# DEATH
## AND YOUR DIGITAL DATA

What happens to your virtual life when you die? **JANE SOUTHWARD** reports on a swathe of new considerations for solicitors drafting wills.

The first post was touching. "Miss you, Mum" was the comment on a schoolfriend's Facebook page, posted 14 days after her death from cancer. One month on, her husband uploaded a pictorial history of their life together. It was a beautiful reminder of a life lost and a deliberate decision by the family to keep her memory alive.

But managing digital legacies when someone dies is a growing area of contention for solicitors and families dealing with death and grief. Should you cancel a loved one's LinkedIn profile? What about email accounts and iTunes playlists? And how do you do this when passwords are kept secret?

Darryl Browne, a wills and estates accredited specialist at Browne Linkenbagh and a member of the Law Society's Elder Law and Succession Committee, says that for solicitors, managing digital assets is a new problem that is on the increase.

"You need to state properly and carefully how you want your assets managed after death and this now includes conventional and digital assets," Browne says.

"I am recommending people and their solicitors do it properly and carefully. It involves writing out a list of your online accounts, with user names, passwords and the designated person to handle them. Then there are your online wishes to consider. You need to designate someone to handle your online life after death."

Tony Kench, financial advisor at Principal Edge, says most estate planners "haven't got into this yet". "It makes sense and is something that should be attended to," Kench says.

Stephen Lynch, director at Somerville Legal, says that although there is a growing awareness of digital assets, it isn't common for them to be discussed by will-makers.

"This is probably for two main reasons," Lynch says. "Firstly, many solicitors would not yet include references to digital assets as part of their discussions with clients when determining what they need in their will and other estate planning documents. Secondly, digital assets are not yet a priority for many people, particularly older clients. However, it is an area that is becoming more and more important with each generation more tech-savvy than the last."

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**DARRYL BROWNE**
WILLS AND ESTATES ACCREDITED SPECIALIST, BROWNE LINKENBAGH

Lynch warns that a will is not necessarily the place where that should be done, particularly if passwords need to be set out.

"A will can potentially be seen by many people beyond the executor, and passwords should be kept separate and in a secure place, such as in a separate document in a sealed envelope in the solicitor's safe custody," he advises.

"A general power for the executor to deal with the testator's digital assets can be included in the will and then a separate list of non-binding wishes as to digital assets can be prepared."

According to NSW Attorney-General and Minister for Justice Brad Hazzard, planning ahead is the key.

"Nine out of 10 Australians have a social media account of some description, yet the vast majority have not even had a conversation – let alone written anything down – about what should happen to these accounts when they die," Hazzard says.

"Do you want others to have access to your emails? Do you want to share your photo collection with family or friends? What about your Facebook account – would you want it taken down or left as a memorial?

"Knowing what to do with each of these digital assets can be tricky, but like any asset you need to think about how they will be dealt with when you pass away."

An online survey of 1,139 Australians this year for the NSW Trustee and Guardian by Lonergan Research uncovered some astounding figures:

- Nine out of 10 Australians have a social media account;
- 83 per cent have not discussed with their loved ones what they want to happen to their accounts when they die;
- Only 3 per cent of Australians who have a will have decided what to do with their social media accounts after their death.

## THE PETER BROCK CASE

**MELISSA TUCKER**, a senior associate at Attwood Marshall Lawyers, outlines the details of a will case that made headlines.

You would be surprised by how many wealthy people die without a will or don't update their will to suit a change in their circumstances.

While the celebrity estate extends into the millions and involves intellectual property rights, royalties, and who gets the Ferrari, the everyday Australian can still learn a valuable lesson from the wills of the rich and famous because:

- Almost every Australian has an estate that must be distributed after they die; and
- A lack of planning will most certainly create unnecessary difficulties for the beneficiaries.

A famous Australian legend who left things too late to advise his family of his true intentions is Peter Brock. He died in 2006 and simply never got around to finalising his will. There was a costly legal battle over which will was actually his last. Brock was in a marital relationship with Bev for more than 25 years. They had two children and Bev had a child from a previous relationship whom Brock raised as his own.

In 1984, Brock made a will in which, apart from some monetary gifts, Bev was to live in the family home until marriage, death or the youngest child turned 18, with income paid to Bev and the children until the youngest turned 25, at which time the children would receive the remainder of the estate.

In 2003, Brock – who was by then involved in a relationship with Julie Bamford – started to complete a do-it-yourself will kit at Bev's insistence. He filled in the details as to executor and his funeral wishes. He told Bev to fill in the rest and signed it in Bev's and his personal assistant's presence. His PA signed as a witness but Bev did not. No details as to the disposal of his estate were ever completed.

