‘Who wants to live forever?’ Determining the future of online social accounts in intestacy

Introduction

John Smith has passed away. Under English intestacy law his photo albums and old letters pass to his next of kin who may choose whether or not to keep these mementos as a record of his life. Imagine, however, that the photos and correspondence were on his social media and email accounts. Having died suddenly, John Smith has not had time to create a Facebook legacy contact which can determine what happens to his account.[1]

Under existing law, John Smith’s next of kin has no ownership over the messages or photos connected to his account nor does the next of kin have an exclusive legal right to determine whether the account is memorialised or deleted. The company’s terms of service determine the range of individuals who can request that an account be deleted: Facebook, for instance, states in its guidance that the requester can be any immediate family member.[2] Without any legislative controls on the service providers’ terms of service, John Smith’s family are at the providers’ whim and holding the latter accountable for their actions in respect of the deceased’s account is difficult.

This problem was brought to light in the 2018 High Court case of *Sabados v Facebook*.[3] A person unrelated to the deceased had requested that the account (and all its records) be deleted. Since the family were not informed, they had no time to download their correspondence with the deceased or save photos of the deceased onto their hard drives. The deleting of the account thus erased one of the primary records of the deceased’s life from the family’s possession.

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[1] Facebook, ’What is a legacy contact and what can they do?’ <https://www.facebook.com/help/1568013990080948 > accessed 15 August 2018

[2] Facebook, ’How do I request the removal of a deceased family member’s Facebook account?’ <https://www.facebook.com/help/1518259735093203?helpref=faq_content > accessed 15 August 2018

[3] *Sabados v Facebook Ireland* [2018] EWHC 2369

Deciding the *Sabados v Facebook* case, Judge Parkes QC ordered Facebook to inform Ms Sabados of the name of the person who requested her deceased husband's account to be deleted.[4] Judge Parkes QC did not go so far, however, as to establish an actual right on Mrs Sabados' part to determine the fate of her husband's account, nor did he suggest that any such right had been infringed; rather Ms Sabados argued that the messages between her and her partner constituted her personal data and its deletion was a breach of the Data Protection Act 1998.[5]

The proposal in this essay, which creates new rights for the deceased's next of kin, goes far beyond Judge Parkes QC's judgment in *Sabados v Facebook*. Given how much of our lives is now recorded online, it is expedient to develop the law on intestacy so as to include digital accounts.

Current law

Today if a person dies intestate, his spouse or civil partner takes any personal chattels absolutely while the residuary estate is divided between his spouse and any issue.[6] Personal chattels are defined as tangible movable property except money, securities, property for business purposes, or property held solely as an investment.[7] There is, therefore, no provision for the future of a deceased person's data. Nor is such data covered by the Data Protection Act 1998.[8] The future of a deceased person's data depends solely on the terms of service of the service provider and these vary considerably between companies.

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4 Brett Wilson, 'Court orders Facebook to disclose information behind deletion of deceased person's Facebook account' (18 June 2018) http://www.brettwilson.co.uk/blog/court-orders-facebook-disclose-information-behind-deletion-deceased-persons-facebook-account/

5 Rebecca Keating, 'The Digital Afterlife' (Oxford Law Faculty, 27 June 2018) <https://www.law.ox.ac.uk/business-law-blog/blog/2018/06/digital-afterlife > accessed 16 August 2018

6 Administration of Estates Act 1925, s.46(1)(i)(2)

7 Inheritance and Trustees Powers Act 2014, s.3

8 Data Protection Act 1998, s.1

Why is this lacuna concerning?

There are two distinct issues in relation to a deceased's data: the continued existence of the online account and the access rights to the content of the account.

