This practitioner’s guide has been prepared to assist Australian 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

What is a digital asset?

A digital asset can include photographs, videos, music, e-books, documents, blogs, movies, social media accounts, intellectual property rights, digital currency, emails, conversations, social media, games, bank accounts, medical records and any other electronic record.

In Australia there is no formal legislative or judicial recognition of digital assets in the legal areas of estate planning or estate administration. In this guide, we take guidance from the United States of America and Canada who have begun the task of formal legislative recognition relating to digital assets.

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

Digital assets can be just as precious and important as physical assets that your clients can touch. They can possess considerable value and have become central to many areas of people’s lives.

For this reason, it is now recommended that all discussions with clients about estate planning and estate administration now include a discussion about digital assets.

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

In this guide:

1. the term ‘custodian’ means a person or service provider that carries, maintains, processes, receives, or stores a digital asset of a user; and

2. the term ‘fiduciary’ includes where the context permits the roles of attorney, executor, administrator, trustee, guardian, appointor, protector, enforcer, monitor, adviser and conservator;

3. the term ‘user’ means a person who has an account with a custodian.

Example definitions of the term ‘digital asset’ are provided in section 4 of this guide.
Section 2: Pre-Death Considerations

How to raise the topic of digital assets with your clients

The first and most important task is to raise the subject of digital assets. Ask your client:

☐ whether they have a computer, smart phone or similar type of device;

☐ whether they use any internet services or have any online accounts (such as an email account); and

☐ whether they have any specific wishes about what they want to happen to those devices (and any of the information that is stored on them) and those services or accounts if they lose mental capacity or die.

If they answer no (or if they instruct you that they do not wish to make provision for them), then a written file note, and potentially a letter of confirmation, should be made to that effect and no further action need be taken.

If they answer yes, then a discussion will be needed about who they want to manage and have control over their digital assets and what they want to happen to their digital assets when they lose capacity or when they die.

Specific questions when taking instructions for estate planning

During the discussion with a client who wishes to make provision for their digital assets, the following questions may be relevant:

☐ will they prepare a digital asset inventory/log and if so, how will it be securely stored?

☐ how will their relevant fiduciary find, and if necessary access, the inventory/log upon their incapacity or death?

☐ if they plan to store their logins and passwords with a password manager, have they reviewed the security protocols that will apply to their data?

☐ how are the digital assets owned (whether outright by the client, on trust for another person, under a licence type arrangement or by a third party such as a service provider/custodian)?

☐ are there confidentiality issues relating to their digital assets (e.g. do they contain information relevant to their employer or their clients)?

☐ do they wish to make, and are they legally able to make, gifts of any or all of their digital assets?
- Do any of the relevant terms and conditions of relevant service provider/custodian prohibit or limit how the accounts can be accessed or controlled by a relevant fiduciary?

- Do they wish to direct that any or all computers and other devices be cleared of content before being gifted to the recipients/beneficiaries?

- Do they have specific wishes about any online accounts – should they be closed or continued in a form allowed by a particular service provider/custodian (such as permitting a Facebook account to be memorialised)?

- Do they have any digital assets that they wish to be kept confidential (e.g. destroyed after their death)?

- Do any of the custodians offer online tools for the user to direct post-death or incapacity disposition of the account (e.g. Google Inactive Account Manager)?

- Is their appointed relevant fiduciary an appropriate person to manage and have control of their digital assets? Or should an appointment of a specific “digital estate” relevant fiduciary be made?

**Drafting considerations for estate planning**

After taking your client’s instructions, the following drafting considerations may be relevant:

- Do you need to review the relevant terms and conditions of the relevant service provider/custodian to determine what is permitted on the incapacity or death of your client (as the account user)?

- Do you need to define ‘digital assets’ in the Will, Power of Attorney or other related document?

- Do you need to draft a clause in the Power of Attorney authorising the relevant fiduciary to access, use, delete, control, transfer, distribute or dispose of the client’s digital assets?

- Do you need to draft clauses in the Power of Attorney that gift specific digital assets (those that are able to be gifted) to particular recipients?

- Do you need to draft a clause in the Will authorising the relevant fiduciary to access, use, delete, control, transfer, distribute or dispose of the client’s digital assets?

- Do you need to draft clauses in the Will that gift specific digital assets (those that are able to be gifted) to the beneficiaries?
Other specific steps to advise your clients to consider

☐ **Regularly download/save/backup their digital assets**: considering the difficulty in recovering digital messages, pictures and videos from certain cloud services, such as Facebook, these digital assets should be regularly downloaded from such sites and saved on other personal devices.

☐ **Prepare a Memorandum of Wishes**: with instructions about the digital assets and how they are to be dealt with. In particular it is important to note which assets must be preserved, and which can be deleted or destroyed at their death or incapacity to help their relevant fiduciary focus on items that are most important.

