Dealing with Digital Assets

In this month's CPD paper we will cover the anomaly that is digital assets. As the generation known as 'millennials' age and have families of their own they're turning to estate planning. As this is a generation who have matured squarely in the information age, they're also more likely to hold digital assets, so we need to start looking at how to deal with these. Unfortunately, there is a dearth of law in the UK covering the succession of digital assets. Bodies like STEP are looking into how these assets can be dealt with so this paper will discuss many of STEP's Digital Assets Working Group's (DAWG) suggestions.

What are digital assets

Stop for a moment and ask yourself how much of your life is online now? Both personally and in the course of your business you may manage a lot of your life digitally. You might use Instagram to keep your family updated on your holiday snaps or have a Facebook page that you market your business through. Maybe you invested in Bitcoin or other cryptocurrencies? Perhaps you even run a blog that you write regular articles for.

The next question then, logically, is which of these things are 'digital assets'? Which of them do we actually own in a way that allows us to pass them on and how do we practically go about doing that? The term 'digital assets' in itself is problematic. It's clearly too vague. The Law Commission in their "Making a Will" consultation paper recognised this and declined to attempt to define digital assets formally. They took the approach of using the term digital assets as a collective descriptor of the various assets and rights that typically are referred to as digital assets.

DAWG take the approach that the term digital assets covers two very different sets of assets and have defined these two categories as follows:

Digital assets can be digital records that we hold and access through computers and other electronic devices. Assets that fall into this category are not giftable at all as they have no true property rights distinct from the device that they are held on. They simply pass as part of the device, so a person who is gifted a laptop would receive the digital records held on it such as photos, videos and documents.

Digital assets can also be digital property rights and interests. These are part of a person's estate and can be gifted.

To clarify this distinction, we'll take the example of a professional photographer. On the hard drive of his computer he holds a portfolio of his photos. These are digital records. Attached to these photos is the photographer's intellectual property rights and copyright. This element is a digital property right which does hold value and can be gifted.

It is easy to get confused with digital assets where there is an overlap between physical assets and online management tools. One key example is online banking accounts. These do not fall into the scope of digital assets as the underlying asset (the money in the bank account) is not a digital asset; the only digital element is the portal used to access the account and manage it.

WHO ACTUALLY OWNS DIGITAL ASSETS?

The actual owner of a digital asset doesn't always match what we naturally feel. If we have spent a lot of money over the years purchasing books for our Kindle devices, or music from iTunes then we probably believe that we own these digital assets. After all, we purchased them. The actual position is not always so clear.

Often when purchasing a digital asset such as an e-book or music files from a third party what we are actually doing is purchasing a license to access and use that asset. Usually this right of access is limited to a certain account and it may only be used through that third party, i.e. you can only access music purchased from iTunes for as long as you hold an iTunes account. You have no true ownership of it. If a permanent copy of the file has been downloaded to the device then this would be owned and capable of being gifted, but usually the platforms terms of service prevent this.

When dealing with this type of asset it is always important to check the terms of service so you can be sure on what the limitations are and if it can be dealt with by will. Different providers will have different terms for what happens to an account on a user's death which should be made clear in their terms and conditions.

Digital assets that have proprietary rights attached to them do belong to the testator and will pass to his personal representatives. Key examples of theses types of assets are:

- Cryptocurrency such as Bitcoin and Litecoin.
- Domain names for websites
- Balance in an online betting account
- The content of blogs
- Monestised YouTube Videos
- Online gaming avatars and goods worth real-world money
- Photographs, videos, audio and other literary assets stored online.

These are all things that should be easy to identify and if necessary, specifically gift in the will. If the digital asset has intellectual property rights associated with it then the testator may need to consider gifting this separately. The drafter should make it clear if the intention is to gift the intellectual property rights along with the physical device it is held on. This will be discussed below under the heading 'Will Considerations'.

Remember that these assets may have considerable value. The highest grossing YouTube account made $22million in 2018.

DIGITAL ACCOUNTS THAT CAN BE DEALT WITH OUTSIDE OF THE WILL

Another type of digital asset that we may feel we own is social media and email accounts. Some people post a fair amount of information about their life on their social media accounts including pictures and videos and would like some control over what happens to this account when they die.

We don't actually own these accounts. These are also platforms that users simply have a license to use and that license will expire on the user's death. Some providers will allow the user some control over what happens to their accounts on death. It is possible for a user to put planning in place for what happens to come of these accounts on death, but it must be done in lifetime outside of the will.

