Fordham Law Review

Volume 83 *Volume 83*
Issue 2 *Volume 83, Issue 2*

Article 16

2014

Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death

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ARTICLES

INHERIT THE CLOUD: THE ROLE OF PRIVATE CONTRACTS IN DISTRIBUTING OR DELETING DIGITAL ASSETS AT DEATH

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We live in a world permeated with technology. Through our online accounts we write emails, we store pictures, videos, and documents, we pay bills and conduct financial transactions, we buy digital books and music, and we manage loyalty programs. Digital assets have quickly replaced physical letters, pictures, books, compact discs, and documents stored in filing cabinets and shoeboxes. The emergence of digital assets raises pressing questions regarding the treatment of digital assets at an account holder's death. Unlike digital assets' physical counterparts, an account holder does not control the ultimate fate of digital assets. Instead, digital assets are controlled by a private contract entered into by an account holder and a company that provides services or digital products. This Article explores the growing conflict between traditional succession practices and digital asset succession, which is controlled by digital asset contracts. It begins by tracing the development of private contracts as a method of transferring assets at death and shows that although contracts are regularly used to transfer assets at death, digital asset contracts have taken an unprecedented step of prohibiting or severely limiting the transfer of assets at death. This Article next explores the prevalence of digital assets and explains how service providers address digital asset inheritance in private contracts. It argues that digital asset contracts that deny inheritance may be validly formed but should be void as a matter of public policy because they transfer decision-making power about assets from an individual account holder to corporations. As our control over the ultimate fate of our digital assets diminishes, the nature of our property interests in digital assets also shifts away from our traditional understanding of ownership of personal property. It argues that we should take a conscious approach to reforming succession law based on time-honored principles of American succession law that benefit society as a whole and not allow

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private contracts controlling digital assets to hijack our system of inheritance. This Article concludes by offering suggestions for reform and action before the ability to transfer and preserve digital assets falls beyond our reach.

INTRODUCTION

We live on the internet, but what happens when we die there? The internet and computers facilitate nearly every aspect of our personal lives.[1] Our personal records, tax filings, bills, music, communication, books, photos, videos, and even journal entries are stored on our computer or in "the cloud" in digital form.[2] It is estimated that an average American

1. Digital assets are also prevalent in our professional lives, but this Article focuses on personal digital assets, not assets that may be controlled by an employer such as work email or hard drives.

2. The "cloud" refers to a network of computer servers or related software owned and maintained by a third party and which is accessible through the internet. *See* Eric Griffith,

regularly accesses more than twenty password-protected sites, all of which could store personal information or assets.[3] Our use of online accounts has created a new asset known as "digital assets." Digital assets include an individual's email accounts, personal webpages, blogs, social networking sites, documents, videos, or photo storage sites. Technological innovations will most likely expand this list in the future, and digital assets are becoming more economically valuable. For example, an individual can own lucrative domain names or accounts with stored financial value like Paypal or frequent flyer memberships. Digital assets may also include an individual's valuable media purchased in electronic format such as movies, television shows, music, and books. Although some of these assets, like personal email accounts, may not have extrinsic monetary value, they may hold significant emotional value. Despite the increasing significance of digital assets in our lives and their growing economic and personal value, the law is currently unclear on whether we can control the fate of digital assets after death.

American succession law favors what is called dead-hand control or the freedom to control the disposition of property at death, primarily through legal instruments such as wills and trusts. Most Americans understand that if they own physical property (real or personal) they have the right to control that property during their lives, and they have the right to control who obtains that property at their death.[4] The right to devise is one of the most significant property rights in American law. The U.S. Supreme Court has recognized that the power to devise property has been part of the "Anglo-American legal system since feudal times."[5] Indeed, courts and legislatures consider a testator's intention the lodestar in determining how assets are transferred.[6] Americans expect to have decision-making control over how their belongings are distributed at their death, and until recently, contracts have regularly been used to effectuate the intention of a decedent. But this expectation is coming into stark conflict with emerging contracts, most clearly demonstrated by contracts governing digital assets.

Digital assets come in a variety of forms and have many different purposes. For purposes of this Article, I have grouped different kinds of digital assets together intentionally in order to show a broader trend in succession law. Digital assets all have one striking similarity—the inheritability of the asset is controlled by a private contract between a

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What Is Cloud Computing?, PC MAGAZINE (Mar. 13, 2013), http://www.pcmag.com/article2/0,2817,2372163,00.asp.

3. Naomi Cahn & Amy Ziettlow, *A Digital Afterlife*, SLATE (Sept. 16, 2013), http://www.slate.com/articles/double_x/doublex/2013/09/digital_assets_how_do_you_handle_a_loved_one_s_online_accounts.html.

4. RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 57 (2010) ("This right to control the disposition of property at death is central to the American psyche. Although people are often vague in their understanding about many aspects of the law, one thing they do know is that they can write a will that controls who will—and who will not—get their property after they die.").

5. Hodel v. Irving, 481 U.S. 704, 716 (1987).

6. JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 1 (9th ed. 2013).

company that provides a service or product (like Google, Facebook, Yahoo! or Apple) and an individual who uses the company's services or purchases a digital product. Under these private contracts, or terms of service agreements, a user often agrees that her digital assets cannot be transferred to a user's family or friends at her death. In other words, digital asset contracts often limit the descendibility and devisability of digital assets.[7] If an agreement is silent as to descendibility, companies may have written policies that address whether the digital assets may be devised. Although private contracts have always played an important role in American succession law, these emerging private contracts controlling digital assets are poised to violate the fundamentals of American succession law.

Our dead-hand control over our digital assets differs significantly from our dead-hand control over our physical, tangible assets. Although we can control our digital assets during life (for example by deleting email accounts, posting or removing pictures or comments from online accounts, or donating or giving frequent flyer miles to friends and family), when we die, we lose control over how our digital assets are treated. A provision in a will concerning our digital assets—unlike a provision concerning physical assets—may have no effect on the ultimate distribution of those assets.[8] In addition, due to contractual provisions controlling our digital assets, we may not be able to adequately prepare for a decline in mental or physical capacity by ensuring that our caretakers or fiduciaries have access to our digital assets and online accounts.

Several scholars and students have encouraged legislative reform and suggested ways to plan for a digital estate,[9] but scholarship has not yet explored the overreaching transformation of succession law in allowing contracts to prohibit an asset from being descendible. This Article identifies and explores the quiet but dramatic shift taking place in American succession law through the use of private contracts. It argues that although contracts are a time-honored way to transfer assets according to the testamentary intent of a decedent, they should only be valid when they are bound by the policies and principles of succession law, namely when they

7. Descendibility means than an asset is capable of being transferred to a decedent's heirs by intestate succession. *See* BLACK'S LAW DICTIONARY 539 (10th ed. 2014). Devisability means that an asset may be transferred to whomever a decedent named in her will. *See id.* at 547.

8. Gerry W. Beyer & Naomi Cahn, *Digital Planning: The Future of Elder Law*, 9 NAELA J. 135, 150 (2013) ("Wills can be an awkward method of planning for the disposition of digital assets. . . . Moreover, it is unclear whether service providers will even respect the terms of wills to transfer ownership of digital assets.").

9. *See generally id.*; Jamie P. Hopkins, *Afterlife in the Cloud: Managing a Digital Estate*, 5 HASTINGS SCI. & TECH. L.J. 209 (2013); Jason Mazzone, *Facebook's Afterlife*, 90 N.C. L. REV. 1643 (2012); John Conner, Comment, *Digital Life After Death: The Issue of Planning for a Person's Digital Assets After Death*, 3 EST. PLAN. & COMMUNITY PROP. L.J. 301 (2011); Noam Kutler, Note, *Protecting Your Online You: A New Approach to Handling Your Online Persona After Death*, 26 BERKELEY TECH. L.J. 1641 (2011); Kristina Sherry, Note, *What Happens to Our Facebook Account When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 PEPP. L. REV. 185 (2012); Tyler G. Tarney, Note, *A Call for Legislation to Permit the Transfer of Digital Assets at Death*, 40 CAP. U. L. REV. 773 (2012).

facilitate transfer according to the testamentary intent of a decedent. Newly emerging contracts, most clearly illustrated by digital asset contracts, threaten the very nature of American succession law by allowing parties to opt out of one of the most fundamental rights of property—the right to devise. Although such contracts may be valid under the principles of contract law, the terms of the contracts violate the principles of succession law. Contracts that prohibit descendibility of personal assets should be void as a matter of public policy.

Part I traces the development of private contracts as a tool for succession and argues that contracts play an integral role in American succession law, especially as assets change form and develop in our modern society. Part I introduces the rise of digital assets and gives an overview of how most online service providers' contracts deal with inheritance. It also highlights some of the unique problems presented if digital assets are not descendible like other personal assets, especially as reliance on digital assets increases.

Part II argues that any contractual provision that prohibits transfer, even if procedurally valid, should be void as against public policy. Prohibiting contracts from transferring assets fundamentally alters the character of succession law, which promotes transfer guided by the testamentary intent of a decedent, and is contrary to the reason contracts were originally accepted as a means of transfer. Nowhere is this problem more apparent than in contracts governing digital assets, which take the unprecedented step of contractually limiting inheritance. Part II demonstrates that the current response of state legislatures and courts is to favor the public policy of allowing digital assets to be devised. Lastly, it explores why internet service providers have taken this radical step of denying inheritance and criticizes companies' potential justifications for doing so.

Part III offers suggestions for reform and contends that if the public does not respond to these contractual terms, inertia will be on the side of internet service providers to dictate the distribution or destruction of digital assets. Public pressure may be the only effective way to force companies to reshape their digital asset contracts and policies. Part III argues that the nonprobate system of asset transfer is an excellent model for companies that provide online services or products and supports digital asset contracts as long as they allow a method of transfer at death according to the decedent's testamentary intent. It then argues that if a testator's testamentary intent concerning digital assets is unknown, the beneficiaries' desires and needs should receive preference over the service provider's default policy of prohibiting descendibility.

I. CONTRACTING INHERITANCE

Digital assets are not the first kind of asset to be distributed according to the terms of a private contract. Transferring assets according to a private agreement (instead of by a will through the probate system) is a common practice in today's estate planning.[10] This part shows that private contracts,

10. *See infra* Part I.A.

bound by the principles of succession law, have been an accepted tool to transfer assets for hundreds of years. Private contracts have been especially effective and efficient in transferring assets that are newly recognized or created in an ever-developing society. This part argues that as long as contracts have worked to promote succession controlled by the testamentary intent of a decedent, courts and legislatures have accepted them as a valid means of transferring assets at death and have upheld the contractual terms in the face of contrary provisions in wills or contests among beneficiaries. Contracts, however, are beginning to undermine our system of succession. Nowhere is this problem more apparent than in contracts governing digital assets, which take the unprecedented and extraordinary step of prohibiting and controlling descendibility. This part then explores the dramatic rise of digital assets and gives an overview of the myriad ways in which digital asset contracts restrict and control descendibility.

A. Using Private Contracts As Tools to Devise Property

The English system of distributing property upon death, which was adopted by the American colonies, has historically been accomplished through probate courts, controlled by a testator's will or by intestacy statutes.[11] But nonprobate transfers through some form of private agreement have been used as an alternative to the public probate system for hundreds of years.[12] The signature characteristic of nonprobate transfers is that the transfer occurs according to an agreement between private parties, not according to a state-supervised probate system.[13] As the nature of wealth changed from being held in land to being held in financial accounts,

11. *See* Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: I*, 42 MICH. L. REV. 965, 977–82 (1944) (describing the adoption of English probate courts in America). Trusts have been used as well, but probate was the primary vehicle of transmission until recent times. The trust gained popularity in the 1960s after Norman Dacey wrote an influential book entitled *How to Avoid Probate. See* LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 106 (2009). State legislatures passed wills acts that establish clear rules for making a will. If an individual follows the prescriptions of a state's wills act in drafting and executing her will, she can be assured that her wishes will be followed when she dies. If an individual has not left a will that meets the requirements of the wills act, the assets are distributed according to the laws of intestacy, which presume the intent of an ordinary testator. DUKEMINIER & SITKOFF, *supra* note 6, at 63.

12. John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 10 (2012) ("Will substitutes are not new. There is a sense in which the nonprobate system extends all the way back to the fourteenth century, when the trust device first emerged in English law.").

13. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1110–12 (1984) (stating that beneficiary designation in life insurance policies, pension accounts, and bank, brokerage, and mutual fund accounts are the functional equivalents of will devises); Grayson M.P. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. MIAMI L. REV. 758–59 (2008) ("Will substitutes, as the name implies, are designed to achieve the practical effect of a will—designating beneficiaries to receive property at the owner's death—outside the probate system. . . . [W]ill substitutes ordinarily take the form of a gift, trust, contract, or other nontestamentary arrangement . . . .").

the nonprobate system of succession became more prominent.[14] Lawrence Freidman noted that "in the twentieth century, will substitutes grew like mushrooms."[15] Today, more wealth transfers occur outside probate by private agreement than in probate by will.[16] Nonprobate transfers include instruments such as revocable trusts, life insurance policies, retirement accounts and pay-on-death accounts, and private contracts. These instruments arose because of a need for flexibility and efficiency, and courts uphold them as valid private methods of transferring assets at death according to the intention of a decedent.

Trusts are the oldest form of a private contract used to distribute assets without using the public court system. Trusts divide ownership of an asset between a trustee, who holds legal title, and a beneficiary, who holds equitable title.[17] A trustee administers and distributes trust assets to a beneficiary in accordance with a trust agreement. Trusts, much like wills, were originally used to transfer real property at death.[18] The trust developed, however, as a way to avoid using a will and therefore avoid the stringent feudal rules controlling the laws of real estate such as the law of primogeniture, tax laws, and laws limiting devisability.[19] By transferring real property to trusts, landowners were able to avoid primogeniture laws and provide for their wives, daughters, and younger sons, avoid some taxation, and allow the family to continue to use the land after the landowner's death.[20] Trusts, then, were created to avoid the immutable probate laws and to provide a means to transfer assets in a way that best effectuated a settlor's intent.

Born out of a need for flexibility, trusts have become a key instrument in managing, administering, and transferring financial assets in the modern era.[21] Although trusts are an old tool, they are used in a modern way to give a settlor more control over her assets after her death. A trust's flexibility allows settlors to plan for the distribution of many different kinds

14. John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 723 (1988) ("Into the eighteenth century, land was the dominant form of wealth. The technological forces that broke up older family-centered modes of economic organization called forth two new forms of private-sector wealth. One category is what we today call *financial assets* . . . which now comprise the dominant form of wealth.").

15. FRIEDMAN, *supra* note 11, at 110.

16. DUKEMINIER & SITKOFF, *supra* note 6, at 435; Langbein, *supra* note 12, at 10 ("The deepest trend now affecting the day-to-day reality of gratuitous transfers in the United States is the nonprobate revolution, by which I mean the burgeoning use of will substitutes to transfer property on death."); McCouch, *supra* note 13, at 759.

17. RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

18. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 632–33 (1995).

19. *See* R.H. Helmholz, *The Early Enforcement of Uses*, 79 COLUM. L. REV. 1503, 1510–11 (1979).

20. DUKEMINIER & SITKOFF, *supra* note 6, at 387; Carly Howard, *Trust Funds in Common Law and Civil Law Systems: A Comparative Analysis*, 13 U. MIAMI INT'L & COMP. L. REV. 343, 349–50 (2006).

21. *See* DUKEMINIER & SITKOFF, *supra* note 6, at 385; FRIEDMAN, *supra* note 11, at 103.

of assets.[22] Because trusts are a private agreement between a settlor and a trustee, trusts also provide the added benefit of privacy. In many ways, trusts are conceptually similar to a third-party beneficiary contract—a trustee promises a settlor to manage trust assets prudently and distribute them to beneficiaries according to the terms that a settlor has dictated in the trust.[23] The purpose of a trust is to distribute a settlor's assets, and the distribution of assets is controlled solely by the intent and desires of a settlor. Although private parties control the distribution of assets, state law controls the creation, interpretation, and enforcement of trusts.[24] Twenty-five states have adopted the Uniform Trust Code, which provides a codification of the law of trust administration.[25] Trusts, as a private agreement between parties, play an important role in asset distribution and are protected and enforced by state courts and legislatures.[26]

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22. Estate planners have turned to the trust as the most flexible estate-planning tool in the arsenal in an attempt to preserve digital asset inheritance. As one estate planner has described, "Many digital assets take the form of licenses, which can be transferred to a trust. In the event of the client's death or disability, the trustee has the authority to manage the assets and transfer them to the beneficiaries according to the client's instructions." Joseph M. Mentreck, *Estate Planning in a Digital World*, 19 PROB. L.J. OHIO 195 (2009). It is unclear whether these trusts, known as digital asset protection trusts, will be a valid way to ensure distribution of digital assets. Even a trust cannot solve the problem of digital assets where the terms of service agreement prevents transferability. In order to place an asset in a trust the owner must have the ability to transfer the property. *See* RESTATEMENT (THIRD) OF TRUSTS § 40 cmt. d ("If the owner of property cannot transfer it to another to be held for the other's own benefit, usually . . . the owner will not be able . . . to transfer it to another to be held in trust . . . .").

23. *See* John H. Langbein, *The Secret Life of the Trust: The Trust As an Instrument of Commerce*, 107 YALE L.J. 165, 185 (1997).

24. *See* DUKEMINIER & SITKOFF, *supra* note 6, at 387–88.

25. ALA. CODE §§ 19-3B-101 to -1305 (2007 & Supp. 2013); ARIZ. REV. STAT. ANN. §§ 14-10101 to -11102 (2012 & Supp. 2013); ARK. CODE ANN. §§ 28-73-101 to -1105 (2011); D.C. CODE §§ 19-1301.01 to -1311.03 (2012 & Supp. 2013); FLA. STAT. ANN. §§ 736.0101-.1303 (West 2012 & Supp. 2014); KAN. STAT. ANN. §§ 58a-101 to -1107 (2008 & Supp. 2013); ME. REV. STAT. tit. 18-B §§ 101–1104 (2012 & Supp. 2013); MASS. GEN. LAWS ch. 203e, §§ 101–1013 (2011 & Supp. 2014); MICH. COMP. LAWS §§ 700.7101–.8206 (2012 & Supp. 2013); MO. REV. STAT. §§ 456.1-101 to .11-1106 (2007 & Supp. 2014); NEB. REV. STAT. §§ 30-3801 to -38,110 (2010 & Supp. 2013); N.H. REV. STAT. §§ 564-B:1-101 to B:12-1205 (2006 & Supp. 2013); N.M. STAT. ANN. §§ 46A-1-101 to -11-1105 (2003 & Supp. 2013); N.C. GEN. STAT. §§ 36-C-1-101 to -11-1104 (2013); N.D. CENT. CODE §§ 59-09-01 to -19-02 (2010 & Supp. 2013); OHIO REV. CODE Chs. 5801.01–5811.03 (2006 & Supp. 2013); OR. REV. STAT. ANN. §§ 130.001–.910 (West 2003 & Supp. 2013); 20 PA. CONS. STAT. §§ 7701–7799.3 (2014 & Supp. 2014); S.C. CODE ANN. §§ 62-7-101 to -1106 (2009 & Supp. 2013); TENN. CODE ANN. §§ 35-15-101 to -1103 (2007 & Supp. 2013); UTAH CODE ANN. §§ 75-7-101 to -1201 (1993 & Supp. 2013); VT. STAT. ANN. tit. 14A, §§ 101–1204 (2010 & Supp. 2013); VA. CODE. ANN. §§ 64.2-700 to -808 (2012 & Supp. 2013); W. VA. CODE §§ 44D-1-102 to -11-1105 (2010 & Supp. 2013); WYO. STAT. ANN. §§ 4-10-101 to -1103 (2013).

