legally speaking

By **Patricia C. Marcin,** Esq. © 2021

WILLS, TRUSTS & ESTATES: PLAIN AND SIMPLE

Death and Digital Assets

Over the holidays, you or a loved one may have received some type of computer or device that connects to the internet, email and various applications. Or photos were taken and stored on such a device, or posts were made on Facebook, Twitter, Snapchat, and more. What happens to these "digital assets" when you die? New York enacted a law in 2016, which may be helpful in dealing with your digital life after death.

This law allows executors and other representatives to deal with someone's digital assets upon death. Prior to the new law, digital service providers (ex., Facebook, Google) frequently refused to grant access to a decedent's accounts, relying on federal privacy laws. Now, a user may direct by means of an "online tool" (assuming offered by the service provider) the disclosure of some or all of the user's digital assets, including the content of electronic communications. The directive set forth in the online tool overrides any contrary communication in a will or other instrument. If there is no directive set forth in an online tool, then the user may direct disclosure by will or other instrument.

The new law makes a distinction between the disclosure of "digital assets" versus the disclosure of the "content of electronic communications." The provider generally must disclose a decedent's digital assets (that is, the existence of digital accounts) and his or her "inventory" of electronic communications (ex., calendar information connected to a decedent's email account, contacts) sent or received by the deceased user, unless the deceased user made a directive prohibiting disclosure, or a court order otherwise. On the other hand, with respect to the service provider's obligation to disclose the "content" of electronic communications, the determinative factor appears to be whether the deceased user gave an affirmative direction to disclose the content. The law first looks to whether the user used an online tool to direct disclosure of the content. Absent online direction, the law then looks to a deceased user's will or other written instrument directing disclosure of content. Note that a provider can still refuse to disclose content until it receives a court order determining that the electronic content disclosure will not violate any state or federal privacy laws.

Consider addressing the disclosure of your digital assets and the content of your electronic communications using a provider's online tool, in your will or revocable trust, and in your power of attorney. In your estate planning documents, you can provide your executor or other agent the power to access control and/or delete your digital accounts and the contents thereof. Make sure your chosen executor/agent has the skill and knowledge to deal with these assets, or permit her or him to hire a technology specialist. Note that a 2019 court case found that photographs stored in an Apple account were not electronic communications requiring a deceased account holder's consent for disclosure.

As new technologies continue to emerge, the legal issues surrounding digital assets continue to grow and evolve. Your estate planning should also continue to evolve and protect you and your family's assets.

Patricia C. Marcin is a partner at the law firm of Farrell Fritz, P.C. concentrating in trusts, estates and tax law. Patricia has lived in Lloyd Harbor since 2005 with her husband John. They have two sons, Sam and Matt. Their faithful dog, Blizzard, still lives at home.

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