(i) Continued existence of the account

The fate of online accounts on death was recognised as a pressing issue prior to *Sabados v Facebook* with the need to leave instructions for online accounts being increasingly publicised.[9] Nevertheless, such publicity has had a limited effect and no legislative steps have been taken to address the problem. Indeed, a 2015 YouGov Poll revealed that if 52% of UK adults with digital accounts died today, no one would be able to access those accounts.[10]

Moreover, proposals for legislative reform have shied away from addressing the fate of online accounts. The Law Commission's consultation on reform of wills, the results of which are currently under review, only briefly touched on the digital world and only in relation to implementing the deceased's wishes when they are contained in an electronic communication.[11]

(ii) Access rights

The second issue is in relation to accessing correspondence connected to the deceased's online account between the deceased and a third party. This issue was at the core of the July 2018 Bundesgerichtshof ('BGH') decision, in which Facebook was ordered to provide access to the contents of an account to the parents of a 15 year old girl who had committed suicide.[12] The BGH

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[9] Gary Rycroft, 'Protecting Your Online Assets' (Law Society Blog, 12 May 2016) <http://www.lawsociety.org.uk/news/blog/protecting-your-online-assets/ > accessed 20 August 2018

[10] YouGov, 'Widespread confusion over who owns online digital accounts after death' (YouGov, 13 April 2015) < https://yougov.co.uk/news/2015/04/13/widespread-confusion-over-who-owns-online-accounts/ > accessed 20 August 2018

[11] Law Commission, *Making a Will* (Law Com Consultation Paper No 231, 2017)

[12] BGH, 12.07.2018 - III ZR 183/17

considered that the general inheritance law provisions of the German Civil Code enabled the heirs of a Facebook user to have the right to access the User's Facebook account. There has been no such case in the English courts thus far.

A lack of access may be especially concerning when part of the estate is associated with the account: for instance, where a business is run through an email account. The value of digital assets is "staggering":[13] the results of a 2011 study by McAfee revealed that on average internet users in the USA have approximately $37,438 in digital assets.[14] With 66% of the UK population active on social media, a not inconsiderable 44 million users, the law should be focused on protecting those assets.[15] The inability of next of kin to obtain access to the contents of an account in order either to understand the deceased's motives for ending his or her life or to increase the value of the estate requires the legislature's urgent attention. It is unrealistic simply to expect partners to keep username and password lists which are shared with their spouses, both because of the security risk and because the average number of accounts registered to one email address in the UK is 118 (according to a 2015 study) and that figure is doubling every 5 years.[16]

Proposal

A provision should be inserted into the Administration of Estates Act after s.46 (on succession to real and personal estate on intestacy) as follows:

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[13] Jamie Hopkins, 'Afterlife in the Cloud: Managing a Digital Estate' (2013) Hastings Science and Technology Law Journal Vol 5:2 209, 221

[14] McAfee 'McAfee Reveals Average Internet User Has More than $37,000 in Unprotected Digital Assets' (Business Wire, 27 Sept 2011) < https://www.businesswire.com/news/home/20110927005661/en/McAfee-Reveals-Average-Internet-User-37000-Underprotected > accessed 20 August 2018

[15] Statista, 'Total number and the share of the population of active social media and mobile social media users in the United Kingdom in January 2018' (January 2018), <https://www.statista.com/statistics/507405/uk-active-social-media-and-mobile-social-media-users/ > accessed 30 August 2018

[16] Tom Le Bras, 'Online Overload - it's Worse Than You Thought' (Dashlane, 21 July 2015) <https://blog.dashlane.com/infographic-online-overload-its-worse-than-you-thought/ > accessed 30 August 2018

s.46A. Rights to digital accounts on intestacy

(1) The spouse or civil partner, or next of kin, has the exclusive right to determine the continued existence of the deceased's digital accounts.

(2) The next of kin or those entitled to the residuary estate may apply to the court to obtain an order requiring the service provider to provide access to the content of the account. The court will only make such an order if it considers infringing the privacy of the deceased necessary and proportionate to achieve a legitimate aim.

(3) The next of kin or those entitled to the residuary estate can obtain the content of the account if he is able to show that the deceased expressly consented to the disclosure of records either in his or her will or by election with the service provider.

The simplest solution would be to include digital assets within the definition of personal chattels; however, this is not possible as the ownership and inheritability of digital assets is governed by the terms of the contract between the service provider and the account holder and many service agreements grant the service provider ownership over posts or photos uploaded onto the platform.[17] Therefore, this essay's proposal is to create a right for next of kin to determine the future of the account and a right to apply to court for access to the content of the account (unless the deceased has authorised access already). What this proposal is not, however, is a proposal to classify data as property for inheritance purposes. The law remains very unclear whether there is such a thing as an ownership right in data and there is no sign that this issue is likely to be resolved soon.[18]

Moreover, this proposal is limited to digital accounts and is not an automatic right to all digital assets. The reason for this can be demonstrated with the example of an iTunes account. If John has an iTunes account, the next of kin ought to be able to determine what happens to the account. John, however, does not own the music on an iTunes account but merely has a licence to use it.[19] Unlike a physical record collection, John's iTunes library cannot be transferred on death.

