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### Death and the Digital Age: The Disposition of Digital Assets

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# SAVANNAH LAW REVIEW

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## DEATH AND THE DIGITAL AGE: THE DISPOSITION OF DIGITAL ASSETS

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*Alberto B. Lopez\**

In January 2015, a series of essays appeared online under the heading of *The End*.<sup>1</sup> As one might guess from the ominous title, the essays address the topic of death from the perspectives of professionals who deal with death, such as physicians and nurses, and private individuals who share their personal experiences up to and following an individual's death. One contributor, for example, revisits a dying friend's last "attempt at modesty" as the friend tried to pull her shirt down over exposed portions of her body, as well as the contributor's "appalling decision" not to revisit the dying friend's bedroom for a final good-bye.<sup>2</sup> Another author describes feeling "gutted and guilty" for wishing to return to life instead of serving the "slavery of disease."<sup>3</sup> Furthermore, the same author labels the old adage about cherishing moments with a dying loved one as "a lot of crap" because of the hardships imposed by disease and medical treatment.<sup>4</sup> The striking thing about a number of the essays is that they reveal survivors' intensely private thoughts in a very public way—on the website of *The New York Times*.

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\* Professor of Law, University of Alabama School of Law. The Author thanks the members of *Savannah Law Review* for kindly permitting him to contribute this Essay to *The Walking Dead* Colloquium's related Journal Issue. Furthermore, the Author thanks his young assistant, Brandt Lopez Jr., for organizing the various papers associated with this Essay in small piles on the floor.

<sup>1</sup> *The End*, N.Y. TIMES: OPINIONATOR, <http://opinionator.blogs.nytimes.com/category/the-end/> (last visited May 31, 2016).

<sup>2</sup> Annabelle Gurwitch, *Death Without Dignity*, N.Y. TIMES: OPINIONATOR (June 10, 2015, 3:21 AM), <http://opinionator.blogs.nytimes.com/2015/06/10/death-without-dignity/#more-157335>.

<sup>3</sup> Sara Lukinson, *Raging as My Sister's Light Dims*, N.Y. TIMES: OPINIONATOR (Aug. 29, 2015, 3:00 PM), <http://opinionator.blogs.nytimes.com/2015/08/29/raging-against-the-dying-of-my-sisters-light/#more-157952>.

<sup>4</sup> *Id.*

In addition to the moving personal narratives, several of the essays in *The End* highlight the relationship between death and law on a macro-level in the form of statutory law. In *Death Without Dignity*, the author considers how the California Senate's passage of the End of Life Option Act<sup>5</sup> could have positively affected a friend's death five years ago.<sup>6</sup> The sentiments expressed in *Death Without Dignity* reflect concerns hotly discussed since cases like *In re Quinlan*,<sup>7</sup> *Cruzan v. Director, Mo. Dep't of Health*,<sup>8</sup> and *Bush v. Schiavo*<sup>9</sup> propelled the issue of one's right to die to the forefront of the public's consciousness. Recently, California served as the epicenter of the debate as a young Californian, Brittany Maynard, decided to move to Oregon to take advantage of its Death with Dignity Act<sup>10</sup> after she was diagnosed with a terminal illness.<sup>11</sup> Whatever one thinks of her choice, Ms. Maynard's decision demonstrates the undeniable impact of positive law concerning death on the decision-making of the living.

For the most part, however, the nexus between death and law operates on a scale far removed from the national glare associated with contentious public policy issues such as one's right to die. In *The Rituals of Modern Death*, a September 2015 addition to *The End*, a physician describes the contrast between a family's experience with the moment of death with that of the physician.<sup>12</sup> For the family, "death can be a moment of deep emotional significance," but for the physician, death leads to "something very mundane: paperwork."<sup>13</sup> Much of that post-mortem "mundane paperwork" is required by law. Statutes require the completion of death certificates that identify the decedent, the location of death,

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<sup>5</sup> End of Life Option Act, CAL. HEALTH & SAFETY CODE § 443, Pt. 1.85 (West 2015). California Governor Jerry Brown signed the End of Life Option Act on October 5, 2015. Greg Bothelho, *California Governor Signs 'Right to Die' Bill*, CNN (Oct. 6, 2015, 5:20 AM), <http://www.cnn.com/2015/10/05/us/california-assisted-dying-legislation/>; Mollie Reilly, *Right-to-Die Bill Passes in California*, HUFFINGTON POST (Sept. 11, 2015, 6:56 PM), [http://www.huffingtonpost.com/entry/california-right-to-die\\_55f1fbbae4b002d5c078cd6b](http://www.huffingtonpost.com/entry/california-right-to-die_55f1fbbae4b002d5c078cd6b).

<sup>6</sup> Gurwitch, *supra* note 2.

<sup>7</sup> 355 A.2d 647 (N.J. 1976).

<sup>8</sup> 497 U.S. 261 (1990).

<sup>9</sup> 885 So. 2d 321 (Fla. 2004).