☐ **Prepare an inventory**: list of their digital assets, including: online accounts (grouping these by category); devices (such as personal computers, laptops, tablets, smart phones, storage devices, backup disks, USB drives etc.); important information stored on or accessed through devices; computer programs which their relevant fiduciary will need to operate in order to access their important information. This will provide their relevant fiduciary with details of these assets and where to find them.

☐ **Manage usernames and passwords**: Most digital assets will have an associated login and password. A relevant fiduciary will need to know this information in order to manage these assets on their behalf. It is more important that their relevant fiduciary know how to reset a password (e.g. the email account where a password reset link would be sent) since their passwords should be changed frequently. Some people keep a physical listing of their passwords or use a Password Manager as an electronic “master key” which can be shared with their relevant fiduciary under the “terms of service” (TOS) agreement for that provider. Bear in mind that some TOS agreements may not allow for access by anyone other than the account user and, if then, only with clear authorisation.

Further information on how to advise clients to plan for their digital legacy is available from **Digital Assets: A STEP Guide for Professionals -->**

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*)?

Upon the incapacity or death of a client, the following considerations may be relevant:

- **did the individual have a digital asset inventory/log or other document listing the digital assets?**
- **if there is no inventory, log or list available, should the relevant fiduciary create one by contacting friends or family, reviewing hardcopy records such as bank account statements for payment relating to online assets and/or accessing their computer or other device?**
- **does the relevant fiduciary need to take any steps to protect the privacy of the individual and the security of the assets, including determining whether it is appropriate to change passwords (and if it is, to do so as soon as possible) ?**
- **does the relevant fiduciary need to take any steps to protect the confidentiality of the digital assets, particularly if the confidentiality is not that of the deceased but of employers or clients?**
- **does the relevant fiduciary need to determine who owns the digital asset, whether access to them is regulated or prohibited, whether they have a financial value, whether they should be valued, whether they should be deleted, transferred to another person, sold, cashed out (if they have financial value) or another option provided by the custodian?**
- **does the relevant fiduciary need to consider whether, and when, it is appropriate to inform the service provider/custodian that the account user has lost capacity or died;**
- **before closing online accounts used by the deceased before death, does the personal representative need to download files, including documents, pictures and videos, onto a portable hard drive to ensure that the content stored with those accounts are available for appropriate distribution or other administration?**
- **where specific provision has been made for the digital assets, does the relevant fiduciary need to determine in what form they should be given to the recipients/beneficiaries (for example should a computer or other device be cleared of content)?**
if no specific provision has been made for the digital assets, how will the digital assets be distributed, and as above, in what form they should be given to the recipients/beneficiaries?

does the relevant fiduciary need to determine whether there are any liabilities relating to the online accounts and pay them together with other liabilities?

After a death, it is important for the fiduciary to take control of the computer and other devices of the deceased as soon as practicable. Such devices often provide access to valuable and/or confidential information that can be used to manipulate financial and other cloud accounts, with the possibility of loss to the estate.

If the deceased’s computer or other devices are protected by passwords that are not available to the personal representative, the services of an expert may need to be used to gain access to the devices. If the personal representative is not sufficiently acquainted with the operation of the various devices, again the services of an expert may be required.
Section 4: Digital Asset Definitions and Precedents

Definitions

The USA's Revised Uniform Fiduciary Access to Digital Assets Act (2015)\(^1\) provides the following definition of a Digital Asset:

“digital asset” means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.”

Canada’s Uniform Access to Digital Assets By Fiduciaries Act (2016)\(^2\) provides the following definition of a Digital Asset:

“digital asset” means a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means”.

Given the lack of Australian legislation and case law, practitioners in Australia may choose to adopt either of the above definitions, however the Canadian model is more likely to be promoted in Australian law reform.

Power of Attorney precedent

My Attorney, to the maximum extent permitted by the law, may on my behalf and notwithstanding my subsequent legal incapacity:

(a) use, access, modify, control, delete, assign, transfer or dispose of any of my Digital Assets; and

(b) obtain, access, modify, delete, and control my passwords and other electronic credentials associated with my Digital Assets.

Will precedent

I give my Executor the following powers, to the maximum extent permitted by the law:

(a) my Executor may on behalf of my estate use, access, modify, control, destroy, assign, transfer or dispose of any of my Digital Assets; and

(b) my Executor may obtain, access, modify, delete, and control my passwords and other electronic credentials associated with my Digital Assets.

Digital Asset Inventory precedent

An example digital asset inventory will be made available shortly at www.step.org/digital-assets.

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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

Website: www.step.org/digital-assets

Working Group: www.step.org/digital-assets-working-group

Contact form: www.step.org/contact-digital-assets-working-group

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