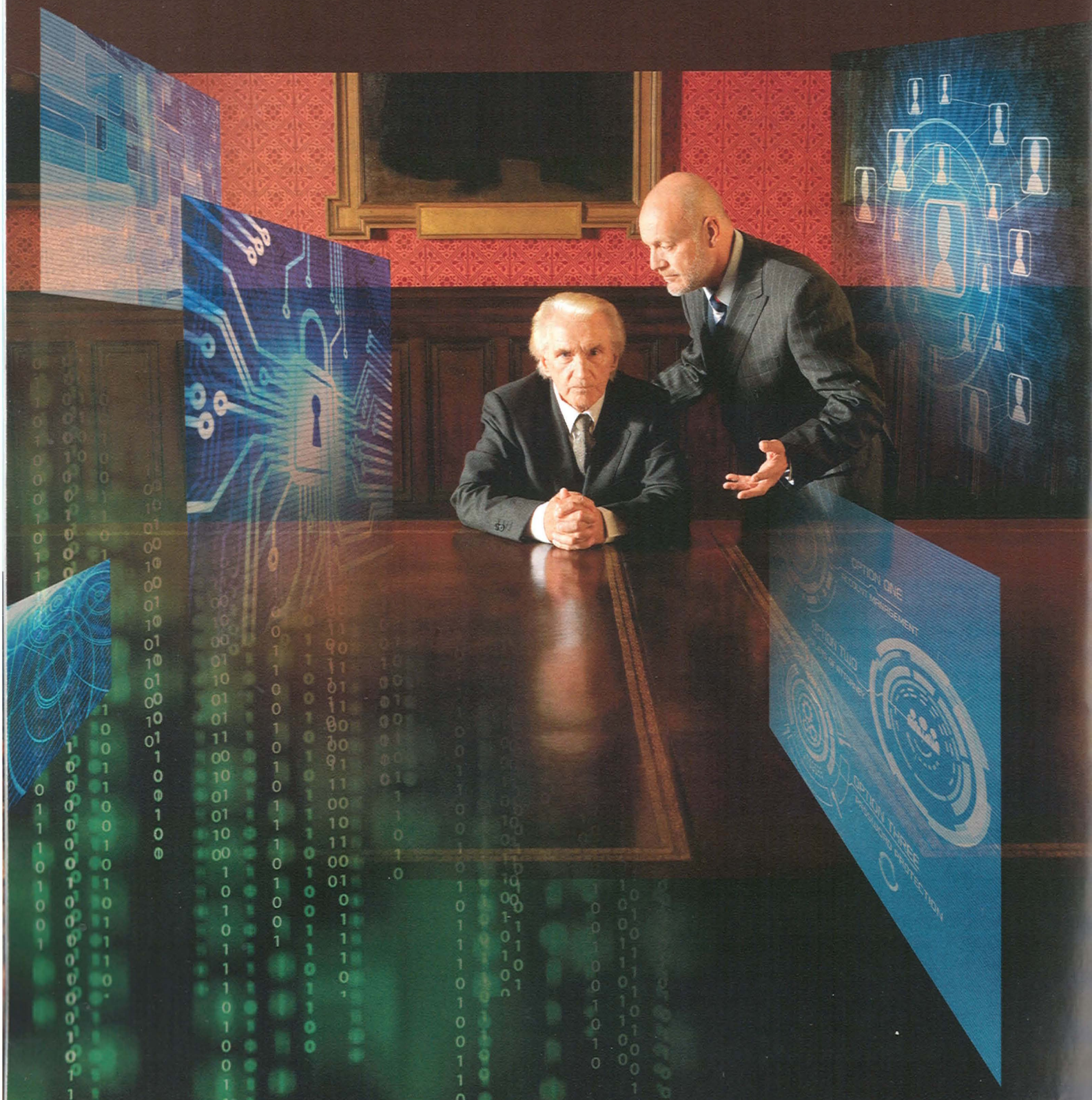


DIGITAL PLANNING

By Naomi Cahn and Amy Zietlow



In 2013, U.S. Trust commissioned a survey of over 700 high net worth individuals. Although three-quarters had a will, almost the same number did not have a comprehensive estate plan, and more than half had made no plans for their digital lives. *2013 U.S. Trust Insights on Wealth and Worth: Key Findings*, www.ustrust.com/publish/content/application/pdf/GWMOL/UST-Key-Findings-Report-Insights-on-Wealth-and-Worth-2013.pdf. Yet high net worth individuals are the group most likely to use the Internet. *Trend Data (Adults)*, Pew Internet, [www.pewinternet.org/Static-Pages/Trend-Data-\(Adults\)/Whos-On-line.aspx](http://www.pewinternet.org/Static-Pages/Trend-Data-(Adults)/Whos-On-line.aspx). As we place increasing amounts of our lives on-line—from paperless banking statements to photos to medical records to customer databases—planning for our digital lives becomes correspondingly important. Moreover, some forms of digital property have economic value; consider the virtual sword for the on-line game that sold for \$16,000 or the domain names that sell for millions of dollars. Or consider the fees that would accrue if your clients did not pay credit card bills accessible only on-line while they were incapacitated. Digital property (by which we mean Internet accounts and data stored on-line) also has personal, emotional, and social value: an on-line photo album can store years of treasured memories, a Facebook page can record an individual's significant events and personal thoughts, and a computer may store the great American novel.

In this article, the authors discuss recent developments that affect how estate planners can advise their clients on the disposition of digital property, and how individuals, regardless of their net worth, can approach management of their digital assets. The authors first look at the risks of not managing assets, and then turn to (1) the Uniform Law Commission's process of developing model legislation, (2) the need for digital estate planning to consider financial assets as well as issues relating to social and emotional issues, and (3) the benefits and drawbacks of the increasing number of companies offering planning programs.

Risks

Lack of planning for digital assets can result in financial loss as well as emotional complexities, a phenomenon that Zietlow has found as she has researched 21st century elder care and grief. Let's consider what happened to Cara, a typical Gen X caregiver. When Cara's mother was hospitalized for a heart attack, Cara spent every moment

she could at her mother's bedside. She was so focused on her mother's care that it did not occur to her that her mother might have bills that needed to be paid. Her mother ran a small catering business that had 10 employees. Cara never logged into her mother's e-mail or went to her mother's office. When Cara went to her mother's house the night of her death, she found several weeks of food from the on-line automatic grocery ordering company that her mother used. She also found a note from her mother's business manager on the front step asking for help