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[17] Hopkins (n 13) 224

[18] Cesar, Debussche, Van Asbroeck, *Data ownership in the context of the European data economy: proposal for a new right* (White Paper, 2017)

[19] Apple, 'Apple Media Services Terms and Conditions' <https://www.apple.com/legal/internet-services/itunes/us/terms.html> accessed 20 August 2018

The right to close an online account would operate in the same way as the right to close a bank account. It would be for the company to set out requirements in terms of proof of identity and proof of death; however, the difference with the current situation is that the law would determine which individuals could make such a request.

The proposal draws on elements of US state legislation. 28 states have created laws that give next of kin the right to manage digital accounts after the original user has died, though none of these state laws are in precisely the same format as this proposal.[20] Subsection (3) echoes the proposed legislation currently being considered in Virginia and Oregon which would enable content to be obtained by a personal representative provided he shows that the deceased expressly consented to the disclosure of records in his will or through an election with the service provider.[21]

Striking the appropriate balance

Finding a solution to the lacuna identified above requires a balance to be struck between the values of privacy, simplicity, and legal certainty.

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[20] HB 138 Revised Uniform Fiduciary Access to Digital Assets Act (Alabama); HB 108 Revised Uniform Fiduciary Access to Digital Assets Act (Alaska); SB 1413 Revised Uniform Fiduciary Access to Digital Assets Act (Arizona); AB-691 Revised Uniform Fiduciary Access to Digital Assets Act (California); SB 16-088 Revised Uniform Fiduciary Access to Digital Assets Act (Colorado); SB 262 Public Act No.05-136 (Connecticut); HB 345 Fiduciary Access to Digital Assets and Digital Accounts (Delaware); SB 494, Chapter 740 Florida Fiduciary Access to Digital Assets Act (Florida); SB2298 Revised Uniform Fiduciary Access to Digital Assets Act (Hawaii); SB 1303 Revised Uniform Fiduciary Access to Digital Assets Act (Idaho); HB 4648 Revised Uniform Fiduciary Access to Digital Assets Act (Illinois); SB 253 Revised Uniform Fiduciary Access to Digital Assets Act (Indiana); SB239/HB507 Maryland Fiduciary Access to Digital Assets Act (Maryland); HB 5034 The Fiduciary Access to Digital Assets Act (Michigan); Minnesota Statutes Chapter 521A Revised Uniform Fiduciary Access to Digital Assets Act (Minnesota); LB 829 Revised Uniform Fiduciary Access to Digital Assets Act (Nebraska); SB 131 (Nevada); AB A9910A (New York); SB 805 Fiduciary Access to Digital Assets (North Carolina); HB 2800 (Oklahoma); Title 33: Probate practice and procedure, Chapter 33-27: Access to Decedents' Electronic Mail Accounts Act, Section 33-27-3 (Rhode Island); SB 908 South Carolina Uniform Fiduciary Access to Digital Assets Act (South Carolina); HB1080 Uniform Fiduciary Access to Digital Assets Act (South Dakota); SB 326 Uniform Fiduciary Access to Digital Assets Act (Tennessee); SB 1193 Revised Uniform Fiduciary Access to Digital Assets Act (Texas); SB 5029 Revised Uniform Fiduciary Access to Digital Assets Act (Washington); AB 695 Revised Uniform Fiduciary Access to Digital Assets Act (Wisconsin); SF0024 Uniform Fiduciary Access to Digital Assets Act (Wyoming)

[21] Mark Obesnshain, *Protecting the Digital Afterlife: Virginia's Privacy Expectation Afterlife and Choices Act* (2015) 19 Rich. J.L. & Pub. Int. 39, 47

(i) Privacy

Assume John has been having an affair, the correspondence relating to which is, in situation A, in the form of love letters and, in situation B, through Facebook messenger. In situation A, ownership passes to the next of kin along with the rest of his personal chattels. In situation B, the next of kin has no right to access those messages. These two outcomes are not inconsistent. The reason for the different outcome in situation B is that at the time of contracting Facebook promised John privacy. If Facebook subsequently were to give a third party access to John's messages, that would be a breach of their own contract and undermine their claims of privacy thereafter with the risk that users move to other providers. This proposal preserves Facebook's right to uphold its promise of privacy as a general rule.

