

# Personal Planning



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- FAMILY SUCCESSION PLANNING
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What will happen to your online presence when you are gone?

## Death, Disability and the Online World

In late March 2004, a notice appeared on the weblog named "The Buck Stops Here", maintained by Stuart Buck, a lawyer then living in Washington, D.C. We can only paraphrase from memory because the posting has been removed from the site, despite the fact that Buck maintains an otherwise extensive archive on his weblog.

"Hello, this is Stuart's wife. I want to let his readers know that Stuart suffered what appears to be a stroke of some sort, and he is currently in the hospital. I will let his readers know more when we get more information from his doctors."

Fortunately, the stroke Buck suffered was not fatal or even severely disabling. We know from his occasional online postings that Buck had some residuals for a period of time after this occurrence, but he was back to posting to his weblog within a week or so, and currently is doing quite well. But his experience underscores a reality that we all face: death or disability can strike out at any time. It is good to be prepared.

This item was posted at Kuro5hin, a popular technology site, in 2008:

"Recently an old friend passed away and since his closest relatives were over 2000 miles away it would take some time for them to

arrive in town to attend services and handle the few remaining affairs he left dangling. He knew this and one day before he passed on, told us as we sat around drinking a few beers and smoking cigars; 'When I die I want you to come in and get this stuff out of here. Do it before any of my relatives arrive.' We gave him our word that we would. The 'stuff' he was referring to was a huge collection of porn video tapes he had collected since the late 70s and early 80s that covered one wall of his apartment. He had told us we could throw it all away or take it and add it to our collections as we saw fit. It wasn't surprising to me that one of the movies I came across were several copies of 'Deep Throat'."

You may have a small online footprint, or it may be quite large. Undoubtedly, you have one or more e-mail accounts, where a good amount of your personal information resides. You may have accounts with several social sites, such as Facebook, MySpace, LiveJournal, Twitter, LinkedIn, etc. You may have internet access to your bank account. You may have a bank account or a stock portfolio that is managed entirely online. You may maintain one or more weblogs. Even larger footprints belong to those who have created web sites, either for personal reasons or to complement

their business, and to those who have businesses that exist entirely online.

What will happen to that footprint in the event of your sudden and unexpected death? The short answer is that much in this area is uncertain. There is no one answer that will cover every possible online reflection of your worldly presence. But you can plan for these eventualities, and in that way allow your family or trusted friend to gain some degree of control of the situation.

It is not only death that must be considered. You may become disabled for a short time before recovering and regaining function, or you may become permanently and completely disabled. In this article, we will talk only about death and the "decedent", but many of these comments will also apply in the event of disability, either permanent or temporary.

### **Online communities**

The social networking sites such as Facebook are designed as a mixture of privacy and sharing of personal information. As a result, they all have very extensive terms of service. None of the terms of service or End-User Licensing Agreements (EULAs) of any of the well-known social sites currently make any mention of how the information they contain is to be protected or released in the event of the death of the account owner. It appears that it will be necessary for users' families to deal with these sites on an ad hoc basis in the event of death or disability.

Many of the sites do make general provision for the release of user information in response to a subpoena, search warrant, or other legal process, and that language is usually sufficient to encompass an order issued by a probate court in favor of a designated personal representative.

The policy adopted at MySpace is probably typical:

"MySpace will not disclose personal information to any third party unless we believe that disclosure is necessary: (1) to conform to legal requirements or to respond to a subpoena, search warrant or other legal process received by MySpace.com, whether or not a response is required by applicable law. . ."

Whether these sites would likewise release the information to a successor trustee, who normally acts without a court order, is more uncertain.

*An update* - In October 2009, Facebook announced that it is adopting a new policy to allow friends to "memorialize" the death of a Facebook user. When Facebook is notified that a user has died, and confirms the death, it will make the following changes:

- The user's account is changed to "private" so that only confirmed "friends" can access the account or find it in a search.
- Contact information and status updates are removed.
- The "wall" is left active for family and friends to post remembrances, if they wish to do so.

### **E-mail accounts**

E-mail is typically offered to customers by internet service providers (ISPs) as part of their access package, or by online services such as HotMail, Yahoo, Google, etc. The service offered by ISPs involves e-mail messages which are stored on the user's computer, while the online services store messages and attachments on their servers and simply provide the user with access to and control of the messages. In either case, the rights of access are governed by the EULAs. None of them that we have reviewed make any men-

tion of a specific policy in the event of the user's death.

E-mail is of particular concern in many situations, for two different reasons. E-mail messages may include contacts and information about current or pending business relationships or transactions, and thus gaining access may be a matter of early priority. E-mail also comes saddled with a high burden of spam and other undesirables, including malware of various kinds infecting attachments. The proper management of an e-mail account requires the regular dedicated use of security software - antivirus, antispyware, firewall, etc. It may not be wise to try to handle that account from a computer separate from the original user's computer, particularly for e-mail that is downloaded and archived on that computer.

### **Web sites, weblogs and online articles**

Any writings that you have placed on a web site in any fashion are usually considered to be your intellectual property, possibly subject to the rights of a web site owner, and are subject to the special provisions of the Federal copyright laws.

You may have posted articles on:

- a web site that you own and control
- a weblog that you have set up, perhaps using a weblog service, such as Blogger, TypePad, etc.
- online-only sites such as Slate, etc.
- the online component of newspapers, magazines, etc.

