This practitioner’s guide has been prepared to assist South African practitioners with the issue of digital assets when taking instructions from clients for estate planning or estate administration.
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Section 1: Overview

Background

Although digital assets have become an important and integral part of our lives, we are currently facing uncertainty in terms of how our digital footprint forms part of our estates and, more specifically, how it should be dealt with after our demise.

In most countries, where there is a strong focus on digital assets, they realised that they had no option but to reform their domestic laws. South Africa is no way different from those jurisdictions and the situation necessitates law reform in South Africa. Our domestic law is generally silent on this topic. Our legal system allows us to rely on certain principles and procedures and, if necessary, we might want to borrow certain ideas and principles from foreign jurisdictions, as an interim solution until we manage to deal with the void in the digital asset space.

What is a digital asset?

When talking about “digital assets” one needs to be cognisant of the ambiguity of this concept. There are two different types of “digital assets”, namely:

- Digital records that are stored on computer devices which represent text, images, sounds, videos and other information which can be converted from non-digital events. These records are stored on digital files.

- Digital property rights and interests that are linked to digital records, such as a website, which includes the domain which is viewed as digital property right and which also includes images and videos on the website which are the digital records.

Why STEP practitioners need to be aware of digital assets when advising clients

Considering the above distinction, when administering an estate of a deceased person, one needs to be mindful that whereas digital property rights and interests do form part of the deceased’s estate, digital records do not form part of the estate.

Digital assets are stored on a hardware device such as a laptop or iPad and hence are part of the composition of this device and therefore upon devolution of an estate, the digital records will be passed on as part of the hardware. It must be noted that the digital property rights and interests associated with that same hardware device will no devolve upon the transfer of the asset.

For further information about the importance of discussing digital assets with clients, please view:

- Digital Assets: A STEP Guide for Professionals -->
  www.step.org/digital-assets
Key terminology used in this guide

When it comes to advising clients on digital assets there are a few terms that a practitioner needs to be comfortable with:

**Computing devices:** Includes devices such as desktop or laptop computers, tablets (such as an iPad), mobile phones and gaming devices (such as a PlayStation.)

**Cloud Accounts:** Are accounts that provide computing services to users who agree to abide by certain terms and conditions as required by the service providers. The best example of this would be a Facebook or Twitter account.

**Digital Property Rights:** Includes intellectual property rights such as a copyright, rights associated with patents, design rights and rights involving trademarks and reputation. However, it also includes contractual rights such as financial services accounts or domain names. These rights can be transferred in terms of a client’s Last Will and Testament (“Will”) or be placed in a trust.

**Digital Property Interest:** Includes bitcoins and other cryptocurrencies, including gaming tokens. These can also be transferred in terms of a Will, if the provider of these interests has no prohibition in its terms and condition.

**Digital Records:** Includes computer files, such as videos, photographs and emails stored on computing devices or cloud accounts. Digital records are not considered property but, when a person dies or becomes incapable to access them, sentimental material could be lost.

**Fiduciary:** A personal representative or executor for a deceased person, a guardian or curator appointed by the court for an incapacitated individual, an attorney under a Power of Attorney, or a trustee appointed to hold in trust a digital asset or other property of an individual.
Section 2: Pre-Death Considerations

How to raise the topic of digital assets with your clients

When advising a client on digital assets, the practitioner will firstly need to establish two issues:

- whether the client has a computer device; and/or
- whether the client uses any internet services.

With today’s proliferation of social media platforms, it can easily happen that a client is not entirely sure as to which internet services they make use of. If there is indeed such uncertainty, a client can access a Wikipedia article listing most of the social networking sites to help him/her find out which services he/she uses: http://en.wikipedia.org/wiki/List_of_social_networking_websites

If the answer to both the above questions is no, then a file note to that effect should be made and there need be no further action taken.