In 2006, Brock brought another will kit into his office and asked his new personal assistant to write it up as he dictated. She expressed concern that his will was complicated and he should see a solicitor. This will was never signed.

In October 2007, the Victorian Supreme Court handed down its decision. The court held the 2006 will was not valid. It was not convinced that Brock intended that the will, as dictated, would be his final and complete will, especially as he had made previous wills, so would have been aware of the requirement for wills to be signed and witnessed.

The court held that the 2003will was valid, therefore revoking the 1984 will. However, because the will only appointed an executor and gave no directions about his estate, the court ruled that Brock's estate would have to be distributed under the intestacy rules.

This meant that his two natural children, Robert and Alexandra, would share the estate. They advised the court that they were prepared to include James, who otherwise would be left out.

Brock's partner Julie Bamford went on to contest the estate under family provision legislation and the estate settled her claim out of court.

Had Brock taken the time to ensure his wishes were validly recorded, he would have saved his family additional pain and suffering. This case serves to highlight the dangers of do-it-yourself will kits and the importance of ensuring your estate is in order.

It is a timely reminder, in order to avoid costly litigation, to ensure your will is up to date and your intentions are clear. Spending time now planning how your estate will be distributed will save your beneficiaries the expense of litigation, if in the future they are forced to contest an out-of-date will.



Imelda Dodds, CEO, NSW Trustee and Guardian, says a professional will-maker can guide you on leaving instructions for your executor to deal with your online life.

"Most social media platforms have policies for handling 'deceased accounts' – it is worth researching so you know what options you have," Dodds says.

"For example, with Facebook you can have your account memorialised or deleted while some accounts allow you to set up a delegated user prior to your death.

"Email providers vary in their approach – for example, some email providers are prepared to share the contents of your account with your executor, next of kin or beneficiaries, whereas other providers will simply close your account."

A year ago, Pouyan Afshar, a barrister at Sixth Floor Selborne Wentworth Chambers, set up a business called eClosure to provide online advice for grieving families dealing with their loved one's online presence.

The company also liaises with online providers on behalf of families.

"Since signing up to social networks and email services is so easy nowadays, you would not expect that closing an account when a loved one dies would be difficult," says Afshar.

"But you would be mistaken. Each service has different requirements and complex processes to close or memorialise accounts. As a result, many deceased persons' accounts remain active, which means that their friends and connections continue to receive birthday notifications and updates, and other people can post on their accounts, leading to anguish and upset."

Using eClosure costs $199 and the company will close five accounts – Facebook, LinkedIn, Pinterest, Twitter and Google+ as well as some email accounts.

Afshar says Facebook is the easiest online account to close as it recognises the importance that a profile can play in remembering departed friends and family.

Facebook accepts requests to place accounts in a memorialised state via a form in its help section. Once the request is approved by Facebook, the account's privacy is restricted to friends only and certain sensitive information is removed. The profile and wall remain active for friends to post memories and condolences.

Afshar warns that at least 30 million Facebook accounts belong to people who are now deceased. He says these and many other online accounts are open to hacking, trolling and security risks.

"Solicitors and consumers aren't up on these issues," he says.

"Most people don't think about their online presence and it's not only distressing when they die but dangerous when you think of the risk to their security." **LSJ**

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> **BRAD HAZZARD**, NSW ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

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THE LAW SOCIETY OF NEW SOUTH WALES | Library & Shop

Assaf, **Voidable transactions in company insolvency.** LexisNexis Butterworths. 2015.

**Archbold: Criminal pleading, evidence and practice.** 2015 edition. Sweet & Maxwell. 2015.

Bagaric, **Sentencing in Australia.** 2nd edition. Thomson Reuters. 2015.

Cook, **Laying down the law.** 9th edition. LexisNexis Butterworths. 2015

Hanrahan, **Commercial applications of company law.** 16th edition. CCH Australia Limited. 2015.

Harris, **Contract law in context.** CCH Australian Limited. 2015.

Latimer, **Australia business law.** 34th edition. CCH Australia Limited. 2015.

**Lewin on trusts.** 19th edition. Sweet & Maxwell. 2015.

Palmer, **Proof: How to analyse evidence in preparation for trial.** 3rd edition. Thomson Reuters. 2015.

Parkinson, **Australian family law in context: Commentary and materials.** 6th edition. Thomson Reuters. 2015.

Tully, **International law practice manual.** Thomson Reuters. 2015.

**Women and family law.** 10th edition. Women's Legal Services NSW

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