<sup>10</sup> Oregon Death with Dignity Act, ORE. REV. STAT. ANN. §§ 127.800–127.897 (West 2015). Oregon is not the only state with a Death with Dignity Act; Washington has a similar statute. Washington Death with Dignity Act, WASH. REV. CODE ANN. §§ 70.245.010–70.245.904 (West 2015).

<sup>11</sup> Brittany Maynard, *My Right to Death with Dignity at 29*, CNN (Nov. 2, 2014, 10:44 PM), <http://www.cnn.com/2014/10/07/opinion/maynard-assisted-suicide-cancer-dignity/index.html>. In October 2015, California passed the End of Life Option Act that permits physician-assisted suicide to California residents with a terminal illness if several conditions are satisfied. End of Life Option Act, CAL. HEALTH & SAFETY CODE §§ 443–444.12 (West 2015); April Dembosky, *California Governor Signs Right-to-Die Law*, NAT'L PUBLIC RADIO (Oct. 6, 2015, 5:18 PM), <http://www.npr.org/sections/health-shots/2015/10/05/446107800/california-governor-signs-landmark-right-to-die-law>.

<sup>12</sup> Haider Jarved Warraich, *The Rituals of Modern Death*, N.Y. TIMES: OPINIONATOR (Sept. 16, 2015, 6:45 AM), <http://opinionator.blogs.nytimes.com/2015/09/16/the-rituals-of-modern-death/>.

<sup>13</sup> *Id.*

and the cause of death for evidentiary and statistical purposes.<sup>14</sup> Virginia's code goes further in its death certificate regulations in that it not only defines when "[a] person shall be medically and legally dead,"<sup>15</sup> but also mandates that the "medical certification" of death shall be "signed in black or dark blue ink."<sup>16</sup> Similarly, many states have anatomical gift statutes that regulate organ donation at death. Illinois law, for example, bars the physician "who determines the time of the decedent's death" from "participating in the procedures for removing or transplanting a part from the decedent."<sup>17</sup> From death certificates to procedures regulating organ donation, death triggers a cascade of statutorily regulated acts that govern living individuals connected to the decedent.

Unlike regulations that govern the living after a death, one of the basic intersections of death and law occurs before an individual's death—the drafting and execution of a will. For the individuals who opt to execute a will,<sup>18</sup> the testamentary intent represented by the will's distributive provisions largely remains a private matter left to the judgment of the individual testator.<sup>19</sup> To

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<sup>14</sup> See, e.g., ALA. CODE § 22-9A-14 (2015); GA. CODE ANN. § 31-10-05 (West 2015); OHIO REV. CODE ANN. § 3705.16 (West 2015).

<sup>15</sup> VA. CODE ANN. § 54.1-2972 (West 2015).

<sup>16</sup> VA. CODE ANN. § 32.1-263 (West 2015). Virginia is not alone in its ink requirement. See, e.g., CAL. HEALTH & SAFETY CODE § 102125 (West 2015) (requiring death certificates to be completed in "durable black ink").

<sup>17</sup> 755 ILL. COMP. STAT. ANN. 50/5-47(g) (West 2016); see also TEX. HEALTH & SAFETY CODE ANN. § 692A.014(i) (West 2015) (barring physician who determines death from participating in removal or transplant procedures). Furthermore, the memorialization of death in the form of funerals is subject to an abundance of regulations. See, e.g., N.J. STAT. ANN. § 45:7-33 (West 2015) ("[T]he practice of mortuary science and the practice of embalming and funeral directing are hereby declared to be occupations charged with a high degree of public interest and subject to strict regulation and control."); FLA. STAT. ANN. § 497.380 (West 2015) (regulating the physical space associated with a "funeral establishment," as well as requiring such an establishment to display a funeral license); MINN. STAT. ANN. § 149A.01 (West 2015) (regulating the State's funeral industry by requiring a license to do any of the following: "take charge of or remove from the place of death a dead human body," "prepare a dead human body for final disposition," or "arrange, direct, or supervise a funeral, memorial service, or graveside service"); 63 PA. STAT. & CONS. STAT. ANN. § 479.3 (West 2016) (detailing licensure requirements for funeral directors).

<sup>18</sup> LexisNexis Newsroom, *Majority of American Adults Remain Without Wills, New Lawyers.com SM Survey Finds*, LEXISNEXIS (Apr. 3, 2007), <http://www.lexisnexis.com/en-us/about-us/media/press-release.page?id=1270146453917826>. But see, e.g., LAWRENCE W. WAGGONER, GREGORY S. ALEXANDER, MARY LOUISE FELLOWS & THOMAS P. GALLANIS, *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS* 35 (2002) (hypothesizing that "it's more accurate to suggest that most people who die prematurely die intestate").

