Gaby Hardwicke SOLICITORS

Briefing Note: Digital Legacies

Introduction

This guide has been prepared by us to assist you in understanding some of the main issues that you should be aware of in relation to digital legacies. The guide is not intended to cover in full all aspects of the matter and should not be relied upon as legal advice. If you have any queries concerning your personal situation you should contact us for advice on your specific circumstances.

Briefing Note
October 2017

Summary:
An introduction to some of the legal issues to consider when leaving digital legacies in your Will.

Digital Ownership

With society becoming increasingly digital, more and more of us are amassing a wealth of intangible assets – from social media and email accounts, to online banking, music, films, blogs, computer games, digital currencies (such as bitcoin) and online currency exchanges (such as Paypal), the trend is towards a society in which large portions of our lives now exist in the ether of the internet. This has created an entirely new class of asset that cannot be assimilated with the traditional legal definitions of personal possessions or chattels, and indeed the law treats digital assets in a different way to ordinary tangible belongings. Whereas people often leave their 'real property', or the physical items that they own, to people in their Wills, the legal status of legacies of digital assets is far less clear – who owns a person's digital assets when they die, and can a person's digital assets, or access to the digital content, be left in a Will? These are the questions now facing someone making a Will with digital assets in the 21st century.

The Legal Position

At present there is some uncertainty over the extent to which digital content even constitutes property in law, and therefore whether it is capable of being owned by individuals at all. The use of online accounts is a contract between service providers, such as Facebook, Twitter or Snapchat for example, and the users of the content, and in most cases the terms and conditions of those contracts declare that the content that users create belongs to the service providers, and that it is at their discretion whether to provide access to the digital data following a person's death. Evidently this creates issues in relation to the transmission of the content upon death. Where once a simple line in a Will bequeathing "my photographs" was a straightforward clause to interpret and administer, now such a clause could be read to include the plethora of digital photos stored on Facebook and other social media platforms, and the law is relatively silent at present on both the ownership of that content and the entitlement to access to that content by loved ones.

There is very little case law or legislation in England and Wales that directly tackles this issue, and until the law is updated to account for the ownership and transmission of digital assets upon death the position will remain unclear. At present the most reliable way to ascertain with any certainty whether your online content can be considered to belong to you, and whether your loved ones will be able to access that content after you die, is to check with the content provider.

Digital Legacies Die Hard

Many people will have unwittingly clicked 'I agree' to the reams of terms and conditions governing our use of digital content, and it is clear from a proper inspection of those terms and conditions that users are in most cases granted a mere licence to use the content for a specified period – normally the duration of the paid subscription to the service. Bruce Willis encountered this problem after discovering that he had no legal right to leave his vast collection of music downloaded through iTunes to his children. Mr Willis attempted to navigate licensing laws by establishing a family trust to "hold" the music, and such arrangements are theoretically possible in England and Wales too, but the efficacy of such arrangements could be contested. Apple, along with virtually all other providers of digital data, maintain, effectively, that the situation is analogous to one where they own a television and contract with a person for them to use it once a week, which does not imply that that person's next of kin has the same contractual rights once that person has died.

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Clearly caution is required when spending money to acquire digital content, and the best advice is for people to carefully consider the terms and conditions of any licensing agreement they enter into in exchange for content they believe they may own once purchased. Nevertheless, content providers are increasingly recognising the issue of digital legacies in Wills, and there are steps that can be taken to enable friends or loved ones to manage or indeed shut down online accounts, social networking services and the like after they are gone.

Modernisation

As an example, in 2015 Facebook updated its Statement of Rights and Responsibilities and its Data Use Policy which now provides for three options following a user's passing; 1) memorialisation, where the user's account is effectively frozen in time; 2) deactivation of the account, or; 3) the creation of a legacy contact. A legacy contact is a 'digital heir' appointed by the deceased user during their lifetime to manage their account after death. The legacy contact will be able to post a message at the top of the deceased user's memorialised timeline, and make certain specified changes to the account such as pin posts, respond to new friend requests, and change the account's profile picture and cover photo. They will not be able to log in as the deceased user or see their private messages, and so access remains limited. Crucially, Facebook will now also honour a choice of digital heir made in a Will.

Google also has a variety of options available, including closing the account of a deceased user, obtaining data from the account, and requesting funds from the account. Google has also introduced what it calls an Inactive Account Manager, or IAM, which enables users to nominate someone to share data with in the event that their account is inactive for a designated period of time. Once the third party's identity has been verified, they will be able to download data that has been left to them by the inactive (or deceased) user. It is important to note that each of the options offered by Google is discretionary in nature, and it cannot therefore be guaranteed that data will be passed as intended.

Many other large service providers, such as Twitter, do not provide options beyond a discretionary request by loved ones to have the account deleted, and many more will simply rely on the original contractual terms to enforce their ownership of the data. But it can be seen that steps are being taken by service providers to enable users to protect their digital legacy direct with the respective providers, and this, in conjunction with the various measures that lawyers can take to help individuals protect their digital lives, is beginning to ensure that digital legacies are secure.

Planning for Death

There are steps that can be taken by legal practitioners to incorporate the wishes of their clients in relation to their 'digital estate'.

It is important to note that where a Grant of Probate is required following a person's death, primarily where a person has assets in their sole name above a certain value, the Will becomes a public document that can be easily accessed by anyone who applies to the Probate Registry for a small fee. It is not therefore advisable to include details pertaining to digital assets, such as account details or passwords, in the content of the Will itself. Instead, clients are advised to prepare a side letter, or letter of wishes, relating to digital assets that can be stored with the Will and accessed by the Personal Representatives following death. The side letter will not become a public document upon death and it can be easily amended without the formalities of validly changing the contents of a Will. The side letter should contain express instructions to enable your Personal Representative/s or loved ones to deal with your digital legacy as you wish.

It is useful to distinguish between digital assets with an intrinsic monetary value, for example a Paypal account loaded with a particular currency, and digital data with a purely sentimental value, such as photographs stored on Facebook. The Personal Representatives of a deceased person are obliged to ensure that all assets of the estate are properly administered, but the same difficulties encountered in relation to

access to social media accounts and email accounts may be encountered in relation to access to online bank accounts.

Consideration should also be given to the possibility of a loss of mental capacity, and Lasting Powers of Attorney can be prepared to make provision for attorneys to access digital accounts in those circumstances.

If you would like to know more about this topic or our other legal services please get in touch with us. For expert advice on digital legacies, Wills and estate planning contact one of our Private Client Services partners:

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