Moreover, automatically providing a spouse with the contents of an email or social media account risks undermining intestacy law's goals of "promoting familial harmony and minimising family quarrels".[22] Equally, however, there may be instances where the existence of the account itself is secret: for example, Ashley Madison or Tinder accounts held by a married person. The proposal therefore leaves it to the next of kin to request an account to be shut down, rather than informing the next of kin of the existence of the account.

In protecting privacy, however, the needs of the fiduciaries must not be ignored entirely. In some instances the next of kin may require access to the contents of the account, for instance in order to achieve closure for themselves in the case of suicide or as evidence in a dispute about a potential bequest or because part of the inheritance cannot be found or because a valuable business is run from the account. To disclose the contents would be a breach of the service provider's contract but would not be a breach of the Data Protection Act 2018 as the Sch.11 para.3 exception will apply ('Information required to be disclosed by law etc or in connection with legal proceedings'). The fact that any such disclosure will only be made in response to a court order means service providers will not need to be concerned about losing users to their competitors as the law applies to all the service providers equally. Moreover, there is no reason to believe that the proposed legislation would breach

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[22] Kristina Sherry, *What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the fate of Social-Media Assets Postmortem* (2013) 40 Pepp L Rev 1 185, 236

the ECHR. It appears that the right to private life cannot be invoked after a person has died.[23] Even if the right to private life did apply, however, that right is a qualified right which could be refused if the information is necessary and proportionate to needs of those living.

(ii) Simplicity of the process

The costs of intestacy should be kept as low as possible.[24] Litigation and recourse to the court system should be minimised. This proposal therefore does not require a court order in every instance but only where the next of kin wish to access the contents of the account and the deceased has not already given his authorisation (in a form recognised by the service provider) to do so. By requiring a legitimate purpose for access to the contents and for the applicant to prove necessity and proportionality, the proposal restricts the instances in which access is likely to be granted and reduces the likelihood of frivolous claims being brought.

(iii) Legal certainty for businesses and users

One of the disadvantages of requiring court oversight in order to protect privacy is that significant delay is introduced into the intestacy process. The intestacy process should not cause substantial losses to the estate, in particular losses as a result of litigation.[25] These two considerations of preserving privacy and preserving the estate must be balanced against each other. The proposed compromise is to set clear guidelines for the circumstances in which a court would be willing to give an order to provide legal certainty to applicants, while enabling the next of kin to close down an account or memorialise it without needing to apply to court.

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[23] *R (Pretty) v DPP* [2001] UKHL 61, [2002] 1 AC 800; *Estate of Kresten Filtenborg Mortensen v Denmark* App no 1338/03 (ECHR, 15 May 2006).

[24] Jill Papworth and Patrick Collinson, 'Wills and inheritance: how changes to the intestacy rules affect you' (The Guardian, 20 September 2014) <https://www.theguardian.com/money/2014/sep/20/wills-inheritance-changes-intestacy-rules > accessed 25 August 2018

[25] Laura McCarthy, *Digital Assets and Intestacy* (2015) 21 B.U.J. Sci. & Tech. L. 384, 396

What if the email account is used for a business purpose, however, and not allowing easy access to the contents leads to the business failing to complete orders or renewing a valuable domain name?[26] Say John is a sole trader and is suddenly hit by a car and killed. Failing to renew the domain or respond to customers could lead to the business losing value - and since the business would be inherited by the estate, that is a loss to the estate. Nonetheless, business email accounts may equally be used for personal or illicit purposes as well and regardless John still has a right to privacy in such cases. The same process of applying to the court should still be followed. It is for the individuals who run a business and have a responsibility to their clients to ensure that the account can be accessed by someone else in the eventuality of illness or death.