<sup>19</sup> Distribution is largely a private matter, but a testator does not have unfettered discretion to distribute property at death. See, e.g., RESTATEMENT (THIRD) OF PROPERTY § 10.1 cmts. a, c (AM. LAW INST. 2003) (discussing limits on the principle of testator freedom, such as the elective share and gifts containing impermissible racial restrictions). As a general matter, however, testamentary freedom remains the foundational principle of the law of wills. See RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* 6-7 (2010); John H.

effectuate a testator's plan for distribution, a testator appoints a personal representative to handle the tasks required to settle an estate.<sup>20</sup> Being appointed as a personal representative may be an honor springing from a testator's trust of that individual, but the job of being an executor can be, to say the least, difficult.<sup>21</sup> Personal representatives may have to travel to deal with a decedent's property that is located in different states, pay employees of a business operated by the decedent, or navigate strained family relationships.<sup>22</sup> Moreover, a personal representative acts in a fiduciary capacity, which means there is a risk of liability for actions taken during estate administration.<sup>23</sup> Because of the difficulty associated with serving as a personal representative, the individual identified by a testator does not have to accept the position.<sup>24</sup> As a result, the practice of designating an alternate personal representative to serve, if the first individual named declines the position, has become a standard element of a well-drafted will.<sup>25</sup>

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Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975) ("The first principle of the law of wills is the freedom of testation."); Mark I. Ascher, *But I Thought the Earth Belonged to the Living*, 89 TEX. L. REV. 1149 (2011) (reviewing LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* (2009)) ("The law of wills allows the dead virtually unfettered discretion in divvying up that which used to belong to them, and probate law generally requires the living to effectuate those desires.").

<sup>20</sup> See, e.g., UNIF. PROBATE CODE §§ 3-701-3-721 (amended 2010) (UNIF. LAW COMM'N 2014).

<sup>21</sup> See, e.g., Carole Fleck, *5 Things to Know About Being the Executor*, AARP (May 6, 2013), <http://www.aarp.org/money/budgeting-saving/info-05-2013/5-things-to-know-about-being-an-executor.html>; Pamela Yip, *Think Long and Hard Before Becoming Someone's Estate Executor*, DALLAS MORNING NEWS (May 17, 2013, 10:03 PM), <http://www.dallasnews.com/business/personal-finance/headlines/20130517-think-long-and-hard-before-becoming-someones-executor.ece>.

<sup>22</sup> Fleck, *supra* note 21; Yip, *supra* note 21.

<sup>23</sup> See, e.g., GA. CODE ANN. § 53-7-1 (West 2015) (describing an executor's fiduciary duties); S.D. CODIFIED LAWS § 29A-3-712 (2015) (discussing the liability of an executor due to fiduciary responsibility); *Greenway v. Hamilton*, 631 S.E.2d 689 (Ga. 2006) (finding that a personal representative breached fiduciary duties provided by Georgia law); 29 TEX. JUR. 3D DECEDENTS' ESTATES § 905 (2015) (addressing fiduciary duty of executor).

<sup>24</sup> See, e.g., ARK. CODE ANN. § 28-48-102 (West 2015) (outlining the form of acceptance to be filed with the court); MICH. COMP. LAWS ANN. § 700.3601 (West 2016) (requiring acceptance); *In re Lublin*, 984 N.Y.S.2d 263, 265 (N.Y. 2013) ("[A] nominated fiduciary is not compelled to accept the office."); *In re Estate of Cavalier*, 582 A.2d 1125, 1126 (Pa. Super. Ct. 1990) ("[A] person or institution named as executor in the will of a decedent cannot be forced to undertake the fiduciary responsibilities of such office. Unless and until the named executor consents to act and qualifies for office, neither statute nor rule of court imposes upon such person a duty to act as a fiduciary for or account to the beneficiaries named in the will."); *Grant v. Osgood*, 127 S.E.2d 202, 205 (S.C. 1962) ("An executor designated in a will is not required to qualify if he does not wish to do so, but if he accepts the trust, he is required to execute it in accordance with law.").

<sup>25</sup> See, e.g., *Cumberland County Surrogate Office: A Will of Your Own*, CUMBERLAND CTY., N.J., <http://www.co.cumberland.nj.us/content/173/2139/3493/3393/1235.aspx>

If being a personal representative was not sufficiently difficult, the advent of the digital age has only increased the burdens placed on those willing to undertake the role on behalf of a decedent. The seemingly ever-expanding usage of digital devices means that individuals increasingly handle many routine aspects of life online. Banking, shopping, and communication are done, at least in part, online by a substantial number of people.<sup>26</sup> For personal representatives, a decedent's online footprint creates access difficulties because many online accounts are password protected. A decedent may have received and paid utility bills, for example, via an online account without any paper record of the transaction; therefore, a personal representative may have trouble closing an account with a utility provider without the account's password.<sup>27</sup> Given the number of online accounts used by most people, living individuals may have trouble remembering their own usernames and passwords,<sup>28</sup> let alone finding such information for an unknown number of online accounts held by a decedent.

Even if passwords are discovered by a personal representative, accessing the account may be construed as a violation of the terms of service agreement between a decedent and a service provider. For example, Karen Williams sought access to her son's Facebook account following his death, but did not have the password to the account.<sup>29</sup> Eventually, Williams gained access to the account after receiving "a tip" from one of her son's friends.<sup>30</sup> Accessing her son's account, however, violated Facebook's terms of service regarding unauthorized access; therefore, Facebook changed the password to the account thereby barring Williams's access.<sup>31</sup> In response, Williams brought suit to regain "full and unobstructed" access to her son's account.<sup>32</sup> Although the court ruled in her favor, the relief granted Williams only ten months of access to the account.<sup>33</sup> At

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("You should name a contingent executor or personal representative to act in case your first selection dies before you, or is unable to serve.").

