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Chair Jeff Barker and
Members of the House Judiciary Committee

Lately I have been involved in the problem of dealing with digital assets of deceased people, including internet accounts, web pages, and other aspects of this complex issue. The Oregon State Bar has proposed a bill (SB 369) that would allow various representatives of a deceased or disabled person to have access to their digital and other internet accounts. I understand that one segment of the industry is backing a competing bill (HB 2647).

Since a great deal of my law practice is concerned with helping clients plan for the passage of their assets at death, and then helping the family deal with the process after death, I have a particular interest in this issue. I have reviewed both bills, and want to share my concerns about HB 2647. As a prelude to that, I thought I should tell you that nearly all the people who come to me for estate planning are very concerned about avoiding probate. Over the years, the public has become aware that a **probate** is necessary to deal with the estates of those who die with a **will** instead of a **trust** as the means of passing their property to the beneficiaries.

Often the first comment I hear from a new client is "Whatever you do, see that my family doesn't need to go through probate." These comments often come from clients who have just experienced the probate of the estate of a family member. I hear and understand their concerns, and as a result about 90% of my clients have an estate plan that will pass their assets (including digital assets) to their beneficiaries without the need for probate. Nearly all of these clients have living trusts that name a person (or rarely a bank) as successor trustee, with power to deal with all the trust assets.

SB 369 is designed to allow a successor trustee to have access to all the digital assets of the deceased person. It was drafted by the Commissioners on Uniform State Laws, of which my partner Joe McKeown, now dead for 40 years, was one of the members. The Commissioners (appointed by the governors of all the states) and their staff have prepared and proposed many uniform laws that have been enacted by the Oregon legislature, including the Uniform Trust Code, the Uniform Commercial Code (which governs all commercial transactions in the United States), the Uniform International Wills Act, and about 60 other uniform laws.

These uniform laws make it much easier for people to move from state to state knowing that the laws that govern their documents and transactions are the same everywhere they go in the U.S. Uniform Laws are drafted by lawyers and law school professors with intimate knowledge of the subjects covered. SB 369 is another in a long line of such laws, which, if enacted in Oregon, would allow Oregonians to benefit by knowing that, if they move to another state, they need not seek out another lawyer to change their trust, wills, powers of attorney and other documents. Although SB 369 is relatively new, it has already been introduced into the legislatures of more than 20 other states.

The problem with HB 2647 is that it requires a **probate** for the deceased person's executor,

successor trustee, or other representative, to have any access to a wide range of electronic communications to which the successor may need access to determine a number of things about the deceased's affairs.

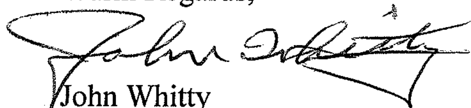
If HB 2647 becomes law, only a **probate court** can allow such access. To give you an idea of what that would require, this is a **short** list of the steps in handling any probate:

1. A lawyer must prepare:
   A. a petition to be signed by the person's personal representative,
   B. an order (called a limited judgment) for the judge to sign, and
   C. letters testamentary (or letters of administration if there is no will) to be signed by the clerk.
2. These documents are then presented to the court, with a filing fee **not less than $550**
3. The judge then signs the order and the clerk signs the letters and sends them back to the lawyer.
4. The lawyer prepares a notice to interested persons, to be published three times in the newspaper, **at a cost of about $300**, and the lawyer or a staff member arranges for the publication.
5. The lawyer or a CPA obtains a tax ID number for the estate.
6. The lawyer prepares and the personal representative signs a notice to all the beneficiaries of the estate, and to the Department of Human Services.
7. The lawyer prepares and signs an affidavit that the notice was sent to all beneficiaries and to the Department, and files the affidavit with the court.
8. There are many more similar steps to complete the probate, involving inventories, proof of search for creditors, accountings, etc. etc., all of which require the involvement of a lawyer, at significant cost, but after doing items 1 through 7, the personal representative could then ask the lawyer to comply with HB 2647 by preparing **another petition** (called a motion in HB 2647) stating all the things required by Section 3 of HB 2647, plus **another order** (limited judgment) for the judge to sign agreeing that the facts required by Section 3 of HB 2647 exist.
9. Then the electronic communication service or remote computing service has the opportunity to ask the judge to modify or terminate the order, under circumstances stated in Section 3(2). If any such request is filed, there would be further need for a lawyer to deal with the issues raised. This all may make some lawyers happy, but not most of us.

All this activity is necessary for the successor trustee of a deceased person if, **BUT ONLY IF,** HB 2647 becomes law instead of SB 369. If a client who is the child of a deceased person asks me why all this expense is necessary for him or her to deal with the deceased parent's internet affairs, after the decedent told them that he or she had fixed things so that no probate would be required, what should I say?

I don't want to be blamed for screwing up a client's estate plan. I can tell the decedent's family that the bar association tried to prevent the bill from passing, but that might not satisfy them. Shall I tell the clients to contact their legislator?

Warm Regards,



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