logging into the company accounts so she could make payroll and find out future catering obligations. Although Cara was able to find all of her mother's log-ins for bill payment—and the grocery order—on her computer, she did not have all of the passwords to access the accounts. She tried to convert the on-line bills back to paper statements, which was not an easy process. She and the business manager were never able to log into the company's accounts, although, with the help of her mother's attorney, they were able to transfer the domain name for the business.

To prevent situations like this, estate planners can step in to make sure their clients have thought through what happens to their digital assets during their incapacity or upon death.

The Legal Context and the ULC Process

Since 2002, a handful of states have enacted laws covering access of personal representatives to digital assets, and numerous other states have considered legislation. The laws range in scope—some allow a personal representative access only to e-mail accounts; others include social media.

In an attempt to bring uniformity to these efforts, in 2012 the Uniform Law Commission (ULC) established a Drafting Committee on Fiduciary Access to Digital Assets and tasked it with

draft[ing] a free-standing act and/or amendments to ULC acts, such as the Uniform Probate Code, the Uniform Trust Code, the Uniform Guardianship and Protective Proceedings Act, and the Uniform Power of Attorney Act, that will vest fiduciaries with at least the authority to manage and distribute digital assets, copy or delete assets, and access digital assets.

The Drafting Committee, which includes, among others, observers from Internet service providers and the elder law, trust and estate, and special needs bars, anticipates development of a model law for states by July 2014. Unlike the existing state laws in the area, the model act covers four different kinds of fiduciaries: personal representatives, conservators, trustees, and agents acting under a power of attorney. The law's goal is to facilitate the fiduciaries' access to, and control over, Internet-based information, and to ensure compliance with relevant

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laws and agreements between account holders and all who provide services through the Internet. In the absence of specific laws, the fiduciary may face two different sets of hurdles.

First, the terms of service agreements for many providers preclude transfer of the accounts; although a fiduciary should not be considered a transferee under traditional trust and estate principles and practice, current laws in most states have not specifically addressed this issue. A few cases have dealt with fiduciary access. E.g., *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass. 2013). The second hurdle is federal law. The Stored Communications Act, 18 U.S.C. § 2701 et seq., enacted in 1986, protects against the unauthorized disclosure of certain types of electronic communications. The federal Computer Fraud and Abuse Act (and its corresponding state laws), 18 U.S.C. § 1030, protect against unauthorized use of protected computers.