26. *See* RESTATEMENT (THIRD) OF TRUSTS 1.1 intro. note (defining trusts); *see also* Farkas v. Williams, 125 N.E.2d 600, 608–09 (Ill. 1955) (upholding a trust as a valid inter vivos trust, despite its "testamentary look"); Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis*, 35 ACTEC L.J. 314, 315 (2010) (asserting that state legislatures play a significant role in trust administration).

Traditional contracts also play an important role in the transfer of wealth today. Life insurance, pay-on-death bank accounts, transfer-on-death security accounts, and pension and retirement accounts are transferred upon death to named beneficiaries according to the terms of an agreement.[27] The main purpose of these agreements is to transfer assets held in an account upon death.[28] The distribution of these assets is controlled directly by the testamentary intent and desires of an account holder.

The significance of life insurance and other financial account private contracts has increased as assets have changed from real property to liquid financial accounts.[29] Like trusts, life insurance companies have existed in America from its founding.[30] Life insurance companies gained momentum and popularity as the American agricultural economy transitioned to an industrialized economy.[31] In the first life insurance case in Massachusetts state court in 1815, the court confronted the question of whether a life insurance policy was an enforceable contract as a means of transferring wealth.[32] The court found that it met the requirements of a valid contract and was "not repugnant to the general policy of the laws," and upheld the agreement.[33] Today, life insurance policies play an important role in transferring wealth at the death of a family member. Seventy percent of American families have some type of life insurance policy.[34] In 2012, beneficiaries of life insurance policies received $60 billion in benefit payments.[35] Americans rely on private contracts between decedents and insurance companies to ensure that their financial needs are met.

Pension and retirement accounts are also controlled by contract. Like life insurance policies, pension and retirement accounts have increased in importance as a method of wealth transfer in the modern American economy. Professor John Langbein described pension funds as "another artifact of the new forms of wealth that arose in consequence of the breakup of older, family-centered modes of production."[36] The growth of private

27. Langbein, *supra* note 12, at 10.

28. DUKEMINIER & SITKOFF, *supra* note 6, at 470, 476, 489.

29. *See supra* notes 13, 14, 16 and accompanying text.

30. SHARON ANN MURPHY, INVESTING IN LIFE: INSURANCE IN ANTEBELLUM AMERICA 1 (Johns Hopkins Univ. Press 2010). According to Murphy, the first life insurance company in America was created in 1809 by the Pennsylvania Company for Insurances on Lives and Granting Annuities. It received its charter about two years later. *Id.*

31. *Id.*; VIVIANA A. ROTMAN ZELIZER, MORALS AND MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES 10, 12 (1979).

32. Lord v. Dall, 12 Mass. (11 Tyng) 115 (1815).

33. *Id.* at 116–17 ("By the common principles of law, however, all contracts fairly made, upon a valuable consideration, which infringe no law, and are not repugnant to the general policy of the laws, or to good morals, are valid, and may be enforced, or damages recovered for the breach of them. . . . This is a contract fairly made; the premium is a sufficient consideration; there is nothing on the face of it, which leads to the violation of law; nor any thing objectionable on the score of policy or morals.").

34. AM. COUNCIL OF LIFE INSURERS, 2013 LIFE INSURERS FACT BOOK 49, 63 (2013), *available at* https://www.acli.com/Tools/Industry%20Facts/Life%20Insurers%20Fact%20Book/Pages/RP13-005.aspx.

35. *Id.* at 91.

36. Langbein, *supra* note 14, at 739.

pension funds and retirement accounts blossomed after World War II, and today's funds hold an immense amount of wealth.[37] In 2013, total retirement assets in America were estimated to be $22.7 trillion and made up about 34 percent of household assets.[38] Thus, middle class Americans' most valuable asset may be their life insurance policies or financial accounts, and these assets are usually transferred outside of the probate system according to the terms of a private agreement.[39] Almost two-thirds of American families' wealth are held and distributed according to private contracts of pension and retirement accounts.[40]

State courts and legislatures have embraced private contracts as a means to transfer wealth in the modern age. Courts generally uphold contractual terms against claims of contrary provisions in a decedent's will. For example, courts have routinely upheld life insurance and pay-on-death contract beneficiary designations even if they conflict with subsidiary laws of wills, such as the practice under probate codes that a divorce operates as a revocation.[41] In addition, state statutes provide that parties may rely on third-party's contractual terms to wholly govern beneficiary designations upon death.[42]

The growth of life insurance, pension accounts, and retirement accounts reveals a familiar pattern—whenever a new asset is created or repackaged, private contracts spring up to control the distribution of those newly created assets. Reproductive material, like these nonprobate transfers, is another example of a newly created asset where its descendibility is controlled by private contract.[43] Due to technological advances in medicine, reproductive material can now be stored and successfully used to create human life after

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37. *Id.* at 740.

38. *Retirement Assets Total $23.0 Trillion in First Quarter 2014*, INV. CO. INST., http://www.ici.org/research/stats/retirement/ret_14_q1 (last visited Oct. 19, 2014).

39. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. e (2003) (acknowledging that insurance contracts are usually controlled by private agreement but can also be part of a will); DUKEMINIER & SITKOFF, *supra* note 6, at 470.

40. DUKEMINIER & SITKOFF, *supra* note 6, at 479.

41. Nunnenman v. Estate of Grubbs, 374 S.W.3d 75, 77 (Ark. Ct. App. 2010) ("An IRA constitutes a contract between the person who establishes the IRA for his or her retirement and the financial institution that acts as the custodian of the IRA. Like an insurance policy, an IRA includes designation of beneficiaries to receive the residue in the event of the retiree's death. The rules pertaining to the construction of contract are well-settled . . . ." (citations omitted)); Varela v. Bernachea, 917 So. 2d 295, 288–89 (Fla. Dist. Ct. App. 2005) (upholding joint account holder's withdrawal of funds from a joint account with right of survivorship); Cook v. Equitable Life Assurance Soc'y, 428 N.E.2d 110, 116 (Ind. Ct. App. 1981) ("Public policy requires that the insurer, insured, and beneficiary alike should be able to rely on the certainty that policy provisions pertaining to the naming and changing of beneficiaries will control except in extreme situations."); Lynch v. Bogenrief, 237 N.W.2d 793, 797–98 (Iowa 1976) (upholding life insurance beneficiary designation to divorced spouse).

42. For example, a Washington statute provides, in relevant part, that "[i]n transferring nonprobate assets, a . . . third party may rely conclusively and entirely upon the form of the nonprobate asset and terms of the nonprobate asset arrangement in effect on the date of death of the owner." WASH. REV. CODE § 11.11.040 (2013).

43. MADOFF, *supra* note 4, at 41.

a donor of reproductive material has died.[44] No federal or state statutory system governs the disposition of reproductive material.[45] Instead, contracts between donors and clinics govern the disposition of a donor's reproductive material.[46] Standard sperm donor agreements, for example, include a provision for a donor to direct how his sperm should be treated in the event of his death.[47] Like other traditional contracts used to distribute assets at death, the agreements controlling reproductive material allow a donor to indicate whether an asset should be destroyed or distributed to others.[48] Private agreements allow for flexibility and efficiency, and ensure that a testator's testamentary intent will be honored.

In the few court decisions that have examined private contracts governing reproductive materials, courts have upheld the disposition of reproductive materials according to the terms of the agreement.[49] In a recent case in California, *In re Estate of Kievernagel*,[50] a California Court of Appeal found that the terms of a sperm donor's agreement with a company storing the donor's frozen sperm trumped the interest of the sperm donor's widow.[51] The agreement between the donor and the company allowed the donor to decide upon his death or incapacitation whether he wanted his sperm to be destroyed or donated to another (presumably his wife).[52] The donor had checked a box and initialed on the agreement that he wanted the company to destroy his sperm sample at his death.[53] After his death, his wife petitioned the court to set aside the contract and deliver his sperm to her.[54] The court held that the contract controlled and the company was to destroy the donor's sperm.[55] In another California case, *Hecht v. Superior Court*,[56] an agreement between the company preserving a donor's sperm provided that, upon a donor's death, the sperm bank would continue to store the sperm or release it to the donor's executor.[57] Despite objections from family members (who wanted the sperm destroyed), the executor obtained

44. *Id.* at 41–42.
45. *Id.* at 42.
46. *Id.* at 41–42.
47. *Id.* at 42–43.
48. *See, e.g.*, *In re* Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 313 (Ct. App. 2008) ("The Agreement provided the sperm sample was to be discarded upon [the decedent's] death. This option was selected instead of the option to donate the sperm sample to [his spouse]."); Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 276–77 (Ct. App. 1993) (stating that the agreement with the sperm bank authorized release of the sperm to Ms. Hecht).
49. *See* Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) ("[A]n agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors.").
50. 83 Cal. Rptr. 3d 311 (Ct. App. 2008).
51. *Id.* at 312.
52. *Id.* at 312–13.
53. *Id.*
54. *Id.* at 312.
55. *Id.*
56. 20 Cal. Rptr. 2d 275 (Ct. App. 1993).
57. *Id.* at 276–77.

the sperm according to the private agreement between the donor and the sperm bank.[58]

As assets have changed, transformed, or been created, private contracts have been the instrument of choice to control the distribution of these assets at death. Today, private contracts play a pivotal role in transferring assets upon death, and courts and legislatures have embraced private contracts as a valid method of distributing assets. Courts and legislatures have accepted these contracts because the contracts have not been "repugnant to the general policy"[59] of succession law. These contracts have existed as a tool to transfer assets according to the testamentary intent of a decedent. They succeeded because they effectuated a decedent's testamentary intent, provided much needed flexibility, and ensured quick and efficient transfer.

Contracts that do not allow transfer of assets, however, threaten the legal regime of succession law and should not be upheld by courts and legislatures. Digital assets present a particularly notable and widespread example of this threat. Digital assets follow the familiar pattern of a newly developed asset being controlled by private contract, but digital asset contracts have veered away from the time-honored, court and legislature–sanctioned method of transferring assets by prohibiting transfer altogether. Although these contracts may be procedurally valid, enforcing them raises significant policy concerns, which will be explored in the following parts.

B. Growing Importance of Digital Assets

There has been a phenomenal increase in the use of the internet and computers by Americans. As a result, Americans have created a slew of digital assets, which are, for the most part, controlled by private contracts. One can only imagine what kinds of new internet services and computer programs will be developed in the future, but whatever new kinds of digital assets society creates, Americans will want a mechanism for transferring them at death. This section introduces the scope of digital assets controlled by private contract and addresses why the question of inheritance is a pressing one. It also gives an overview of how private contracts treat the descendibility of digital assets.

1. The Importance of Access to Financial Accounts

The digital age has transformed how we create and store personal information. If current trends of internet usage and storage continue, access to digital assets will become critical in order to properly manage an estate for an incapacitated or deceased individual.

Digital assets are increasing as more Americans use the internet every day. In 1995, 14 percent of American adults used the internet.[60] Today, 85

58. *Id.* at 291. The court did not address the validity of the contract.

59. Lord v. Dall, 12 Mass. (11 Tyng) 115, 117 (1815).

60. *Internet Use Over Time*, PEW RESEARCH CTR., http://www.pewinternet.org/data-trend/internet-use/internet-use-over-time/ (last visited Oct. 19, 2014).

percent of American adults use the internet in some way.[61] Over half of internet users post original photos or videos on websites.[62] American teenagers lead the way in internet usage with a staggering 95 percent access the internet.[63] Older Americans have also increased their internet use in the last five years. In 2009, 13 percent of adults over sixty-five years old used social networking; today, 43 percent use social networking.[64] Over half of adults sixty-five years or older use the internet and the majority of older American adults who use the internet use email.[65] With the dramatic increase in internet usage, young and old Americans are creating digital assets every moment. The question about what to do with these assets at death is one that is immediate and one that will continue to grow in scope and interest as the majority of adults continue creating digital assets.

Although financial accounts managed online may not truly be considered "digital assets" because the money transferred via these online accounts is arguably physical instead of digital, access to these online accounts is important for individuals trying to manage an incapacitated or deceased individual's estate. In an economy that is becoming increasingly digital, it is likely that there will come a day when it would be impossible for a fiduciary to manage another's estate without access to the decedent's online accounts.[66] Even now, granting access to online accounts will improve a fiduciary's efficiency in administrating or managing an estate.

The increase in internet use makes access to digital financial accounts more important for caretakers and family members after the death of a loved one. The number of Americans who bank online is steadily increasing.[67] Many banks, credit card companies, and brokerage accounts offer the ability to receive correspondence and monthly bills electronically and deduct payments automatically. Bank of America has indicated that one-third of its checking account and savings account users have signed up

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61. Kathryn Zickuhr, *Who's Not Online and Why*, PEW RESEARCH CTR. (Sept. 25, 2013), http://www.pewinternet.org/Reports/2013/Non-internet-users.aspx.

62. Maeve Duggan, *Photo and Video Sharing Grow Online*, PEW RESEARCH CTR. (Oct. 28, 2013), http://www.pewinternet.org/Reports/2013/Photos-and-videos.aspx.

63. *Internet User Demographics*, PEW RESEARCH CTR., http://www.pewinternet.org/data-trend/teens/internet-user-demographics/ (last visited Oct. 19, 2014).

64. Joanna Brenner & Aaron Smith, *72% of Online Adults Are Social Networking Site Users*, PEW RESEARCH CTR. (Aug. 5, 2013), http://www.pewinternet.org/Reports/2013/social-networking-sites.aspx.

65. Kathryn Zickuhr & Mary Madden, *Older Adults and Internet Use*, PEW RESEARCH CTR. (June 6, 2012), http://www.pewinternet.org/2012/06/06/older-adults-and-internet-use/.

66. To demonstrate the effectiveness of conducting financial transactions online, see Carmen Maria Machado, *The Afterlife of Pia Farrenkopf*, NEW YORKER (Mar. 27, 2014), http://www.newyorker.com/currency-tag/the-afterlife-of-pia-farrenkopf (Farrenkopf's bills, bank notices, and financial accounts were all administered electronically, her death went undiscovered for five years, and when her accounts were depleted, the bank foreclosed on her house and a contractor discovered her remains in her garage).

67. In 2010, 46 percent of American adults banked online. Today, 51 percent of Americans adults bank online. SUSANNAH FOX, PEW RESEARCH CTR., 51% OF U.S. ADULTS BANK ONLINE 2 (2013), *available at* http://www.pewinternet.org/~/media//Files/Reports/2013/PIP_OnlineBanking.pdf.

for paperless statements.[68] Utility providers, phone and internet companies, and insurance companies also provide electronic service and financial management. Many utility providers are moving away from mailing paper statements to consumers and moving toward conducting all business via the phone or internet.[69] Service providers that offer electronic statements and billing save on printing and postage, and often offer incentives for customers to sign up for paperless accounts.[70] The Internal Revenue Service also has begun to encourage people to file electronic tax returns, and in 2012, 80 percent of Americans filed their taxes electronically.[71]

Problems accessing email or online financial information make it much more difficult for those managing the property of an incapacitated or deceased individual.[72] Increased lifespan has resulted in many people living with decreased mental or physical capacity.[73] The aim of estate planning is to allow people to plan for how their assets will be managed when they are unable to do so themselves. If they cannot grant a fiduciary access to their online accounts, a primary goal of estate planning will be threatened. With a few exceptions, state laws have not kept up with the shift to paperless financial administration.[74] Executors and attorneys-in-fact are left floundering as they attempt to manage different policies and

68. Candice Choi, *3 Things to Watch for with Paperless Statements*, NBC NEWS (Apr. 13, 2011, 4:37 PM), http://www.nbcnews.com/id/42576708/#.UqjWUvRDvTo.

69. *See, e.g.*, *Utility Billing Payment Options*, CITY OF MANHATTAN, KAN., http://www.ci.manhattan.ks.us/index.aspx?NID=280 (last visited Oct. 19, 2014) (providing customers the option to enroll in an Online Utility Billing and an Automatic Bill Payment Plan); *Welcome to Utility Services eBill*, CITY OF TUSCON, https://www.onlinebiller.com/tucson/ (last visited Oct. 19, 2014) (allowing customers to elect to receive online-bill statements and email notifications, and allowing customers the option of turning off paper statements).

70. Choi, *supra* note 68 (citing examples from Wells Fargo and a power provider in the Northeast that both held sweepstakes to win prizes if customers signed up for paperless billing); Caitlin Conran, *Save Trees for Earth Day—Go Paperless!*, GREEN MOUNTAIN ENERGY (Apr. 4, 2014), https://www.greenmountainenergy.com/2014/04/save-trees-for-earth-day-go-paperless/ (promising to plant 1000 trees if a total of 60,000 customers are enrolled in "Tree Free billing" by the end of April 2014); *Enroll in Paperless Billing*, GEORGIA POWER, http://www.georgiapower.com/residential/paperless-promo.cshtml?hp=rfy_box4 (last visited Oct. 19, 2014) (giving customers who switch to paperless billing the chance to win a $100 gift card).

71. IRS OVERSIGHT BOARD, ELECTRONIC FILING 2012 ANNUAL REPORT TO CONGRESS 16 (2012), *available at* http://www.treasury.gov/irsob/reports/2013/IRSOB~E-File%20Report%202012.pdf.

72. *See* Cahn & Ziettlow, *supra* note 3 (recounting the story of a young college graduate who returned home after her mother had died to find that the electricity had been turned off because there was no automatic withdrawal set up, no paper statements had been sent, and the daughter did not have access to the online account); John Yates, *What's Your Problem? Powerless Despite Power of Attorney, Bank: Caretaker Wife Can't Access Online Account*, CHI. TRIB., May 26, 2011, at C23.

73. DUKEMINIER & SITKOFF, *supra* note 6, at 495; DANAYA C. WRIGHT, THE LAW OF SUCCESSION: WILLS, TRUSTS, AND ESTATES 427 (2013) ("Most people are likely to face a period of incapacity as they reach the end of their lives.").

74. David M. Lenz, *Death and Downloads: The Evolving Law of Fiduciary Access to Digital Assets*, 23 PROB. L.J. OHIO 2 (2012).

contracts of an individual service provider in order to gain access to needed information.[75]

While it is still possible to manage an estate without access to an incapacitated or deceased person's online accounts, the ease and efficiency of online access cannot be underestimated, especially for accounts that are administered solely online. As we adopt a digital system of financial management, we need to ensure that the system provides a method of transferring access to online accounts. The existing practice and scant law on this issue is woefully inadequate to address the pressing demands of a digital future.

2. The Importance of Preserving Value

As digital assets continue to increase and replace physical records, photos, and personal correspondence, there should be a greater demand from account holders and their beneficiaries to ensure that digital materials are inheritable.[76] Digital assets may hold monetary value, which an account holder sees as part of her estate, and also may hold emotional and historical value to future generations.

