



In Support of Sensible Legislation on Digital Assets

By KC Marie Knox

by mail. While there are many benefits to this method of communication and storage of information, there are just as many pitfalls. Primarily, if you have not provided your next of kin the username and password for each digital account you own, it may be impossible for anyone else to secure access to that account.

Upon your death, someone else will be left in charge of your estate and will have to make sense of your digital assets notwithstanding their grief at your passing. Calls to email service providers will be met with roadblocks since the owner of the account is no longer around. The service provider will consistently reference the end-user license agreement that is between the provider and the owner, citing statements that those agreements are designed to protect the integrity of their accounts and insure privacy. There is nothing that can be done and it may be months, years and potentially never before all of the digital information is recreated.

A person's digital information is just like any other asset that needs to be administered correctly on incapacitation or death. The time has come where personal representatives, trustees, and agents acting under a power of attorney can access such digital assets with greater ease and less red tape.

According to a 2011 Census Bureau report,¹ more than three-quarters of all Americans owned a computer. That number increased to nearly ninety percent of all Americans

FOR THE PAST TEN OR SO YEARS, NEWS ARTICLES have abounded regarding the difficulty in accessing the digital records of the dearly departed. Famous examples include the case of Justin Ellsworth, the U.S. Marine who was killed while serving in Fallujah, and his father's desperate pleas to access his Yahoo account, which were denied. Another is the case of Karen Williams, whose 22-year-old son was killed in a motorcycle accident, and her desire to access his Facebook account, which was also refused. Both parents were faced with bureaucratic roadblocks during a time when emotions were already being pushed to their limits.

The problems associated with digital records are exacerbated by our desire to "go green." No matter how the picture is painted, it seems as though people of all generations are eschewing traditional paper communications for digital. In fact, many companies are now making email the default method of communication and will charge a fee for communication



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with a bachelor's degree or higher.² A quick look around your room will likely produce a computer, a tablet, laptop, cell phone, or perhaps all three. All of those electronic devices likely hold at least one component that can be characterized as a digital asset (e.g., email, pictures, books, apps, etc.). Individually or in combination with traditional assets, those digital assets have the potential to cause a significant impact on one's estate, both in terms of valuation issues and administrative logistical issues.

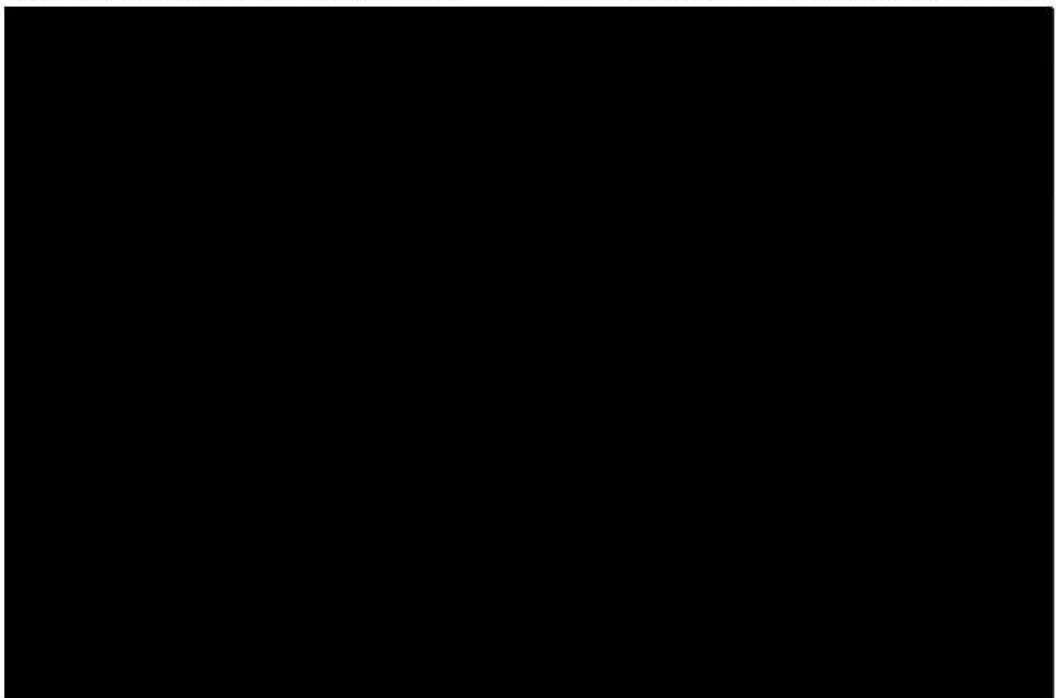
Delaware has taken the first major step forward to address some of those issues. On August 12, 2014, Delaware Governor Jack Markell signed HB 345 into law, more formally known as "The Fiduciary Access to Digital Assets and Digital Accounts Act." The law, which will go into effect on January 1, 2015, is the first comprehensive law that provides access to a person's digital estate following death. The Act is a legislative response to the fast-growing problem of the inability to retrieve information from email accounts, social media accounts, business records and other digitized accounts following a person's death.

