▶ A math-based currency.
 - ▶ Created by a global network of computers that have to solve increasingly complex math problems.
 - ▶ The creation of bitcoin is termed “mining” - each time a “miner” solves one of the algorithms, he/she is rewarded with new bitcoin. However, you do not need to be a “miner” to buy or sell cryptocurrency.
 - ▶ Every time a transaction is made, it is recorded on a public ledger called the “block chain”. This ledger is broadcast to anyone running open-source bitcoin software.
 - ▶ Each account is assigned a “public address” and a “private address” - these “addresses” are a series of letters and/or numbers. In order to transfer units **into** an account you need to know the account’s public address. In order to transfer units **out** of an account, you need the account’s private address. Any one person can have multiple accounts.

Bitcoin/Cryptocurrency

- ▶ Private Addresses:
 - ▶ If you lose a private address, the units in that account can never be transferred out.
 - ▶ If someone obtains your private address, they could “steal” units from your account.
- ▶ Therefore, if you are giving estate planning advice to a client regarding cryptocurrency, make sure to advise the client of the risks in releasing the private address.

Post-Mortem Triage

- ▶ In the event your client has passed away, and has not engaged in any planning respecting digital assets:
 - ▶ Look to the Will to see what powers (if any) were provided to the executor, and whether those powers could extend to digital assets.
 - ▶ The Executor should start compiling a list of all digital assets:
 - ▶ Physical assets: iPhone, Computer, iPad, hard-drives, USB sticks, PVRs
 - ▶ Accounts: iCloud, Twitter, Facebook, Instagram, LinkedIn
 - ▶ Electronic Assets with monetary value: Bitcoin, online gambling chips, e-banks (e.g., Tangerine)
 - ▶ The Executor should then determine what information the deceased left behind on these assets (i.e., passwords, security questions, account information)
 - ▶ Do any of these assets need to be included in the probate application?
 - ▶ The Executor should then consider what needs to be done to close/deactivate each of the digital assets (i.e., likely requiring proof of death, and proof of legal representative)

Pre-Mortem Planning

- ▶ Complete a “digital audit”
 - ▶ IDENTIFY all potential digital assets.
 - ▶ Provide INSTRUCTION on what should happen to each asset in the event of death.
 - ▶ Give the necessary information to allow ACCESS to the assets on death.
- ▶ Consider including clauses in the Will and Power of Attorney which contemplate the following:
 - ▶ Naming a Trustee/Executor/Attorney (as the case may be) for the digital assets.
 - ▶ Providing instruction/authorization to deal with digital accounts.

Pre-Mortem Planning

- ▶ Options for Access:
 - ▶ Draft a “Virtual Asset Instruction Letter” to leave with a trusted person, the lawyer, or in the safety deposit box or home safe (provided the executor has access).
 - ▶ Make sure to keep in mind the rules in SK regarding “Incorporation by Reference”:
 - ▶ (1) The unattested doc must be in existence at the relevant date (execution or republication). The onus is on the one seeking incorporation i.e.) if no evidence, no incorporation.
 - ▶ (2) The will must refer to it as an existing doc. This is a matter of construction.
 - ▶ (3) The will must describe the document with sufficient certainty so that it can be identified. Parole evidence is admissible to identify the document. Evidence of testator’s intention is NOT, unless there are two or more documents which equally satisfy the description in the will.
 - ▶ If not “incorporated by reference” is it a valid amendment to the Will? (consider the rules in SK re: formal will/holograph will)

Pre-Mortem Planning

- ▶ Online Service Provider: There are a number of online service providers that will store your passwords - for example:
 - ▶ www.securesafe.com - this website will save your documents and your passwords. You can also leave contact information for recipients (intended beneficiaries) setting out your wishes.
 - ▶ www.deathswitch.com - this is an automated system that prompts you for your password on a regular basis to make sure you are still alive. If no reply, the computer assumes you are dead and sends a pre-scripted message to intended recipients.
 - ▶ www.gen-ark.com - cloud-based storage system.

Conclusion

- ▶ Digital Assets present new and emerging challenges that estate planners should be aware of.
- ▶ There are steps that can be taken as part of the estate planning exercise to identify and provide instruction regarding digital assets.
- ▶ Even if no pre-planning has been undertaken, executors arguably have an obligation to consider digital assets (especially if such assets should be disclosed as part of a probate application).
- ▶ There is no legislation in Canada which governs digital assets - the process for obtaining access to each type of asset is largely governed by the contract entered into between the deceased person and the provider.

Questions?

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