

Estate Planning for Digital Assets

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As our lives have become more virtual, the record of our identities and actions performed is now increasingly likely to be dealt with online. Digital assets that we own may include software, websites, downloaded content, online banking information, social-media accounts and even e-mails. Family and fiduciaries may face a few difficulties in trying to access the deceased's digital assets: 1) passwords; 2) encryption; and 3) federal criminal law that penalize unauthorized access to computers and data (Computer Crimes Act 1997 in Malaysia).

As such, nowadays when we prepare a will, we have the added responsibility of leaving instructions to our loved ones about what to do with our online assets after we die. For example, leaving details of passwords or access codes.

This article explores the different ways in which the principal digital service providers respond upon being informed that an account holder has passed away. Many of the legal requirements referred to relate to those set in United States where many of the largest digital service providers are based.

A. E-mail

Gmail¹ and Hotmail² allow the email accounts of the deceased to be accessed, provided certain requirements are met. Yahoo!³ has adopted a policy of refusing access to email accounts when an account holder dies, stating that it will delete an account once proof of death has been given. The terms of service indicate that survivors have no right to access the email accounts of the deceased and, in a section entitled '*no right of survivorship and non-transferability*', account holders must agree that '*contents within account terminate upon death*'. This is, in our view, of little help to executors or beneficiaries who wish to keep the contents of the account concerned because the terms of service prohibit the company from disclosing private e-mail communications. Yahoo! will turn over an account to family members only after they go through the courts to verify their identity and relationship to the deceased.

B. Social Media

One of the problems with social media websites is that there is no uniform set of rules in accessing the data in the case of the death or incapacity of the account holder. Below are a few examples of main principal websites most frequently accessed.

¹ <https://support.google.com/mail/answer/14300>

² <http://answers.microsoft.com/en-us/windowslive/forum/hotmail-profile/my-family-member-died-recently-is-in-coma-what-do/308cedce-5444-4185-82e8-0623ecc1d3d6>

³ <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html>

(i) Facebook

Facebook's policy on death is to turn the deceased user's profile into a memorial, "*as a place where people can save and share their memories of those who've passed.*"⁴ The deceased's wall remains active, so that the friends and family can post memorial messages. Memorializing of a profile involves: the deceased user's profile is no longer being shown in the "Suggestions" box on the right-hand side of the homepage; the privacy setting is altered so that only confirmed friends can view the profile and search for it; contact information & status updates are removed; no one is able to log into the account in the future.

⁴ <http://blog.facebook.com/blog.php?post=163091042130>

(ii) Flickr

This online photo management and sharing application has a limited free service but requires a regular subscription to access all photographs held on an account. Unless the subscription continues to be paid after death there is a danger that Flickr will close the account simply because it has ceased to be maintained.⁵ Account holders should arrange for their executors to keep paying, at least until they have time to deal with the Flickr assets. Alternatively, the account holder should back up their photographs on a hard disk or in another format.

⁵ <http://www.flickr.com/help/forum/98825/>

(iii) Instagram

Similarly, the photos stored in this application may be able to be accessed by the deceased's family by informing Instagram about the death of the Instagram user. This can be done through e-mail.⁶

⁶ <http://instagram.com/legal/privacy/#section8>

(iv) Twitter

Upon request, Twitter can close accounts and provide archives of public Tweets for deceased users. Family members are required to submit a formal request to Twitter's Trust & Safety department.⁷

⁷ <http://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/87894-how-to-contact-twitter-about-a-deceased-user>

(v) YouTube

YouTube grants access to accounts of deceased persons provided if certain requirements are met:⁸

- A copy of the death certificate of the deceased;
- A copy of the document that gives the family the Power of Attorney over the YouTube account.

⁸ <http://support.google.com/youtube/bin/answer.py?hl=en&answer=94458>

Bequeathing E-Affairs

As discussed above, many digital assets are normal assets that happen to be held in digital form, for instance photographs or an online bank account. In bequeathing online assets in a will, the main question to be determined is whether the provisions contained in the will, as drafted, cover digital assets. In addition, in preparing a will, the content of what should be considered as digital assets must be ascertained as well. In getting one's digital affairs in order, this website is being helpful by listing down a few steps in bequeathing the online assets:⁹

⁹ <http://blogs.loc.gov/digital-preservation/2011/07/when-i-go-away-getting-your-digital-affairs-in-order/>

"The first step is to inventory everything about your online life, such as your email accounts, Facebook, Twitter...everything. Use a spreadsheet or create a table in a word-processing document. For each website, list the name, URL, your username and password. Include any additional information someone might need to access each account. Or indicate if

you want an account deleted. Note if there is any money at stake in an account or if there are any business implications.Do you have any money sitting in your Paypal account? Do you have an ongoing business on eBay?

The second step is to research any rights issues that may impede your heirs from accessing your accounts. When you create an account on most sites you agree to its policies or terms of service. Check each site for their policy on deceased members and the access rights of heirs. Determine what authorization you may have to supply, if any, and jot that information down on your inventory.

Some sites allow users to be memorialized after they die. Some sites delete an account if it remains inactive for a period of time or if a due payment is not received, so note on your inventory if a site has time-related conditions.

It may help to designate a digital executor, someone who is internet savvy, can carry out your instructions and, if necessary, work with the legal executors of your will.

The third step is notification. Tell your heirs about your intentions for your digital content. You don't have to share usernames and passwords yet, just let them know that you've created a document with detailed information about your digital possessions and tell them where you will keep that document once you print it out. A logical place for it would be with your will or other important papers."

Possible problems arising in bequeathing online assets

It is tempting to leave digital information in a will but is not recommended as anyone can see these after the testator has passed away and the will becomes a public document. One way round this may be to use an online digital inheritance arrangement. Executors and beneficiaries only need the access code to the online storage facility.¹⁰

Conclusion

Despite the increasing role that digital assets play in our lives, no governing law has been stipulated in Malaysia regarding estate planning of digital assets. Since the concept of bequeathing e-affairs in Malaysia is still at its infancy stage, a person in bequeathing online assets must carefully consider all accounts and communicate details to permit access to his or her executor. This is important as more and more of our business and social interactions are conducted online, our files are stored in digital form. By planning for the administration of one's digital estate, the administration of the deceased's estate is made easier, enabling the deceased's wishes to be followed.

¹⁰ http://www.stepjournal.org/journal_archive/2012/step_journal_november_2012/i%E2%80%99m_shutting_down_now.aspx