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## Digital Estate Planning

# Digital privacy for the living and the dead

By **Sharon Hartung**



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(September 30, 2019, 10:33 AM EDT) -- In Oct. 2017, Maureen Henry obtained a judge's order to gain access to her late son Dovi's social media accounts.

This tragic story of the digital age illustrates the painful state of our relationship with technology upon death, digital custodians (being the on-line service providers), and the law. And when talking about digital privacy upon death, we're also talking about estate planning. Digital privacy, when coupled with confidentiality and security creates a triad compounding the complexity of issues for loved ones and the executor.

The internet and the emergence of a new class of assets called digital assets has fundamentally changed estate planning and the role of the executor.

This story is that of a young man who died in 2014 and his grieving mother's attempts to determine what happened. In her pursuit, she requested access to her son's social media accounts and e-mail in the hope of gaining insight into why he died. In 2017, a Canadian court directed the various tech custodians to provide the mother access. This story resurfaced in 2019 as she is still waiting for some of these tech giants to comply with the court order.

Although this story focused on the important implication of the unfulfilled court orders and our relationship with the tech custodians, which is defined by the terms of service we agree to with the various providers, there are five major points worth addressing related to estate planning:

1. Loved ones and executors will be going to court to gain access to our e-mail and online photos. Consider the time and cost when looking at the timeline in this story -- years. Without a will and preplanning this could be the new reality in the digital age.
2. Our digital lives are intertwined with our physical lives -- one can take down the other. In the 21st century home office, instead of receiving mail the old-fashioned way, virtually everything is done online from paying bills, to making purchases, to interacting with our financial institutions. In the executor role, be they lay persons, such as sons and daughters, or corporate designates, executors have long relied on printed documents to begin their roles. An executor's challenge in the digital era goes well beyond access to social media; it means unravelling the interconnectedness between our physical lives and our digital lives and ensuring that our estate needs are met.
3. Both our physical and digital lives might only have a virtual trail. Less than 50 per cent of Canadians have a will, and less than 35 per cent have what they consider an updated will. When dying intestate, meaning without a will, the court appointed executor determines what happens to your assets upon death. If the executor can't find or access your assets, there will be nothing to pass on to loved ones.
4. Consumer awareness regarding digital privacy on death needs to change. As the number of

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cases, such as Maureen Henry's grow, it is unlikely consumers will remain content that their digital assets can't be transferred on death. As consumers gain awareness of this issue, they will demand tech custodians provide favourable terms of service upon death along with preplanning tools so that beneficiaries can be identified.

5. Conflict of law. Conflict of laws happen when it isn't clear which laws and rules take priority in a particular situation. For example, this could occur if we live in one country and own property in another. Conflict of law is more likely to occur with digital assets when we are dealing with global custodians, such as Google and Facebook.

In Canada, no province/territory has enacted executor access laws yet, and the proposed law says the executor has all the same rights as they do for physical property. In the U.S., most of the states have enacted digital access laws that require the testator to provide direction in advance of death for specific communication assets such as e-mail and messaging. In terms of pre-planning, Facebook offers Legacy Contact, and Google has Inactive Manager.

It is estimated that 70 per cent of North Americans use Facebook, indicating we are setting up a conundrum for our executors if we don't do some form of estate planning of our digital assets.

Our apps and online accounts need to provide more options about our digital-privacy wishes upon death. Just as we have seen various constructs for physical asset estate planning, we need a variety of methods to help manage digital assets upon death.

### **Executor's role in digital age**

In addition to legal advice and preparing a will, individuals need an estate inventory, which is a list of digital and physical assets. And, executors must be prepared for a new kind of project in the digital age.

Consumers must demand greater flexibility and more preplanning functions in the terms of service from our tech custodians. Password managers are for the living, and #estatetech solutions need to emerge, evolve and mature to handle digital assets on death that meet the legal, regulatory and practical requirements of the executors. Our digital footprints are getting so big we'll need a new kind of tech to manage our tech in addition to other pre-planning options.

Estate Planners need to advise clients on preplanning digital assets now that our digital footprints are intertwined with our physical lives for successful estate transfer on death.

The digital impact on estate planning is an emerging area that estate planners can no longer ignore. The tragic story of Maureen Henry and her search for understanding her son's death illustrates the need for tech companies and consumers to be better prepared and informed.

*Sharon Hartung is the founder and principal of Your Digital Undertaker and has over 30 years of experience in IT management, project management and consulting. She is the author of the newly published Your Digital Undertaker — Exploring Death in the Digital Age in Canada.*

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