

Confidential matters

A LACK OF PRIVACY RIGHTS UPON DEATH IS AT ODDS WITH THE INCREASING DRIVE TO PROTECT PERSONAL DATA, ARGUES MARGARET O'SULLIVAN

THE RIGHT to privacy and the protection of personal data are major concerns in modern society. Complicated privacy legislation exists in many jurisdictions with the objective of protecting personal information by imposing multiple safeguards, some of which can be onerous, expensive and frustrating from a compliance perspective. With increasing stores of digital information, we also frequently see reports of security breaches of government and major corporations' databases – such as the notorious 'Panama Papers' leak of confidential client information from Mossack Fonseca. Identity fraud, theft and other types of cyber-attack are part of everyday reality in a digital world.

Juxtaposed with society's increasing vigilance in safeguarding the privacy of financial and personal matters is the lack of such protection upon death. Indeed, after a person dies, we often see public disclosure of their sensitive personal and financial information via the court probate process.

Many people are unaware that in multiple jurisdictions a probated will is a public document. Information regarding estate values included in court records relating to wills and probate applications is generally accessible and searchable by the general public.

For example, in my home jurisdiction of Ontario, members of the public can, for a fee, obtain copies of wills, probate applications and grants where personal representatives of an estate filed a probate application with an Ontario court (except in the rare circumstance that a judge has ordered a file to be sealed). The probate application includes the total value of the deceased's estate, including a breakdown of personal assets and real-estate assets.

England and Wales is another jurisdiction that, for a fee, now makes digital copies of grants of probate and wills available for online public viewing from anywhere in the world through a searchable database dating back to 1858.

Why is it that the value of a person's estate, particularly with respect to non-contentious estates, and the contents of their will, both of which are considered highly private and

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sensitive, are publicly disclosed upon death, especially given modern attitudes and public policy concerning privacy of information? There seems to be a huge disconnect between privacy rights during life, when they are tightly guarded by way of legislation, and after death, when they seem to simply evaporate.

While some documents may have historical and archival importance to family members and genealogists, it would seem that the public display of one's will and probate grant after death has no value or significance. Such information should remain confidential or at least be better safeguarded. A strong argument can be made that there is a potential harm in making this information publicly searchable and available. For example, vulnerable persons and beneficiaries could become targets for financial abuse.

In 2013, perhaps recognising this, the Law Society of England and Wales, in its response to a consultation on non-contentious probate rules, proposed an 'opt-out' procedure for removing certain information from a grant of probate, including the value of estate assets in non-contentious proceedings.¹

Trust and estate practitioners, at least in common-law jurisdictions, have been acculturated to a legal tradition that did not question or challenge the need for confidentiality of sensitive personal and financial information as part of the court probate process.

With demographic change and the increasing influence of an ageing baby-boomer populace, perhaps a movement towards greater privacy rights after death may evolve. The Law Society's 2013 initiative is a step in this direction; it certainly raises the issue and puts it out for discussion. As trust and estate practitioners, it may be timely for each of us to consider the issue of privacy after death, and how a modernised probate process should appropriately address it in our respective jurisdictions.

¹ Family Division's Working Group on the Non-Contentious Probate Rules 1987, response of the Law Society of England and Wales (August 2013)