The largest social media platform is Facebook with 2.38 billion monthly active users globally. Facebook gives users three options for dealing with their account on death; permanent deletion, memorialisation, or nominating a legacy contact. Permanent deletion is straightforward. Memorialisation keeps the account visible to the friends the deceased had connected with but doesn't allow anyone to log on or extract the data.

A legacy contact can be nominated in lifetime by completing a simple form on Facebook, and it may be logical to elect the person who is going to be the executor. After the user's death the legacy contact can access the account and manage it to an extent. They are allowed to update the profile and cover photos, post a final status, and download a copy of everything the deceased ever shared on Facebook.

Google offers a similar service to people with a Gmail account called the 'inactive account manager'. This allows a user to decide what happens to the data stored in their Gmail account once they have been inactive for a set period of time. As a security measure the user will be notified before their inactive account manager is activated after a period of inactivity, just to avoid their personal data passing to their contact before they've actually passed away. As with Facebook the user nominates a trust contact to act as their account manager after death, so they can either access and download the data or delete the associated accounts.

We can't deny the emotional impact of social media. It's important to ask a client what social media they are active on and if they have thought about what they would want to happen to those accounts on death. It's also important to consider each platform individually, as not all of them allow any control after death. Twitter is one of those and has recently caused controversy by announcing their plans to remove inactive accounts so that those usernames (or twitter handles) could be released for new users to use. Social media might not have any property rights attached to it, but its sentimental value can be great. The BBC reported on one case of this this news upsetting the surviving partner of one twitter user, Dean Eastmond, who passed away aged 21. His surviving partner finds it helps with his grief to reread the deceased's old tweets and "can't imagine how he'd feel" if he saw someone else using this handle.

WILL CONSIDERATIONS

Now we have an understanding of what types of digital assets can and can't pass to the personal representatives of an estate we need to consider how to deal with the various types of digital assets by will. This is another area where STEP DAWG is greatly useful, as in their practitioner's guide to digital assets they have suggested a number of clauses to assist a drafter.

A good starting point is a definition of what digital assets are being disposed to, if we are referring to them collectively and not making specific gifts. STEPs example clause for this is:

"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 personal representative(s)."

Of course, this then calls for a definition of what is meant by digital records so the distinction between electronic records held on devices and the actual proprietary rights attached to them is clear. This means we can then consider including clauses to specifically gift electronic devices, but with directions as to what to do with the digital records. This slightly amended example of a similar clause provided by STEP will show you this in practice. Here we can see the separation of gifts of the physical device and the digital information stored on the device that the testator had intellectual property rights over, in this case literary works:

"I give my laptop to [NAME] but I direct my Executor, before distribution of this gift to transfer such of my Digital Records as represent my Digital Literary Works from such laptop to an external storage device (and delete the same from such laptop), which (as set out in clause [#] below) I give to [NAME]."

We might also want to consider appointing a special executor just to deal with the digital assets the testator holds. It isn't always necessary as naturally an executor has the authority to deal with any of the digital assets that vest in him, but it may be that the person the testator wishes to handle their general estate is not the best fit to handle their digital estate. I'm sure we all know someone who would make a great executor but who is woefully unskilled at using a computer. Whatever clause you are using to appoint a digital executor, make sure the definitions used match up with any other definitions in the will that describe digital assets, so it is clear exactly what the digital executor has power over. For example, if using the definition given above your digital executor appointment clause may look like this:

"I appoint [NAME] to be my executor in respect of my Digital Property Rights ("my Digital Executor). I also authorise [him/her] to manage my Digital Records and carry out all actions and incur such costs and expenses as are reasonable to recover, preserve, and transfer by Digital Records where appropriate."

Specific gifts of digital assets that we know form part of the testator's estate and which will vest in the personal representatives should be relatively straightforward. The same rules apply in regard to being as specific as possible when describing the asset so the executor can identify it. It is often useful to attach a general statement of "*insofar as I am permitted to transfer them"* if the actual proprietary rights over the asset are unclear. Main offenders here are store accounts and air miles.

External Considerations

We've identified the digital assets in the will, and we've appointed digital executors to deal with them, but that might not be all that we have to do to make the actual transition of the assets as easy as possible. It's all well and good identifying the assets and having people in place to deal with them, but we also need to think about how those executors or beneficiaries will actually access them! After all, a gift of the testator's professional photography portfolio held on their cloud storage account is worthless if it can't be accessed.

Perhaps the worst cases of digital assets being lost because of lack of access is cryptocurrencies like Bitcoin. This digital currency can be gifted by will, but if the executors don't have access to the personal and private keys associated with the digital wallet that the currency is held in it is lost forever. The company will not help an executor access the account even on production of a grant of probate.

