

## Laws vary on accessing digital assets of deceased

January 7, 2015 12:00 AM

By Tim Grant / Pittsburgh Post-Gazette

In an age when social media websites record so many life experiences and so much personal information is stored online, financial advisers and estate lawyers are increasingly advising clients on handling their digital estates as well as their financial legacies.

Laws on the books address the transfer of financial assets, such as real estate, bank accounts, stocks and even physical items like furniture and silverware. But federal and state regulations are — for the most part — in catch-up mode when it comes to digital assets.

Some states have passed laws that give executors of estates the authority to handle the decedent's digital assets — including online accounts such as Facebook, LinkedIn and email — as they would any other assets.

Pennsylvania is not one of them, said David Walters, a financial adviser at Palisades Hudson Financial Group and author of the chapter on planning a digital estate in Palisade Hudson's new book, "Looking Ahead: Life, Family, Wealth and Business After 55."

"Because there are not laws in many states now addressing digital assets, executors often do not have legal authority over these assets," Mr. Walters said. "In most cases, that means the original agreement between the online vendor and the person dictates what happens when that person dies.

"Usually what the online vendor will do is shut down the account."

For that reason, as part of estate planning documents, Mr. Walters recommends including a list of all online accounts and passwords. The individual can stipulate what should be done with email and other online accounts upon death.

“Think about what would happen if you were to die unexpectedly or become disabled,” he said. “If your spouse or other loved one doesn’t have your user names and passwords, he or she may find it awkward at best and impossible at worst to manage your affairs.”

Pittsburgh lawyer E. David Margolis said he makes a point to discuss the issue of digital assets with clients. He asks them to fill out an “important information inventory,” which is a road map into the client’s personal affairs such as a list of financial accounts with account numbers and information about all online accounts.

“This is not something we do formally in a will. It’s for their own purposes, but some clients ask me to keep a copy,” said Mr. Margolis, a trusts and estate attorney at Buchanan Ingersoll & Rooney, Downtown.

A digital asset rarely has monetary value, “but it’s a window into your life,” Mr. Margolis said. “It’s a question of preserving access to the information.”



Updates › Death and Social Media Account Access

# DEATH AND SOCIAL MEDIA ACCOUNT ACCESS

27.02.2015

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Partner

## Online Platforms

Globally there are billions of email and social media accounts across Facebook, LinkedIn, Twitter, Instagram, Gmail, Yahoo!, Hotmail and numerous other platforms. An ABC news report of 6 January 2015, stated that some estimates suggest that up to 30 million of the 1.3 billion Facebook users are actually dead.

## Accessing Accounts

Access to accounts of deceased loved ones is an increasingly important and sensitive issue for families, but the realities of life and the law are taking time to catch up to the technology and usage of social media, with numerous reported battles between families and the corporate technology giants seeking access to the accounts of their deceased loved ones. Disputes can also occur between the families and the partner of the deceased about who should have control or access.

The important lesson from this is to consider the issues as part of estate planning and attempt to identify and plan how online content should be dealt with after your death to the extent possible.

Efforts to get around problems of family having access after the death of a loved one have included insertion of clauses into wills providing for the executor to have specified authority to access social media accounts, seeking court orders for access against the service provider, and changes to the law in some jurisdictions.

However, the following issues arise:

- › Each service provider's terms of service differ in relation to account access after the user has died, regardless of an executor having legal authority to manage the estate.
- › Access to those accounts would not be difficult if the deceased had left the account logon details and password for their executor and explained how they wanted their online content dealt with after death.
- › The law in each country, and often between states within the United States, differ. In Delaware, for example, the *Fiduciary Access to Digital Assets and Digital Accounts Act* has been passed permitting a person acting in the equivalent of a guardianship or administration or other fiduciary role to access digital data of a person's assets placed in a Delaware located trust, with numerous other US states considering similar legislation. While 13 other states have considered enacting a similar law, the majority have not so far.

Facebook's "Legacy Contact"

On 12 February 2015, after nearly a decade of taking the position merely to delete or essentially freeze the account of a deceased person, Facebook changed its user Security settings and policy to allow account holders to specify either that they want their account deleted after death or to name a "Legacy Contact" who has authority to manage the page content after they die to the extent of authority provided to them.