Many of our emails, pictures, or videos stored online would not be of much economic worth. Most Americans, however, believe that their digital

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75. *Id.*

76. With the increased attention on digital assets, estate planners are beginning to counsel testators to plan for their digital assets. Estate planners encourage testators, among other things, to back-up digital materials on an external drive and grant explicit permission through a will or a trust for family members to access online accounts. Gerry W. Beyer & Naomi Cahn, *When You Pass On, Don't Leave the Passwords Behind: Planning for Digital Assets*, 26 PROB. & PROP. 40 (2012); Nancy Anderson, *You Just Locked Out Your Executor and Made Your Estate Planning a Monumental Hassle*, FORBES (Oct. 18, 2012), http://www.forbes.com/sites/financialfinesse/2012/10/18/you-just-locked-out-your-executor-and-made-your-estate-planning-a-monumental-hassle/; Tracy Sears, *Facebook Sends Family Information About Son's Page Before His Suicide*, WTVR.COM (Apr. 19, 2012, 8:27 AM), http://wtvr.com/2011/11/04/facebook-sends-family-information-about-sons-page-before-his-suicide/; *see also* Steve Eder, *Deaths Pose Test for Facebook*, WALL ST. J., Feb. 11, 2012, at A3. Online services have sprung up to address the risk of information being out of date, but none has legally recognized powers to control individual assets and it is possible that the companies may go out of business before a user needs the service. *See, e.g.*, ASSETLOCK, http://www.assetlock.net/ (last visited Oct. 19, 2014); DEAD MAN'S SWITCH, http://www.deadmansswitch.net/ (last visited Oct. 19, 2014); IF I DIE, http://ifidie.org/ (last visited Oct. 19, 2014); PASSWORDBOX, http://blog.passwordbox.com/ (last visited Oct. 19, 2014). In addition, online services that attempt to distribute assets have questionable legal validity and are likely invalid under the wills acts of most states. In every state except Nevada, a valid will is still required to be in writing on paper or some other tangible medium and signed by a testator. *See* UNIF. PROBATE CODE § 2-502 (2010). Nevada's electronic will statute requires the use of a testator's electronic signature. NEV. REV. STAT. ANN. § 133.085(1)(b) (LexisNexis 2012). Some states and the Uniform Probate Code allow a signature to be made by another if the signature is made in the testator's conscious presence and by the testator's direction. *See* UNIF. PROBATE CODE § 2-502(a). Electronic documents have not been welcome in the field of wills, trusts, and estates. Although many legal documents and pleadings are accepted electronically in the court system today, every state but one prohibits the use of electronic wills. NEV. REV. STAT. § 133.085; Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 887 (2007).

assets hold a significant monetary value,[77] and may wish to pass on that value to their beneficiaries. The monetary value of emails, pictures, or videos could increase, of course, depending on to whom they belonged. Emails and photos stored on the online accounts of the rich and famous could easily be sold for large profits.[78] Before Congress passed the Presidential Records and Materials Preservation Act,[79] for example, the correspondence and documents of the president and his staff (most of which would be stored digitally in today's world) were regularly sold to Congress for large sums.[80] Despite the Act, presidents continue to make money off of these papers and other documents in personal presidential libraries.[81] It is possible that a decedent's emails, photos, and other personal information stored online could be of great financial value to a decedent's beneficiaries.

As business shifts online, more personal webpages, blogs, and online accounts hold monetary value. Domain names, for example, can be worth millions of dollars.[82] Blogs have also found a way to generate income. According to *Forbes*, some 13.2 million women bloggers receive some sort of profit from their blogs,[83] ranging from free products to a trip to Hawaii or a monthly stipend.[84] Even social networking sites can generate income for an account holder. A "Twitter party," where a host invites followers to tweet about a product for one hour, can earn a host anywhere from $750 to $5,000, depending on the number of participants.[85] Profit generated from these sites is dependent on viewership and the number of people who click on advertisements.[86] It takes time and effort to build a profitable

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77. According to a McAfee survey conducted in 2011, the average American valued her digital assets at $54,722. *McAfee Reveals Average Internet User Has More than $37,000 in Unprotected 'Digital Assets,'* MCAFEE (Sept. 27, 2011), http://www.mcafee.com/us/about/news/2011/q3/20110927-01.aspx (including photos, projects, hobbies, personal records, career information, entertainment, and email).

78. Just one of Marilyn Monroe's letters was sold at auction for $52,460 in 2011. *See* Lauren Guzniczak, *Marilyn Monroe Letter Appraised at $52,460*, VALUE MY STUFF, http://www.valuemystuff.com/en/news/news-archive/marilyn-monroe-letter-appraised-at-52460 (last visited Oct. 19, 2014). Imagine how valuable access to her email account would have been.

79. 44 U.S.C. §§ 3315–3324 (2012).

80. Nixon v. United States, 978 F.2d 1269, 1282 (D.C. Cir. 1992) ("Congress routinely bargained for and purchased presidential papers for 'fancy sums.'"). Washington's papers sold for $25,000, Madison's for $25,000, Monroe's for $20,000, Jackson's for $18,000, and Arthur's for $7,500. *Id.* at 1282–83.

81. *Id.* at 1279 ("[T]he reality is that Presidents have been able to use real leverage in negotiating with respect to the disposition of presidential papers to extract from the United States 'fancy sums' in the form of lucrative library deals, while maintaining essential control over the materials.").

82. Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003) ("[D]omain names are valued, bought and sold, often for millions of dollars . . . .").

83. Larissa Faw, *Is Blogging Really a Way for Women to Earn a Living?*, FORBES (Apr. 25, 2012), http://www.forbes.com/sites/larissafaw/2012/04/25/is-blogging-really-a-way-for-women-to-earn-a-living-2/.

84. *Id.*

85. *Id.*

86. Lisa LaMotta, *How to Make Money Online*, FORBES (Nov. 9, 2007), http://www.forbes.com/2007/11/09/microsoft-yahoo-coke-ent-tech-

viewership.[87] An account holder may be interested in transferring the income stream to her beneficiaries by continuing her website and retaining her established viewership.

Loyalty programs also could be considered a form of digital asset and are controlled by private contracts. Loyalty programs give customers who are loyal to certain service providers or retail stores "points" or "miles." These points or miles can then be redeemed for free flights, merchandise, or nights at resorts.[88] It has been reported that two-thirds of Americans collect reward miles and points for travel, and 25 percent let miles expire.[89] Frequent flyer miles, retail store shopping points, or hotel reward programs have economic value and some individuals may have rewards worth thousands of dollars.[90] *The Economist* has dubbed frequent flyer miles "a new international currency" and perhaps "the world's second-biggest currency after the dollar."[91] According to *The Economist*, "In a recent poll of frequent travellers, two-thirds said that they see frequent flyer miles as the next best thing to actual cash: almost half even thought they should earn interest on their accounts."[92] Organizations such as the Red Cross and the Make-A-Wish Foundation have tapped into that economic value, encouraging people to donate their frequent flyer miles.[93] As reward programs continue to increase in value and are used more widely, it is likely that public demand to devise these assets will increase.[94]

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cx_ll_1108makemoneyonline.html (stating that websites need to have a viewership of 500,000 visitors per month in order to attract large advertisers).

87. *See generally* Faw, *supra* note 83.

88. Xavier Dreze & Joseph C. Nunes, *Using Combined-Currency Prices to Lower Consumers' Perceived Cost,* 41 J. MKTG. RES. 59, 59–60 (2004) (tracing the rise and implication of loyalty programs); Knowledge@Wharton, *The Lowdown on Customer Loyalty Programs*, FORBES (Jan. 2, 2007, 2:30 PM), http://www.forbes.com/2007/01/02/frequent-flyer-miles-ent-sales-cx_kw_0102whartonloyalty.html (explaining that loyalty programs have been around for more than 100 years and more than 75 percent of consumers today have at least one loyalty card).

89. Genevieve Shaw Brown, *Unused Frequent-Flier Miles 'Hidden Treasure' for Passengers*, ABC NEWS (Apr. 10, 2013), http://abcnews.go.com/Travel/unused-frequent-flier-miles-hidden-treasure-passengers/story?id=18922409.

90. Susan Stellin, *Bequeathing Your Unused Miles*, N.Y. TIMES, Nov. 25, 2012, at TR3.

91. *Frequent Flyer Economics*, ECONOMIST, May 4, 2002, at 15.

92. *Id.*

93. Jamie Lisse, *How to Donate Frequent Flyer Miles*, USA TODAY, http://traveltips.usatoday.com/donate-frequent-flyer-miles-1668.html (last visited Oct. 19, 2014).

94. Several online programs have sprung up to assist customers in keeping track and using their rewards. As of February 27, 2014, the following websites were active and aimed to help customers manage reward points and programs: https://www.points.com/; http://awardwallet.com/; https://www.traxo.com/; https://www.miletracker.com/; and https://www.usingmiles.com/ (last visited Oct. 19, 2014). Bloggers already follow which airlines allow account holders to devise frequent flyer miles. *See* AIRFAREWATCHDOG, http://www.airfarewatchdog.com/blog/15509513/yes-you-can-inherit-frequent-flyer-miles/ (last visited Oct. 19, 2014); Gary Stoller, *What Happens to Frequent-Flier Miles If you Die?*, USA TODAY (Sept. 1, 2013, 6:03 AM), http://www.usatoday.com/story/travel/flights/2013/09/01/deceased-travelers-frequent-flier-points/2749761/ (citing examples of people trying to devise reward points).

Even if digital assets hold no monetary value, they can hold emotional value to a decedent's friends and family. Because so much of our lives are played out online, our online accounts give invaluable information about our interests, personalities, and desires to those we leave behind. People increasingly seek comfort after a loved one's death from their online presence.[95] Digital assets have replaced, and will continue to replace, sentimental assets like letters, scrapbooks, home videos, and shoeboxes full of photos, which all carry great emotional significance to a bereaved family and historical significance to society.[96] As of now, many digital assets are subject to deletion upon the death of an account holder.[97] If nothing is changed, digital assets of all kinds will be lost to future generations.

Despite the fact that digital assets hold emotional and financial value, which account holders may wish to transfer to their beneficiaries,[98] contracts controlling digital assets may severely limit an account holder's ability to do so. The next section discusses how digital asset contracts commonly treat the descendibility of digital assets.

C. Exploring Digital Assets' Contractual Terms

As we have seen, although email, social networking sites, and loyalty programs are commonly seen as "belonging" to an account holder,[99] they are actually controlled by contracts between a service provider and an account holder. The terms of service agreement for digital accounts are as varied as the type of accounts themselves, but most address issues that control a decedent's ability to transfer assets upon his or her death.[100] Some companies address the transfer of assets in policy supplements that are not actually part of the terms of service agreement.[101] In most cases,

95. Geoffrey A. Fowler, *Life and Death Online: Who Controls a Digital Legacy?*, WALL ST. J., Jan. 5. 2013, at A1; Fredrick Kunkle, *Virginia Family, Seeking Clues to Son's Suicide, Wants Easier Access to Facebook*, WASH. POST (Feb. 17. 2013), http://www.washingtonpost.com/local/va-politics/virginia-family-seeking-clues-to-sons-suicide-wants-easier-access-to-facebook/2013/02/17/e1fc728a-7935-11e2-82e8-61a46c2cde3d_story.html.

96. Deven R. Desai, *Property, Persona, and Preservation*, 81 TEMP. L. REV. 67, 75, 93 (2008) ("With much of our expression and identity constructed in the digital world, not paying attention to the administration of this information will result in valuable resources being lost to the vagaries of inconsistent service provider policies . . . . [H]istorians' interests in preservation of these materials is a subset of society's general interest, for in both cases the artifacts are the very building blocks of future understanding, creativity, and production.").

97. *See, e.g.*, *Yahoo Terms of Service*, YAHOO!, http://info.yahoo.com/legal/us/yahoo/utos/en-us/ (last updated March 16, 2012) ("Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.").

98. For further discussion of the value of digital assets to beneficiaries, see *infra* Part III.C.

99. Jonathan J. Darrow & Gerald R. Ferrera, *Who Owns a Decedent's Emails: Inheritable Probate Assets or Property of the Network?*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 281, 313 (2007); *see also* People v. Lipsitz, 663 N.Y.S.2d 468, 473 (Sup. Ct. 1997) ("E-mail is 'comparable in principle to sending a first class letter . . . .'" (quoting ACLU v. Reno, 929 F. Supp. 824, 834 (E.D. Pa. 1996))).

100. *See infra* notes 102–16 and accompanying text.

101. *See infra* notes 109–13 and accompanying text.

however, this is irrelevant because an account holder agrees in the terms and services agreement to a company's policy supplements. Through private contracts, internet service providers determine if an asset is descendible and how it is distributed without direction from an account holder.

Terms of service agreements or company policies follow one of four general approaches to transferability of digital assets at death: (1) the contractual term or policy expressly prohibits account transferability upon death or transferability in general;[102] (2) the term or policy generally prohibits transfer but allows transferability with permission from the service provider;[103] (3) the term or policy expressly allows transferability upon death with certain proof;[104] or (4) the term or policy is silent on whether an account can be transferred upon death.[105]

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102. *See Microsoft Services Agreement*, MICROSOFT, http://windows.microsoft.com/en-us/windows-live/microsoft-services-agreement (last updated June 11, 2014) ("We may assign this Agreement, in whole or in part, at any time without notice to you. You may not assign this Agreement or transfer any rights to use the Services."); *Terms of Service*, TWITTER, https://twitter.com/tos (last visited Oct. 19, 2014) ("Twitter gives you a personal, worldwide, royalty-free, non-assignable and non-exclusive license to use the software that is provided to you by Twitter as part of the Services."); *Yahoo Terms of Service*, *supra* note 97 ("*No Right of Survivorship and Non-Transferability*. You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.").

103. DELTA, ALL ABOUT SKYMILES: SKYMILES MEMBERSHIP GUIDE 30 (2014), *available at* http://www.delta.com/content/dam/delta-www/pdfs/skymiles/SM_MemGuide.pdf ("Miles are not the property of any member. Except as specifically authorized in the Membership Guide and Program Rules or otherwise in writing by an officer of Delta, miles may not be sold, attached, seized, levied upon, pledged, or transferred under any circumstances, including, without limitation, by operation of law, upon death, or in connection with any domestic relations dispute and/or legal proceeding."); *MileagePlus Rules*, UNITED AIRLINES, http://www.united.com//web/en-US/content/mileageplus/rules/default.aspx (last visited Oct. 19, 2014) ("Accrued mileage and certificates do not constitute property of the member and are not transferable other than as authorized and/or sponsored by United."); *Statement of Rights and Responsibilities*, FACEBOOK, https://www.facebook.com/legal/terms (last visited Oct. 19, 2014) ("You will not transfer your account (including any Page or application you administer) to anyone without first getting our written permission.").

104. *IHG Rewards Club Global Membership Terms and Conditions*, INTERCONTINENTAL HOTELS GRP., http://www.ihg.com/hotels/us/en/global/customer_care/member-tc (last visited Oct. 19, 2014) ("When an IHG® Rewards Club member passes away, the member's IHG® Rewards Club points may be transferred to the IHG® Rewards Club account(s) of the member's beneficiary(ies)."). Marriott allows transfer to a spouse or domestic partner only. It does not allow points to be inherited by any other person. *Rewards Terms & Conditions*, MARRIOTT, http://www.marriott.com/rewards/terms/default.mi (last updated May 1, 2014) ("Accrued Points and Miles do not constitute property of the Member. Points accrued by a Rewards Program Member are for the Member's benefit only and may not be transferred to anyone except as provided below. Points are transferable to a legal spouse or domestic partner in the case of documented death of the Member . . . . Points are not transferable to another person for any other reason, including divorce or inheritance.").

105. Stellin, *supra* note 90 (noting that JetBlue and United do not have clear policies). Dropbox's terms are silent on whether an account can be transferred to another user. *Dropbox Terms of Service*, DROPBOX, https://www.dropbox.com/privacy#terms (last updated Feb. 20, 2014). Google's term of service agreement does not address transferability. It does provide a method to petition for access to the email account. *Accessing a Deceased Person's*

In addition to the four direct approaches above, some agreements include terms that could also be interpreted to limit transfer of assets at death. For example, some terms of service agreements allow a service provider to terminate an account at any time for any reason, which could be used to justify policies that prohibit transfer at death.[106] Such a clause could be used to terminate an account of a deceased user whether or not a user wanted to devise his account. Others state that a provider will only terminate an account if a user violates the agreement.[107] For those agreements that prohibit transfer of an account, it is possible that attempting to devise an account at death could result in a provider terminating the account.

Account agreements also usually preserve a company's ability to access individual accounts according to the law.[108] Terms of service agreements may prohibit account holders from granting access or revealing their password to anyone else.[109] In addition, account agreements usually choose which state's law will apply to disputes about an account.[110] Because state

Account, GOOGLE, https://support.google.com/accounts/answer/2842525?hl=en&ref_topic=3075532 (last visited Oct. 19, 2014).

106. *See Google Terms of Service*, GOOGLE, http://www.google.com/intl/en/policies/terms/ (last updated Apr. 14, 2014) ("Google may also stop providing Services to you, or add or create new limits to our Services at any time."); *Yahoo Terms of Service*, *supra* note 97 ("[A]ll terminations, limitations of access and suspensions for cause shall be made in Yahoo's sole discretion and . . . Yahoo shall not be liable to you or any third party for any termination of your account . . . ."); *Terms of Service*, TWITTER, https://twitter.com/tos (last visited Oct. 19, 2014) ("We may suspend or terminate your accounts or cease providing you with all or part of the Services at any time and for any reason . . . .").

107. *Microsoft Services Agreement*, *supra* note 102 ("If you violate this agreement, we may take action against you including (without limitation) removing your content from the services, suspending your access to the services, asking you to refrain from certain activities, canceling your services, and/or referring such activity to appropriate authorities."); *MileagePlus Rules*, *supra* note 103 ("Any failure to follow Program Rules, United's contract of carriage, United's fare rules, any abuse of Program privileges, any violation of law, rule or regulation, . . . may result in the termination by United of such member's membership . . . .").

108. *See, e.g.*, *Microsoft Services Agreement*, *supra* note 102 ("Similar to other providers of Internet services, Microsoft is served with legal demands and requests from law enforcement, government entities, and private litigants for content stored on our network. This information may relate to an alleged crime or civil matter and is usually requested pursuant to the normal legal process of the country or locality where the activity occurred. Microsoft may be obligated to comply with requests for your information or your content as part of such investigations or legal proceedings.").

109. *See, e.g.*, *Statement of Rights and Responsibilities*, *supra* note 103 ("You will not share your password (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize the security of your account.").

110. *See, e.g.*, *Google Terms of Service*, *supra* note 106 ("The laws of California, U.S.A., excluding California's conflict of laws rules, will apply to any disputes arising out of or relating to these terms or the Services."); *Microsoft Services Agreement*, *supra* note 102 ("The laws of the state where you live govern the interpretation of this Agreement, claims for breach of it, and all other claims . . . ."); *Statement of Rights and Responsibilities*, *supra* note 103 ("The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions."); *Yahoo Terms of Service*, *supra* note 97 ("You and Yahoo each agree that the TOS and the relationship between the parties shall be governed by the laws of the State of California without regard to its conflict of law provisions . . . .").

law controls most property transfers upon death, the choice of law provision in a terms of service agreement could be a determinative factor as to whether the assets are capable of transfer.

Even if the contract has a term that could be interpreted to prohibit the transfer of an account to an estate, some service providers have more lenient policies outside of their contractual terms. Microsoft, for example, states in its Terms of Service Agreement that an account may not be transferred.[111] According to a Microsoft forum, however, Microsoft does allow the "Next of Kin" to obtain the contents of an Outlook.com account.[112] This policy is not memorialized in any of the contract terms between a user and Microsoft and could be changed or revoked at any time.