Some states have started to address these issues. Narrow statutes have been enacted in a handful of states³ but they only address email accounts—not social media or other internet-based accounts—and are relatively restrictive, limited to turning over copies of emails, but not providing actual access to the account. In Delaware, however, if a

person dies and is a resident of Delaware at the time of death, all companies are obligated to provide the username, login and password information to the estate representative. The company would be able to withhold this information only if they were directed that the account not be accessible in the event of death or incapacity.

The Act provides authority to a decedent's personal representative, an agent authorized under a power of attorney or a trustee of a trust. The representative would essentially step into the shoes of the deceased or disabled account holder and would have all of the powers, rights and responsibilities the account holder had.⁴ Following proof of death or disability and appropriate appointment of authority, the custodian of the account is obligated to turn over all username, password and any other relevant information necessary to fully access the account. Failure to do so could result in court orders and potential liability for damages to the estate.⁵

California has the opportunity to improve upon the statute already passed in Delaware by addressing some of the shortfalls that Delaware's HB345 does not address. Legislation is currently pending in California on this issue. On January 9, 2014, Senator Joel Anderson introduced SB 849, proposed legislation in California to address the same subject matter as Delaware's HB345. The proposed legislation was amended on April 21, 2014 and the first hearing on the matter



was held on May 6, 2014 with testimony being taken. If passed, the new legislation would expand California Probate Code §9650 to require that electronic communication services or remote computer services provide a decedent's personal representative access to the decedent's account.⁶

At first blush, this proposed legislation is much more restrictive than the Delaware law, since it may be interpreted to only address email accounts. It is essential that any proposed legislation cover a much more expansive group of digital assets. Email is just the tip of the iceberg.


There are other digital assets, some of which may hold significant monetary value, which also must be addressed. For example, self-published authors are using the web and cloud storage as a means by which to create, preserve and distribute their works. California's legislature should adopt the more expansive definition of digital assets as proposed by the Uniform Law Commission: "a record that is electronic,"⁷ with record meaning "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."⁸ This would not only include email, but also encompass a broader spectrum of digital assets.

Secondarily, the proposed California legislation only gives authority to a personal representative appointed by the court, which means that agents acting under a power of attorney or trustees acting outside of the oversight of the Probate Court

are not covered. The expansion of the breadth of digital assets covered and the persons entitled to the information following disability or death are crucial for any proposed legislation to adequately address the issues arising from the expanding realm of digital assets.

On a positive note, California's proposed legislation does deal with an issue relating to the disclosure liability of the service providers. The Electronic Communications Privacy Act⁹ and the Stored Communications Act¹⁰ regulate the disclosure and transmission of digital assets. While these Acts were initially intended to prevent unauthorized wiretapping or disclosure of information without the user's consent, it has been interpreted much more broadly, thereby potentially exposing a service provider to liability for disclosure to anyone other than the registered owner.

The proposed California legislation provides indemnity for the service providers who comply with an order to release information to a personal representative. It will remain to be seen if this will provide enough incentive for service providers to comply with the court's order or whether the federal government will prosecute these types of cases in the first instance.

It is hoped that the ultimate law passed in California will be more expansive both in terms of coverage and in authority granted, but still maintain the additional protections of liability indemnification. What should be clear though is that these new laws are important and are definitely needed in this technological age. Digital assets are not going away and these laws are designed to make administration of the assets easier. The days of maintaining business records, check registers, bank accounts, photo albums, and other communications through traditional pen and paper are dwindling; computers are becoming our filing cabinets. Storage, back-ups and original works—art, short stories, novels, biographies—are being digitized. Now it is up to us to incorporate those digitized assets into our overall estate plan, addressing both concerns of disability and death. 

¹ Thom File, United States Census Bureau, "Computer and Internet Use in the United States: Population Characteristics," May 2013, available at www.census.gov/prod/2013pubs/p20-569.pdf, last accessed September 16, 2014.

² *Supra* Table 1.

³ Connecticut (SB262, effective October 1, 2005); Idaho (SB1044, effective July 1, 2011); Indiana (SB0212, effective July 1, 2007); Maine (LD850, proposed); Maryland (SB0029, proposed); Michigan (HB5929, proposed); Nebraska (LB783, proposed); Nevada (SB131, effective October 1, 2013); New Hampshire (HB0116, proposed); New Jersey (A2943, proposed); New York (A823, proposed); North Carolina (SB279, effective June 12, 2013); North Dakota (HB1455, proposed); Oklahoma (HB2800, effective November 1, 2010); Oregon (SB54, proposed); Pennsylvania (HB2580, proposed); Rhode Island (33-27-3, effective May 1, 2007); and Virginia (SB914, proposed).

⁴ Delaware Code, Title 12, Chapter 50, §5005.

⁵ *Supra* §5006.

⁶ Proposed legislation California Probate Code §9650(a)(3).

⁷ Uniform Fiduciary Access to Digital Assets Act §2(9).

⁸ UFADAA §2(21).

⁹ 28 U.S.C. §2510 et seq.

¹⁰ 28 U.S.C. §2710 et seq.