Over the past decade, a few cases have considered executors' access to decedents' on-line accounts, but there are no definitive rulings. For example, in a case involving the late model Sahar Daftary ("Miss Face of Asia"), a California federal court refused to compel Facebook to release messages to the executors and then declined to comment on whether, under federal law, Facebook could voluntarily disclose the messages. *In re Facebook, Inc.*, 923 F. Supp. 2d 1204 (N.D. Cal. 2012).

Digital Planning

As estate planning increasingly includes digital assets, attorneys have begun to incorporate these issues into their practices. In addition, numerous commercial enterprises have attempted to develop products to provide help.

Drafting the Right Language

Wills, trusts, and powers of attorney can include language specifically addressing digital property. Each document can include a statement specifically authorizing Internet service companies to disclose information to an executor or other representative and to provide access to accounts. Of course,

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information on each asset along with passwords should never be placed in a will or other potentially public document; moreover, as we discuss below, it is important that the list of digital assets and log-in information be readily accessible and easy to amend. Because courts are just beginning to face these issues, the enforcement of these documents remains uncertain; at the least, they indicate the client's intent, however.

Wills. Wills can designate an individual with the authority to manage digital property. For example, a will might provide that the executor has the legal consent to control all of the testator's digital property, including obtaining digital files from any Internet service provider. The language can be useful for purposes of complying with federal privacy law. For examples, see *Sample Language—Wills*, Digital Estate Resource, www.digitalestateresource.com/sample-language.

As providers develop improved policies and states enact more specific laws, it will become increasingly common to add language to testamentary documents specifically devising digital assets. It can also be useful to incorporate by reference a document that sets out a distribution system, along with passwords and other access information.

Powers of Attorney. Although powers of attorney are useful for a variety of purposes, ranging from signing a real property sales contract to approving stock transactions, they are just starting to encompass digital property. The ULC's proposed legislation would authorize agents to manage digital assets, and estate planners are beginning to develop

language that can be included in a power of attorney that authorizes agents to manage the assets. For examples, see *Sample Language—Power of Attorney*, Digital Estate Resource, www.digitalestateresource.com/sample-language.

Trusts. Because of their flexibility and privacy, trusts offer a useful ownership structure. Not only can an account holder transfer property into a trust (if transfer is permissible), but an account holder also can take title to new digital property in the name of a trust. As a result, ownership is through the trustee, and successor trustees can easily take over trust property. Although these options seem feasible, they are just beginning to appear in the estate planner's arsenal.

Companies Offering Programs

In terms of what to recommend to clients, no one-size-fits-all uniform method ensures the integrity of account information. A small industry has developed to provide additional help. The most basic products provide password protection or storage, the most sophisticated step into the estate planning process. Other sites allow for the memorialization of a deceased person.

Password Protection

First, of course, estate planners could suggest to their clients that they simply depend on their own memory or keep a handwritten list, either stored somewhere safe or with someone they trust. For more security (and legibility), they can keep the list on their computer, and even password-protect it—so long as they are able to remember the password. Saving passwords to a USB flash drive (and communicating its stored location to the appropriate loved ones) also provides an alternative means for password protection.

To help the fiduciary readily obtain a person's passwords, clients could consider using one of the on-line password protection companies. CNet, *Who We Are and What We Do*, www.cnet.com/who-we-are, which provides comprehensive reviews of

technology, lists more than 700 password managers. Among the most widely used are 1Password, <https://agilebits.com/onepassword>, which, for a fee, can help not only create strong passwords but also help someone remember and, if necessary, restore them. Also popular are several free services, including PasswordSafe, <http://passwordsafe.sourceforge.net>, and LastPass, <https://lastpass.com>, which similarly offer the ability to help you create and retrieve passwords. Many of the services require a master password to unlock the data, which also facilitates the ability to make changes and add accounts easily.

Account Management

Going beyond password protection, clients also should think about how they will want their accounts managed once they are no longer able to do so. New services can help implement the client's wishes. Google is the first major Internet service provider to offer its own program for incapacity and death planning. During spring 2013, it rolled out the "Inactive Account Manager," which lets users decide precisely how they want to deal with the digital data they have stored through any Google product, ranging from Gmail to Picasa photo albums. The process is straightforward, once the account holder knows where to start; the role of an estate planner may be simply to point out the option of using the service. The first step is to go to <http://google.com/settings/account> and then look for "account management." The tab to click on next is "control what happens to your account when you stop using Google." The account holder can choose to have the accounts deleted entirely, or can choose up to 10 people to be notified when the account is deactivated. The user also can let Google know at what point—up to a year of silence—to end the account. After adequate confirmation of silence, Google will then notify the named individuals and provide links so they can download data.