By agreeing to use the service, account holders bind themselves to the contractual terms and policies of the service provider. Service providers are free to change or update their policies regarding whether the assets are descendible at any time. Frequent flyer reward programs are a good example of an asset completely controlled by a company through contract. Although one can donate frequent flyer miles during life, after death many airlines prohibit an individual from devising her miles to her beneficiaries. Delta,[113] Southwest,[114] JetBlue,[115] and United[116] all have policies that prohibit miles from being transferred upon the death of an account holder. Even if an airline allows transfer, there is no guarantee that the airline will allow transfer in the future. Prior to March 2013, for example, Delta allowed transfer of a deceased member's miles as long as an executor provided an affidavit and a copy of the deceased member's death

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111. *Microsoft Services Agreement*, *supra* note 102 ("We may assign this Agreement, in whole or in part, at any time without notice to you. You may not assign this Agreement or transfer any rights to use the Services.").

112. *My Family Member Died Recently/ Is in Coma, What Do I Need to Do to Access Their Microsoft Account?*, MICROSOFT COMMUNITY (Mar. 15, 2012), http://answers.microsoft.com/en-us/outlook_com/forum/oaccount-omyinfo/my-family-member-died-recently-is-in-coma-what-do/308cedce-5444-4185-82e8-0623ecc1d3d6 ("The Microsoft Next of Kin process allows for the release of Outlook.com contents, including all emails and their attachments, address book, and Messenger contact list, to the next of kin of a deceased or incapacitated account holder and/or closure of the Microsoft account, following a short authentication process. We cannot provide you with the password to the account or change the password on the account, and we cannot transfer ownership of the account to the next of kin. Account contents are released by way of a data DVD which is shipped to you.").

113. DELTA, *supra* note 103.

114. *Program Terms and Conditions*, SOUTHWEST AIRLINES, http://www.southwest.com/html/customer-service/faqs.html?topic=rapid_rewards_program_terms_and_conditions (last visited Oct. 19, 2014) ("A Member has the ability to transfer Rapid Rewards Points to another Member with an active Rapid Rewards account. However, points may not be transferred to a Member's estate or as part of a settlement.").

115. *TrueBlue Terms and Conditions*, JETBLUE, https://trueblue.jetblue.com/web/trueblue/terms-and-conditions (last visited Oct. 19, 2014) ("Points are non-transferable and may not be combined among TrueBlue Members, their estates, successors and assigns. Accrued Points and Award Travel do not constitute property of Member and are non-transferable (i) upon death, (ii) as part of a domestic relations matter, or (iii) otherwise.").

116. *MileagePlus Rules*, *supra* note 103 ("Accrued mileage and certificates do not constitute property of the member and are not transferable other than as authorized and/or sponsored by United.").

certificate.[117] Without notice to its members, Delta changed the policy in its Sky Miles policy book by stating that miles may not be "transferred under any circumstances, including, without limitation, by operation of law, upon death, or in connection with any domestic relations dispute and/or legal proceeding."[118] Delta received some negative press and angry members signed a petition to protest the policy change, but the policy remains unchanged.[119] The airlines, not the member, determine how assets accumulated during a member's life are distributed at a member's death and can change their policies regarding distribution at any time and without notice to their members.

There may be little protection that state contract law can offer those who are mistreated by airlines. The Supreme Court recently held that a state's implied covenant rules (including the obligation of good faith and fair dealing) are preempted by the Airline Deregulation Act[120] (ADA).[121] In *Northwest, Inc. v. Ginsberg*,[122] an airline terminated a member's frequent flyer membership. The member claimed that the airline breached the covenant of good faith and fair dealing.[123] The airline argued that its frequent flyer program was not subject to the covenant of good faith and fair dealing because state common law rules and regulations are preempted by the ADA.[124] The Court held that state common law rules as well as state regulation fall under the purview of the ADA preemption provision,[125] and that the frequent flyer program related to rates, routes, and services of an air carrier under the ADA.[126] The Court held that by establishing frequent flyer programs, airlines do not subject themselves to state contract law or to the requirement of good faith and fair dealing if the requirement is a state-imposed obligation rather than a contractual choice.[127]

Although the Court did not address succession rules, under the precedent of *Ginsberg*, it is unlikely that beneficiaries will be successful in challenging or enforcing airline policies that deny inheritance rights of

117. John Ollila, *Delta's Policy Change About Death & SkyMiles*, LOYALTYLOBBY (Mar. 21, 2013), http://loyaltylobby.com/2013/03/21/deltas-policy-change-about-death-skymiles/.

118. *Id.*

119. Haley Peterson, *Delta Angers Frequent Fliers by Banning Them from Transferring Miles to Family Members and Friends After Death*, MAIL ONLINE (Mar. 26, 2013), http://www.dailymail.co.uk/news/article-2300104/Delta-angers-frequent-fliers-banning-transferring-miles-family-members-friends-death.html.

120. Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified in scattered titles of U.S.C.).

121. Northwest, Inc. v. Ginsberg, 134 S. Ct. 1422, 1426 (2014).

122. *Id.* at 1422.

123. *Id.* at 1427.

124. *Id.* at 1431.

125. *Id.* at 1429.

126. *Id.* at 1431.

127. *Id.* at 1432. Previously, in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222, 227–229 (1995), the Supreme Court held that the ADA preempted a consumer protection claim because the Act tried to enforce law regulating the marketing practices of airlines. The Supreme Court found that the breach of contract claim could go forward because the contract created duties and responsibilities that were self-imposed and not required by the state, and left the door open for "court enforcement of contract terms set by the parties themselves." *Id.* at 222.

rewards and miles under the principles of state succession or contract law. Succession law, like contract law, is formed at the state level. Under the ADA and Supreme Court precedent, Congress must now act in order to protect the rights of succession of frequent flyer miles. As the Supreme Court noted, Congress has authorized the Department of Transportation to investigate unfair and deceptive practices in air transportation.[128] In addition, the Court noted that the free market might limit unfair practices by encouraging loyal customers to enroll in competing airline loyalty programs.[129] Nevertheless, it is likely after *Ginsberg* that state contract and succession laws attempting to control frequent flyer programs will be preempted under the ADA.

Thus, although service provider contracts treat the issue of digital asset inheritance differently, most are written to allow a service provider wide latitude in determining if digital assets are descendible and how they are to be distributed. In addition, the service agreements and policies of a service provider can change without notice to account holders. Even if an asset was originally devisable, there is no guarantee that it will still be devisable at an account holder's death. The provisions drafted by a service provider, not an account holder, reign in determining how digital assets are treated after an account holder's death. Account holders must exclusively rely on service providers' good will in allowing any transfer of their assets at death.

D. Forming Digital Asset Contracts

Courts have not addressed whether provisions barring or significantly limiting the descendibility of digital assets are enforceable, but, under contract formation principles, it is unlikely that courts would strike down digital asset contracts. Form contracts, like the ones used to govern most digital assets, are widespread in our system today and usually upheld.[130] In order for a digital contract to be validly formed, the terms must be reasonably communicated to a user and a user must manifest assent to the agreement.[131]

When a user creates an account or enrolls in a service online, a service provider usually requires its users to execute what is known as an internet "clickwrap" or "browsewrap" agreement.[132] A clickwrap agreement requires users to click on a dialogue box indicating consent to the terms and conditions of the account or program.[133] If a user does not click on the dialogue box indicating consent, a user is unable to continue opening an account or using the service.[134] Unlike a clickwrap agreement, a

128. *Ginsberg*, 134 S. Ct. at 1433.
129. *Id.*
130. *See generally* MARGARET JANE RADIN, BOILERPLATE 8–15 (2012) (giving an overview of the "world" of contracts, in which standardized form contracts are prevalent).
131. Ajemian v. Yahoo!, Inc., 987 N.E.2d 604, 611 (Mass. App. Ct. 2013) (collecting cases).
132. Feldman v. Google, Inc., 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007).
133. Jallali v. Nat'l Bd. of Osteopathic Med. Exam'rs, Inc., 908 N.E.2d 1168, 1173 (Ind. Ct. App. 2009).
134. *Id.*

browsewrap agreement is displayed to a user but does not require a user to click on a dialogue box before continuing with the service.[135]

Courts have generally found that clickwrap agreements are enforceable, meaning that they reasonably communicate the terms of an agreement to a user and that users manifest assent by clicking some kind of dialogue box to continue using the program.[136] Browsewrap agreements can also be enforced if a user has actual or constructive knowledge of the terms and conditions of the service, but courts view browsewrap agreements less favorably.[137] For example, in the only published case where an executor sought access to a decedent's email account, *Ajemian v. Yahoo! Inc.*,[138] the agreement at issue was akin to a browsewrap agreement instead of a clickwrap agreement. The court found that it could not infer that the provisions of the contract "were displayed on the user's computer screen (in whole or in part)."[139] In addition, the court did not find that the terms were reasonably accepted because there was no place for the user to "click[] 'I accept' or . . . tak[e] some similar action."[140] Perhaps courts will continue to view browsewrap agreements with more skepticism because a user never affirmatively agrees to the terms of use.

Even if the contracts are formed properly under contract law, contracts entered into by an individual with an online service provider do not allow an individual's testamentary intent to rule the distribution of assets. The contracts are not negotiated, the terms concerning inheritance are not clear and conspicuous, and there is little alternative choice for users. Most digital asset contracts are offered in a take-it-or-leave-it fashion, with no room for negotiation or place to indicate testamentary intent. An individual must agree to the terms of service agreement in order to continue enrolling in the program, using the service, or purchasing the asset. It is unclear whether people realize that by using an email service or buying a digital copy of a movie that they are relinquishing their right to transfer those assets at death due to constraints placed upon them under contract. Even if people understood that they were relinquishing power over their assets at death, it is unclear whether the market provides a real choice to use a different internet service provider that allows descendibility.[141] The lack of an alternative choice undermines any real control account holders have over

135. *Feldman*, 513 F. Supp. 2d at 236 n.1.

136. *See, e.g.*, Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 28–30 (2d Cir. 2002); TracFone Wireless, Inc. v. Pak China Grp. Co. Ltd., 843 F. Supp. 2d 1284 (S.D. Fla. 2012); *Feldman*, 513 F. Supp. 2d at 236; *Jallali*, 908 N.E. 2d at 1173 (citing Adsit Co., Inc. v. Gustin, 874 N.E.2d 1018, 1022 (Ind. Ct. App. 2007)); Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999); Barnett v. Network Solutions, Inc., 38 S.W.3d 200, 204 (Tex. Ct. App. 2001).

137. Molnar v. 1-800-Flowers.com, No. CV 08-0542 CAS (JCx), 2008 WL 4772125, at *7 (C.D. Cal. Sept. 29, 2008); Sw. Airlines v. Boardfirst, LLC, No. 3:06-CV-0891-B, 2007 WL 4823761, at *5 (N.D. Tex. Sept. 12, 2007); Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974, 982 (E.D. Cal. 2000).

138. 987 N.E.2d 604 (Mass. App. Ct. 2013).

139. *Id.* at 612.

140. *Id.* at 613.

141. For more discussion of market pressures, see *infra* Part III.A.

their digital assets. In order to create digital assets, one must agree to the terms of the digital asset contracts. As such, as digital assets become more pervasive in everyday life, our very conception of what it means to own something may shift due to clauses in contracts that control our communications, finances, and entertainment.[142]

Although a court may find a digital asset contract invalid due to problems with contract formation, issues with contract formation can be fixed by making contractual language more conspicuous so that there is a showing of reasonable communication and assent. The more substantive problem lies in what the contracts are trying to do, not how they are formed.[143] Even if private contracts between service providers and users are valid, terms that deny inheritance should be void as a matter of public policy.

II. Promoting Digital Asset Inheritance Through Public Policy

Private contracts may be a time-honored tool to transfer assets at death, but most contracts controlling digital assets differ from other private agreements or nonprobate transfers in two related ways. First, private agreements controlling digital assets are the first widespread contracts to prohibit transfer of personal property instead of facilitating it. Second, the terms of transfer are usually not controlled by the testamentary intent of an account holder but by a service provider's policies. Through these contracts and policies, service providers make decisions that are traditionally left to a testator.[144]

This part argues that even if digital asset contracts are procedurally valid, terms that prohibit inheritability should be void as a matter of public policy. Contracts that prohibit or control descendibility fundamentally alter American succession law. Digital asset contracts illustrate the danger of allowing companies to direct how assets are handled after death in accordance with companies' wishes and desires. This part then demonstrates that the current response of state legislatures and courts reflect the concern that denying inheritance is against public policy. Lastly, this

142. *See* discussion *infra* Part II.A–B.

143. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1057–58 (Mass. 2000) ("With this said, we conclude that, even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of their frozen preembryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will . . . . It is well established that courts will not enforce contracts that violate public policy.").

144. In our system of succession, the testamentary intent of a testator (manifested in a will, trust, or other written instrument) controls how property is distributed. *See* Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 832 (Ohio Misc. 1974) ("Whether this judgment was wise is not for this court to determine. But it is the duty of this court to honor the testator's intention within the limitations of law and of public policy."); *In re* Glavkee's Estate, 34 N.W.2d 300, 305 (N.D. 1948) ("[T]he cardinal rule of testamentary construction is to ascertain the intention of the testator and give it effect."); Harkey v. Neville, 49 S.E. 218, 219 (S.C. 1904) (citing "the well-settled rule of law in the construction of wills that the intention of the testator is to be obtained from his own words"). If a testator has not manifested intent, courts apply the presumed intent of a testator through intestacy provisions created by state legislatures. *See* DUKEMINIER & SITKOFF, *supra* note 6, at 63.

part analyzes potential reasons why companies have taken such a dramatic turn in limiting private contract inheritance and argues that there is no justifiable reason for service providers to deny digital assets from being transferred at death according to the testamentary intent of an account holder.

A. Altering Succession Law

Private contracts that control the administration of financial accounts are aimed at distributing assets. They ensure that the transfer of assets is unimpeded, occurring without lengthy delay or undue cost. As we have seen, new contracts are emerging that either deny transfer altogether or, if they allow transfer, only do so according to the discretion of a service provider. These contracts challenge the policies that underpin our system of property succession.

As a general matter, the common law has long disfavored any restraints on alienability of property as a matter of policy.[145] One of the most embedded rights in the American subconscious is the freedom to distribute property as we see fit at our death.[146] The American freedom of disposition grants us the satisfaction of having power over our belongings after we die.[147] The Restatement (Third) of Property states, "The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please."[148] This principle has guided courts' interpretation of wills, trusts, and intestacy statutes throughout the history of our nation. How the principle of freedom of disposition applies to private contracts that limit this freedom is the central problem facing American succession law.

Although courts have not considered a challenge to private contracts denying inheritance, the Supreme Court has considered federal legislation that denied inheritance. In 1983, Congress passed a law that prohibited the devise or inheritance of small fractional shares of land allotted to Native Americans. Several years after the legislation was passed, the Supreme Court found that the statute was a taking that required just compensation.[149] In determining whether a taking occurred, the Court considered two factors.[150] First, the Court characterized the right to pass on property as

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145. White v. Brown, 559 S.W.2d 938, 941 (Tenn. 1977) ("[The decedent's] attempted restraint on alienation must be declared void as inconsistent with the incidents and nature of the estate devised and contrary to public policy."); RESTATEMENT (SECOND) OF PROPERTY § 4.1 (1983) ("A disabling restraint imposed in a donative transfer on an interest in property is invalid if the restraint, if effective, would make it impossible for any period of time from the date of the donative transfer to transfer such interest.").

146. MADOFF, *supra* note 4, at 57.

147. *See* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6–14 (1992) (describing traditional justifications for freedom of testation).

148. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003).

149. Hodel v. Irving, 481 U.S. 704 (1987). The challenged statute was § 207 of the Indian Land Consolidation Act, Pub. L. 97-459, tit. II, 96 Stat. 2519.

150. *Hodel*, 481 U.S. at 715–17.

"one of the most essential sticks in the bundle of rights that are commonly characterized as property."[151] It established that the "right to pass on valuable property to one's heirs is itself a valuable right,"[152] which "has been part of the Anglo-American legal system since feudal times."[153] Second, the Court found that the statute completely abrogated the right to pass on property.[154] The Court found that "[e]ven the United States concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional"[155] and that "abolishing both descent and devise" of an asset was an "extraordinary step."[156]

Contracts controlling digital assets take the extraordinary, unprecedented step of abrogating the right to pass property at death. If nothing is done, corporations will be able to infringe upon a valuable right that has been part of our system since feudal times[157] and change the very core of American succession law by declaring digital assets unable to be devised and a decedent's intent to be irrelevant. By prohibiting assets from being devised, service providers change the nature of our ownership rights over digital assets. Digital asset contracts treat digital assets more like a licensed good, where consumers only have power over the assets as granted by an agreement.[158] Again, it is the corporation that decides what ownership interest we have in our digital assets. Through the terms of agreements, we acquiesce to their formulation of our interests in our emails, social media, frequent flyer miles, and other digital assets.

Contracts that prohibit the transfer of digital assets and contracts that allow transfer at the discretion of a corporation are also changing American succession law by ignoring the testamentary intent of a decedent in distributing her assets. Even contracts that allow transfer may only allow transfer in the discretion of a company, completely ignoring the intention of a decedent. American succession law has always held that the intention of a testator is the paramount concern in distributing her assets. The Restatement (Third) of Property states that "[t]he controlling consideration in determining the meaning of a donative document is the donor's intention,"[159] and "[t]he donor's intention is given effect to the maximum

151. *Id.* (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

152. *Id.* at 715.

153. *Id.* at 716.

154. *Id.* at 717 ("The difference in this case is the fact that both descent and devise are completely abolished.").

155. *Id.* at 716.

156. *Id.* at 718.

157. *See id.*

158. For example, Apple licenses the use of iTunes software to users. According to the license agreement, Apple has full control over the transfer of the software. *See Licensed Application End User License Agreement*, APPLE, https://www.apple.com/legal/internet-services/itunes/appstore/dev/stdeula/ (last visited Oct. 19, 2014) ("You may not rent, lease, lend, sell, redistribute or sublicense the Licensed Application. . . . You agree not to modify, rent, lease, loan, sell, distribute, or create derivative works based on the Services, in any manner, and You shall not exploit the Services in any unauthorized way whatsoever, including but not limited to, by trespass or burdening network capacity.").

159. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003).

extent allowed by law."[160] Whether the transfer occurs via a will or a private agreement, the aim of the instrument and of the transfer is to distribute assets in accordance with a decedent's intent. Courts invoke this principle as a rule of construction when asked to interpret provisions of a will,[161] and legislatures have codified the principle to ensure that courts implement the intention of a testator instead of the judgment of the court.[162]

Private contracts controlling digital assets are not aimed at distributing digital assets according to an account holder's testamentary intent. Instead of abiding by the principles of succession law, companies, through carefully drafted contracts, determine whether assets—created through services or purchased in digital form—are devisable by an account holder or are subject to company control and subsequently deleted or destroyed. We are allowing contracts to divest us of the ability to control our digital property and to redefine our property interests in digital assets.

B. Defining Digital Property

Our conception of property arises out of our culture and laws. It exists to the extent that we say it does and the law protects it.[163] If current trends continue, corporations may reshape our property interest in digital assets by making them nontransferable at death. We may be forced to accept that we do not have decision-making power over our digital assets and thus diminished property interests in the assets. Perhaps in twenty years it will seem absurd to even think that we should have been able to devise our digital assets.

