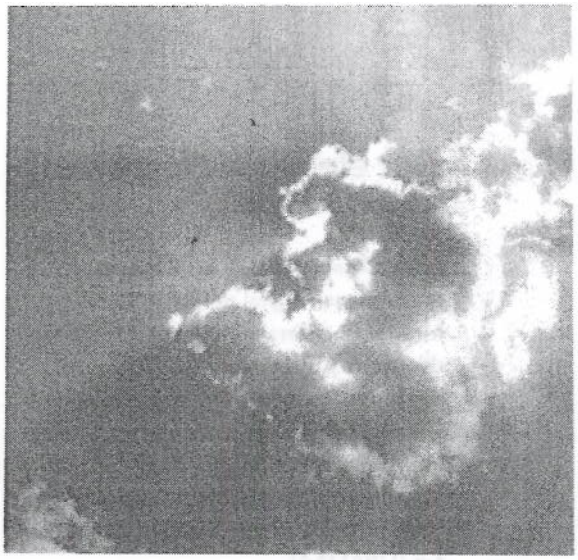
Our electronic afterlives: What happens to our digital assets after we die?

By Sarah M. Andrew



For those of us who work in estate planning, it's common to speak with our clients about what they want done with their "stuff" after they die: the personal library, the record collection, the vintage salt-and-pepper shakers. In recent years, the catalogue of "stuff" that people have has expanded to include digital property. The expansion has not been painless or without controversy. And though the law is often slow to catch up with societal changes, there are several important efforts currently underway to codify our relationship to our cyber "stuff."

We can think of digital assets as belonging to four distinct, yet overlapping categories: (1) online content that we create, such as Facebook and blog posts; (2) electronic property that we purchase and store online, such as i-Tunes music files; (3) access to private information that we store online, such as our e-mail accounts; and (4) access to assets that are simply managed online, such as electronic banking. As we move into an increasingly electronic future, the definition of digital property will continue to evolve. These categories are most useful to illustrate just how many of our interactions have transitioned from real-time, in-person exchanges in the physical world, to the comparatively mysterious (and password-protected) cyber-world.

Problems arise when there is a need to delegate management of digital assets to an agent or executor. No federal law comprehensively covers such delegation. States, including Pennsylvania, are beginning to explore options, as will be discussed below. Until a legal framework is set in place, digital property owners must deal individually with the various companies that provide online services. This is no easy task, as each company has a different governing policy, known as the "terms-of-service" agreement.

A typical terms-of-service agreement will prohibit a user from sharing access to the service with any other person, for any reason. Without specific authorization under the agreement, a user may not appoint an agent to manage online accounts during an emergency or an extended period of incapacity. The most practical solution of sharing login and password information with the prospective agent would be a violation of the agreement, which would threaten the continued use of the service. Any prospective agent who is nevertheless given such access would not be protected from prosecution or liability for actions taken online, even at the express direction of the user. This prohibition extends into the afterlife; a user generally has no legal right to grant an executor access to digital assets. The sad result is that years of collected data such as writings, pictures and other records may be lost forever.

Fortunately, some companies have begun to offer solutions. In February of this year, Facebook began offering users the option to name a "legacy contact." The legacy contact administers the "memorialized" account that is created when a Facebook user dies. The legacy contact can take certain limited actions that include downloading all of the information saved on the deceased user's Facebook page, or posting a final message from the user to the world. Google has been offering an "inactive account manager" option since 2013. This option allows a user to dictate what happens to Gmail messages and other Google-related services (including Google Drive, Blogger and YouTube) after death or in case of an extended period of inactivity. Twitter takes another approach, and agrees to work with "a person authorized to act on the behalf of the estate or with a verified immediate family member of the deceased." No access is granted to the executor or family member, but requests by that person to deactivate the account will be honored.

More and more online service companies are responding to consumer demand by providing such increased control of digital assets. These options are a step in the right direction. However, the sheer number of online services invites confusion, as each company has different rules and policies.

The market response to this problem has generally been the development of digital asset management tools. Companies such as SecureSafe and PasswordBox promise to collect and securely store online account logins, passwords and legacy directions in a sort of digital file cabinet. This method does not overcome terms-of-service restrictions. Further, there are obvious risks to placing such sensitive information all in one place online, no matter how strong the encryption. The estate planner's response to this problem has not been much better. Most practitioners now include clauses in powers of attorney and wills that contemplate granting access of digital assets to agents and fiduciaries. Such language may or may not effectively override company policies.