If, however, they answer yes and the client has a computing device or an internet service, the practitioner should make the client aware that these devices should be identified. The practical and security issues relating to the access usernames and passwords for these devices should be noted. The questions relating to how or if the information should be stored in a safe location, should be highlighted and the impact of the accessibility must be communicated. Inevitably, if a password were to change, the client must take note that any document or password storage facility reflecting outdated information should be altered in line with any changes.

Even if the client does have computing devices and internet services and chooses not to have them administered after death or incapacity, these devices should be identified so that the relevant fiduciary will be aware of them. Should the client wish not to address these devices, then the recommendation is that a file note should be made. Clients are changing and upgrading their computing devices and should be reminded to update the information in accordance with their wishes and instructions.

Specific questions when taking instructions for estate planning

When discussing digital assets with a client the following issues should be addressed:

- Is the client planning on preparing a digital assets inventory, and if so, where and how securely will it be stored?
- How will the administrator or other relevant fiduciary of the estate find and access the inventory?
if the client has given a list of passwords to a third-party password manager, have they reviewed the security protocols applicable to their data?

what is the ownership status of digital property rights and interests: outright ownership by client; held in trust for another person; or under a license type arrangement?

is the confidentiality of any digital assets that of another person – such as an employer?

do they wish to make gifts of any of their digital property rights and interests? And if so, are they legally permitted to do so?

are there any service providers who limit or deny access of the cloud accounts, for the person administering the estate?

do they wish for the computing devices to be cleared of any records before being distributed to beneficiaries and do they have specific wishes in relation to their cloud accounts?

is the person administrator of the estate the right person to manage and have control of the digital estate?

should a separate digital fiduciary be appointed for digital records?

**Drafting considerations for estate planning**

After instructions, have been taken from the client, there are a few drafting considerations that the practitioner should be mindful of:

are there cloud accounts in the client’s name where the terms and conditions need to be scrutinised?

a clear distinction needs to be made between digital records which cannot be bequeathed and do not vest in the personal representative after death, and digital property rights and interests which can be bequeathed and do vest in the personal representative after death.

bank accounts that are in credit or debit arrangements between the client and the bank. The existence of an online facility to manipulate the bank’s electronic ledgers does not create a new digital property right that is capable of being gifted or held on trust.

should the client consider drafting a specific clause in his/her Will or a Letter of Wishes authorising a digital fiduciary to access, use, delete, control, transfer, distribute or dispose of the client’s digital records and for him/her to be remunerated for costs and professional fees incurred in doing so?
Other specific steps to advise your clients to consider

You may also wish to consider advising your clients to take the following specific steps:

- **Regularly download/save/backup their digital assets** as it can become quite cumbersome to retrieve those once the creator thereof is deceased or incapacitated.

- **Prepare a Memorandum of Wishes** (also referred to as a Letter of Wishes) in order for the digital fiduciary to deal with the digital records according to the clients wishes. The more extensive this list, the easier it becomes for the digital fiduciary. Therefore the wishes contained in such a memorandum should be very precise and detailed.

- **Prepare an inventory** of all the computing devices, cloud accounts and cryptographic tokens in their possession. If the inventory is inclusive of passwords and usernames, then the risks associated with this should be highlighted and the client must then prepare a detailed digital asset instruction to the Fiduciary. There are a number of practical issues that will impact on how the administration or transfer of the digital estate will be dealt with, for example, one problem that can arise is that the person administering the estate will not be granted access to cloud accounts, due to lack of authorisation stemming from the terms and conditions applicable to each cloud account.

- **Manage Usernames and Passwords.** Compile a list of usernames and passwords. However the digital Fiduciary needs to be vigilant about using these passwords. Some cloud accounts do not authorize access by a third party and in such instances the digital fiduciary would be committing an offense.

Further information on how to advise clients to plan for their digital legacy is available from [Digital Assets: A STEP Guide for Professionals](http://www.step.org/digital-assets)
Section 3: Post-Loss of Capacity & Post-Death Considerations

How can STEP Practitioners deal with the issue of digital assets when taking instructions for administration of estates (either deceased or inter vivos)?