<sup>26</sup> Thomas Wailgum, *Too Many Passwords or Not Enough Brain Power?*, PCWORLD (Sept. 9, 2008, 3:15 PM), [http://www.peworld.com/article/150874/password\\_brain\\_power.html](http://www.peworld.com/article/150874/password_brain_power.html) (citing a 2007 Microsoft study that found users had about 25 online accounts that required a password for access).

<sup>27</sup> See, e.g., Naomi Cahn & Amy Zietlow, *A Digital Afterlife*, SLATE (Sept. 16, 2013, 4:30 PM), [http://www.slate.com/articles/double\\_x/doublex/2013/09/digital\\_assets\\_how\\_do\\_you\\_handle\\_a\\_loved\\_one\\_s\\_online\\_accounts.html](http://www.slate.com/articles/double_x/doublex/2013/09/digital_assets_how_do_you_handle_a_loved_one_s_online_accounts.html) (describing the challenge faced by a daughter seeking to resolve an electricity bill without a password to the online account following the death of her mother).

<sup>28</sup> See Wailgum, *supra* note 26 (noting that "nearly 60 percent of those studied felt they couldn't possibly remember" all the passwords required for their multiple numerous accounts).

<sup>29</sup> Associated Press, *In Death, Facebook Photos Could Fade Away Forever*, USA TODAY (Mar. 1, 2013, 8:05 AM), <http://www.usatoday.com/story/tech/2013/03/01/in-death-facebook-photos-could-fade-away-forever/1955933/>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* (describing the justification for the password change as "company policy").

<sup>32</sup> Michael Avok, *Karen Williams' Facebook Saga Raises Question of Whether Users' Profiles Are Part of 'Digital Estates'*, HUFFINGTON POST (May 15, 2012) (on file with author).

<sup>33</sup> *Id.*

the expiration of the ten-month access period, Facebook terminated the account.

<sup>34</sup>

In addition to private law barriers to postmortem access created by terms of service agreements, public law also impedes access for personal representatives in possession of passwords to a decedent's online accounts. In each state, an account holder's online privacy is protected by a statute that bars "unauthorized access" to a computer, accessing a computer without "effective authorization," or a similar phrase.<sup>35</sup> Reflecting the importance of protecting online accounts, the penalties for violating state privacy laws include monetary fines, imprisonment, or both.<sup>36</sup> While these statutes are primarily aimed at computer hacking, accessing a decedent's online account without evidence of authorization is risky given the broad language employed by the statutes. To reduce whatever threat of criminal sanction exists, estate planners recommend that account holders leave a list of passwords to be used by personal representatives after the account holder's death to demonstrate that access to the account has been authorized by the account holder.<sup>37</sup> As evidence of the growing importance of post-mortem access to online accounts, post-mortem digital asset services have become a cottage industry online.<sup>38</sup>

Without an account's password, a personal representative may simply provide an online service provider with evidence of a decedent's passing and request access to a decedent's online account. However, online service providers hesitate to permit access and the subsequent transfer of digital information for fear of running afoul of the Stored Communications Act (SCA),<sup>39</sup> which is a portion of the larger Electronic Communications Privacy Act.<sup>40</sup> The primary obstacle to gaining access to electronically stored content in the SCA is

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<sup>34</sup> *Id.*

<sup>35</sup> MD. CODE ANN. CRIM. LAW § 7-302(c)(1)(i) (West 2015) (stating that a person may not "without authorization . . . access, attempt to access, cause to be accessed, or exceed the person's authorized access to all or part of a computer network, computer control language, computer, computer software, computer system, computer service, or computer database"); TEX. PENAL CODE ANN. § 33.02(a) (West 2015) ("A person commits an offense if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner."). For a list of state privacy laws, see *Computer Crime Statutes*, NAT'L CONF. STATE LEGS. (June 12, 2015), <http://www.ncsl.org/research/telecommunications-and-information-technology/computer-hacking-and-unauthorized-access-laws.aspx>.

<sup>36</sup> *See, e.g.*, MD. CODE ANN. CRIM. LAW § 7-302(d)(1) (West 2015) (imposing a fine of up to \$1,000 and/or a prison term not exceeding three years); TEX. PENAL CODE ANN. § 33.02(b) (West 2015) (designating the offense as a "Class B misdemeanor").

<sup>37</sup> *See, e.g.*, Mary Randolph, *Access to Online Accounts: Helping Your Executor and Loved Ones*, NOLO, <http://www.nolo.com/legal-encyclopedia/access-online-accounts-helping-executor-35013.html> (last visited May 31, 2016).

<sup>38</sup> *See, e.g.*, Evan Carroll, *RIP Digital Legacy Startups*, DIGITAL BEYOND (Mar. 21, 2014), <http://www.thedigitalbeyond.com/2014/03/rip-digital-legacy-startups/> (cataloging the success and failure of various online businesses that handle digital assets).

