FINANCIAL AND ESTATE PLANNING IN THE AGE OF DIGITAL ASSETS: A CHALLENGE FOR ADVISORS AND ADMINISTRATORS^

Rod Genders and Adam Steen[a]

a: Corresponding author

Tel: +61 417557108
Email: asteen@csu.edu.au

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ABSTRACT

The overwhelming majority of citizens in Australia use email and the internet every day, yet few people stop to think of the value and importance of the online or 'digital assets' they possess. Complications arise for trustees and beneficiaries with respect to accessing these assets in the event of death or disability. We examine the nature of these assets and discuss the current legal issues they raise with respect to estate planning and administration. We argue that there is an urgent need for appropriate legislation to be developed to assist fiduciaries to discharge their responsibilities and support beneficiaries.

^This paper results in part from the work of the Digital Assets Working Group (DAWG) of STEP. The DAWG is a worldwide group of Estate and Trust administrators actively engaged in research, policy and practice issues involving Digital Assets.

Introduction

In general 'digital assets' can be said to include any assets that can be accessed and held online in digital form. Until now the importance of such assets has been overlooked in estate planning and administration. Digital assets are often forgotten by testators/donors when giving an asset list to relatives/practitioners, and it may be too late to rectify this once a fiduciary takes control. Digital assets are held in cyberspace and as such they are truly global, thus raising interjurisdictional issues, particularly when one remembers that online platforms are almost wholly domiciled outside Australia. From an estate planning and administration perspective, difficulties arise because service agreements between users and online platform operators usually stipulate that the contract is between the registered user and the operator. Hence, online platform operators have been either unwilling or unable to allow relatives or trustees to access the personal records and other online material of the account holder in the event of death or disability.

This paper provides a brief discussion of the importance of digital assets in the context of estate planning and administration. The issues discussed also have importance for others providing financial advice, such as financial planners. The lack of clear legislative guidance with respect to the rights to access and bequeath digital assets is challenging client advisors to discharge their duties and causing discomfort to beneficiaries. Legislative intervention is required because of the regulatory need to have uniform responses to the treatment of these assets in the affairs of clients. Best Interest Duty for financial planners is an example of a legislated requirement whose compliance is often frustrated because of inadequate authoritative standards for dealing with digital assets in the estate planning and administration affairs of clients. The paper is divided into the following sections: Section 2 defines and describes digital assets; Section 3 discusses implications for financial planning, estate planning and administration; Section 4 briefly discusses legislative progress in the area of digital assets; and Section 5 provides concluding comments.

Defining Digital Assets

The overwhelming majority of citizens in Australia use email and the internet every day. We suggest few people stop to think of the vast array of digital assets they possess, or reflect on their value and importance in conducting their everyday activities. Accordingly, the first challenge for advisors is to convey the scope and importance of digital assets.

Van Niekerk (2006) proposes that a digital asset is any item of text or media that has been formatted into a binary source that includes the right to use it. Essentially this means any kind of data stored in binary form over which a person has ownership rights. In examining the scope of digital assets Zhang and Gourley (2009) note that they include digital documents, audible content, motion picture and other relevant digital files that may be in current circulation or will be in the future. They further propose that digital assets may be stored on currently existing digital appliances or those that may be developed in the future.

The kinds of assets that could be classified as digital assets, include:

- electronically stored videos and photographs
- email
- financial information such as share trading
- online bank accounts
- blogs
- photos and videos stored on social media sites such as Facebook and Twitter
- domain names and websites
- purchased content from providers such as Amazon and iTunes
- personal financial and health records
- transaction and personal details held on auction sites holding details
- financial online payment systems such as PayPal
- content on government department systems including medical records and tax documents
- cryptocurrencies such as Blockchain and Bitcoin

(Cahn, 2011; The Elder Law Report, 2013).

For business operators, important digital assets include stored assets such as client or customer information.

Implications for Financial Planning, Estate Planning and Administration

Digital assets are an established and growing part of modern society. Faster download speed, reduced hardware costs and more flexible user platforms are encouraging the use of social media, cloud storage, and digital information stored in libraries— making digital assets increasingly attractive, convenient, valuable and, consequently, more important than ever before.

Toygar, Rohm and Zhu (2013) argue that digital assets are similar to tangible and intangible assets that people want to protect, transfer, sell or inherit. For financial planners, digital assets raise several issues, not the least of which are identification and valuation of those digital assets. The majority of digital assets possess monetary and/or sentimental value. Online banks accounts whose values are readily attainable are the most obvious type of digital asset possessing a monetary value. Establishing the value of other digital assets, however, is more problematic.

For estate planners and administrators, digital assets create particular challenges (Connor, 2010). There is explosive growth in the volume of such assets that the average citizen now owns or controls, and yet these digital assets are often overlooked entirely when it comes to writing a will or establishing a power of attorney. As technology has progressed, the number of assets available for transfer to heirs has increased. Further, some assets, such as digital collections, confer only the right to use and not own the purchased content; hence they are not something that can be bequeathed.