Before death or incapacity, it is easy for a client and the practitioner, to deal with any digital assets. However once the client becomes incapacitated or deceased the administration of his/her digital assets becomes an issue. Therefore, there are a few considerations a practitioner needs to make upon the death or incapacity of a client:

- was an inventory created?

- if no inventory was created, should the practitioner attempt to reconstruct one by contacting friends and family of the client, by reviewing hardcopy records such as bank account statements for payments relating to online assets such as cryptocurrencies?

- should a practitioner be unable to access any device of the client, it is possible to involve a digital forensic expert to identify digital assets by obtaining access to the devices? It is of vital importance that each step should be recorded in such a scenario in order to demonstrate that any breach of terms and conditions were merely done so to identify digital property rights and interests of the deceased.

- does the practitioner need to be taking any necessary steps to protect the client’s privacy and security of their assets?

- does the practitioner also need to be taking necessary steps to protect the confidentiality of the digital records? This is especially the case when the confidentiality is not actually that of the client but rather that of a client’s employers or customers.

- is there a need for the practitioner to identify the owner of any rights in cloud accounts? Furthermore, it needs to be considered whether access to these cloud accounts are regulated or prohibited, whether they can be deleted, transferred to another person, sold or cashed out?

- does a practitioner need to inform a cloud service provider that the account user has died or lost capacity?

- before proceeding with closing a cloud account, does the practitioner need to download any files first and store them on an external device for distribution?

- if a device or property right interest is bequeathed, does the practitioner need to
determine in what form they need to be devolved in. For instance, should a laptop be clear of all contents before been given to a beneficiary?

☐ does the practitioner need to determine if there are liabilities relating to cloud accounts and how the payment of these accounts should be processed?

Depending on the role of the practitioner and the specific instructions, after the death of a client, it is imperative that the practitioner takes control of the devices as soon as practicably possible as these devices can contain valuable and sensitive information. This can lead to identity theft and a diminishment of the client’s estate, which can result in the client’s wishes not being able to be fulfilled upon his/her death.

**South Africa Law**

In terms of the Wills Act 7 of 1953, read in conjunction with the Intestate Succession Act 81 of 1987 and the Administration of Estates Act 66 of 1965, as amended from time to time, computing devices, digital property rights and interests can be transferred or dealt with in terms of a Will or in terms of the intestate succession legislation. The fiduciary will therefore be able to deal with these matters as part of the administration process and will be administered by the fiduciary upon the client’s death.

**Digital Fiduciary**

A concept that has come to light in the wake of the “digital assets boom” is that of a “digital fiduciary”. This is the same as an Executor but someone tasked with administering the digital assets of the client.

**Deceased Estate**

Digital records that were under the control of the deceased will be able to be managed by either the digital fiduciary. However unlike with Digital Property Rights and Interests, digital records may, depending on the true nature of the asset or interest, not form part of property and therefore the digital fiduciary will not be entitled to fiduciary fees unless the testator/testatrix specifically authorised such remuneration.

**Power of Attorney**

There can be a Power of Attorney authorising an individual to administer the digital assets of a client. However, a problem that arises in South Africa is that the Power of Attorney lapses once a person becomes mentally incapable or dies. Therefore, there is little or no value of having a Power of Attorney. In other countries, there is a concept known as durable, lasting or enduring Power of Attorney which goes beyond mental incapacity.

**Appointment of a Curator**

The other consideration might be to consider the appointment of a Curator. The Common Law and Statutory Law addresses the issue and provide measures to authorise others, i.e. curator boni, to make legal decisions on behalf of such person. These applications are expensive as it involves a thorough well motivated application.
However such a curator can only be appointed once the client has already become incapacitated and is in need of assistance to manage his/her own affairs. Due to the fact that the asset value of digital estates might not be tangible, this route should not be considered in isolation.
Section 4: Digital Asset Definitions and Precedents

Proposed definitions and precedents

The proposed definition below can be used in a Will that defines digital property rights:

“My Digital Property Rights” means such property rights and interests as are associated in any way with my Digital Records and to which I am entitled at the time of my death and which devolve upon my heir(s).

