



Managing your “Digital Footprint” after your Death

Does anyone know your online bank, Paypal and eBay passwords?

1. Why should Digital Assets be included in Estate Planning?

With the increase in technology, many of us are becoming more tech-savvy. As a result, more of our assets are being converted to a digital form.

There is currently no standard legal definition of a ‘digital asset’. A digital asset may be classified as an online account owned by an individual or digitally stored data (whether that data is stored on a device owned by an individual or on devices accessed via the internet, often as part of a service offered by a third party and governed by a contract with the individual).

Examples include, but are not limited to, email accounts, memberships, blogs, social networking sites, videos, photos, Paypal accounts, online businesses or data stored using file sharing facilities such as Dropbox.

It is debatable whether a digital asset is a form of intangible personal property (that is, assets which lack a physical form such as patents), or whether it is a form of intellectual property. The form of a digital asset may also change simply by the data being printed.

As people are becoming more conscious of the impact on the environment, many businesses are transitioning away from a predominantly paper-based records management system to digital record-keeping and management. Many businesses are also encouraging their customers to adopt a similar approach.

For example, Telstra charges a fee for the issue of paper-based statements but if the customer elects for their statements to be emailed to a nominated email account, then no fee is payable. Without providing your executor with access to your digital assets (i.e. your email account), your executor may have difficulty accurately assessing your assets and liabilities at the time of your death.

This highlights the growing importance of effective planning and management of your digital assets, particularly from an estate planning perspective.

2. Creating a Plan

The failure by people to create a plan to manage their digital foot-prints after their deaths means that executors could overlook the person’s digital assets after their death. This may happen because the digital asset is inaccessible to the executor or because the executor is unaware of the existence of the digital asset.

To avoid digital assets being lost in cyberspace, we recommend to our clients that they prepare a list of all of their digital assets to be placed with their Will and kept in a safe and secure location. This may include providing usernames, passwords and answers to secret questions.

However, some practical difficulties may arise including the secure storage and privacy of that information, changing passwords, keeping usernames and passwords in separate locations, the addition and removal of various digital assets over time, and



the list being lost or becoming separated from the client's estate planning documentation.

While creating the list, we encourage clients to give consideration to the following matters, amongst others:

- (a) the terms and conditions of any user-service agreement or contract with a third party who is the owner of the device within which the client's data is stored. For example, the user-service agreement may prohibit executors (and other third parties such as family members) from gaining access to a person's electronic account. Prohibitions of this nature have been largely untested in the Australian Courts, but there have been numerous litigious matters in the United States of families seeking access to email accounts and other online profiles of deceased relatives.
- (b) whether they are happy for the executor appointed in their Will to have access to their email accounts and other online profiles;
- (c) does the digital asset hold any sentimental value, such as photos? Would the client prefer these to be accessed and printed for future generations?;
- (d) does the digital asset have any monetary value, such as a paypal account, an online business or a website which generates advertising revenue? If so, what information needs to be left with the executor (subject to the terms and conditions of any user-service agreement) to enable the executor to assess the value of the digital asset and liaise with the third party owner of the data storage facility to have the asset transferred to, or the value of the asset paid into, the estate?;
- (e) does the client want their digital asset closed, "memorialised" (a service offered by Facebook), recorded onto a disc or transferred to somebody else? It is important to be aware that any online profiles which are left unattended are at risk of identity theft.

3. Practical Solutions to Minimise Loss

Effective estate planning by the deceased during their lifetime will assist the executor to administer the estate in accordance with the deceased's wishes. As technology evolves and while the law in this area is still developing, it is prudent for those about to make a Will to be aware of these changes and the impact which technology is having on their assets, and to take practical steps to help minimise the chances of assets being lost or overlooked by the executor.

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