But for all other accounts, a digital "vault" might be appropriate. These

services promise to allow users to assign beneficiaries for each on-line account, as well as safely store other aspects of an on-line presence. Legacy Locker explains that it allows account holders to save their on-line account information in a digital "safety deposit box" and then specify "beneficiaries" to receive information about these accounts once Legacy Locker has verified the account holder's death. Legacy Locker also advertises its ability to deliver "Legacy Letters" to friends or family members. Similar services are provided by companies such as AssetLock, Cirrus Legacy, and SecureSafe. They also often solicit estate planners by offering special promotional services.

Drawbacks

Although these products all help with organizing, there are two major drawbacks. First, the long-term security of these companies is questionable; if you store passwords today, will the company still exist when the client's fiduciary needs them?

A second major problem is the terms of service ("click-through") agreements that preclude transfer. For example, Yahoo!'s terms of service state that its accounts are nontransferable, and it will not provide access to, or contents of, a deceased user's account. (It will, however, once an

account holder's death certificate is submitted, close an account, suspend the billing of any premium services, and permanently delete any contents within the account of a verified deceased user.)

Based on traditional trusts and estates principles, the fiduciary steps into the account holder's shoes, so taking over an account should not be a problem. On the other hand, even with brick-and-mortar assets outside of the digital world, such as safe deposit boxes, states have enacted laws that specifically address fiduciary access, but there are not yet similar laws for Internet assets. Similarly, HIPAA includes specific exceptions for authorized individuals.

Going Beyond the Financial

Planning for digital assets is not just dealing with bank accounts or potentially valuable domain names. There can be difficult, and potentially painful, emotional issues as individuals decide how to handle electronic possessions. As digital estate planning moves mainstream, many clients may have read about or researched new products available, especially if their own roles as caregivers or recipients have changed.

The Gold Standard in end of life health-care planning is 5 Wishes, www.agingwithdignity.org/

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five-wishes.php, developed by the legal counsel for Mother Teresa, Jim Towey. 5 Wishes moves individuals logically through the holistic decisions they need to think about should they be in a situation in which they can no longer make health and life decisions for themselves. Questions might include:

- who they want to make health-care decisions when they are unable to do so,
- the kind of medical treatment they want or do not want,
- how comfortable they want to be, and
- what they want their loved ones to know.

The document is short, graphically pleasing in its calming blue tones, and a great conversation starter. Although 5 Wishes does not address digital asset planning directly, the categories do provide an opening to help clients think through comparable and analogous issues for managing their digital assets. Here are the questions adapted for digital decision making:

- Who do they want to manage their accounts?
- How can they facilitate that kind of management?
- What do they want others to

know about their accounts?

- What should happen to the accounts?

Although 5 Wishes has been field tested, with over 18 million copies in circulation, other new tech companies specialize in end of life and estate planning. For a helpful review, see Jaweed Kaleem, *End of Life Tech Companies Grow with Changes in Death Technologies*, June 13, 2013, www.huffingtonpost.com/2013/06/13/end-of-life-death-tech-funeral_n_3431174.html.

One of the most useful on-line tools, Everplans, www.everplans.com, serves as a digital alternative to 5 Wishes. Also in a calming blue tone like 5 Wishes, the web site opens with four potential planning paths:

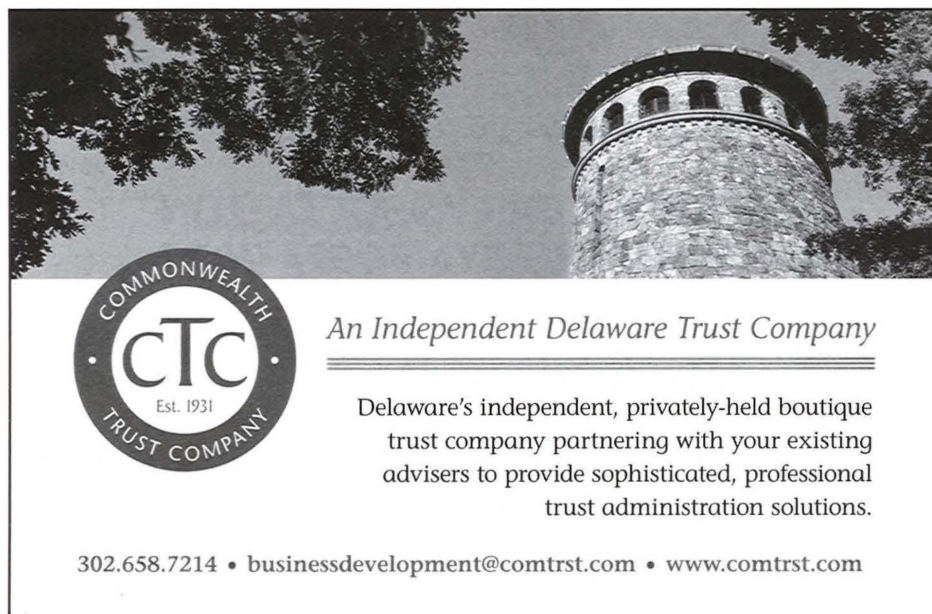
- “Long before death” (making choices for yourself to reduce the burden on your family),
- “Eldercare and End of Life” (making choices for a loved one you care for),
- “After a Death” (making choices after a death has occurred), and
- “Be There for Someone” (making choices as a supportive friend).

Each path walks the user through chronological steps from naming an agent to act under a power of

attorney to planning a funeral. Everything can be done on-line, but the quantity of tools can be a bit overwhelming. In fall 2013, Everplans partnered with the organization, Death Over Dinner, www.deathoverdinner.org, a national project encouraging families and communities to talk about their end-of-life plans. Everplans created a eight-page, mini-workbook that can be used following a dinner event. Mini Workbook, deathoverdinner.org/wp-content/uploads/2013/09/DeathOverDinnerWorkbook130910Clean.pdf.

In terms of digital estate planning, Everplans offers an informative article, *How to Create a Digital Estate Plan*, accessed at www.everplans.com/paths/long-before-a-death/articles/how-to-create-a-digital-estate-plan, with links to checklists and workbooks to download. The authors recommend suggesting to your clients that they begin with the simple one-page “Just in Case” worksheet, which can be downloaded for free. This form prompts the user to list critical information about the existence of an advanced directive, life insurance, will, and name of attorney. From that point, the user can move to the nine-page “My Important Info” form, which serves as an inventory of all financial assets from credit cards to automobile insurance, and then graduate to the 16-page workbook, which, like 5 Wishes, seeks to be holistic by addressing all of the financial, medical, digital, and funeral planning that needs to be done at the end of life. Clients who may be thinking about these questions for the first time may appreciate the extensive checklists of EverPlans, whereas clients who prefer more open-ended questions with encouragement to write freely may prefer the style and structure of 5 Wishes. For estate planners, Everplans also offers a rare library resource of articles about digital legacy and digital executors.

Most sites still require printing, completing, and filing paper forms (5 Wishes does offer a digital form), but for clients looking for an entirely digital tool, MyDirectives.com offers



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the first HIPAA-compliant, fully digital, advanced directives tool. A useful and short MyDirectives video fully explains how the tool works and how visitors can set up a free account. An individual can then easily share the form through e-mail with his or her family and physician. Like 5 Wishes and Everplans, the site is welcoming in its calm blue color and uncluttered design, and offers a clear place to begin with the deep insight that "trauma can happen anytime . . . and that families with a plan cope better in a crisis." The site does not offer digital or tangible asset inventory tools, however.

For clients looking for general resources, articles, and tools, Death-wise.org is a nonprofit organization that seeks to promote more "wisdom" about death. It encourages creating an "end of life binder" filled with printable one-page worksheets. Its five-page "Wise Conversations Starter Kit" is unique in that the section on determining end-of-life wishes is completed as a Likert scale survey rather than the common check-box inventory. Despite its ease of use, however, the scales may be more confusing to a family trying to address the nuances of a loved one's wishes. It also offers an extensive list of conversation starter sentences that are especially helpful because the most important part of end of life and legacy planning is *communicating* the client's wishes.

Conclusion

Although reports show that four out of five funeral and end-of-life planning start-ups will fail, the number of resources will only increase in the coming years. Having a working knowledge of what is out there and how each site would meet the different personalities and life situations of clients will make the estate planner an invaluable guide in the new world of digital estate planning. As estate planning increasingly includes comprehensive planning, as more assets are held on-line, and as we live more of our lives digitally, these issues will become even more significant for our clients—and ourselves. ■



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