For those involved in estate administration, difficulties are experienced when attempting to apply delegated authority (such as power of attorney) to digital assets. The difficulty arises as service agreements between users and online platform operators usually stipulate the contract is between the registered user and operator. Many online providers have End User Licence Agreements (EULA) which restrict access to the digital assets to the named individual, and expressly exclude personal legal representatives. Terms of Service (TOS) and privacy policies are generally mandated during the initial sign-up process. Some of these contain a section entitled 'no right of survivorship and non-transferability', indicating that survivors have no right to access the email accounts of the deceased. Families of deceased or incapacitated users of digital assets are surprised at the difficulty and uncertainty experienced in attempting to deal with such assets. Online platform operators and service providers are usually either unwilling or unprepared to assist in facilitating access to these assets by trustees. For example, many Internet Service Providers (ISPs) do not have rules regarding what happens in the event of the account holder's death or diminished capacity. This problem is exacerbated when a person dies without a will.

As will be discussed further below, the above situation is compounded by the absence of legislation relating to these issues in most countries. Digital assets as a new category is global, which represent a unique barrier to an integrated approach in legal and government spheres, causing a number of issues for fiduciaries having to manage the affairs of a deceased person, or an individual who has lost or is losing their mental capacity.

While the issues for fiduciaries are not restricted just to elderly donors or testators, the rise in both the elderly population and in the numbers having access to the internet has meant that practitioners are seeing a significant increase in cases where digital assets appear and, in turn, an increase in the number of cases where they are unable to discover, access or transfer assets not in a physical format. This is only set to get worse.

This is further compounded by the need for companies providing or hosting digital assets to choose security and privacy over convenience or any form of third party access. There is a collision between the rights and needs of vulnerable people in modern society, and the increasingly global electronic register of our critical information and assets.

Governments, businesses, banks and all manner of other institutions are increasingly moving their data 'into the cloud' in the name of efficiency, cost and improved access. This is supposed to represent the 'democratisation of data' in the information age. Further, medical science is continually improving average life expectancy. However, as more of us live longer, and with increased access to the internet, there has been a significant increase in cases where trusted agents of incapacitated people are unable to discover, access or control digital assets.

Legislative Progress on Digital Assets

As the number of digital assets held by the average person increases, questions surrounding the disposition of these assets upon the individual's death or incapacity are becoming more common. Few laws exist on the rights of fiduciaries over digital assets.

Data sovereignty and jurisdictional law remain of critical concern. With many of the major online providers headquartered in the US, its Patriot Act is a serious concern when it comes to issues of local privacy and confidentiality laws. Both Australia and the EU have expressed concerns about these issues, and the increase in cloud storage will only inflame the situation.

Security of login access to online accounts (especially banking and finance) is also a legitimate concern, and something that must be adequately addressed. However, a mere blanket prohibition upon sharing of passwords is presently impractical in the modern context of a user who has died or suffers diminished capacity. Appropriate protocols must therefore be put in place to permit fiduciaries to access the online accounts of users in appropriate circumstances.

Not surprisingly, most law relating to estate administration was written in the pre-digital age. Due to the uncertain status of ownership and control of digital assets, and the inherent difficulties in extraterritorial application of laws or court orders upon international companies hosting these assets, the need for a major international push for mutually accepted guidelines is clear. Laws in this area are unsettled and vary between countries and even between states within a country.

Legislative reforms are currently underway in various countries that are intended to resolve some of the uncertainty. Currently ten US states have enacted the Uniform Fiduciary Access to Digital Assets Act 2014 (UFADAA) . The Act spells out the rights of fiduciaries with respect to clients' digital assets. Similar legislation is proposed in other countries including Australia.

Concluding Comments

For those involved in providing financial and other advice, an obvious concern is the security of an ever-increasing amount of confidential data. The lack of coherent and consistent legislative guidance across jurisdictional boundaries is obvious and needs to be addressed. Private international law will need to evolve to provide cross border harmonisation of law and practice across jurisdictions. In the meantime, practitioners must seek their own solutions and advice to deal with what can be difficult issues. As a first step, it should become standard for practitioners to identify and examine the digital assets of clients. The TOS agreements clients have entered into with various service providers may stipulate and govern how their fiduciary can work with their digital assets.

Some professional bodies and organisations involved in these issues are actively working with legislators and business to introduce workable solutions to the problems raised above. For example, the Society of Trustees and Estate Practitioners (STEP) has created a Digital Assets Working Group to clarify issues relating to the access, control and ownership of digital assets following the incapacity or death of the registered user. For professionals working in this space the STEP website at http://www.step.org/ provides a range of resources and details of professionals working in this area.

Future research will examine the issue of digital assets in the light of accounting standards and property law. Additionally, the significance of software systems and services as digital assets needs further research.

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