<sup>39</sup> 18 U.S.C.A. § 2702 (2012).

<sup>40</sup> Electronic Communications Privacy Act, 18 U.S.C.A. §§ 2510–2522, 2701–2712 (West 2015).

§ 2702(a)(1), which states “a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service.”<sup>41</sup> Although it contains exceptions that permit voluntary disclosure of digital information,<sup>42</sup> the provisions of the SCA do not go so far as to compel disclosure of any electronic information. The opening sentence of the section describing the SCA’s exceptions notes that a service provider “may divulge the contents of the communication”<sup>43</sup> and then lists the specific exceptions, which suggests that compulsory disclosure is not countenanced by the statute.<sup>44</sup> While it may protect an account holder’s privacy interests during the account holder’s life, the SCA creates an additional obstacle to post-mortem data acquisition due to the disclosure limitations it places on service providers.

The much publicized case of *Ajemian v. Yahoo!, Inc.*<sup>45</sup> illustrates the challenges faced by personal representatives trying to collect online information in conjunction with the process of probate. In *Ajemian*, the co-administrators of a decedent’s estate requested access to the decedent’s email messages in a Yahoo! email account on the basis that the messages constituted property that comprised part of the decedent’s estate.<sup>46</sup> Yahoo! denied access, claiming that revealing email content—even to an administrator of a decedent’s estate—would violate the SCA.<sup>47</sup> Although the court based its decision on the terms of the service agreement without reaching the merits of the property claim,<sup>48</sup> the facts of the case suggest that the barriers to access are substantial. One of the co-administrators had initially opened the email account for decedent’s primary use, had access to it, and shared it as a co-user.<sup>49</sup> This co-administrator “continued to access the account from time to time” but had “forgotten the password.”<sup>50</sup> Given the circumstances, one might have guessed that the co-administrator’s status as an intermittent co-user of the account would have permitted access without litigation. Interestingly, Yahoo! initially agreed to provide access to the contents of the account after receiving documented evidence of the user’s death.<sup>51</sup> But, Yahoo! changed its position and decided to litigate the issue of access to the contents of the decedent’s account under the

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<sup>41</sup> *Id.* at § 2702(a)(1).

<sup>42</sup> *Id.* at § 2702(b).

<sup>43</sup> *Id.*

<sup>44</sup> For an argument that personal representatives should be included among the exceptions, see Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 *FORDHAM L. REV.* 799, 840–42 (suggesting that the exception for an “agent of such addressee or recipient” of an electronic communication should apply to estate representatives).

<sup>45</sup> 987 N.E.2d 604 (Mass. 2013).

<sup>46</sup> *Id.* at 606.

<sup>47</sup> *Id.* at 608–09.

<sup>48</sup> *Id.* at 615–16 (basing the ruling on forum selection and limitations clauses in the terms of service agreement and remanding the issue of whether the contents of the emails were property of decedent’s estate for briefing and further probate proceedings).

<sup>49</sup> *Id.* at 607.

<sup>50</sup> *Id.* at 608.

<sup>51</sup> *Id.*

terms of service agreement and the SCA.<sup>52</sup> Notably, *Ajemian* is just one of numerous conflicts between survivors and online service providers that have erupted with the proliferation of digital assets.<sup>53</sup>

Approximately a decade ago, a handful of states anticipated the problem presented in a case like *Ajemian* and enacted statutes that permitted a personal representative to access a decedent's email accounts.<sup>54</sup> The legislatures in these states reached the same statutory conclusion—a personal representative not only possessed authority to access an email account, but also to copy emails stored in the account.<sup>55</sup> While laudable for their prescience, a straightforward criticism of the earliest statutes is that they have not kept pace with the growth of social media as a means of communication in lieu of email. Facebook, for example, had a mere six million users at the time Connecticut enacted the first statute authorizing a personal representative to access and copy emails in 2005.<sup>56</sup> Five years later, Facebook had approximately 600 million users, and that number doubled to 1.2 billion by 2013.<sup>57</sup> Because they limit access to email accounts only, early statutes are a step, or maybe three steps, behind the accounts frequently utilized and deemed valuable by modern decedents.

Recognizing the limitations of existing legislation and the high probability of future fiduciary claims to access digital accounts, the Uniform Law Commissioners drafted the Uniform Fiduciary Access to Digital Assets Act (UFADAA) in 2014.<sup>58</sup> UFADAA's original provisions broadly defined "digital asset" to mean "a record that is electronic" and cloaked a fiduciary with broad authority to access digital assets by default unless prohibited by a decedent's will or court order.<sup>59</sup> The wide-reaching access granted to a fiduciary, such as a personal representative of an estate,<sup>60</sup> included the acquisition of the contents of electronic communications like email messages.<sup>61</sup> Although UFADAA's broad

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<sup>52</sup> *Id.* at 608–09. The reported case does not reveal why Yahoo! changed its position. *Id.* The parties reached a partial agreement that required Yahoo! to provide a list of emails without the contents of those emails. *Id.* at 609. However, plaintiffs sought to receive the contents of the emails, which led to the reported decision. *Id.*

<sup>53</sup> See, e.g., Tom Hauser, *Family Fights to Access Late Son's Digital Data*, ABC 5 EYEWITNESS NEWS (Jan. 21, 2015, 6:33 AM), <http://kstp.com/news/stories/S3682368.shtml?cat=1>; Chris Roberts, *Mom Fights for Access to Dead Son's Facebook*, NBC BAY AREA (Mar. 1, 2013, 3:50 PM), <http://www.nbcbayarea.com/blogs/press-here/Mom-Fights-for-Access-To-Dead-Sons-Facebook-194389861.html>.