Inadequacies of alternative proposals

Several alternative proposals have been presented in the USA, though virtually none have been suggested in the UK. One proposal is to encourage the increased use of online digital estate planning services. The problem with relying on such services, however, is twofold: first, there are security issues with using such a service as it requires passwords to be listed online;[27] second, many users of social media or email either do not consider that the next of kin will need to determine what happens to such accounts or, alternatively, die unexpectedly before they have had time to consider the future of their accounts. Therefore, while individuals have a private option of online digital estate planning services, legislation must provide a default rule.

Another proposal is to impose a legal requirement on service providers to prompt users to check a box indicating their preferences on death.[28] The justification offered for such an approach is that the law should protect the digital outcome that social media users would have liked to occur on death. The primary flaw in this proposal is that a large proportion of social media users sign up as teenagers when they are highly unlikely to want their family to have access to their account but their view may

[26] Gerry W Beyer and Kerri M Griffin, *Estate Planning for Digital Assets* (2011) Estate Planning Studies 1, 3

[27] Carl M Szabo and Jacklyn Kurin *Digital Asset Planning, Password Sharing & The Risk of Liability* (White Paper, 2017); Hopkins (n 13) 239

[28] Sherry (n 22) 242

change later in their life. Admittedly the social media company could offer a regular reminder to update the user's preferences. However, there is little reason to think that social media users would respond to prompts to reconsider their post-death access settings, even if they did genuinely want their families to have the right to close the account. It is recognised that social media users exhibit indifference towards their online account settings.[29] For instance, the revelation that a data analytics firm had used personal information harvested from Facebook profiles without permission to create targeted advertisements resulted in a mere 5% of UK users leaving Facebook despite 93% being aware of the scandal.[30] The proposal of checking a box, therefore, would likely result in many social media users never updating their preferences and, if they ticked 'no' when they initially signed up aged 13, their next of kin would not be able to determine the future of the account. This proposal is therefore not as practical as the proposal presented in this essay.

Conclusion

In July 2018 there were 2.196 billion active Facebook users worldwide.[31] Per month an average of 50 million photos are uploaded to Flickr;[32] per day an average of 500 million tweets are tweeted;[33] per minute 300 hours of videos are uploaded to Youtube.[34] The significance of these digital assets has dramatically increased in the space of fifteen years. Combined, these assets now amount to narratives of each of our lives. Just as the next of kin would determine the future of the deceased's biographical

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[29] Shelton, Martin, Rainie 'Americans' Privacy Strategies Post-Snowden' (Pew Research Center, March 2015) <http://www.pewinternet.org/files/2015/03/PI_AmericansPrivacyStrategies_0316151.pdf> accessed 1 September 2018

[30] Emily Tan, 'One in 20 Brits delete Facebook accounts after the Cambridge Analytica scandal' (Campaign, 2 April 2018) <https://www.campaignlive.co.uk/article/one-20-brits-delete-facebook-accounts-cambridge-analytica-scandal/1460836 > accessed 1 September 2018

[31] Statista, 'Most famous social network sites worldwide as of July 2018' (Statista, July 2018) <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/ > accessed 1 September 2018

[32] Franck Michel, 'How many public photos are uploaded to Flickr every day, month, year?' (Flickr, December 2017) <https://www.flickr.com/photos/franckmichel/6855169886 > accessed 1 September 2018

[33] Internet Live Stats, 'Twitter Statistics' <http://www.internetlivestats.com/twitter-statistics/ > accessed 1 September 2018

[34] Salman Aslam, 'YouTube by the Numbers: Stats, Demographics & Fun Facts' (Omnicore Agency, 5 Feb 2018) <https://www.omnicoreagency.com/youtube-statistics/> accessed 1 September 2018

manuscript or photo albums, so too should they have the right to determine the future of the deceased's online accounts. So far there has been virtually no discussion of legislation on digital accounts in intestacy in the UK; yet it is arguably the most pressing issue surrounding intestacy at the present time. Introducing an exclusive right for next of kin to determine the future of online accounts and a right to apply to court for access to the contents of those accounts is a highly desirable step for the legislature to take.

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