Specific rights and interests could be phrased as follows:

“My business carried on under the name [            ] and using the [                  ] cloud service”;
“Any of my literary works which are only in digital form”;
“The benefits associated with my [                   ] store account”;
“The balance owing to me at the date of my death under the terms of the contract between me and [            ]betting.co.za”; 
“My domain name [                   ].co.za; and

In a Will the following definition of Digital Record can be used:

“Digital Record” means an electronic record with which I am concerned in any way on any computing device (whether they are on my devices or devices used by me in connection with any of my Cloud Services) at my death, but excluding all of my Digital Property Rights. For this purpose, ‘electronic’ is a reference to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities and ‘record’ means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

Role of the Digital Fiduciary and proposed clause

A person can include specific digital records in a Will, however one thing the client needs to be cognisant of is that these digital records would be managed by a digital fiduciary and not an executor (it is possible that it is the same person but in a different capacity)- such as:

“This will include part or the whole of the content of any message sent and received by me, and other digital text, music, images, videos, books and other similar media whatsoever.

Cloud Services and a Will

In the event of a Will containing references to cloud services used by the testator/testatrix, a possible definition that can be used is:

“My Cloud Services” means the services of such cloud service providers as were used by me during my lifetime and/or at the time of my death.
Digital Fiduciary

Should a client wish to appoint a digital fiduciary for the administration of his/her digital property rights and interests, the following wording might be appropriate:

I appoint [              ] (“my Digital Fiduciary”) to be my Executor in respect of only my Digital Property Rights.

Likewise, if a testator/testatrix wishes to appoint a digital fiduciary is his/her will:

I appoint [                ] (“my Digital Fiduciary”) to manage my Digital Records and authorise him/her to carry out all actions and incur such costs and expenses as may be reasonable for the recovery, preservation and transfer of my Digital Records.

But besides appointing a digital fiduciary, there will also be specific administrative instructions that will need to be drafted into the will. For example:

I direct my [Digital] Fiduciary to terminate my cloud accounts with [            ] and [ ], to memorialise my Facebook account named “[             ]” and to delete my Digital Records from all my devices and cloud services provided that:

- He/she shall have taken adequate control of such Digital Property Rights with any association to any digital records existent in such cloud accounts; and
- He/she shall have afforded my Digital Fiduciary sufficient opportunity to recover any of my digital records available to him/her.

Bequest of Device

Another issue that needs to be addressed is when a device is to be bequeathed. What happens to the Digital Records that are on such devices? The following could be a wording used to circumnavigate this issue:

I bequeath my laptop to [             ] but I direct my [Digital] Fiduciary, before distribution of this gift:

- To transfer such Digital Records that are present in my Digital Literary Works from said laptop to an external storage device (and delete same from such laptop); and
- To afford my Digital Fiduciary the opportunity to recover my Digital Records
Section 5: Where Can I Get Help?

Laws in this area of law are unsettled and vary between countries and even between states within a country. Legislative reforms are currently underway in various countries which are intended to resolve some of the uncertainty around digital assets. However, the Terms of Service agreements your clients have entered into with various service providers may govern how their fiduciary can work with their digital assets.

For information and advice, please refer to the Digital Assets section of the STEP website at www.step.org/digital-assets where you will find more information and links to other knowledgeable professionals who can help guide you through this process.

**STEP Digital Assets Special Interest Group (SIG)**

**Website:** www.step.org/digital-assets

**Committee:** www.step.org/digital-assets-committee

**Contact form:** www.step.org/sigs-contact

For any further assistance, please contact digitalassets@step.org
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