<sup>54</sup> See, e.g., CONN. GEN. STAT. ANN. § 45a-334a (West 2015); IND. CODE ANN. § 29-1-13-1.1 (West 2016); R.I. GEN. LAWS ANN. § 33-27-1 (West 2015).

<sup>55</sup> *Id.*

<sup>56</sup> Ami Sedghi, *Facebook: 10 Years of Social Networking, in Numbers*, GUARDIAN (Feb. 4, 2014, 9:38 AM), <http://www.theguardian.com/news/datablog/2014/feb/04/facebook-in-numbers-statistics>.

<sup>57</sup> *Id.*

<sup>58</sup> UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT (UNIF. LAW COMM'N 2014) [hereinafter UFADAA].

<sup>59</sup> *Id.* at §§ 2, 4.

<sup>60</sup> UFADAA § 2 (defining "fiduciary" to mean "an original, additional, or successor personal representative, [conservator], agent, or trustee") (alteration in original).

<sup>61</sup> *Id.* at § 4(3).

access was intended to aid estate administration, it also served as the foundation for substantial resistance during the legislative process.<sup>62</sup> Companies like Facebook and Google expressed privacy-related concerns associated with a fiduciary's largely unfettered access to digital accounts.<sup>63</sup> Furthermore, Yahoo! objected that providing a personal representative with post-mortem access to an email account violated the terms of service between it and the account holder.<sup>64</sup> Ironically, a number of tech companies participated in UFADAA's drafting process.<sup>65</sup> Despite their involvement, companies opposed to UFADAA flexed their lobbying muscles in state legislatures and the UFADAA-based bills stalled.<sup>66</sup>

Instead of awaiting a modified version of UFADAA to emerge, UFADAA's opponents drafted a legislative alternative for state legislatures to consider, denominated as the Privacy Expectation Afterlife and Choices Act (PEAC Act).<sup>67</sup> Section 1(A) requires service providers to supply to personal representatives a "record or other information pertaining to the deceased user," but not the contents of any communications, if a court orders disclosure after making certain findings.<sup>68</sup> In other words, a personal representative may acquire

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<sup>62</sup> Morgan M. Wiener, *Opposition to the Uniform Fiduciary Access to Digital Assets Act*, NAT'L L. REV. (July 21, 2015), <http://www.natlawreview.com/article/opposition-to-uniform-fiduciary-access-to-digital-assets-act>; Alessandra Malito, *Two Groups Battle It Out to Create Uniform National Rule for Fiduciaries to Access Digital Assets*, WEBCEASE (May 28, 2015), <http://webcease.com/news/blog/133-two-groups-battle-it-out-to-create-uniform-national-rule-for-fiduciaries-to-access-digital-assets>.

<sup>63</sup> Wiener, *supra* note 63; Carly Ziegler, *Fiduciary Access to Digital Assets and Accounts: Uniform Fiduciary Access to Digital Assets Act "UFADAA"*, NAT'L L. REV. (Oct. 3, 2014), <http://www.natlawreview.com/article/fiduciary-access-to-digital-assets-and-accounts-uniform-fiduciary-access-to-digital>.

<sup>64</sup> Bill Ashworth, *Your Digital Will: Your Choice*, YAHOO! (Sept. 15, 2014), <http://yahoopolicy.tumblr.com/post/97570901633/your-digital-will-your-choice>.

<sup>65</sup> Jena L. Levin & John T. Brooks, *Administration of Trusts and Estates in the Digital Age*, WEALTHMANAGEMENT.COM (Dec. 1, 2015), <http://wealthmanagement.com/estate-planning/administration-trusts-and-estates-digital-age>.

<sup>66</sup> See Ziegler, *supra* note 64.

<sup>67</sup> PRIVACY EXPECTATION AFTERLIFE & CHOICES ACT § 1(A) [hereinafter PEAC Act], <http://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac/>.