Some contracts explicitly state that an account holder's digital assets do not constitute property, perhaps in an attempt to avoid the inheritance question altogether.[164] The determination of whether or not assets are "property," however, does not resolve the question of whether assets should be inheritable. There is no singular accepted definition of property. Courts and scholars view property as a bundle of rights, including the right to

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160. *Id.*

161. *See supra* note 144.

162. *See, e.g.*, FLA. STAT. ANN. § 732.6005(1) (West 2012) ("The intention of the testator as expressed in the will controls the legal effect of the testator's dispositions. The rules of construction expressed in this part shall apply unless a contrary intention is indicated by the will."); N.J. STAT. ANN. § 3B:3-33.1 (West 2007) ("In a will construction the effectuation of the testator's intent is the cornerstone."); OR. REV. STAT. ANN. § 112.227 (West 2003 & Supp. 2013) (same); S.C. CODE ANN. § 62-2-601 (Supp. 2013) ("The intention of a testator as expressed in the testator's will controls the legal effect of the testator's dispositions.").

163. Jeremy Bentham posited, "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases." JEREMY BENTHAM, THEORY OF LEGISLATION 113 (C.K. Ogden ed., Richard Hildreth trans., Harcourt, Brace & Co. 1931) (1802); *see also* State v. Shack, 277 A.2d 369, 372 (N.J. 1971) ("Property rights serve human values. They are recognized to that end, and are limited by it. . . . [T]he law will deny the occupants the power to contract away what is deemed essential to their health, wealth, or dignity.").

164. DELTA, *supra* note 103 ("Miles are not the property of any member."); *Membership Rewards Terms and Conditions*, AM. EXPRESS, https://rewards.americanexpress.com/myca/loyalty/us/catalog/tandc?tier=MR&mrk (last visited Oct. 19, 2014) ("Points are not your property.").

transfer an asset during life and at death, and the rights to use, exclude, possess, and destroy.[165] While digital assets may not be inheritable, an account holder clearly has the right to use them, to exclude others from using them, and to destroy them by deleting the account. Labeling an asset as "not property" has no effect on the analysis of whether the asset should be inheritable or not. The nature of the asset and our control over it is more significant than its label. Whether contracts state that the assets are not property or whether they contractually prohibit inheritance has the same result and the same question remains—whether contracts should be able to prohibit and control descendibility as a matter of public policy.

Digital asset contracts that prohibit and control inheritance (no matter their methods) are reestablishing a kind of feudal digital property system. Our interest in our emails and social networking profiles is more akin to a life estate than a fee simple absolute because they are not capable of being included in our probate estate.[166] By prohibiting transfer of digital assets, service providers act more like overlords over our personal digital assets than as corporations providing us with a service in exchange for advertising benefits and other forms of compensation. Courts and legislatures would be well advised to consider the long-lasting effect on our system of property succession by allowing service providers to prohibit the transferability of digital assets at death.

Internet service providers have more power than consumers to shape the market of digital assets because digital assets are a new form of asset. Courts, and most state legislatures, have yet to establish a norm for how digital assets should be treated at death. Digital asset contracts are creating a new norm and new expectations regarding individuals' power over them at death. Perhaps the public is more susceptible to allowing internet service providers to shape the development of digital assets because the assets are intangible and stored in a metaphorical cloud.[167] In the convenience of the moment and without realizing its potential to force an alternative through exerting market pressure, the public is sacrificing a fundamental right to pass on their assets accumulated and created during their lives.[168]

If we allow contracts to determine if our digital assets are distributed or destroyed at our death, we open the door to allowing contracts to prohibit the descendibility of our tangible assets and any newly developed class of assets in the future. Consider how digital asset contracts could apply to the control of tangible assets. It is possible that banks could agree to allow free checking accounts or other banking perks as long as a client agreed that all the assets in her account were not transferable at her death and by default

165. *See* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (referring to "the bundle of rights that are commonly characterized as property").

166. JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 316 (2d ed. 2012) ("An ordinary life estate is alienable, but not devisable or descendible."); RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 1.1. cmt. b (2003).

167. *See supra* note 2.

168. For further discussion of public pressure on internet service providers, see *infra* Part III.A.

would go to the bank when she died. Perhaps the administrative details of transferring the contents of an account to beneficiaries would be viewed as too burdensome or the bank would reason that it wanted to protect the privacy of an account. If contractual terms can eliminate the right to transfer assets at death as a matter of public policy, banks would be free to impose conditions of this sort on their customers. If customers had no alternative choice for banking, banking practices that were modeled after digital asset practices would change our conception of currency. Such an arrangement may be possible through private contract but should not be enforceable because it violates policy principles of succession law and changes our property interest in our assets.

Although it may seem far-fetched for a bank to control currency in such a manner, contracts are already being used to create and control different forms of currency. Consider the rise of frequent flyer programs, which allow a person to enroll as a member of a certain airline and then accumulate points or miles for the distance flown using that airline. Miles or status can then be redeemed for free flights, waived baggage fees, upgrades, priority bookings, or merchandise.[169] During a member's life, a member can usually use, give, or donate the miles she has earned through her loyalty.[170] At death, however, some programs prohibit a member from transferring or donating her miles via a testamentary instrument.[171] Her interest in the miles disappears due to the contractual limits and policies placed on those interests by airlines. Frequent flyer miles or rewards points function in many ways like a new currency controlled by airlines or credit card companies, which are destroyed at an owner's death.

Similarly, we could imagine a system where property was sold under a contract that transferred it back to a seller or was destroyed at the death of an owner. Furniture stores could begin to sell furniture under contracts that would require return or destruction of the furniture at the end of a purchaser's life. In many ways, this scenario is already unfolding in the world of digital music, books, and videos.[172] These digital assets are often licensed to a user instead of sold, which allows companies like Amazon or Apple to retain control of the media and prevent the transfer of such media

169. *Use Miles*, DELTA, https://www.delta.com/content/www/en_US/skymiles/use-miles.html (last visited Oct. 19, 2014) (describing ways Delta frequent flyer members can use miles).

170. *Id.*; *Program Terms and Conditions*, *supra* note 114 ("A Member has the ability to transfer Rapid Rewards Points to another Member with an active Rapid Rewards account."); *Use Award Miles*, UNITED AIRLINES, http://www.united.com/web/en-US/content/mileageplus/awards/default.aspx (last visited Oct. 19, 2014) (describing ways to transfer or donate miles).

171. *See supra* notes 113–16.

172. Perhaps there is an argument that digital media sold under a license is less expensive because it does not include the right to devise the media at death, or that furniture sold under a contract requiring return at death would also be less expensive for purchasers. Without an alternative market choice, however, it is unclear whether purchasers are truly paying less for a licensed good that cannot be devised. A full market analysis of these issues is beyond the scope of this Article.

at death. In both scenarios, the benefit of not passing property at death accrues to sellers or service providers.

As a practical matter, the decision to prohibit digital assets from being transferred at death is one made by internet service providers. Internet service providers supply a necessary service and have a disproportionate amount of bargaining power. A user has no ability to bargain for better terms. An internet service provider sets the terms and conditions of use and allows those who agree to those terms to use the platform. Those who do not agree must elect not to use the platform. Their primary concern is to make decisions that benefit themselves, not to make decisions that uphold society's conception of property or are in accordance with American succession law. The decision to prohibit descendibility benefits the service provider most, allowing corporations to avoid administrative hassle and promote more use and purchase of services and products.[173] Digital asset contracts reshape our property interest in digital assets and give us fewer rights and less control over our digital assets than our physical assets. What is especially troubling about digital asset contracts that control letters, photos, videos, and music or book licenses is that these digital goods are replacing traditionally physical goods, which were all inheritable and often treasured by those who received them.[174]

Service providers are not focused on protecting an individual's control over assets she created, earned, or uploaded. Protecting an individual's control over her assets or property interests is a concern of courts and legislatures.[175] Courts and legislatures should continue to determine whether public policy favors digital asset inheritance.

C. *Favoring Digital Asset Inheritance*

The state of the law concerning digital asset inheritance is in flux. Legislators, courts, and testators, despite an ever-pressing need for a framework for the inheritability of digital assets, have not uniformly or consistently considered these assets. Although courts and legislatures have not found that prohibiting digital asset inheritance is void as a matter of public policy, their actions so far demonstrate that they favor inheritance, despite terms of private contracts that attempt to prohibit it.

173. See *infra* Part II.D for potential justifications of internet service providers.

174. E-book sales, for example, grew by 43 percent in 2013 while hardcover sales rose by 6 percent and paperback sales dropped less than 1 percent. E-book sales currently account for approximately 20 percent of all book sales reported by publishers. *E-book Sales Are Up 43%, but That's Still a 'Slowdown,'* USA TODAY (May 16, 2013, 11:16 AM), http://www.usatoday.com/story/life/books/2013/05/15/e-book-sales/2159117/.

175. *See, e.g.*, FLA. STAT. ANN. § 540.08 (West Supp. 2014) (protecting a person's control of her "name, portrait, photograph, or other likeness"); Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 161 (Wis. 1997) (awarding punitive damages to property owner after defendants intentionally trespassed on the land).

1. State Legislation

To date, six states have adopted reforms to promote fiduciary access to digital assets: Connecticut,[176] Rhode Island,[177] Oklahoma,[178] Indiana,[179] Idaho,[180] and Delaware.[181] Two other states—Virginia[182] and Nevada[183]—have passed limited reforms concerning digital asset access after death. The first state to enact reform in this area was Connecticut in 2005, shortly followed by a similar law passed in Rhode Island in 2007.[184] Connecticut's and Rhode Island's laws require email providers to grant executors access to, or copies of, the email of deceased persons if a request is made or if ordered by a probate court.[185] Oklahoma, Indiana, and Idaho enacted broader legislation, allowing an executor to control or terminate any social networking, blog, or email account.[186] Idaho also addressed the need for fiduciaries to access digital assets of incapacitated persons and gives the right to control or terminate digital accounts to conservators.[187] Indiana's law allows custodians to access or gain copies of "any documents or information of the deceased person stored electronically."[188] Delaware's newly enacted law broadly defines digital assets and accounts and allows a fiduciary to "exercise control over any and all rights in digital assets and digital accounts of an account holder."[189]

Virginia and Nevada have passed very limited reforms relating to digital assets. Virginia passed a law granting access to accounts of deceased minors in 2013.[190] Virginia's law received public support and attention after parents of a minor who committed suicide fought a public battle with Facebook to try to gain access to their child's account to determine why he committed suicide.[191] Nevada passed a law that grants a personal representative power to terminate an online account of a decedent subject to the restrictions prescribed by a decedent in a will or court order.[192] Several states are considering legislation to address how digital assets are to be

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176. CONN. GEN. STAT. ANN. § 45a-334a (West 2014).
177. R.I. GEN. LAWS § 33-27-3 (2011).
178. OKLA. STAT. tit. 58, § 269 (2014).
179. IND. CODE ANN. § 29-1-13-1.1 (LexisNexis 2012).
180. IDAHO CODE ANN. § 15-5-424 (Supp. 2013).
181. Fiduciary Access to Digital Assets and Digital Accounts Act, 79 Del. Laws 416 (effective Jan. 1, 2015), *available at* http://www.legis.delaware.gov/LIS/LIS147.NSF/vwLegislation/HB+345?Opendocument.
182. VA. CODE. ANN. § 64.2-110 (Supp. 2013).
183. NEV. REV. STAT. ANN. § 143.188 (LexisNexis Supp. 2013).
184. *See* CONN. GEN. STAT. ANN. § 45a-334a (West 2014); R.I. GEN. LAWS § 33-27-3.
185. CONN. GEN. STAT. ANN. § 45a-334a; R.I. GEN. LAWS § 33-27-3.
186. IDAHO CODE ANN. § 15-3-715(28) (Supp. 2013); IND. CODE ANN. § 29-1-13-1.1 (LexisNexis 2012); OKLA. STAT. tit. 58, § 269 (2014).
187. IDAHO CODE ANN. § 15-5-424.
188. IND. CODE ANN. § 29-1-13-1.1.
189. Fiduciary Access to Digital Assets and Digital Accounts Act, 79 Del. Laws 416 (effective Jan. 1, 2015), *available at* http://www.legis.delaware.gov/LIS/LIS147.NSF/vwLegislation/HB+345?Opendocument.
190. VA. CODE. ANN. § 64.2-110 (Supp. 2013).
191. *See* Kunkle, *supra* note 95.
192. NEV. REV. STAT. ANN. § 143.188 (LexisNexis Supp. 2013).

handled after the death of an account holder.[193] Legislation has failed to pass in at least some of those states, however, due to opposition from service providers.[194]

None of the laws passed by state legislatures have been challenged or used by fiduciaries to force online companies to give them access to an account in court. Perhaps online companies have readily acquiesced to the newly minted laws in these states and have granted access to executors who have sought it. For those states that have passed legislation on the matter, however, the legislatures have enacted laws to promote the policy of allowing transfer and allowing a decedent's intent to govern the transfer of digital assets, thereby limiting the terms of a contract between an account holder and service provider.[195] Contracts that attempt to bypass these state laws are illegal and against public policy favoring the freedom of disposition.

Another indication that public policy favors digital asset inheritance is the current work done by the Uniform Law Commission, a nonprofit, nonpartisan group that has created a committee to study the issues relating to digital estate planning and to offer uniform legislation on the issue.[196] The Uniform Law Commission is currently drafting legislation that would "vest fiduciaries with the authority to access, manage, distribute, copy or delete digital assets and accounts."[197] Once the Uniform Law Commission

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193. *See, e.g.*, Administration of Internet-Based Accounts, S. 29, 2013 Gen. Assemb., Reg. Sess. (Md. 2013), *available at* http://mgaleg.maryland.gov/webmga/frmMain.aspx?pid=billpage&stab=01&id=SB0029&tab=subject3&ys=2013RS; S. 2313, 2011-2012 S., 187th Sess. (Mass. 2012), *available at* http://www.malegislature.gov/Bills/187/Senate/S02313; Neb. Legis. 783, 102d Legis., 2d Sess. (2012), http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=15623; A09317, St. Assemb., 2012 Legis. Sess. (N.Y. 2012), *available at* http://assembly.state.ny.us/leg/?bn=A09317&term=2011; S. 54, 77th Leg. Assemb., Reg. Sess. (Or. 2013), *available at* https://olis.leg.state.or.us/LIZ/2013R1/Measures/Text/SB0054/Introduced.

194. *See* Katy Steinmetz, *From Here to E-ternity: What Happens to Your Virtual Things When You're Gone?*, TIME, Feb. 11, 2013, at 54 ("In Massachusetts, Google lobbied against a digital assets bill."); *Oregon Legislature Takes Up Fight to Save Digital Assets of Deceased*, OPB (Mar. 1, 2013, 8:05 AM), http://www.opb.org/news/article/oregon-legislature-takes-up-fight-to-save-digital-assets-of-deceased/ ("The Oregon Legislature responded this week and took up the cause with a proposal that would have made it easier for loved ones to access the 'digital assets' of the deceased, only to be turned back by pressure from the tech industry . . . .").

195. See, for example, a synopsis of the newly enacted Delaware law, which states that the Act should be construed liberally to allow access and control by a fiduciary. Fiduciary Access to Digital Assets and Digital Accounts Act, 79 Del. Laws 416 (effective Jan. 1, 2015), *available at* http://www.legis.delaware.gov/LIS/LIS147.NSF/vwLegislation/HB+345?Opendocument.

196. *Committees: Fiduciary Access to Digital Assets*, UNIF. LAW COMM'N, http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets (last visited Oct. 19, 2014). As Professor Langbein describes, "[t]he Uniform Law Commission is . . . a legislative drafting consortium of the state governments . . . . The commissioners are appointed pursuant to statute in each state, mostly by the governor, and are a mix of practicing lawyers, legislators, judges, and law professors." Langbein, *supra* note 12, at 3.

197. DRAFT FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1 (2013), *available at* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013AM_FADA_Draft.pdf.

drafts legislation, it will be incumbent upon the states to adopt the legislation. Although the process is a slow one, uniform legislation would provide a helpful platform for state legislators in crafting their own legislation that best fits the needs of their constituents and protects the public policies of property succession. The Uniform Law Commission's draft legislation demonstrates the movement toward favoring digital asset inheritance as a matter of public policy.

2. Court Cases

There have been only a handful of cases where administrators or executors sought a decedent's digital assets. The cases have all arisen in states that have not passed legislation on the matter. Although courts have not directly addressed whether terms that prohibit transfer are valid, there is some indication that courts are hesitant to enforce contracts that deny descendibility. In *Ajemian*, the only published case, administrators of their brother's estate brought an action in probate court against Yahoo! seeking a declaration that their brother's emails on Yahoo!'s servers were property of the estate and therefore the administrators were entitled to access them.[198] John Ajemian opened his Yahoo! email account in 2002 and died in a car accident in 2006.[199] After his death, Ajemian's brother and sister tried to gain access to his email account to notify his friends and family of his death.[200] Although Yahoo! initially agreed to give the administrators the information they sought as long as they produced documentation of their brother's death, Yahoo! subsequently refused them access to the account.[201] Under the service agreement in effect in 2006, Yahoo! argued there was no right of survivorship in the email account and that it could not be transferred.[202]

The court did not reach the issue of whether the email could be transferred, however, because Yahoo! moved to dismiss the suit in Massachusetts based on the forum selection provision in the agreement, which required suit to be brought in California.[203] Although the probate court granted dismissal, on appeal, the court found that Yahoo! did not offer clear evidence that the terms of service amendments were reasonably communicated to the plaintiffs and refused to enforce the forum selection limitation in the contract. The court also noted that the decedent was domiciled in Massachusetts at his death.[204] It reversed the probate court and allowed litigation on the issue of whether the decedent's digital assets are part of his estate to continue in Massachusetts state court.[205]

198. Ajemian v. Yahoo!, 987 N.E.2d 604, 606–09 (Mass. App. Ct. 2013).
199. *Id.* at 607.
200. *Id.* at 608.
201. *Id.* at 609.
202. *Id.* at 608.
203. *Id.* at 609.
204. *Id.* at 615.
205. *Id.*

In re Ellsworth[206] is a perfect example of the difficulties presented in litigating access to digital accounts and demonstrates why there is not more case law on inheritability of digital accounts. In 2005, a father of a slain soldier in Iraq petitioned Yahoo! to give the contents of his son's email account to him despite a clear term in Yahoo!'s service agreement stating that accounts were terminated upon death and not transferable.[207] When Yahoo! refused, the father took the issue to Michigan probate court.[208] The Michigan probate court ordered Yahoo! to give the contents of the email account to the soldier's father. Instead of challenging the order, Yahoo! obliged but did not change its policy.[209]

Yahoo! could have appealed the decision, arguing that the email account was not a probate asset, the assets were controlled by the terms of service agreement, and the terms of service agreement clearly stated that an account would be terminated upon the death of an account holder. Yahoo!, however, gave up the fight after the probate court issued a mandate and sent the emails to Ellsworth's father. Yahoo! obliged to the court order in this instance but declined to change its policy of nontransferability.[210] Yahoo! thus demonstrated that it valued its terms of service agreement while appeasing the public by releasing the emails. Yahoo! sent Ellsworth's father a compact disc with the account information[211] for much less than it would cost to pay their legal team to appeal the probate court's mandate.