Against this backdrop of few good options, the law can provide a much-needed framework for digital asset planning. At this time, there is no federal legislation that controls the fate of our digital assets. Federal laws generally prohibit hacking and spying, but they do not address the

Continued on page 11

Our electronic afterlives

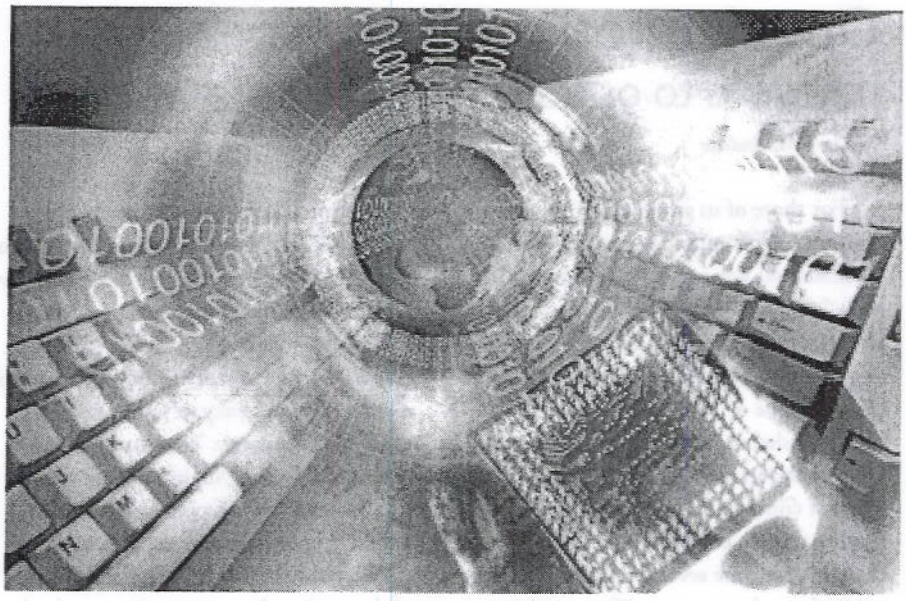
Continued from page 10

appointment of fiduciaries to manage our personal, digital property. There is, however, a general movement throughout the country for states to enact laws and regulations concerning the control of digital assets. This movement received a boost in July of 2014, when the Uniform Law Commission completed and approved the Uniform Fiduciary Access to Digital Assets Act (UFADAA).

The UFADAA specifically addresses the rights of fiduciaries to access and manipulate digital assets on behalf of principals or decedents. The application of the law is limited to personal representatives of decedent's estates, court-appointed guardians or conservators, trustees, and agents under powers of attorney. The UFADAA defines a digital asset as an electronic record, which includes any type of information stored electronically on a device or uploaded to a website, and rights in digital property. The Act seeks to encompass all of the broad and shifting categories of digital property.

Since the UFADAA was approved just last summer, several states have already adopted the suggested language. Other states, including Pennsylvania, are considering statutory amendments to incorporate the recommendations. On Feb. 20, 2015, Pennsylvania Senate Majority Leader Dominic Pileggi introduced SB518, an addition to the PEF Code (Title 20 Pa.C.S.A.). As of this writing, the bill has been referred to the Judiciary Committee.

The proposed Pennsylvania legislation is based largely on the UFADAA. Individuals would have authority to appoint fiduciaries to manage digital assets in the same ways such fiduciaries may currently be appointed to manage tangible property. The proposed legislation also imposes the same fiduciary duties on agents and personal representatives as currently exist in the PEF code; the fiduciary must still act for the benefit of the principal or estate. In addition, the proposed law offers the same immunity from liability for fiduciary actions taken in good faith.



The spirit of the law is simply to extend all existing fiduciary authority over the principal or decedent's physical assets to include digital assets, in every conceivable form. In response to industry criticism that the proposed law violates consumer choice and privacy, the law would defer to the account-holder's choice of agent through a terms-of-service agreement, where such choice has been made in accordance with company policy.

The world has changed in extraordinary ways since the internet has become a widely available part of our daily lives. We live much of our lives online; there is hardly an exchange that cannot be accomplished nearly as well in cyberspace as in the physical world. New forms of digital property are constantly being invented. Our laws should reflect that digital assets are as much a part of our estates as those items we once placed reverently in safe deposit boxes. The passage of SB518 would provide a much-needed tool for estate planning practitioners and our clients. In the meantime, we should probably continue to advise clients to keep a list of logins and passwords handy, just in case. ■

Sarah M. Andrew is an associate with Schoffstall Elder Law, serving the greater Lehigh Valley. Her practice areas focus on issues affecting older adults and their families, including estate planning and administration, long term care planning and guardianship. For more information, visit www.lvelderlawattorney.com.