

ESTATES & TRUSTS LEGALNEWS

DIGITAL ASSETS: THE NEW FRONTIER IN ESTATE PLANNING

by Kathleen A. Strachan

Introduction

The administration of a person's estate containing digital assets and a digital legacy is a new frontier in Canadian and U.S. estate law. This newsletter will address some of the legal privacy issues that may create challenges faced by estate trustees in Canada in executing their responsibilities to determine, secure, and protect the digital assets and digital legacy of a decedent.

Digital Assets

Digital assets are made up of the intangible footprints that individuals leave behind. They are defined as any digital material owned by an enterprise or individual including text, graphics, audio, video and animations.¹ Examples include: computers, flash drives, iPods, tablets, blogs, Facebook accounts, Twitter accounts, multiple email accounts, photos on Flickr, documents in Google docs; information stored in LinkedIn, videos on YouTube, online bank and investment accounts, online subscriptions, and online shopping accounts.

The Law

As is usually the case where the pace of development of new technologies surpasses the law that aims to govern its use, there is a shortage of legislation and other legal guidance, addressing how to tackle these issues. In addition, the fact that the digital world knows no geographic boundaries and moves seamlessly from jurisdiction to jurisdiction makes it extremely difficult. To date five U.S. states have enacted laws that relate to digital assets with regard to estate planning. The earliest from Rhode Island and Connecticut are limited in scope to email accounts. A 2007 statute from Indiana includes "electronically stored documents of the deceased." A 2010 statute from Oklahoma covers the broader notion of digital assets. In 2011, Idaho passed a bill based upon the Oklahoma one. With regards to Canadian law, there have not been any developments to address what rights an estate trustee can exercise over a decedent's digital assets.

Privacy Issues

Subject to some limiting exceptions, the privacy rights of Canadians are not extinguished immediately upon their death. Accordingly, for digital assets stored on a personal or private sector computer, an estate trustee must consider; (i) the purpose and use of the information; (ii) the location of the hardware on which the assets are stored; and (iii)



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if the hardware is not owned by the decedent, the ownership rights the decedent has in the information. Also, if an individual's digital assets are accessible online through a user name and password like a Facebook, Google docs or a Twitter account, the privacy policy and terms of such services will also come into play.

Canadian federal private sector privacy legislation – the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and legislation from the various provinces, all include exceptions for the collection, use and disclosure of personal information solely for personal or domestic purposes or what may be called non“commercial” activities. Any personal information, such as emails, which are held on the decedent's personal computer and used solely for their personal use may be accessed by the estate trustee, assuming that they can locate the deceased's password and User ID. However, information held on a computer owned by an individual's employer represents an entirely different matter. The question of where the ownership line is to be drawn with respect to information on a corporate asset used for personal purposes by an employee is currently the subject of much debate.

Most recently the issues of the ownership of information on corporate assets and access rights to online assets have intersected in a dispute over the ownership of a Twitter account.² In October 2010, Noah Kravitz, quit his job at a popular mobile phone site, Phonedog.com. The site had two parts — an e-commerce wing, which sells phones, and a blog. While at the company, Mr. Kravitz, began writing on Twitter under the name Phonedog_Noah, and over time, had amassed 17,000 followers. When he left the company, PhoneDog told him he could keep his Twitter account in exchange for “tweeting on their behalf from time to time” - Mr. Kravitz agreed. Eight months after Mr. Kravitz left the company, PhoneDog sued, saying the Twitter list was a customer list. A similar issue arose with regards to LinkedIn contacts³. . Of late, a court in England issued an order that required an employee who resigned to start his own consulting business to turn over all of his LinkedIn contacts to his former employer – along with receipts and contracts proving that none of them became clients of his new firm. This was the first time that the ownership of digital assets was addressed in the U.K. and it clarified (at least for now) that the contacts in a LinkedIn profile are more likely to belong to the employer than they are to the individual, if those contacts are customers, employees, or vendors of the employer.

In short, an estate trustee's ability to access a decedent's online digital assets will involve a variety of factors. First, if the estate trustee is dealing with a corporate asset, he or she must review the corporate social media policies of the employer, to determine who truly owns the asset. Secondly, with regards to accessing a decedent's social

media accounts, the estate trustee must consider the terms of use of the various sites, in addition to their ownership, content, and privacy policies.

Conclusion

As evidenced above, digital estate planning can create a minefield of legal issues, which should only be undertaken by an experienced estate planner. Domain names, websites, and blogs are no longer trivial assets – and could now be worth hundreds of thousands of dollars. As the law evolves, it is impossible to predict how this will all unfold, but for the foreseeable future, I expect that this area will remain the domain of estate specialists.

¹ PC magazine

² A Dispute Over Who Owns a Twitter Account Goes to Court, the New York Times, December 25, 2011.

³ Who Owns your LinkedIn Contacts? Forbes, November 3, 2011.