Other cases involve families trying to gain access to a decedent's Facebook account in order to obtain information about a decedent's death. The threat of litigation, media attention, and legislative action have led Facebook to allow families limited access, demonstrating again that public policy favors inheritability of digital assets. In 2005, the Williams family tried to access their son's account after he was killed in a motorcycle accident.[212] After filing a lawsuit against Facebook, Facebook granted the mother of the deceased man ten months of access to his account and then

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206. *In re* Ellsworth, No. 2005-296, 651-DE (Mich. Prob. Ct. 2005).

207. *See Yahoo Terms of Service*, *supra* note 97.

208. *See Justin's Family Fights Yahoo Over Access to His E-Mail Account*, http://www.justinellsworth.net/email/yahoofight.htm (last updated Dec. 18, 2006, 8:11 PM) (collecting news articles about the Ellsworths' fight to get their son's emails); *see also Who Owns Your E-mails?*, BBC NEWS (Jan. 11, 2005), http://news.bbc.co.uk/2/hi/uk_news/magazine/4164669.stm; *Yahoo! Will Give Family Slain Marine's E-mail Account*, USA TODAY (Apr. 21, 2005), http://usatoday30.usatoday.com/tech/news/2005-04-21-marine-e-mail_x.htm?POE=TECISVA.

209. Stefanie Olsen, *Yahoo Releases E-Mail of Deceased Marine*, CNET NEWS.COM (Apr. 21, 2005), http://www.justinellsworth.net/email/cnet-apr21-05.htm; Adrienne Schwisow, *Dead Marine's E-Mail Raises Legal Issues*, ASSOCIATED PRESS (Apr. 22, 2005), http://www.justinellsworth.net/email/ap-apr22-05.htm.

210. *Yahoo Terms of Service*, *supra* note 97 ("You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death.").

211. Jennifer Chambers, *Family Gets GI's E-Mail*, DETROIT NEWS (Apr. 28, 2005), http://www.justinellsworth.net/email/detnewsapr.htm.

212. *Karen Williams' Facebook Saga Raises Question of Whether Users' Profiles Are Part of 'Digital Estates,'* HUFFINGTON POST (Mar. 15, 2012), http://www.huffingtonpost.com/2012/03/15/karen-williams-facebook_n_1349128.html.

removed his profile.[213] In 2011, a twenty-year-old posted a picture on Facebook of himself holding a gun to his mouth before taking his own life.[214] Facebook did not grant the family access to the man's account[215] but eventually removed the picture after the media publicized Facebook's refusal.[216] Similarly, a family struggling with their teenager's suicide petitioned Facebook for access to his account to find clues about what had driven him to suicide.[217] Facebook refused initially, but the family continued to press Facebook for information. Finally, Facebook gave the family a copy of his account on a CD.[218] The family successfully lobbied Virginia's legislature to pass a law allowing parents access to their deceased minor's online accounts.[219]

There is currently no guarantee that courts will allow families to access accounts of a decedent based on public policy arguments. Although the trend seems to appear to favor inheritance, courts may still decide to enforce a service provider's policies. A family recently filed suit in Northern California against Facebook trying to force Facebook to give them access to a family member's account.[220] The woman died after falling from an apartment building in England, and her family petitioned for access to her Facebook account to prove that her death was not suicide.[221] The court, however, granted Facebook's order to quash, and did not compel Facebook to give anything to her family.[222]

D. Justifying Companies' Contractual Choice

As discussed above, contractual bars to devising digital assets prevail in today's legal landscape. The silence of some terms of service agreements on the subject reveals that several service providers have not yet determined how to handle assets or accounts upon the death of an account holder. Others have made an affirmative decision to deny access or transferability of an account to an account holder's legal heirs in their terms of service agreements. There are also reports that service providers have lobbied against state legislative reforms that would provide easier access to digital assets.[223] In considering whether digital asset contracts that limit or

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213. *Id.*

214. Eder, *supra* note 76.

215. Jennifer Kabbany, *Winchester: Grieving Mother Calls for Facebook Hotline*, U.T. SAN DIEGO (Jan. 13, 2012), http://www.utsandiego.com/news/2012/Jan/13/winchester-grieving-mother-calls-for-facebook/.

216. *See* Gerry W. Beyer, *Managing a Deceased Loved One's Digital Assets*, WILLS, TRUSTS & ESTATES PROF BLOG (Feb. 14, 2012), http://lawprofessors.typepad.com/trusts_estates_prof/2012/02/managing-a-deceased-loved-ones-digital-assets.html.

217. Sears, *supra* note 76; *see also* Eder, *supra* note 76.

218. Sears, *supra* note 76; *see also* Eder, *supra* note 76.

219. Sears, *supra* note 76; *see also* Eder, *supra* note 76.

220. *See In Re* Request for Order Requiring Facebook, Inc. to Produce Documents and Things, 923 F. Supp. 2d 1204 (N.D. Cal. 2012).

221. *Id.* at 1205.

222. *Id.* at 1206.

223. *See* Steinmetz, *supra* note 194; *Oregon Legislature Takes Up Fight to Save Digital Assets of Deceased*, *supra* note 194 ("The Oregon Legislature responded this week and took

prohibit inheritance should be upheld on public policy grounds, we must also examine the potential policy justifications that service providers may offer for including these provisions.

I suggest and refute three possible justifications companies may use to prohibit the intent of an account holder from determining how her digital assets should be distributed at her death. First, companies may have administrative or cost concerns about allowing the transfer of an account from one user to another. Second, companies may have concerns about protecting the privacy of their users. Third, companies may fear that allowing the accounts to be devised would run afoul of federal privacy laws. None of these reasons, however, justify the extraordinary measure of prohibiting or severely limiting transfer of digital assets.

1. Administrative and Cost Concerns

Companies may prohibit digital assets from being inherited in their contracts due to administrative and cost concerns. Managing requests from fiduciaries and beneficiaries is a potential drain on resources. Offering a platform or service in perpetuity for people who have died may expend resources the company would like to use for account holders who are still living. An economic analysis on how much service providers would need to spend in order to offer the ability for assets to be transferred at death is beyond the scope of this Article, but it is enough to note that administrative and cost concerns may encourage an increasing number of companies to have a clear-cut policy against descendibility. Cost and administrative concerns are easily remedied, however, and cannot justify prohibiting transfer of digital assets altogether.

Administrative and cost concerns to companies providing internet services could be alleviated by requiring beneficiaries who request assets to pay a reasonable fee for the transfer. Assessing fees for added costs of transferring assets could offset any claimed administrative cost as well as ensure that those who truly appreciate the value of digital assets are able to obtain them.[224] Many beneficiaries who seek access to a decedent's account do not expect the service provider to allow the account to remain on the provider's platform indefinitely. Rather, they seek to access the account of a loved one and download any files they wish to keep.[225] By

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up the cause with a proposal that would have made it easier for loved ones to access the 'digital assets' of the deceased, only to be turned back by pressure from the tech industry . . . .").

224. Fees are assessed in a wide variety of situations to offset costs. For example, frequent flyer miles can be redeemed for free flights, but usually nonrefundable fees are still assessed by the airline to cover certain costs. *See, e.g.*, *Award & Service Fees*, DELTA, http://www.delta.com/content/www/en_US/skymiles/use-miles/award-travel/award-service-fees.html (last visited Oct. 19, 2014); *Award Ticketing Options/Service Fees*, UNITED AIRLINES, http://www.united.com/web/en-US/content/mileageplus/awards/travel/ticketing.aspx (last visited Oct. 19, 2014);

225. *See, e.g.*, *Request for Order Requiring Facebook, Inc. to Produce Documents and Things*, 923 F. Supp. 2d at 1205 (family sought access to Facebook account for information regarding decedent's death); Ajemian v. Yahoo!, Inc., 987 N.E.2d 604, 608–09 (Mass. App.

enacting a time limitation of one or two years in which beneficiaries could access an account, service providers could alleviate any additional cost of preserving an account after an account holder has died.

In most situations, a user's digital assets are of little or no value to an internet service provider. It is difficult to imagine a situation where Google, Microsoft, or Yahoo! could realize any value from a dead user's email account. The value of the email accounts, if any, can only be realized by the beneficiaries of the deceased user, who would hold the copyright and right of publicity to profit from the emails.[226]

Similarly, the value of frequent flyer miles is much less to the airline than to a passenger. While the miles "may be worth several hundred dollars to a passenger," *The Economist* estimated in 2005 that each additional passenger costs an airline around $25.[227] The frequent flyer programs earn an "estimated annual revenue of more than $10 billion for the industry worldwide."[228] According to *The Economist*, when United Airlines filed for bankruptcy in 2002, it said that the frequent flyer program was the only part of the business that was making a profit.[229] With such a profit-making system, it is difficult to see how airlines would not be able to pass on that cost of allowing members to transfer the miles they have already earned at death with a transfer fee.

Some companies that allow transfer of assets at death have conquered potential administrative and cost concerns. Google, for example, has created a method for users to determine whether they would like their account materials to be deleted after a certain amount of time or sent to trusted individuals.[230] If an individual has not activated the Inactive Account Manager, beneficiaries may petition Google for access to a deceased person's account, but Google does not guarantee access.[231] Perhaps other online service providers will follow Google's example and allow an automatic way for the assets of an account to be transferred or deleted according to the intent of a testator. On the other hand, because Google holds the decision-making power in this situation, it is possible that

Ct. 2013) (family sought access to account to email friends of decedent about funeral arrangements); *In re* Ellsworth, No. 2005-296, 651-DE (Mich. Prob. Ct. 2005) (father sought content of his son's email account); Kunkle, *supra* note 95 (parents sought access for information regarding their teenager's suicide).

226. The 1975 Copyright Act protects "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (2012). The individual holding a copyright may prevent other persons from reproducing the work, creating derivative works, distributing the work, or publicly displaying the work during the term of the copyright. *Id.* § 106. The right of publicity protects individuals' right (or the right of their estate) to exploit the commercial value of their face, voice, and likeness during life. Martin Luther Ling, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc. 694 F.2d 674, 676 (11th Cir. 1983); J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY §§ 1:3, 9.1, 9.18 (2d ed. 2014).

227. *Funny Money*, ECONOMIST, Dec. 24, 2005, at 102.

228. *Id.*

229. *Id.*

230. *About Inactive Account Manager*, GOOGLE, https://support.google.com/accounts/answer/3036546?hl=en (last visited Oct. 19, 2014).

231. *Accessing a Deceased Person's Account*, *supra* note 105.

Google could, at any time, do away with the Inactive Account Manager and prohibit its users from transferring digital assets at death.

2. Postmortem Privacy Concerns

Companies cite concerns over user privacy as the main justification for their refusal to allow a decedent's estate to obtain digital assets.[232] Although privacy is an important factor in determining whether digital assets should be transmitted to beneficiaries, service providers are making decisions about privacy after death for its users. State legislatures make default rules in succession through intestacy statutes, and thus are the proper body to establish default rules because such matters are "fraught with questions of morality" and give the power to "establish[] social norms."[233] In the digital asset context, the default rule is established by the private sector in favor of deleting the contents of the email or social networking account, despite good reasons to transmit the contents of an account to a family. While some individuals may celebrate this default rule of deletion, others may prefer to preserve their digital footprints for their beneficiaries. People will have widely different views on how to treat their digital assets, but if the decision is made by appropriate legislative bodies, at least the decision maker will be held responsible through the electoral process. Instead of supplanting the traditional role of the legislature in crafting default rules for succession and in the absence of legislative action, companies should defer to an individual's intent and construct a way for users to determine what happens to their account when they die. This is the best way to effectuate users' testamentary intent, ensure privacy concerns are addressed, and abide by the age-old principles of American succession law.

Companies' retreat behind the banner of privacy in refusing to transfer digital assets to beneficiaries is somewhat suspicious. They may be more interested in lowering their liability exposure and costs than in forwarding

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232. Fowler, *supra* note 95; *Accessing a Deceased Person's Account*, *supra* note 105 ("At Google, we're keenly aware of the trust users place in us, and we take our responsibility to protect the privacy of people who use Google services very seriously. Any decision to provide the contents of a deceased user's account will be made only after a careful review, and the application to obtain account content is a lengthy process."); *Report a Deceased Person*, FACEBOOK, https://www.facebook.com/help/408583372511972/ (last visited Oct. 19, 2014) ("We try to prevent references to memorialized accounts from appearing on Facebook in ways that may be upsetting to the person's friends and family, and we also take measures to protect the privacy of the deceased person by securing the account. Please keep in mind that we cannot provide login information for a memorialized account. It is always a violation of our policies to log into another person's account."); *Options Available When a Yahoo Account Owner Passes Away*, YAHOO!, http://help.yahoo.com/kb/index?locale=en_US&page=content&id=SLN9112 (last visited Oct. 19, 2014) ("To protect the privacy of your loved one, it is our policy to honor the initial agreement that they made with us, even in the event of their passing. At the time of registration, all account holders agree to the Yahoo Terms (TOS). Pursuant to the TOS, neither the Yahoo account nor any of the content therein are transferable, even when the account owner is deceased. As a result, Yahoo cannot provide passwords or access to deceased users' accounts, including account content such as email.").

233. DUKEMINIER & SITKOFF, *supra* note 6, at 65.

the cause of privacy. Google, for example, is facing claims from users that it processes emails to provide targeted advertisements in a way that violates privacy.[234] In the course of the litigation, Google argued that people have no legitimate expectation of privacy in information turned over to third parties and that those who use web-based email cannot be surprised if their emails are processed by the recipient's electronic communication service.[235] Thus, when it suited its own purposes, Google argued that privacy interests were narrower than users expected. Without any law, our privacy interests in our digital assets remain at the whim of corporate America. Service providers may champion privacy one day and trample it the next if it best suits their interests.

Liability concerns about the privacy of digital assets may be exaggerated. Under the common law, the personal right to privacy does not survive death.[236] The right to bring action for an invasion of privacy is a personal right, and traditionally personal rights are not assignable or descendible upon the death of an individual holding a personal right.[237] Thus, a decedent's family or friends could not sue email or social networking service providers for a violation of privacy rights if the service providers released an account to a decedent's heirs. As J. Thomas McCarthy, a leading scholar on the right to privacy explained, "Traditional privacy rights protect various aspects of the dignitary, reputational, emotional, and physical rights of persons. Once the subject person is dead, all these legal interests cease to be invaded."[238] Thus, service providers cannot reasonably fear that releasing the contents of an online account to a family will subject them to liability under the common law.

Service providers are not the appropriate arbiters of privacy. Such an important decision should be made by an account holder or, if an account holder has not made his wishes known, by the legislature through intestacy laws. The law does not protect the privacy interests of a decedent.[239] As

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234. *See In re* Google Inc. Gmail Litig., 936 F. Supp. 2d 1381, 1382 (J.P.M.L. 2013); Jessica Guynn, *Google Must Face Suit over Scanning of Messages in Gmail, Judge Rules*, L.A. TIMES (Sept. 26, 2013), http://articles.latimes.com/2013/sep/26/business/la-fi-tn-google-gmail-scanning-lawsuit-judge-ruling-20130926.

235. *See* Defendant Google Inc.'s Motion to Dismiss Plaintiff's Consolidated Individual and Class Action Complaint; Memorandum of Points and Authorities in Support Thereof at 19, *In re* Google Inc. Gmail Litig., No. 5:13-md-02430-LHK (N.D. Cal. June 13, 2013), ECF No. 44.

236. RESTATEMENT (SECOND) OF TORTS § 652I (1977) ("Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded."); MADOFF, *supra* note 4, at 124 ("It is a settled principle of American law that the right of privacy (like the claim for defamation) does not continue after death.").

237. Memphis Dev. Found. v. Factors, Etc., Inc., 616 F.2d 956, 960 (6th Cir. 1980); Hannah Mfg. Co. v. Hillerich & Bradsby Co., 78 F.2d 763, 766 (5th Cir. 1939); Wyatt v. Hall's Portrait Studios, 128 N.Y.S. 247, 250 (1911).

238. MCCARTHY, *supra* note 226, § 9:1.

239. *See* RESTATEMENT (SECOND) OF TORTS § 652I ("[A]n action for an invasion of privacy can be maintained only by a living individual whose privacy is invaded."); *see also* Justice v. Belo Broad. Corp., 472 F. Supp. 145, 147 (N.D. Tex. 1979) (collecting cases); Flynn v. Higham, 197 Cal. Rptr. 145, 149 (1983) (collecting cases).

emails and social networking accounts are the new letters and personal documents of the modern day, an analogy to a decedent's privacy rights in her tangible personal property is sound. Digital assets are no different from other tangible assets that an individual might want to keep hidden from friends and family. In order to do so, a person must take steps during her life in order to destroy letters, pictures, or materials that are purely personal. If she does not do so, her property, with all of its secrets, passes to her heirs at her death. A decedent may leave instructions for an executor to destroy personal documents and letters, but there is no guarantee that an executor will follow a decedent's wishes or that a court will enforce a will that requires destruction.[240]

Well before digital correspondence existed, those who wished to destroy their personal papers for privacy reasons usually did so before death. Many U.S. presidents intentionally destroyed their presidential papers in order to ensure privacy.[241] Justice Hugo Black infamously destroyed his Supreme Court notes and memoranda when he became sick before he resigned from the Court.[242] Martha Washington's decision to destroy her personal correspondence with George Washington right before her death is also a well-known example of a public figure who decided to destroy personal correspondence to ensure privacy.[243] Due to the presumption against destruction, particularly of records that hold historical import, American leaders knew that the best way to ensure the privacy of their correspondence was to destroy it themselves before their death.

If testators are concerned about the privacy of their physical material, they ought to destroy it before they die or name a trusted executor who will fulfill their wishes. Likewise, those who wish troubling or secretive correspondence or photos to be deleted should do so during their lives or make it clear that they wish their digital assets to be destroyed at their death. There is no reason why our private digital assets should receive greater protection than our private tangible assets. An account holder may intend for her accounts and emails to be deleted upon her death and not distributed to her legal heirs. However, this should be a decision for an account holder to make, not a service provider.

240. *See, e.g.*, Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 217 (Mo. Ct. App. 1975) (holding that destruction of home as instructed in will was against public policy); *In re* Estate of Jones, 389 A.2d 436, 437 (N.H. 1978) (authorizing sale of property to a third party when the will provided that the house should be destroyed); *In re* Will of Pace, 400 N.Y.S.2d 488, 492–93 (Sur. Ct. 1977); *see also* Phil Kuntz & Bob Davis, *A Beloved Uncle's Will Tests Diplomatic Skills of Joseph Lieberman—Document Disinherits Children Who Failed Religious Test; Senator Tries to Mend Rift*, WALL ST. J., Aug. 25, 2000, at A1 (Senator Lieberman as appointed executor did not enforce religious test left by uncle for family to inherit).

241. Nixon v. United States, 978 F.2d 1269, 1279–80 (D.C. Cir. 1992) (noting that Presidents Van Buren, Garfield, Arthur, Grant, Pierce, and Coolidge intentionally destroyed their papers).

242. DUKEMINIER & SITKOFF, *supra* note 6, at 14.

243. JAMES WALTER, ROBERT CARY & JAMES SHARPLES, MEMORIALS OF WASHINGTON AND OF MARY, HIS MOTHER, AND MARTHA, HIS WIFE 229 (Stanford Univ. Libraries 1886); ROBERT P. WATSON, AFFAIRS OF STATE: THE UNTOLD HISTORY OF PRESIDENTIAL LOVE, SEX, AND SCANDAL 82 (2012).

