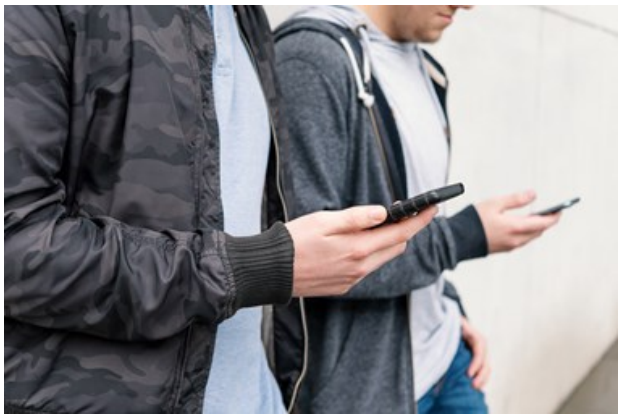


What happens with your digital assets after death?

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The term “digital assets” is very broad but put simply, it means any content that is stored digitally. Digital assets have become significant for most people as we conduct more and more of our lives in a digital (online) world; from social media accounts to file storage, online shopping and so on. These are assets (they belong to you) and they need to be considered in the event of a person’s death.

Examples of digital assets

There are many types of digital assets and this list is not intended to be exhaustive, however, when thinking of what digital assets you may own, you might consider:

- social media accounts such as Facebook, Twitter, LinkedIn and Instagram;
- personal email accounts;
- digital photographs;
- cloud storage;
- music files and playlists such as iTunes and Spotify;
- books stored on devices such as Kindle;
- online shopping accounts; and
- PayPal accounts or other financial accounts.

There is complexity associated with managing digital assets after death

Digital assets add a layer of complexity to managing a person's assets and estate, after their death due to restrictions in existing legislation and the uncertainty of which law applies to certain assets.

There is currently no specific law in Australia that applies to a person's digital assets when they die or that provides an executor with a right to have access to, or deal with, those assets.

Further, in Australia, research shows that approximately half of the adult population do not have a Will. Of those people who do have a Will, many would not have given thought to what would happen to their digital assets, including their emails and social media accounts, after their death.

This blog looks at the difficulties executors, and administrators where a person does not leave a Will (referred to as legal representatives), face in finding and gaining control over a deceased person's digital assets. It also identifies some of the different digital platforms and how they deal with managing and deleting accounts after a person's death.

What is "property"?

Generally, when someone dies, their assets only form part of their estate for distribution, if they are "property".

In Victoria, any property that can pass to a beneficiary or beneficiaries is defined in the *Wills Act 1997 (Vic)* as:

"any property which a person is entitled to at the time of their death, or which a legal representative of that person becomes entitled to by virtue of their position, after the death of the person."

Property is also defined in the Victorian legislation as including any interest in real property (i.e. real estate or land) or personal property.

Personal estate is understood to include leasehold estates, shares, rights, chattels, securities, credits, goods and moneys.

The definitions do not include any reference to digital assets and there is currently no standard legal definition of "digital asset" in Australian legislation.

When digital assets are not considered property

Some digital assets, due to their nature, cannot be classified as "property" (under the current legislation) and therefore do not form part of a deceased person's estate.

Also, some digital assets are controlled by online businesses and custodians. This creates issues for legal representatives trying to find or access digital assets of a person's estate. The right to access digital assets is governed by the specific terms and conditions of the organisation and the terms of service the account user entered into when they initially signed up.

In many cases, a digital asset may be a mere license to use an online service, platform or piece of software which is terminated on the death of the person who entered into the agreement. Some e-book subscriptions and magazines from Kindle and iTunes fall into this category.

A legal representative's ability to access a Will-maker's or deceased person's digital assets, and information about those assets, is important for a number of reasons. This includes being able to properly carry out their duties and obligations under the Will, to prevent risk of financial loss and to reduce the risk of identity theft.

Further, many digital assets are governed by foreign jurisdictions, such as where providers are based overseas. The jurisdiction relevant to the foreign digital asset will often be found by the terms and conditions of the agreement that the account user signed with the custodian online business.

"Memorialising" or closing digital assets

Many online platforms have policies and procedures in place to deal with accounts where the user has died. Below, we look at three such platforms and how they deal with the death of a platform user.

Facebook

Facebook has terms and policies that the user agrees to when setting up their account. Facebook grants users a license that is non-exclusive, worldwide, royalty-free, sub-licensable and transferable.

Facebook allows a user to nominate, if they want, for their account to be memorialised or permanently deleted if they die. If a user elects to memorialise their account, they are also able to appoint a Legacy Contact who can manage their account after they die. If a Legacy Contact is not nominated, then the person's account cannot be changed.

Only Facebook friends of the person who has died can be added as a Legacy Contact. A Legacy Contact can only add new friends, but not delete old friends. A Legacy Contact can respond to posts but cannot alter old posts or delete posts. They also cannot log in as the deceased user or view the user's private messages.

The account holder may also choose to give their Legacy Contact permission to download an archive of photos, posts and profile information they have shared on Facebook.

Only Facebook friends of the person who has died can contact Facebook about the death of a user.

Once a Facebook friend is verified by Facebook as a family member of a user who has died, they can request the removal of a user's account or the memorialisation of an account if the user has not selected an option themselves.

Instagram

Like Facebook, Instagram grants users a non-exclusive, worldwide, royalty-free, sub-licensable, transferable and fully-paid licence.

Instagram will memorialise an account when they receive proof of death from anyone who knew the deceased. Verified immediate family members may request the removal of an account from Instagram.

The immediate family member needs to provide proof that they are an immediate family member, such as the deceased person's birth or death certificate, or proof of authority under local law that the family member is the lawful representative of the deceased person's estate.

A memorialised account cannot be logged into by anyone else or altered. The content is only visible to the audience that the user already had, and not to the public. People can also post to the deceased person's account.

PayPal

PayPal is an online account with monetary value and the way in which an account is dealt with and closed is similar to that of a bank account.

Only a PayPal account owner can close their account unless the owner dies. If the owner dies, the legal representative of the person's estate needs to provide a copy of the death certificate, Will and identification of the legal personal representative to PayPal. The information will be reviewed and if approved, the account will be closed and any account balance paid to the estate.

What you can do now, to protect your digital assets if you die

When a person makes a Will, they should give thought to their digital assets and accounts in their estate planning.

They should prepare a list or private register of all their digital assets and relevant usernames and passwords for each account or service, along with instructions for a relative of executor to take over. Persons that have numerous accounts may use a password manager.

They should store this list or register with their Will and keep it in a safe and secure location. The details should not be included in the Will, as the Will becomes a public document when probate, or Letters of Administration if the person did not leave a Will, is granted.

However, every estate plan encompassing a person's digital assets will of course be subject to each organisation's individual policies, which may or may not allow access to legal representatives or family members.

How a Wills and Estates lawyer can help

Smith Family Law can prepare your Will and advise you when preparing a list or private register of your digital assets in order to assist your executor to administer your estate after your death. This will minimise the chances of your digital assets being lost, overlooked or abused.

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