

Afterlife on the Cloud

Creating a Heavenly Plan for Electronic Assets

BY DAVID M. LENZ

“David M. Lenz is out of the office and will return on July 9, 2012. If you need immediate assistance, please call (216) 696-4200 and ask for his assistant.” Like most attorneys, when I leave town this summer, I will use Outlook’s “Out of Office Assistant” to create this kind of “away message.” I will also tell my secretary and colleagues how to access any important files that are in progress when I leave. I imagine you would do the same things as a matter of course. But how many of us, or our clients, make similar plans with respect to our computers and email accounts in case of death?

Increasingly, life is lived in an electronic world. When death comes, a person now leaves behind a vast array of digital items containing valuable information that may assist with administering an estate, be treasured by a family member, or have intrinsic monetary value. As estate planners, we have not fully adjusted to the new ways assets and information are stored in the post-modern world.

These “electronic assets” are also walled off behind a series of user names, passwords, and security questions. Loved ones may not be able to access important files and accounts unless they know the deceased person’s user name, password, high school mascot and make and model of his first car. Lack of access often renders these assets worthless to the survivors. Concerns about security and identity theft exacerbate these problems by creating a mind-set that people should never write down electronic passwords, much less tell them to someone else.

As trusted advisors, we are in a position to open clients’ eyes to the importance

of planning for these assets. Many estate planning concepts are appropriate for digital assets but are more difficult to apply in that world. Estate planning clients often keep their important documents in a safe place, tell a few trusted individuals where the documents are, and expect their wishes will be followed. The problem with this concept in the digital world is identifying the important items, deciding what should be done with them, and keeping an updated list in a safe location. Here are some of the key issues that any digital asset plan should address:

What Is the Electronic Information?

How many different password-protected

Loved ones may not be able to access important files and accounts unless they know the deceased person’s username, password, high school mascot and make and model of his first car.

and/or web-based activities does a client encounter in one day? The client may have multiple work and personal email addresses; social networking profiles for Facebook, LinkedIn, and Twitter; online access to bank, brokerage, or credit card accounts; and cloud-based photo sharing archives. Maybe she has her own blog or website. Maybe he owns Internet domain names or operates an online business. The Cleveland Clinic and other hospital systems now offer web portals to view medical records. This information may be valuable to a guardian or health care agent in the event of a disability.

A client may use TurboTax, Quicken, or simple spreadsheets to keep track of

their financial information on their home computer. These may also be password-protected. The information-gathering phase of an estate administration would be substantially easier if a client planned to provide their executor immediate access to all of this consolidated financial information.

Unfortunately, few clients take the time to think through what electronic information they would want their survivors to be able to access after their death or disability.

Where Is the Information Kept?

Equally important to identifying the information is knowing where it is kept. In estate administration, traditional sources

of information are: (1) copies of income tax returns, (2) file drawers with investment information, and (3) new asset statements arriving in the mail. Now consider a deceased person who (1) e-filed his personal income taxes through TurboTax, (2) had an E*Trade brokerage account, and (3) signed up for electronic statements when he recently switched banks. The

financial information exists, but only in the computer and email. The traditional, paper-based, ways of gathering asset information will be powerless to find it.

As the world becomes increasingly digital, clients have more electronic devices that store information. The home computer is the starting point for a search for electronic assets, but where is the information stored? If someone started your client’s home computer after her death, would it be obvious where to find the family photos or the spreadsheet where she kept detailed records of her finances? Other information may not be on the home computer. Maybe her most up-to-date contact list is on her smart phone. Increasingly, there are cloud-

based services, external hard drives, flash drives, or memory cards that store key files or family photos and videos.

Any digital asset plan should identify not only what the key pieces of information and assets are, but also where the information is located.

Who Controls the Information?

The executor does not automatically step into the decedent's shoes (or keyboard in this case) for purposes of administering electronic assets. For example, an iTunes account is only a license to use music that is personal to the owner and, under Apple's terms and conditions, cannot be transferred at death (or any other time). There may be more leeway for an executor to control email and other social media. In February, Nebraska became one of only a few states to specifically authorize executors to manage email and social media accounts on behalf of the deceased. Without state law or specific provisions in a Will or Power of Attorney, access to the electronic assets without a password is governed by the long list of terms and conditions displayed above the "I agree" button when the account was created.

Consider an executor trying to access a deceased person's Gmail account. He must submit: (1) his name, (2) his mailing address, (3) a certified death certificate, (4) his own email address, (5) the deceased's email address, and (6) a complete email from the deceased's Gmail address to the executor. This information is submitted to Google for review. If approved, the executor moves to "Part 2" of the process which requires "an order from a U.S. court and/or submitting additional materials." Google makes clear that, even if all appropriate information is submitted, it still may not grant access.

Clearly it is easier to name a person to manage electronic information after death

and provide him or her the user names and passwords. Clients should consider naming a "digital executor" in their Will, Trust, or other document. Such a document would provide clear authority if the named agent ever experienced problems that could not be managed by access to the passwords. The "digital executor" may be a different person than the executor, particularly if the chosen executor is not tech-savvy.

What Should be Done with the Assets?

Many of the "assets" described in this article are really just information about financial or tangible assets that will be useful to the executor. But what about the sentimental and emotional connections of some assets? Instead of having family members fight over who gets to keep the photo albums, the "digital executor" should be given control over duplicating and distributing family photos from the deceased person's hard drive.

Also, gone are the days when an obituary and funeral were the primary ways to memorialize someone. The Internet allows myriad ways for a person to digitally live on well after death. At death, Facebook allows a user's account to be either taken down or turned into a memorial page where friends can post memories and well-wishes. Clients should instruct their digital executor as to which option they prefer. If the client has a final note they want sent to their friends, they should instruct their digital executor where and how they want to post their ultimate "away message." If clients are more systematic about spelling out their electronic memorial wishes, they can use websites like www.mywonderfullife.com to create a customized memorial page and allow their agents (called "angels") to carry out their wishes. There are even websites that will try to help a client transfer his or her electronic assets, such as DataInherit and SecureSafe. Another large provider in this

area was "Entrustet," which was purchased by Securesafe in April. This brings to mind one of the drawbacks of planning through web-based providers. Since these sites are so new, clients should be careful to make sure they have not outlived the service they are using.

How Can We Help Clients Plan Their Digital Estate?

A common reaction among many clients when digital estate planning is raised is "Wow! I never thought of that!" If our clients are not planning for electronic information, we are not accomplishing our goal of developing a comprehensive plan for them. So, what can we do?

- Talk about electronic assets with our clients.
- Encourage clients to create a digital inventory of files, accounts, and passwords.
- Have clients list where to find important files.
- Have clients designate an "digital executor" and tell them their wishes.
- Include electronic asset powers in Wills and powers of attorney.

Given the proliferation of personal electronics and online information, the gap in estate planning caused by digital assets will only continue to grow in the years to come. These steps can help our clients close that gap for that day when they are permanently "Out of the Office."



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