3. Federal Privacy Laws Concerns

The third potential reason that service providers do not want to allow transfer of digital assets to beneficiaries stems from concern that transferring digital assets may violate federal privacy laws. Service providers may be liable under the Stored Communications Act, which is part of the Electronic Communications Privacy Act.[244] The Stored Communications Act was passed in 1986 and was enacted to protect the privacy of communications online.[245] It does so by criminalizing the "intentional[] access[] without authorization [of] a facility through which an electronic communication service is provided."[246] The Stored Communications Act also prohibits "a person or entity providing an electronic communication service to the public" from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service"[247] unless the recipient of the information is an agent[248] or the disclosure is done with the consent of the customer.[249] If a company violates the Stored Communications Act, a company may be liable for statutory and punitive damages and attorney's fees.[250]

Companies use the Stored Communications Act to try to avoid divulging the information and assets of online accounts. In *Ajemian*, Yahoo! argued that it could not turn over the email account of a deceased user to his estate because doing so would violate the Stored Communications Act.[251] Interestingly, Yahoo! initially agreed to provide the family with the information they sought as long as the family provided documentation of the account holder's death.[252] Later, however, Yahoo! refused to give the family the information they sought and cited the Stored Communications Act as a bar to further cooperation.[253] To date, there is no case law where a court has interpreted the Stored Communications Act as prohibiting the transfer of an email account upon the death of an account holder.[254] In an abundance of caution, however, Yahoo! claimed that the statute prohibited

244. 18 U.S.C. § 2701 (2012).

245. Pub. L. No. 99-508, § 1, 100 Stat. 1858 (1986); Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a User's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1208 (2004).

246. 18 U.S.C § 2701(a)(1). Fines and imprisonment of up to ten years are imposed on those who violate § 2701(a). *See id.* § 2701(b).

247. *Id.* § 2702(a)(1).

248. *Id.* § 2702(b)(1).

249. *Id.* § 2702(c)(2).

250. *Id.* § 2707(c).

251. Ajemian v. Yahoo!, Inc., 987 N.E.2d 604, 608–09 (Mass. App. Ct. 2013).

252. *Id.* at 608.

253. *Id.* at 609.

254. Service providers argue that the Stored Communications Act applies more broadly than it does. For example, in *Chevron Corp. v. Donziger*, No. 12-mc-80237 CRB (NC), 2013 WL 4536808, at *6 (N.D. Cal. Aug. 22, 2013), Google and Yahoo! argued that the Stored Communications Act prevented the companies from responding to a subpoena. The district court found that the Stored Communications Act allowed the companies to give identifying information about one of their subscribers.

the transfer of digital assets and refused to comply with the family's request.[255]

Facebook has also cited the Stored Communications Act in refusing to give records of a deceased user's account to her family.[256] When a woman died after falling from her apartment building in England, her family sought information from Facebook to see whether it held any clues about her death.[257] The family persisted and sought a court order forcing Facebook to give them information about their loved one's account. The court granted Facebook's order to quash, finding that the Stored Communications Act did not compel Facebook to give her information to her family.[258] The court refused to decide whether the family's consent qualified as consent under the Stored Communications Act.[259]

Service providers are using the Stored Communications Act as a justification to avoid distributing assets, but it is unlikely that the Stored Communications Act would apply to the transfer of digital assets at death. The Stored Communications Act was not intended to prevent the transfer of digital assets to beneficiaries. In 1986, it was hardly possible for Congress to imagine a world where internet providers became the main custodians of personal correspondence, pictures, entertainment, and documents. Despite companies' concern that the Stored Communications Act prevents the transfer of digital assets at death, it is unlikely that the federal authorities would prosecute a service provider for distributing digital assets of a decedent to a decedent's beneficiaries.[260] It is also unlikely that those who received the assets would try to find a service provider liable for transferring the digital assets to them. In addition, the Stored Communications Act allows access if an account owner consented.[261] If a decedent leaves instructions in his will concerning his digital assets, service providers may respect the wishes of a testator without fear of civil liability. If a decedent does not leave instructions in his or her will a family should be able to provide the requisite consent to access a decedent's digital assets without subjecting the service providers to liability.[262]

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255. *Ajemian*, 987 N.E.2d at 608–09.

256. *In re* Request for Order Requiring Facebook, Inc. to Produce Documents and Things, 923 F. Supp. 2d 1204, 1205 (N.D. Cal. 2012).

257. *Id.*

258. *Id.* at 1206.

259. *Id.*

260. To the best of my knowledge and research, no such prosecution has ever occurred. According to the Office of Legal Education Executive Office for United States Attorneys, "there have been very few prosecutions under [The Stored Communications Act]" since its enactment in 1986. H. MARSHALL JARRETT ET AL., OFFICE OF LEGAL EDUCATION, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, PROSECUTING COMPUTER CRIMES 95, *available at* http://www.justice.gov/criminal/cybercrime/docs/ccmanual.pdf. The Stored Communications Act prohibits intentional access without authorization, 18 U.S.C. § 2701(a)(1), and precludes an estate from being prosecuted, as the personal representative of the estate has the authorization to collect and distribute a decedent's assets. *See* 31 AM. JUR. 2D *Executors and Administrators* § 370 (2012).

261. 18 U.S.C. § 2702(c)(2) (2012).

262. See *infra* Part III.C for further argument that the focus should be on beneficiaries.

As stated above, the Act has exceptions for agents of a recipient.[263] These exceptions are broad enough to allow the transfer of assets to a decedent's estate. Fiduciaries of an estate are also agents of the estate and should have access to the accounts in the same way that a decedent had access to her accounts. The Stored Communications Act should not be used to stifle the transfer of assets at death.

* * *

Although private contracts have always played a role in distributing newly emerged assets at death, digital asset contracts fundamentally differ from other private contracts that facilitate inheritance. Instead of facilitating transfer of assets, digital asset contracts severely limit transfer and ignore the intention of an account holder. Digital asset contracts may be valid, but enforcing them fundamentally shifts American succession law out of the control and power of decedents and into the hands of service providers, especially as digital counterparts continue to replace our tangible assets. The next section offers suggestions for how we can reclaim control over the ultimate fate of our digital assets before it is too late.

III. RECLAIMING DIGITAL ASSETS

If nothing is done, service providers will continue to dictate the development of law and practice in the digital asset arena. Many commentators have suggested legislation to ensure that account holders do not lose their digital assets at death,[264] and legislation is being developed in states and by the Uniform Law Commission.[265] The legislation that has been passed has not been tested and the effect of such legislation remains unknown.[266] Although legislation is an important part of the solution, this Article suggests three other considerations to ensure digital assets are inheritable. First, it is important to recognize that corporations and companies that hold digital assets are service providers and subject to consumers' continuing business or loyalty. If consumers are more aware of the contractual terms concerning inheritance of their digital assets, public sentiment may force corporations to reshape their treatment of digital assets.

Second, as I have shown in this Article, private contracts have been widely used to transfer assets in a seamless fashion without interference from courts or legislatures. States have upheld nonprobate transfers as an adequate and sometimes preferable method of transfer. There is no reason why transfer of digital assets should not occur by private contract, as long

263. 18 U.S.C. § 2702(b)(1).

264. *See, e.g.*, Conner, *supra* note 9; Kutler, *supra* note 9; Tarney, *supra* note 9.

265. Nat'l Conference of Comm'rs of Unif. State Laws, *Fiduciary Access to Digital Assets*, Act at *1, http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013AM_FADA_Draft.pdf (last visited Oct. 19, 2014).

266. No cases are recorded that challenge the following legislation: CONN. GEN. STAT. ANN. § 45a-334a (West 2014); IDAHO CODE ANN. § 15-3-715(28) (2011); IND. CODE ANN. § 29-1-13-1.1 (LexisNexis 2012); NEV. REV. STAT. ANN. § 143.188 (LexisNexis Supp. 2013); OKLA. STAT. tit. 58, § 269 (2014); R.I. GEN. LAWS § 33-27-3 (2011); VA. CODE. ANN. § 64.2-110 (Supp. 2013).

as digital asset contracts, like life insurance, retirement, and bank account contracts, allow transfer and allow a testator to make the determination about where his assets will go at death.

Third, I argue that when a decedent has not clearly expressed her intention, courts and legislatures should be more sensitive to the desires and wishes of beneficiaries than the terms and policies established by service providers. Although American succession law usually does not look to beneficiaries' wishes or desires in transferring assets, digital asset transfers are different because beneficiaries will benefit more from the digital assets of their loved ones than the service providers who will end up deleting the accounts. When questions arise, beneficiaries' interest in preservation should trump the service providers' interest in destruction.

By encouraging public awareness, allowing digital asset contracts to distribute assets as part of the nonprobate system, and focusing on the beneficiaries' interests in transferring digital assets instead of service providers' interest if a decedent has not made her intention known, digital assets will be reclaimed by those who created or earned them.

A. Channeling Public Sentiment

Digital asset service providers all have one thing in common: they depend on cultivating a reputation of being fair, dependable, and customer friendly. Whether a company is an email provider or an airline, both need good relationships with account holders and customers to succeed. If the public were more aware of the distribution decisions that were made by service providers about their digital assets, perhaps public sentiment on the issue and market pressures could force service providers to reshape their policies. Otherwise, the public will continue acquiescing to the terms of agreement put forward by service providers, agreements that show little concern about the testamentary intent and desires of an account holder.

Digital asset service providers may be particularly sensitive to public sentiment because users can use digital platforms to quickly and efficiently communicate disapproval and outrage.[267] For example, in 2009, Facebook encountered stiff disapproval from the public when it changed its terms of service agreement to allow Facebook a right to use, copy, or publish posts of Facebook users.[268] After three days of a flurry of angry Facebook posts from users around the world and threats of litigation from consumer advocacy groups, Facebook reverted to its old policy and disclaimed any intention to take away users' ownership rights in their posts.[269] Facebook

267. Ian Parker, *Being the Squeaky Wheel on Social Media*, KATU.COM (Feb. 4, 2014, 4:35 PM), http://www.katu.com/news/local/Being-the-squeaky-wheel-on-social-media-243421891.html; Jon Swartz, *Social Media Like Twitter Change Customer Service*, USA TODAY (Nov. 18, 2009, 4:09 PM), http://usatoday30.usatoday.com/tech/news/2009-11-18-twitterserve18_st_n.htm.

268. Brad Stone & Brian Stelter, *Facebook Backtracks on Use Terms,* N.Y. TIMES, Feb. 18, 2009, at B1.

269. *Id.* ("Facebook's retreat can also be credited to the mass of members who made their voices heard in a strikingly vociferous movement that spanned the globe.").

also has been responsive to users' concerns about publicly available lists of "friends."[270] Perhaps if users were more knowledgeable about what occurs to their Facebook profile at death, there would be more of a public outcry for Facebook to change its policies to allow the user to decide how an account should be treated at death.

Pushback from the public will only be effective if consumers are aware of changes made to policies governing digital assets. Facebook's privacy policy change in 2009 was observed and publicized by watchdog groups, and information about the changes was quickly disseminated.[271] Other service providers have made changes with less public attention. Just last year, for example, Delta allowed the transfer of deceased members' miles with certain proof of death.[272] Delta quietly changed its policies in March 2013 and received only a small amount of negative press.[273] Without more press and more angry customers, Delta (unlike Facebook) will not be forced to reexamine its policy and non-transferability at death of frequent flyer miles will be the norm.

Customer pushback has made a difference on an individual level. Although contractual language in digital asset contracts may be clear in dictating whether a service provider allows transfer of an account at the death of an account holder, the contractual language may not be the last word on the issue. Email providers, airlines, and social networking platforms provide a service to the public. Their success is contingent on accumulating many users who are happy with the service provided. It is possible that customer service representatives would allow transfer of the account despite what the terms of service agreement states. There is anecdotal evidence that companies have agreed to transfer assets despite contrary contractual language.[274] For example, *The New York Times* reported that even when the terms of service agreement states that miles cannot be transferred on death, in some situations, customer service representatives have allowed transfer when a customer has contacted the airline directly.[275]

Consumers should understand that under many of their digital asset contracts, they do not have the authority to make decisions about what happens to their account at their death. In traditional succession law, the decision-making authority over a decedent's property transfers to an executor or trustee who is compelled by fiduciary duties to implement the intent of a testator.[276] When an individual contracts with a corporation to

270. Caroline McCarthy, *Facebook Backtracks on Public Friends Lists*, CNET (Dec. 11, 2009, 8:06 AM), http://news.cnet.com/8301-13577_3-10413835-36.html.

271. Stone & Stelter, *supra* note 268.

272. Ollila, *supra* note 117.

273. Peterson, *supra* note 119; Stoller, *supra* note 94.

274. George Hobica, *Can Frequent-Flier Miles Be Inherited?*, USA TODAY (May 14, 2010, 5:13 PM), http://usatoday30.usatoday.com/travel/columnist/hobica/2010-02-03-inheriting-frequent-flier-miles_N.htm; *see also* Stoller, *supra* note 94 (decisions occur on a case-by-case basis).

275. Stellin, *supra* note 90.

276. *See* 31 AM. JUR. 2D *Executors and Administrators* § 4 (2012).

relinquish this decision-making power, however, the corporation steps in for a decedent and determines how a decedent's digital assets will be treated. If customers voice their disapproval of not having the decision-making power over their digital assets, perhaps they will encourage competition among digital asset service providers. Consumers may be more likely to use a social networking platform, email service provider, or airline if they know that they will be able to determine what happens to that asset at death.

Relying solely on market pressure and channeling public sentiment, however, may not be adequate to fully address the public policy concerns presented by digital asset contracts for several reasons. First, people do not like confronting their mortality by making decisions about what happens to assets when they die. Only about one-half of Americans have drafted a will to distribute their tangible assets.[277] It may be difficult to harness enough public support and attention to force service providers to allow the transfer of digital assets because people simply do not want to think about their death. Second, those most affected by a company's contract provision prohibiting inheritance are a decedent's heirs. Heirs are not involved in negotiating a contract and their interests are not considered in digital asset contracts. Third, because digital assets are a new form of asset, digital asset contracts have more leeway in creating a new norm and in shaping account holders' expectations about their accounts. Lastly, customers may not be aware of a service provider's policies regarding descendibility. These policies constantly change and are buried in fine print.[278] Knowing that individuals are less likely to press the issue of descendibility, that those most affected by the decision to prohibit inheritability are not involved in the negotiation or acceptance of a contract, and that digital assets contracts are shaping a new norm, internet service providers hold a disproportionate amount of bargaining power. Americans will likely lose control over their digital assets at death if they allow the market to shape their interests in those assets by continuing to rely on internet service providers' policies and goodwill.

If Americans become sufficiently aware of and concerned about the disappearance of digital assets at death, they will be able to create the outcry needed to force corporations to reshape their policies or to provide the impetus for new corporations to rise that will address public concerns. Inertia is on the side of service providers to dictate the terms of digital asset inheritance or destruction. It is possible for public opinion to be the ultimate arbiter of digital asset distribution, as long as public sentiment can be channeled to force service providers to be responsive to their customers.

B. Using the Nonprobate System

If a contract allows for digital assets to transfer at death, the nonprobate system is best equipped to effectuate the transfer. There is no need to

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277. DUKEMINIER & SITKOFF, *supra* note 6, at 64.
278. *See supra* Part I.C.

reinvent the wheel for digital asset transfers by adopting new kinds of trusts or testamentary instruments. As long as service providers allow transfer and allow an account holder's testamentary intent to dictate transfer through digital asset contracts, the nonprobate system will work as it has for newly emerged assets in the last hundred years.

For those agreements that allow transfer of an account at an account holder's death, assets can be transferred outside of probate through a private transaction. There are only two options to transfer property upon death: probate transfer or nonprobate transfer.[279] Whether property is categorized as probate or nonprobate is usually determined by private agreement.[280] In a nonprobate transfer, a valid will substitute passes a property interest according to the terms of an agreement between parties.[281] If a will substitute fails or does not exist, the property will pass through the laws of intestacy.[282] In the six states that have enacted legislation relating to digital accounts, digital assets are treated as part of the probate estate of a decedent and an executor or personal representative is authorized to access the account.[283] None of these statutes has been challenged, but states have long regulated the transfer of probate and nonprobate property. Even without statutory authorization, digital assets easily transfer much like other nonprobate assets according to the terms and service agreement of a service provider.[284]

The nonprobate system of transfer provides a solid framework for inheritability of digital assets because of key similarities. First, like digital assets, nonprobate transfers are controlled by private agreements.[285] The distribution terms, beneficiary designations, and other terms of the accounts vary by service provider. Courts usually uphold the terms of an agreement

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279. *See* DUKEMINIER & SITKOFF, *supra* note 6, at 41; HAROLD WEINSTOCK & MARTIN A. NEUMANN, PLANNING AN ESTATE: A GUIDEBOOK OF PRINCIPLES AND TECHNIQUES § 6:2 (4th ed. 2002).

280. WEINSTOCK & NEUMANN, *supra* note 279 (enumerating the ways property can be nonprobate property by private agreement, for example assets held in joint tenancy, in a bank account trust, in a funded living trust, or life insurance proceeds); *see* BLACK'S LAW DICTIONARY 1219 (10th ed. 2014) (defining "nonprobate").

281. RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 7.1(a) (2003).

282. DUKEMINIER & SITKOFF, *supra* note 6, at 64–65; WEINSTOCK & NEUMANN, *supra* note 279, § 6:1 (defining probate as a court proceeding to pass property under a will or under the laws of intestacy); *see* BLACK'S LAW DICTIONARY 949 (10th ed. 2014) (defining "intestacy").

283. CONN. GEN. STAT. ANN. § 45a-334a (West 2014); IDAHO CODE ANN. § 15-5-424 (Supp. 2013); IND. CODE ANN. § 29-1-13-1.1 (LexisNexis 2012); OKLA. STAT. tit. 58, § 269 (2014); R.I. GEN. LAWS § 33-27-3 (2011); VA. CODE ANN. § 66.2-110 (Supp. 2013); *see also* Fiduciary Access to Digital Assets and Digital Accounts Act, 79 Del. Laws 416 (effective Jan. 1, 2015), *available at* http://www.legis.delaware.gov/LIS/LIS147.NSF/vwLegislation/HB+345?Opendocument.

284. *See, e.g.*, *About Inactive Account Manager*, *supra* note 230 (last visited Oct. 19, 2014) (allowing transfer of digital assets according to the intent of a decedent).

285. Langbein, *supra* note 12, at 10 (listing major types of private agreements used outside the probate system to transfer goods); *see also* DUKEMINIER & SITKOFF, *supra* note 6, at 435.

between parties over contrary provisions in wills.[286] Digital accounts and life insurance, pay-on-death, pension, retirement, or other bank accounts are asset specific, meaning that each asset has a different agreement directing its transfer at a decedent's death.[287] Although estate planners may find it difficult to coordinate the transfer of different assets, the transfers do occur according to specific policies.[288] Also, much like digital assets, people often have several different financial accounts, insurance agreements, or retirement accounts, each with potentially different beneficiary designations.[289] No matter the number of accounts a person owns, each individual account is sufficient to transfer assets to an executor or beneficiaries.[290] Digital assets are well suited to follow the pattern and usage of other nonprobate, contractual transfers.