<sup>68</sup> *Id.* at § 1 (A). The evidence required to permit disclosure of the record of information include:

- (a) the user is deceased; (b) the deceased user was the subscriber to or customer of the provider; (c) the account(s) belonging to the deceased user have been identified with specificity, including a unique identifier assigned by the provider; (d) there are no other authorized users or owners of the deceased user's account(s); (e) disclosure is not in violation of 18 U.S.C. § 2701 *et seq.*, 47 U.S.C. § 222, or other applicable law; (f) the request for disclosure is narrowly tailored to effect the purpose of the administration of the estate; (g) the executor or administrator demonstrates a good faith belief that account records are relevant to resolve fiscal assets of the estate; (h) the request seeks information spanning no more than a year prior to the date of death; and (i) the request is not in conflict with the deceased user's will or testament.

a list of the “To” and “From” lines associated with an email account but may not see the substance of those emails under § 1(A).<sup>69</sup> However, a court could order a service provider to reveal the contents of communications under § 1(B), if the personal representative shows that the decedent consented to disclosure either by will or some mechanism within the service that demonstrates a decedent’s intent to permit post-mortem disclosure of the content of communications.<sup>70</sup> Whether seeking a list of communications or the substance of those communications, the PEAC Act requires a personal representative to obtain a court order for the relevant information.<sup>71</sup> Thus, the PEAC Act resides at the other end of the privacy spectrum on the issue of a personal representative’s access to an online account when compared to the default access granted by the original terms of UFADAA.

In July 2015, one year after its original effort went public and encountered strong opposition, the Uniform Law Commission responded to the privacy-related criticisms and produced a competitor to the PEAC Act in the form of a revised version of UFADAA.<sup>72</sup> The Revised UFADAA resembles the PEAC Act in its protection of a decedent’s privacy interest as it pertains to the content of online communications. Section 7 not only mandates disclosure of the contents of electronic communications, but also authorizes the custodian of the electronic communications to require that personal representatives obtain court orders for such disclosure.<sup>73</sup> Similar to the list of contacts permitted by the PEAC Act, § 8 of the Revised UFADAA permits a custodian to disclose “a catalogue of electronic communications sent or received by the user,” if the personal representative presents the custodian with certain decedent-related information, such as a death certificate.<sup>74</sup> Much like § 7 of the PEAC Act, § 8 also allows the custodian to require the fiduciary to seek a court order for disclosure prior to transferring the relevant information to the fiduciary.<sup>75</sup> Although it is not a mirror image of the PEAC Act in all respects,<sup>76</sup> the Revised UFADAA cuts ties

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*Id.*

<sup>69</sup> See *Privacy Afterlife*, NETCHOICE, <http://netchoice.org/library/decedent-information/> (last visited May 31, 2016).

<sup>70</sup> PEAC Act, § 1(B).

<sup>71</sup> *Id.* at §§ 1(A), (B).

<sup>72</sup> REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT (UNIF. LAW COMM’N 2015) [hereinafter Revised UFADAA].

<sup>73</sup> *Id.* at § 7(5)(C).

<sup>74</sup> *Id.* at § 8.

<sup>75</sup> *Id.* at § 8(4)(D).

<sup>76</sup> For a chart comparing UFADAA, the PEAC Act, and the Revised UFADAA, see *Comparison of Uniform Fiduciary Access to Digital Assets Act (Original UFADAA), The Privacy Expectations Afterlife and Choices Act (PEAC Act), and the Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA)*, UNIF. L. COMM’N, <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/Comparison%20of%20UFADAA%20PEAC%20and%20Revised%20UFADAA.pdf> (last visited May 31, 2016). In a strange twist of legislative fate, NetChoice recently endorsed the Revised UFADAA. See *Uniform Fiduciary Access to Digital Assets Act (Revised): Balancing Fiduciary Needs, Privacy Rights, and Complying with Federal Law*, NETCHOICE, <https://netchoice.org/wp-content/uploads/Uniform-Fiduciary-Access->

to its predecessor and moves closer to the PEAC Act in its protection of an account user's post-mortem privacy.

Regardless of whether the revised UFADAA or the PEAC Act eventually wins legislative supremacy,<sup>77</sup> the importance of digital assets to testators is beginning to change the practice of will drafting. Some testators, but far from all, affirmatively plan for passing digital assets after death.<sup>78</sup> Among those executing a will that includes a definitive statement about the disposition of digital assets, the approach to planning for such access to online information and permission to disclose account information is not uniform. Some drafters may, for example, define a digital asset, which is no small feat given the myriad of electronically stored contents that may constitute “digital assets,” and then provide a personal representative with blanket authority to access information associated with the defined digital assets.<sup>79</sup> Similarly, a drafter may choose to permit access, as well as disclosure, for specifically described digital accounts in a single provision.<sup>80</sup> Whatever the approach to drafting, a definitive statement of the decedent's intent for access to and disclosure of account information is recommended as evidence of the decedent's “lawful consent” and “authorized access” for purposes of privacy laws as well as terms of service agreements.<sup>81</sup>

Beyond its practical impact on will drafting, the pressure for access to online information after a user's death has had one other important effect—changes in the policies of online service providers. Google created a mechanism that permits users to dictate how their accounts should be handled after a period of

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to-Digital-Assets-Act-Revised-2-pager.pdf (last visited May 31, 2016). However, other groups that lobbied against UFADAA have not yet taken a position on the Revised UFADAA; therefore, the Revised UFADAA's path to codification may yet encounter opposition. See Levin & Brooks, *supra* note 66.