Sponsors of the latter two usually have detailed written agreements that govern copyright in the items they publish.

You may want your successors to delete your postings on such sites, or you may want them archived and preserved. You should plan to give explicit instructions, whichever choice you make, so that your successors know what to do.

In most cases, there will not be any reason to consider commercial exploitation of your writings because there is not expected to be any commercial interest in them. But the issue should be discussed with your successor, and with counsel to ensure that all copyrights that exist are respected and preserved.

#### *Online businesses*

Our comments here are geared to those users who have more or less casual involvement with a web site. If you have a business that is partially or entirely based on an online presence, then there are more detailed ideas and recommendations that we can discuss with you to ensure that these business interests are protected. The detailed recommendations that go into business succession planning are beyond the scope of this short monograph.

#### **Planning**

Advance planning can allow your chosen successors to take control of your online presence and assets in a calm and orderly fashion. Failure to plan could allow these issues to careen entirely out of control.

The key that provides access to just about every online location is the username and password combination. A person who has this key can gain access and can do anything that the original owner could do.

Our primary recommendation is to (1) record your user names

and passwords in a secure manner and (2) make advance arrangements with a trusted person to use them to gain early access to your accounts and deal with them appropriately in the event of your death. We will call this person a **surrogate**, a word we use carefully to distinguish his informal role from the formal and recognized role of the trustee or the personal representative of the estate.

The choice of surrogate is crucial. It must be someone whom you can trust to carry out your directions when the need arises, but who will not try to gain access until the need does arise. You may decide to record usernames and passwords in writing, but leave the list in the custody of a lawyer who will release it to the designated person only on your death or disability.

For most people and in most situations, a spouse or relative is the natural choice to deal with initial access issues. But many people, like the porn collector, will need a different choice. A married man who is carrying on an affair with another woman may not want his wife or child to be the first person to have the access to his e-mail accounts, as another example.

The role of the surrogate is different from that of the personal representative who is appointed by a probate court to manage the decedent's estate, or the trustee who is selected under his trust agreement. The surrogate is a person who will have early and entirely informal access to the decedent's accounts before those formal designations are made. It is important for the surrogate to keep in mind that he will be acting without any express legal authority. He will have to be careful to ensure that he can appropriately account for his actions if any question is ever raised about what he has done. In some cases, he will want to consult with the princi-

pal's spouse or family before acting. In some cases, as we will see, he may decide to forego taking any action until a court has formally appointed a personal representative.

The action that the surrogate would take on the death of the owner could include one or more of the following:

1. To gain access to the accounts and, possibly, change the passwords to prevent access by others and to protect the accounts pending resolution of any issues;
2. To delete any items that the principal has directed him to delete, so long as such action is legal;
3. To provide for appropriate announcement at the location of the death or disability of the owner;
4. To delete an account in its entirety; or
5. To secure the decedent's computers and storage media to ensure that they are not accessed by unauthorized persons.

The qualifier in item 2 in this list is very important. No one should ever try to delete information in order to conceal illegal activity by the decedent or others. To do so may itself violate the law.

For e-mail accounts, the surrogate may choose to set up an auto-responder that will respond to each received e-mail message with a notice of the owner's death, and providing additional information, such as contact information for the trustee, personal representative, or other person who will be handling his affairs.

For a social networking site, he may elect to place a short and discreet notice of the user's death, and provide appropriate contact information. For some of the principal's friends, this may be the first notice that they receive of this event, so it should

be handled with the proper level of tact and discretion.

Personal or business web sites can also be updated to provide a suitable notice of the death. If the site involves an online business, then additional steps may be necessary, and may have to be carried out quickly. In such cases, it may be determined that an estate should be opened and a personal representative be appointed immediately.

### **Gaining access after death**

Again, virtually no online provider makes express provisions in its EULA for handling accounts after the death of the owner. If the owner has not made advance arrangements for a trusted person to have access to his accounts, his family or his personal representative will have to try to deal with the sponsor of the site or service directly. How each will respond will depend on the advice of its legal department.

Many providers will insist on dealing only with a personal representative appointed by a probate court. They may or may not be willing to deal instead with the successor trustee of a trust.

Some may take the position that no one, not even a duly appointed personal representative, may have access to e-mail accounts. Read literally, many of the terms of service documents would prohibit release of these files to anyone, even the personal representative of a deceased owner.

Many online services have minimal customer support at best. It may be very difficult to make contact with a live human being to discuss issues regarding access to and disposition of online content.

These issues are beginning to arise as death and disability issues begin to arise when they were not previously anticipated. As time goes on, we can anticipate that online communities and document custodians will come to add new provisions to deal with the online property of deceased or disabled owners. Facebook's new initiative is a start, but there are still several needs left unaddressed.

### **Additional precautions**

Whether you are a friend acting as a surrogate, a family member doing the same, a court-appointed personal representative, or trustee of a decedent's trust, you should never take possession of the decedent's computers if you can avoid doing so. Leave them where they are and do all of your inspections at that location. If the computer turns out to contain material that is illegal to possess, there should never be any basis on which a prosecutor could claim that you are now the one "in possession" of that material.

Again, if any such material is found, it should not be deleted or concealed. It should be normally be brought to the attention of law enforcement authorities. Consultation with an attorney before doing so would be highly recommended.

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