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## Wills, Trusts & Estates

# Social media deep dive: Data privacy in death

By **Sharon Hartung**



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(March 3, 2020, 2:30 PM EST) -- Social media is not immune to death. After we're gone, all of those colourful tiles that we joyfully interact with will either succumb to digital death or persist into the digital hereafter if we don't act on them when we're alive.

In 2019, there was a media surge reporting that the growing number of deceased persons on Facebook could potentially outnumber the living. Twitter stumbled into its own estate planning debate in late 2019 when it announced it would close down inactive accounts it considered dormant (after six months). The death positive movement lit up a protest on social media. Stories of how deactivation would affect the deceased's survivors fuelled a tweet storm. Shortly thereafter, Twitter responded by saying it would not remove inactive accounts and would look at implementing memorialization functionality.

From an estate planning perspective, the number of dead people on social media might not seem like a relevant estate planning concern, but how our clients use social media can dramatically impact their overall estate from a privacy, financial and sentimental value perspective. Without documented wishes and instructions upon incapacity and death, there could be a significant mismatch in expectations between the account holders and their fiduciary.

Misunderstandings for the handling of social media accounts or the access to the digital assets contained therein is ripe for enmity between family members and beneficiaries; notwithstanding, all of which could be further constrained legally by the provider's terms of service. As is the case with physical assets, this can lead to conflict, time delays and even estate litigation before the fiduciary can sort out a path forward.

### A starting point in discovery

Social media is truly a product of the information age, although its roots are said to date back to the introduction of the telegraph machine. According to Wikipedia, there are 13 types of social media communities ranging from blogs, photo sharing sites, social networks, enterprise networks, to social gaming. Most people will refer to social media by the name of the social platform or provider they use most often, such as LinkedIn (2003), Facebook (2004), Twitter (2006), Pinterest (2010-2011). The use of social media for sharing information, posting photos and communicating among friends and family, or even within a broad or specific community, is mainstream when you consider it is estimated that 70 per cent of North Americans use Facebook.

According to *Forbes* magazine, of 2019's top 10 most downloaded social-messaging apps, Facebook Inc. owns four of them, namely, Facebook, Instagram, Facebook Messenger and WhatsApp Messenger. Not as obvious in the social media category are gaming apps or streaming services (e.g., World of Warcraft, the Elder Scrolls Online, Black Desert Online, Blizzard, STEAM, FORTNITE) known as Massively Multiplayer Online Role-Playing Games (MMOs, MMOGs or MMORPGs for short) where players engage, transact, compete, and communicate in a virtual world on the Internet.

### Technological solutions compound problem

As mainstream and integrated our collective use of social media seems to be in our daily lives, so will

become our client's expectations and wishes for what happens to these accounts and their content upon incapacity and death. The term that has emerged to describe these expectations is "digital legacy." Because our clients interact to such a large degree online creating an extensive digital presence, these digital footprints will need to be addressed in estate planning. A conversational definition of digital legacy I've seen from James Norris of the Digital Legacy Association (U.K.), is where he defines, "our digital legacy is what remains of us digitally once we die. When we die our digital footprint becomes our digital legacy."

In previous articles, I've commented on how our engagement in the digital age, be it with a new class of assets called digital assets or even the modern-day obituary, our online and digitized existence needs a rethink for privacy, identity theft risk and cyber intrusion. Unlike physical assets or rights, it's not simply a matter of the fiduciary freezing an account or changing the locks for an online social media account.

Our digital tidiness and information technology habits while we are living influence the risk profile of both our physical and digital estates upon death. As is a common theme for digital assets, I've outlined that terms of use, terms of service, or provider contracts maintain control or influence on what a fiduciary can and can't do upon the death of the account owner. And the master of all disguises is the evolving terms of service where the online provider often reserves the right to update or change their terms at any point. There just may not be the certainty that specific services or functions within a provider will continue indefinitely, particularly if you consider the degree to which social platform services are provided for free.

This is the first of a four-part series.

*Sharon Hartung, TEP, 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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