<sup>77</sup> One or the other is likely to be enacted in many (and probably most) states given the value of digital assets held in online accounts. See *McAfee Reveals Average Internet User Has More Than \$37,000 in Underprotected 'Digital Assets'*, MCAFEE (Sept. 27, 2011), <http://www.mcafee.com/us/about/news/2011/q3/20110927-01.aspx> [hereinafter *McAfee Reveals*] (finding that the average user in the United States places the value of digital assets near \$55,000).

<sup>78</sup> See, e.g., Kelly Greene, *Passing Down Digital Assets*, WALL STREET J. (Aug. 31, 2012), <http://www.wsj.com/articles/SB10000872396390443713704577601524091363102> (quoting an estate planner who includes provisions for digital assets in drafted wills). However, planning for the distribution of digital assets is not necessarily common. See Yuki Noguchi, *Death Often Brings Disputes Over Online Lives*, NPR (May 11, 2009), <http://www.npr.org/templates/story/story.php?storyId=104024294&sc=fb&cc=fp>.

<sup>79</sup> See, e.g., *Sample Will and Power of Attorney Language for Digital Assets*, DIGITAL BEYOND, <http://www.thedigitalbeyond.com/sample-language/> (last visited May 31, 2016).

<sup>80</sup> James D. Lamm, Christina L. Kunz, Damien A. Riehl & Peter John Rademacher, *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. MIAMI L. REV. 385, 417–18 (2014).

<sup>81</sup> *Id.* at 417. More specifically, the relevant federal laws include the Computer Fraud and Abuse Act of 1986, 18 U.S.C.A. § 1030 (West 2015), and the Electronic Communications Privacy Act of 1986, 18 U.S.C.A. §§ 2510–2522, 2701–2712 (West 2015).

inactivity with its “Inactive Account Manager.”<sup>82</sup> Google’s manager permits a user to designate an individual to receive notice of account inactivity and provides a mechanism for the designee to download information specified by the user.<sup>83</sup> Similarly, Facebook changed its policy of memorializing accounts, which meant that the account remained accessible to friends of the user but not to anyone else, to making the user’s information available in a manner consistent with the user’s privacy settings at death.<sup>84</sup> According to Facebook, altering the policy governing memorialization to match a user’s privacy setting honors “the choices a person made in life while giving their extended community of family and friends ongoing visibility to the same content they could always see.”<sup>85</sup> Furthermore, Facebook added a “Legacy Contact” option that permits a user to designate someone to manage a memorialized account after the user’s death.<sup>86</sup> Although the legacy contact cannot delete information from the account or read messages sent by a deceased user, the contact has the ability to write posts, update the user’s profile, and respond to new friend requests.<sup>87</sup>

From practical changes in service provider policies and wills drafting to model legislative proposals, each of the reactions to the problem of postmortem access to digital assets orbit one central goal—establishing a decedent’s intent regarding distribution of property. The combination of the novelty of planning for digital assets and the low rate of estate planning generally means that a decedent’s intent for access to or disclosure of digital property at death is often unknown.<sup>88</sup> The vacuum of information about a decedent’s intent presents a substantial challenge to a fundamental tenet of the law of testate and intestate succession: honoring a decedent’s intent.<sup>89</sup> To fill the informational void for those who do not execute a will with access and disclosure provisions or a list of passwords, an online tool permits a user to memorialize a preference within the account’s settings. Similarly, Revised UFADAA and the PEAC Act create default settings for a decedent’s intent to grant access to or disclosure of digital assets after death. In the end, the changes in private ordering and public law spurred by the clash of digitization and estate administration reflect the theme of

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<sup>82</sup> *About Inactive Account Manager*, GOOGLE, <https://support.google.com/accounts/answer/3036546?hl=en> (last visited May 31, 2016); see also Geoffrey A. Fowler, *Google Lets Users Plan ‘Digital Afterlife’ by Naming Heirs*, WALL STREET J. (Apr. 11, 2013), <http://blogs.wsj.com/digits/2013/04/11/google-lets-users-plan-digital-afterlife-by-naming-heirs/>.

<sup>83</sup> *About Inactive Account Manager*, *supra* note 82.

<sup>84</sup> Chris Prince & Alex DiSclafani, *Remembering Our Loved Ones*, FACEBOOK NEWSROOM (Feb. 21, 2014), <http://newsroom.fb.com/news/2014/02/remembering-our-loved-ones/>.

<sup>85</sup> *Id.*

<sup>86</sup> Vanessa Callison-Burch, Mark Govea & Jasmine Probst, *Adding a Legacy Contact*, FACEBOOK NEWSROOM (Feb. 12, 2015), <http://newsroom.fb.com/news/2015/02/adding-a-legacy-contact/>.

<sup>87</sup> *Id.*

<sup>88</sup> See LexisNexis Newsroom, *supra* note 18.

<sup>89</sup> See, e.g., UNIF. PROBATE CODE § 1-102(b)(2) (amended 2010) (UNIF. LAW COMM’N 2014).

*Death and the Digital Age*

*Savannah Law Review's The Walking Dead* Colloquium—the impact of death on the law of the living.