Like digital assets, some modern nonprobate transfers are relatively new. For example, in 1989, the first uniform legislation to promote contractual transfer-on-death beneficiary designations for mutual funds and brokerage accounts was introduced.[291] Today, many mutual funds transfer according to private transfer-on-death agreements seamlessly and efficiently.[292] Uniform legislation, much like the legislation presented in 1989 on nonprobate transfers, is currently being drafted to ensure that fiduciaries have access to digital accounts at a person's death.[293] With the vast growth in digital assets and uniform legislation being developed, digital assets could follow the path of nonprobate assets and be transferred according to private agreements and be sanctioned by state legislation.

Google has started allowing transfer of digital assets to be accomplished through private agreement. Google has created a method for users to determine whether they would like their account materials to be deleted

286. *See supra* note 41 and accompanying text.

287. Langbein, *supra* note 12, at 11.

288. *Id.* at 10.

289. *Id.* at 12 ("It is not uncommon for a propertied person to have a dozen or more will-like beneficiary designations in effect on various banking, investment, insurance, and pension accounts.").

290. *Id.* at 11.

291. *Id.* at 3–4.

292. *See* CHARLES SCHWAB, SCHWAB DESIGNATED BENEFICIARY PLAN APPLICATION 1 (2005), *available at* http://www.schwab.com/cms/P-239303.2/app10780.pdf?cmsid=P-239303 (stating that the assets will be distributed to beneficiaries upon death of account holder and that the beneficiary plan "will generally take precedence over [other] estate planning vehicles"); FIDELITY INVESTMENTS, BENEFICIARIES—TRANSFER ON DEATH 5, *available at* https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/customer-service/beneficiaries-transfer-on-death.pdf (last visited Oct. 19, 2014) ("Transfer of assets in the Account will begin as soon as practicable after the Date of Death."); VANGUARD, TRANSFER ON DEATH PLAN KIT (2014), *available at* https://personal.vanguard.com/pdf/bdbp.pdf?2210085517 (advertising a "convenient way to pass . . . nonretirement assets to your heirs outside of probate").

293. *See Fiduciary Access to Digital Assets*, UNIF. LAW COMM'N, http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets (last visited Oct. 19, 2014) ("The Committee will draft a free-standing act and/or amendments to ULC acts . . . that will vest fiduciaries with at least the authority to manage and distribute digital assets, copy or delete digital assets, and access digital assets.").

after a certain amount of time or sent to trusted individuals.[294] Ideally, other digital asset providers will follow Google's example and allow account holders to transfer assets according to their testamentary intent. If service providers create a system to transfer assets according to the terms of an agreement, there is no reason why a digital asset contract, like many other nonprobate agreements, should not efficiently and effectively control the transfer to a decedent's beneficiaries or executor.

C. Focusing on Beneficiaries

If a decedent has made her intent known concerning digital assets, then executors, service providers, and courts should effectuate that testamentary intent. If a decedent has not made her desires known about how to handle her digital assets, courts and legislatures should give more weight to the desires of beneficiaries than to the policies of service providers, especially when service providers' policies result in destruction. Focusing on beneficiaries' desires instead of the corporate policies will better serve society's interests in preserving digital assets and transferring them for productive use.

1. Beneficiaries' Desires and Presumed Intent

Although the interests and desires of beneficiaries are rarely, if ever, taken into account in the American system of succession,[295] the interests of beneficiaries should take a more prominent role in determining how digital assets should be distributed when it comes to enacting intestacy rules for digital assets. This is primarily because decedents' intent concerning digital assets is difficult to discern.

State intestacy laws distribute a decedent's property according to a legislature's presumption of what a reasonable decedent would have intended.[296] Digital assets create a new wrinkle in presuming testamentary intent. More than ever before, our intimate conversations and thoughts are preserved through a digital medium. Some of us are alarmed at the idea that our loved ones could have access to our digital accounts when we die.[297] Others would prefer to preserve the memories, pictures, and personal correspondence stored in emails and social networking sites for future generations. The traditional focus of presumed intent is difficult with digital assets because both destruction and preservation are reasonable decisions for a person to make. Legislatures have the responsibility of

294. *About Inactive Account Manager*, *supra* note 230.

295. *See* DUKEMINIER & SITKOFF, *supra* note 6, at 556 (in almost all states parent has power to disinherit children); *see also* Hodel v. Irving, 481 U.S. 704, 716 (1987) (affirming right to transfer property but not a right to receive).

296. *See* DUKEMINIER & SITKOFF, *supra* note 6, at 64–65 ("[T]he primary objective in designing an intestacy statute is to carry out the probable intent of the typical intestate decedent."); *see also* UNIF. PROBATE CODE §§ 2-101, 2-102, 2-103, 2-105 (2010).

297. Justin Atwater, Note, *Who Owns Email? Do You Have the Right to Decide the Disposition of Your Private Digital Life?*, 2006 UTAH L. REV. 397, 415 (arguing that email should be deleted under a rebuttable presumption).

crafting a default rule that best meets the needs of their constituents, but not all states have tackled this difficult area.

Instead of focusing on the presumed intent of a decedent who left no indication of intent, courts and legislatures should focus on whether the beneficiaries want a decedent's digital assets at all. The states that have passed legislation allow executors or personal representatives to access email accounts but do not require access to be explicitly granted by a decedent.[298] In this way, it appears that in the absence of guidance from a decedent, an executor and beneficiaries may choose whether they will seek access to a decedent's digital accounts. The statutes, then, seem to focus on the desires of the beneficiaries instead of trying to determine what a decedent intended.

To understand how statutes give preference to beneficiaries, we must understand how executors and personal representatives operate. Most people name a trusted family member or friend to be executor of their estate in their will. If an individual does not name an executor, the court will appoint a personal representative (also called an administrator), giving preference to family members.[299] In many cases, a personal representative is also a beneficiary of the estate.[300] Executors and personal representatives are fiduciaries and thus owe various fiduciary duties to beneficiaries.[301] One of the primary duties of an executor or personal representative is to collect and distribute assets of an estate.[302] Thus, if a state grants executors or personal representatives access to digital assets, it would be incumbent upon a fiduciary to exercise prudence, reasonable care, and reasonable skill in collecting digital assets.

The exercise of fiduciary duties is rarely hard and fast. Instead, fiduciary duties allow an executor or personal representative flexibility in managing an estate according to a general standard of reasonableness and care.[303] It is the duty of an executor to disclose complete and accurate information regarding access to digital assets, which may affect beneficiaries' rights or decisions.[304] If beneficiaries are not interested in obtaining access to emails or social networking sites, an executor or personal representative will not be required to collect and distribute the assets.[305] Perhaps beneficiaries will

298. CONN. GEN. STAT. ANN. § 45a-334a (West 2014); IDAHO CODE ANN. § 15-3-715(28) (Supp. 2013); IND. CODE ANN. § 29-1-13-1.1 (LexisNexis 2012); OKLA. STAT. tit. 58, § 269 (2014); R.I. GEN. LAWS § 33-27-3 (2011).

299. DUKEMINIER & SITKOFF, *supra* note 6, at 43.

300. *See* 31 AM. JUR. 2D *Executors and Administrators* § 4 (2012) (stating that an executor or personal representative is chosen by a testator).

301. 34 AM. JUR. 2D *Federal Taxation* ¶ 72073 (2014).

302. 31 AM. JUR. 2D *Executors and Administrators* §§ 369, 370.

303. *See* Bloodworth v. Bloodworth, 579 S.E.2d 858, 861 (Ga. Ct. App. 2003) ("An executor of an estate occupies a fiduciary relationship toward parties having an interest in the estate. The relationship between an executor and those he represents normally is deemed confidential and requires the utmost good faith." (alterations and citations omitted)).

304. *Id.* at 861–62 (finding that personal representatives had a duty to avoid conflicts and give full and fair disclosure of all known things that may affect beneficiaries' rights).

305. As the law stands in the few states that grant a fiduciary access to a decedent's digital assets, if a decedent has not made his desires known about what to do with his digital

view digital assets with the same kind of apathy as they would view their loved one's old, dusty files or record collections. If beneficiaries are not interested in a decedent's assets, an executor is free to throw away or donate those assets.[306] Similarly, if beneficiaries are not interested in computer files or emails, an executor will be free to request that the service provider delete the contents of the account.

If there is a dispute about how to handle digital assets that the parties cannot resolve, the parties will be able to file a complaint in state court.

2. Value Realized by Beneficiaries

Beneficiaries' desires should also play a role in distributing digital assets, especially emails and social networking sites, because in most cases the assets are only valuable to the beneficiaries. Digital assets may not have an objective monetary value but could have a great deal of emotional or sentimental value to a family. Beneficiaries are in the best position to put property to productive use. The only other alternative is destruction of digital assets by service providers.

Social networking sites, personal webpages, or blogs already serve as a virtual memorial to a loved one and allow friends and family a digital way to mourn together.[307] Facebook has adopted an approach to allow a memorial page for a deceased user's account. In 2013, it was estimated that 30 million Facebook users' pages had become memorial sites to honor deceased users.[308] Facebook allows the family of the deceased to choose whether the site will become a memorial or be shut down.[309] Others have found comfort in reading old emails and even tracing purchases on a loved

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assets, his beneficiaries will be able to choose whether they want an executor or personal representative to pursue access. CONN. GEN. STAT. ANN. § 45a-334a (West 2014); IDAHO CODE ANN. § 15-3-715(28) (Supp. 2013); IND. CODE ANN. § 29-1-13-1.1 (LexisNexis 2012); OKLA. STAT. tit. 58, § 269 (2014); R.I. GEN. LAWS § 33-27-3 (2011).

306. *See, e.g.*, *In re* Estate of Long, 732 P.2d 1347, 1350 (Mont. 1987) ("Personal representatives may only abandon property with the consent of heirs, devisees or the court . . . ."); *see also* OR. REV. STAT. ANN. § 114.305(7) (West Supp. 2013) (authorizing personal representative to abandon worthless property).

307. Lisa Belkin, *Facebook After Death*, N.Y. TIMES (May 25, 2010, 12:30 PM), http://parenting.blogs.nytimes.com/2010/05/25/facebook-after-death/?_r=0 (a mother's account of how her son's Facebook page helps her grieve with others); Matthew Ingram, *Death and Facebook: Blurring the Line Between Real and Virtual*, BLOOMBERG BUSINESSWEEK (Nov. 14, 2012), http://www.businessweek.com/articles/2012-11-14/death-and-facebook-blurring-the-line-between-real-and-virtual; Annie Johnson, *Online Memorials Help Students, Families Cope with Loss*, USA TODAY (Dec. 20, 2013, 3:38 PM), http://www.usatoday.com/story/tech/2013/12/20/online-memorials/4145385/; Jaweed Kaleem, *Death on Facebook Now Common as "Dead Profiles" Create Vast Virtual Cemetery*, HUFFINGTON POST (Jan. 6, 2013, 6:03 PM), http://www.huffingtonpost.com/2012/12/07/death-facebook-dead-profiles_n_2245397.html.

308. Johnson, *supra* note 307.

309. *See How Do I Report a Deceased Person or an Account That Needs to Be Memorialized?*, FACEBOOK, https://www.facebook.com/help/150486848354038 (last visited Oct. 19, 2014).

one's eBay account in order to gain a deeper understanding of a deceased person's life.[310]

The lack of monetary value of digital assets does not diminish the law's protection of the beneficiaries' interest in preserving digital assets. American law is not blind to emotional interests. For example, courts have found that emotional or sentimental interests in property should be taken into account when determining whether a partition should occur by sale or in kind.[311] In addition, emotional harm can be compensated under tort law. As early as 1950, courts applied the tort of intentional infliction of emotional distress to remedy emotional harm.[312] Under this tort, the law will remedy emotional harm to an individual if he can show that the defendant acted intentionally or recklessly in an extreme or outrageous manner and that the defendant's act caused the plaintiff to suffer severe emotional distress.[313] Courts also allow recovery for negligent infliction of emotional distress, where the defendant's action comes close to physically damaging the plaintiff but does not.[314] The law also regularly compensates plaintiffs for the loss of consortium, which is based on the emotional and physical loss of a spouse or love or affection of a family member.[315] The law should also protect beneficiaries' emotional interests in the digital assets of their deceased loved ones. Preserving digital correspondence, pictures, videos, and posts for their emotional value is as important as preserving assets with monetary value.

The law is also not blind to protecting the financial interests of beneficiaries. In recent years, courts and legislatures have allowed living beneficiaries to enjoy a decedent's publicity rights.[316] Families of famous

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310. Katherine Rosman, *Over the Internet, into My Mom's Heart*, WALL ST. J., Sept. 1, 2007, at A1.

311. Zimmerman v. Marsh, 618 S.E.2d 898, 901 (S.C. 2005) (finding that emotional and sentimental attachment to land may be considered); Ark Land Co. v. Harper, 599 S.E.2d 754, 761 (W. Va. 2004) ("[T]he economic value of the property is not the exclusive test for deciding whether to partition in kind or by sale. Evidence of longstanding ownership, coupled with sentimental or emotional interests in the property, may also be considered in deciding whether the interests of the party opposing the sale will be prejudiced by the property's sale.").

312. Payton v. Abbott Labs, 437 N.E.2d 171, 177 (Mass. 1982); RESTATEMENT (SECOND) OF TORTS § 46 (1977).

313. Wilkes v. Young, 28 F.3d 1362, 1366 (4th Cir. 1994) (describing common law requirements of intentional infliction of emotional distress); Miller v. Willbanks, 8 S.W.3d 607, 612–13 (Tenn. 1999).

314. Dillon v. Legg, 441 P.2d 912, 920–21 (Cal. 1968) (mother who saw her child run over by car was allowed to recover damages).

315. Hitaffer v. Argonne Co., 183 F.2d 811, 814 (D.C. Cir. 1950) ("Consortium, although it embraces within its ambit of meaning the wife's material services, also includes love, affection, companionship, [and] sexual relations."), *overruled on other grounds by* Smither & Co. v. Coles, 242 F.2d 220 (D.C. Cir. 1957); Montgomery v. Crum, 161 N.W. 251, 260 (Neb. 1928) (recognizing loss of consortium claim for "unlawful deprivation of custody, possession, and companionship of the child"); Theama v. City of Kenosha, 344 N.W.2d 513, 515–16 (Wis. 1984) (extending claim of loss of consortium to children deprived of a parent's "society and companionship").

316. CAL. CIV. CODE § 3344.1 (Supp. 2014); IND. CODE ANN. §§ 32-36-1-8 to -20 (LexisNexis 2012); Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage

decedents can share in the handsome profits from the image, voice, and footage of their family members. It is reported that Martin Luther King, Jr.'s family is still being paid for the commercial use of his words and was compensated when the nation built the Martin Luther King, Jr. monument in Washington, D.C.[317] Allowing a descendible right of publicity benefits the beneficiaries and puts their interests first.

Email accounts and social networking sites are the new letters and personal records of today's society. The historical importance of our digital records cannot be underestimated. Our digital records offer valuable insight into the society in which we live. As such, beneficiaries may wish to preserve those records for future generations and historians. People document their lives online through email, pictures, and videos more than ever before, but, without a policy in favor of preserving this information at the beneficiaries' request, all of the information will be lost. Never before has more information about the lives of ordinary citizens been created and saved. In the past two years we have accumulated more data than the entire combined record of human civilization.[318] And our capacity to store more data and information is growing at an exponential rate.[319] Deven Desai has argued that "[t]he uneven and unclear management of [digital] creations means that society will lose access to perhaps the greatest chronicling of human experiences ever."[320]

Beneficiaries' desire for preservation of digital assets should be honored as well because there is a presumption against destruction by testamentary instrument. If beneficiaries do not obtain digital assets, destruction of those assets is the only other alternative. Courts usually overturn provisions in wills that mandate destruction of a testator's property. The most common situation is where a testator dictates in her will that her home should be destroyed at her death.[321] Courts have usually refused to allow destruction of property at death because it injures neighbors and the community, and causes monetary loss to beneficiaries.[322] Commentators have added that the dead do not have to live with the consequences of their decision to

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Prods. Inc., 296 S.E.2d 697, 705 (Ga. 1982) (holding that the "right of publicity survives the death of its owner and is inheritable and devisable").

317. MADOFF, *supra* note 4, at 9–10.

318. Jonathan Shaw, *Why "Big Data" Is a Big Deal*, HARV. MAG., Mar.–Apr. 2014, at 30 ("The data flow so fast that the total accumulation of the past two years—a zettabyte—dwarfs the prior record of human civilization.").

319. *Id.* (stating that computing power doubles every eighteen months).

320. Desai, *supra* note 96, at 67.

321. Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 211 (Mo. Ct. App. 1975); *In re* Estate of Jones, 389 A.2d 436, 437 (N.H. 1978) (authorizing sale of property to a third party when the will provided that the house should be destroyed); *In re* Will of Pace, 400 N.Y.S.2d 488, 492–93 (Sur. Ct. 1977); Nat'l City Bank v. Case W. Reserve Univ., 369 N.E.2d 814, 818-819 (Ohio Ct. Com. Pl. 1976) (holding that destruction of a home was not against public policy but authorizing sale of home to a historical society). *But see In re* Estate of Beck, 676 N.Y.S.2d 838, 841 (Sur. Ct. 1998) (allowing destruction of house where the agency who wished to preserve the house previously sought an injunction to destroy the house under an urban renewal project).

322. *Eyerman*, 524 S.W.2d at 214.

destroy their property.[323] Similarly, courts and legislatures should recognize the presumption against destruction in deciding how to handle digital assets at death. If a decedent has not made his wishes known and beneficiaries desire to obtain the digital assets for personal reasons or historical significance, courts and legislatures should allow beneficiaries access to the accounts, thereby promoting productive use of the assets over destruction.

CONCLUSION

The treatment of digital assets at an account holder's death is undermining American succession law. Through the use of private contracts, Americans have lost the ability to control how a significant and increasingly important asset is treated at their death. Contractual provisions are altering succession law on an ad hoc basis, with terms in individual contracts that best promote the service provider's interests and not necessarily the interests of society as a whole. Reform should be principled and conscious, and not be based solely on contractual terms imposed by service providers. If no action is taken by the public, state legislatures, or courts, corporations will continue to exercise unbridled power over the digital assets accumulated during our lives. As a result, families and future generations may lose an entire category of valuable and historically significant assets.

This Article has shown that private contracts have played an important role in facilitating inheritance, especially with newly emerging assets. Digital asset contracts, however, take the unprecedented step of prohibiting or severely limiting transfer of the asset. Although the formation of digital asset contracts may be valid, this Article has argued that the terms prohibiting inheritance and ignoring the testamentary intent of a testator should be unenforceable as against public policy. This Article has explored possible justifications for companies to prohibit transfer and has argued that they are lacking: administrative or cost concerns can easily be handled by charging a transfer fee, privacy concerns do not extend beyond death, and federal law is unlikely to apply to state succession issues.

Lastly, this Article has argued that the use of private contracts to facilitate transfer is an efficient and effective way to ensure that assets are transferred according to a decedent's testamentary intent. The best solution is for public sentiment to force corporations to reshape their digital asset policies and allow for transfer according to the desires of an account holder. The nonprobate system is well suited to transfer assets according to private agreement. If a decedent's intent is unknown, legislatures and courts should focus on the desires of the beneficiaries, as digital assets have the most value and significance to families and friends of an account holder.

323. Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 72–73 (1999) ("Living persons face the . . . social repercussions of their actions; dead persons do not.").

By encouraging public awareness and action, Americans may have the best avenue to reclaim control over their digital assets.