However, that person will only be able to make a final post, update the profile, reply to friend requests and archive photos and posts, but not be allowed access to private messages. If no Legacy Contact is specified, Facebook will simply freeze the account as previously. The Legacy Contact may also be provided authority by the account holder to download an archive of the posts, photos and profile shared on Facebook. Accounts will then have the word "Remembering" before the account holder's name to memorialise them with the frozen account page.

At present Legacy Contacts are only being added in the United States with intention to expand to other countries. One issue arising is the need to update the named Legacy Contact after relationship breakdowns or inevitably there will be a dispute with an estate executor or new partner after death over that authority.

### **Yahoo!, Google and Hotmail**

While Facebook's position has softened, the approach of some other providers has not. Yahoo's policy remains that at the time of registration, all account holders agree to their terms which specify that neither the account nor any of the content are transferable, even when you die. Yahoo will not provide access to the account or emails but permit an account to be closed or suspended and content permanently deleted.

Google permits account closure and in limited cases to obtain content from an account, their primary responsibility being to keep user information secure, safe and private.

Microsoft on the other hand is willing to release all emails and attachments across their Outlook, Hotmail and other email accounts to the next of kin or executor.

### **The Last Tweets, Posts and Pics**

Twitter, LinkedIn and Instagram have policies of deactivating the account of a deceased person. Twitter permits the executor or certain family members to request an account be deactivated. Instagram and LinkedIn will as a matter of policy remove the deceased's account once notified.

### **Other Digital Content**

These issues are merely the tip of the digital iceberg. Beyond this are complex issues relating to rights in a range of potentially very valuable digital assets and their taxation such as:

- › Websites, blogs and domain names.
- › Copyright in photos, musical, digital artworks and other works posted online.
- › Monetised YouTube videos with significant popularity.
- › Avatars in online gaming which can have a bitcoin or monetary value.

There are also the often unanticipated consequences such as the fact that music and videos downloaded to a mobile phone, computer or iPad are typically only a non-assignable end user licence to use them for personal purposes such that the content cannot be transferred, and having an executor access iTunes, for example, may well breach the end user licence of itself. This can be complicated by cloud based storage access and terms.

The Courts are only seeing the first elements of these issues around the world. Over time those issues will inevitably increase with population growth, wider internet access globally and generations who have grown up with the technology.

For more information on this article or any other wills and estate matters please contact **Mark Fatharly** on **(08) 9321 3755**.

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**LAYER 8**  
By Michael Cooney

About |

Layer 8 is written by Michael Cooney, an online news editor with Network World.

OPINION

## Death notice: In Delaware your social media accounts now go to your heirs

Varied death policies of Twitter, Facebook, Instagram and others cause concern, lead to legislation



Network World | Aug 19, 2014 2:40 PM PT

In what has become a literal battle of wills, Delaware recently become one of the first states in the union to grant families' access rights to the digital assets of their deceased and incapacitated loved ones.

Under House Bill 345, Delaware residents digital legacies will be treated the same as the physical assets, documents and records left for their heirs and executors to handle after their deaths. The new law represents the first comprehensive state statute dealing with the disposition of a decedent's digital assets in the nation, according to Delaware Governor Jack Markell's website. Eighteen or so states have enacted or are looking to enact at least some digital death provisions but Delaware's is believed to be one of the more comprehensive so far, according to experts.

"More and more frequently, attorneys and survivors are finding it difficult or impossible to access and manage the online accounts and assets of the decedents whose estates they're responsible for settling. Often, the user agreements for websites and other digital services stipulate that no person other than the user is entitled to access his or her accounts," the site states.

Working in conjunction with expert attorneys from the Uniform Law Commission and the Estates and Trusts Section of the Delaware State Bar Association, Rep. Darryl Scott drafted this bill after talking with a constituent in his district who was refused access to an email account held by her late husband. Even though his will named her as the executor of the estate, the email service provider would not allow her to sign into the email account to access important billing notices and financial communications. Instead, the provider deleted the deceased's account and all its stored information, never allowing the content to be reviewed.