Research carried out by Coincover suggests that 4 million Bitcoin has been lost this way. Currently a single Bitcoin is worth just over £6,000, so that's a staggering amount of lost currency.

Some practitioners suggest leaving a separate letter of wishes with the will with details of all of the testator's digital accounts and assets giving instructions on how to access them. This letter is also known as a 'digital assets log'. The obvious problem with this is that it is not very secure. We are generally discouraged from writing down our passwords so writing down full instructions on how to access what is probably very personal and possible valuable information seems unwise due to the damage that could be caused if it fell into the wrong hands. If someone other than the executor finds this information the estate may even suffer loss.

Another issue with this approach is that sharing passwords is normally a breach of the terms of service of the account provider, if we are dealing with access to information stored using a third party such as a cloud account. This is more of a contract law issue than a succession one.

Even if the testator does opt to leave a letter of wishes the access to and distribution of their digital estate is as the mercy of their memory. If they change their passwords, they need to remember to update the information in the letter of wishes as soon as possible.

There are companies out there that specialise in digital password banks and digital inheritance vaults that allow a person to securely store the information required to access online accounts. These services should be securely encrypted and therefore a much safer option than a written letter of wishes. They do still rely on the testator keeping the stored information up to date though.

Law Commission proposals for reform

In July 2017 the Law Commission launched a public consultation paper into making a will (consultation paper 231). We have covered the suggestions for reform that they proposed in previous CPD papers, but the issues identified, and the reforms suggested all centered around a need to modernise succession law. In this paper the issue of digital assets was discussed briefly.

The first issue they identified was the difficulty in defining digital assets, but this has been discussed above.

The main issue according to the Law Commission is the lack of certainty over the legal status of different types of digital assets. They accept that an electronic device like a computer or a phone can be gifted in a will in the same manner as any other tangible asset. This is not surprising as these items fit firmly within the definition of personal chattels under section 55(1)(x) of the Administration of Estates Act 1925, as amended by the Inheritance and Trustee' Powers Act 2014. The complications arise when we have to consider whether the beneficiary has any rights over intellectual property associated with the device. When we gift the digital records, as we gifting the right to use those records for gain too? Is it implied or does it need to be made express? The example the Law Commission use to demonstrate this is below:

"A professional photographer leaves his computer containing all of his work to his children, it might be asked whether the children have any legal right to make commercial use of those photographs. While the law is clear that the copyright of those images is property in its own right, separate from the

computer, it might not be clear whether the testator intends to give a beneficiary all of the hardware, the image files, and the copyright."

Obviously the only way to solve this issue at the moment is to gift these things specifically and make sure it is clear in the will exactly what is being gifted, for example "I give my Dell desktop computer with all copyrights [other descriptions of intellectual rights as necessary]…."

The Law Commission pointed out that many testators opt to leave a list of passwords and instructions on how to access their devices and accounts. This is often encouraged as there are some assets that will be lost to the estate if the executors are not given the means of accessing them. The problem with this is that sharing passwords is often in breach of various services user agreements. In fact, usually we are encouraged to keep these things a secret and not even write them down!

Clearly a solution is needed to make the transition of digital assets easier and the law clearer. Unfortunately, the Law Commission report failed to make any recommendations for reform. The main issues stem not from succession law, but from contract law and intellectual property law. They suggest that for any progress to be made in this area of succession law we must first look to reform the laws relating to user agreements and terms of service for digital platforms as that is the root of the problem. They hope to address this in a future law reform project.

Conclusion

This CPD paper has hopefully given readers a good overview of the core difficulties with identifying and dealing with digital assets that a client might own. Digital assets shouldn't present too much of a problem to the drafter if they go in armed with the knowledge of what types of digital assets can and can't be gifted so they can appropriately advise the client. This is definitely an area to keep an eye on for any future developments, as with the rapid increase in digital estates change to clarify the law is surely coming.

For further reading the author recommends looking through the resources that STEP offer on the topic here: https://www.step.org/digital-assets-global-special-interest-group

Important Reminder:

These notes are produced solely for the benefit of SWW members when completing the December 2019 CPD test to gain 1 hour of structured CPD towards their annual quota. The notes do not represent legal

advice and no reliance can be made on the content of the notes in any or individual specific client circumstances. Having read the notes members should cement their understanding by considering further reading around the subject – cases details can be found by searching the case references using BAILII or GOOGLE.