A good overview of the legislation's impact was written by *Stateline*, the state government blog run by the Pew Charitable Trusts, prior to the bill's approval. From the Stateline story:

*If the Delaware measure becomes law, it would supersede any "terms of service" agreements that users have with Internet and social media providers. However, if a person specifies in a separate online tool, such as Google's "inactive account manager" that he wants emails deleted or transferred to a particular person after a period of inactivity, that would take precedence.*

*"We put in provisions that prohibit the tech companies from making the choice for you. They can't, in their service agreement, say that upon your death, we're going to delete your account," said Democratic state Rep. Darryl Scott, who co-sponsored the legislation and worked with the state's bar association to get it passed. "We were trying to restore control to the family to make those decisions, just as they do with many other things, like journals and letters and safety deposit boxes."*

*Delaware's bill is similar to a model law endorsed recently by the Uniform Law Commission, a nonprofit organization of lawyers, including legislators and judges, appointed by each state government. The group researches and drafts standardized state laws that can then be considered by legislatures.*



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*Benjamin Orzeske, the commission's legislative counsel, said the group spent two years working on the digital assets proposal, and he thinks it will be introduced in about a dozen states next year. "This law isn't changing the level of privacy," Orzeske said. "It's just making it media neutral, whether it's on paper or online."*

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By Jenni Bergal

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DOVER, Del. — When Donna Johnson's father died unexpectedly of a massive heart attack, her mother tried to get access to his email account and digital photo repository. She wanted to pay bills and make sure that treasured family photos remained intact.

Even though she was executor of his will, his widow was stunned to learn that in her state — as in many others — she had no legal right to access his online accounts.

"This caused a lot of emotional wear and tear on my mother. The whole situation was extremely traumatic, and this was just one more thing she had to deal with," said Johnson, 43, who is executive director of the Delaware State Board of Education.

Johnson eventually reached out to a state legislator she knew, and last month, the Delaware Legislature passed a bill that would grant executors and other fiduciaries access to a deceased person's digital information. It is awaiting action by Democratic Gov. Jack Markell.

If the bill is signed into law, Delaware would join at least eight other states in enacting legislation dealing with digital assets.

The laws run the gamut from requiring Internet providers to give an executor access to all contents of a dead person's email to granting the personal representative of someone who dies the power to terminate his social media accounts. At least 10 other states considered digital-assets legislation this year.

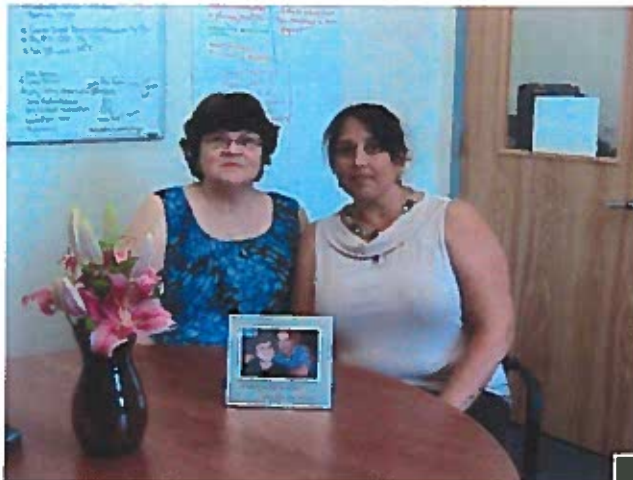
"This is one of those issues where the law has not kept up with these new technologies and accounts that have been created," said Pam Greenberg, a senior fellow at the National Conference of State Legislatures. "I'm sure we'll see additional legislation in this area."

Although a growing number of states are passing digital-estate laws, many in the tech industry have been fighting back, citing concerns about privacy and liability.

Lobbyists for some of the country's largest tech companies tried to kill the Delaware bill, which deems digital assets such as email, social media, photos and financial-management accounts part of a person's estate upon death.

Executors or trustees would be given the same control over those assets as they have with physical assets, such as safety-deposit boxes and stock certificates, unless the person stipulates in his will that he does not want that information released or gives other specific instructions.

Guardians of people who become incapacitated also could gain access to digital assets, but they would need a court order.



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Donna Johnson, right, says her mother, Claudia, spent months trying to access her late husband's email account and digital photo album, but she had no legal right to those accounts.



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"This law isn't changing the level of privacy," Orzeske said. "It's just making it media neutral, whether it's on paper or online."

But some in the technology industry warn that the model law and the Delaware bill remove users' privacy protections.

"What happens to digital accounts when you die is an issue of great concern to our members because they are the custodians. They are concerned about creating a safe and secure environment for our users," said Carl Szabo, policy counsel for NetChoice, a trade association whose members include AOL, Yahoo, Facebook and Google.

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