Digital records and estate planning

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The report of the NSW Law Reform Commission, *Access to digital records upon death or incapacity*, brings to the fore an issue of growing importance for estate planning and estate administration. Whilst the report makes recommendations which will require a legislative response, and a nationally consistent approach, it also includes useful prompts for current practice. That is the focus of this article.

Snapshot

- Digital records should be considered during estate planning.
- Legal personal representatives may need to search digital records to administer or manage an estate.
- Provisions may be included in wills, powers of attorney and enduring guardian documents, authorising the legal personal representative to deal with digital records. This makes the wishes of the client known and should assist in dealings with service providers.

What is a digital record?

Digital records may exist in digital or other electronic readable form. It is an expression deliberately chosen by the Commission to be broader than the more conventional 'digital assets', as the record may not be an 'asset' in the conventional sense – it may not be owned by the user, even though it may have been created by or relate to the user. Digital records may have financial or sentimental value to the user. Often they will be useful to a person dealing with the user's managed or deceased estate. The report observes that people regularly access photographs, music, movies, emails, social media, games, bank accounts and even medical records online. People are assembling a digital legacy of considerable volume and importance which can include things of financial value such as domain names and copyright interests in literary works that only exist online.

It is appropriate, when assisting clients with their estate planning, to discuss digital records and ask whether the client wishes to make particular arrangements for their digital records on death or incapacity. Some practitioners include provisions, not only in wills but also in powers of attorney and enduring guardian documents, specifically authorising the relevant legal personal representative ('**LPR**') to deal with digital records to the extent it is relevant to their role. This makes the wishes of the client known and should assist in dealings with service providers.

Who should be the executor, attorney or enduring guardian (LPR)?

A crucial issue when taking instructions for a will is whether the person best able to act as the client's executor is the person best placed to manage the client's digital records. Whilst the notion of a 'digital executor' is very recent, the concept of a person being appointed to bear responsibility for only part of a deceased's estate has a long history. *In the Goods of Harris* (1870) LR 2P & D 83 and *Re Wills of Mary Clark* [1903] NSWStRp 83; (1903) 4 SR (NSW) 248 are early examples. Recent examples – where a 'literary executor' was appointed – are *Sharp v A-G (NSW)* [2015] NSWSC 1580 and *The Estate of Nicholas Paul Enright* [2017] NSWSC 1646. If this approach is adopted, in due course, a grant of Probate can be made to the digital executor in respect of the digital records alone.

A similar issue arises when taking instructions for an enduring power of attorney or enduring guardian appointment. In both instances, the client may wish to appoint a different attorney or enduring guardian to deal with digital records. If those instructions are given, different instruments of appointment – such as two enduring powers of attorney - may be needed. The limit of the digital attorney's authority can be stated in clause 3 of the prescribed form as a Condition and Limitation. Each instrument should recognise the existence of the other.

What authorities, functions or restrictions should be imposed?

A multiplicity of further issues can arise for instructions. The client may wish to confer broad powers to deal with digital records. The instructions might relate to management of financial assets or things of a personal nature; for example, to ensure that email correspondence with sentimental value is printed for a family member. On the other hand, a client may not want anyone to access their digital records. Alternatively, they may want the LPR to download account content for distribution to beneficiaries or others.

Where the client wishes to give broad powers to deal with digital records on their death or incapacity, the provisions should be drafted to cover all actions that may need to be taken. A will clause referred to in the Commission's report included the following terms: 'Subject to the terms and conditions of individual providers, I authorise and direct my executor to (i) access, control, modify, transfer, delete, close or otherwise deal with any digital records…'

Some clients may be concerned about maintaining their privacy. In this context, the following will clause was referred to in the Commission's report: 'My executor will do all things reasonably necessary and possible to: (i) have all emails deleted from my email accounts; (ii) subject to the terms and conditions of individual providers, have all, or any part of, my digital resources and digital accounts which are published or stored on the internet closed.'

What digital records will be relevant to an attorney as compared to a guardian?

Generally, the authority given to an enduring attorney will relate to legal or financial aspects of the principal's digital records. The function given to an enduring guardian will concern personal aspects. Certain records in an email account may be relevant to the attorney, such as emails from telephone providers sending an invoice for payment, but are unlikely to be relevant to the enduring guardian's role. The digital records on MyHealth website may only concern the enduring guardian. Some digital records may be relevant to both.

What other advice should be given?

Clients can assist their LPR by keeping a list of digital records.

As technology develops, and its role in our lives continues to evolve, provisions in estate planning documents may need to be reviewed. Further, it is important clients are aware that, at least at this time, provisions in their estate planning documents regarding digital records do not guarantee the LPR will be able to deal with their digital records to the extent desired. The LPR may be constrained by factors such as terms of service agreements, policies of service providers and laws that may prevent service providers from sharing or allowing access to records.

What does the LPR need to consider in relation to digital records when administering a deceased estate?

The Commission points out that prior to the digital age an executor or administrator unfamiliar with the testator's financial circumstances would search through personal records relating to bank accounts, superannuation and utility providers, amongst other things. Now, many of these records are held digitally, often in email accounts. If access to digital records is not available, the LPR may have difficulty ascertaining the full extent of the assets and liabilities, resulting in difficulty fulfilling their duties to call in the assets of the deceased, preserve their value and pay the debts of the deceased.

Many of these matters are also relevant for an attorney, financial manager, enduring guardian or guardian. If they are unable to access the digital records of an incapacitated person, they may be unable to satisfy their obligations, such as to pay outstanding invoices. Confidential information can be held in digital records. If they are not monitored (or if appropriate, terminated or passwords changed) there may be a greater chance of identity theft. Significant assets, like Bitcoin, could be lost. Depending on the circumstances, LPRs could be exposed to personal liability.

What does the practitioner advising the LPR need to consider?

It may be useful to:

- ascertain whether the deceased or managed person had prepared a list of their digital records (and, if not, inquire whether the LPR can prepare one);
- refer to options for dealing with the digital records (for example, deleting, selling or transferring them);
- suggest they consider whether there is an increased risk of identity theft if accounts are not closed or otherwise dealt with;
- advise the LPR:
  - to find out if there are any invoices received digitally
  - to consider downloading account content for distribution to beneficiaries, or for other administrative purposes, before closing online accounts
  - to consider the privacy and security of some records (such as changing the passwords, where possible and where allowed)
  - that terms of service agreements and policies of service providers need to be considered
  - that there can be criminal law implications for unauthorised access to and modification of restricted data held on a computer (see *Criminal Code* (Cth) s 478.1; *Crimes Act* 1900 (NSW) s 308H).

Can the client make a digital will?

The short answer is 'not formally', although 'digital wills' have been possible since the introduction of the 'informal wills' legislation in 1989. There have been cases in Australia where courts have been prepared to declare that a digital document is a will of a deceased person utilising the dispensing powers in s 8 *Succession Act 2006* (NSW) and similar provisions in other jurisdictions. There may have been many more digital wills which have not been discovered or accessed, e.g. *In the estate of Leslie Wayne Quinn (deceased)* [2019] QSC 99.

It may be that the requirement of social distancing and the increased prospect of death through the Covid-19 pandemic will hasten the use of digital wills, or other informal wills. However, if the Commission's proposals for digital wills, and all informal wills, are adopted they will be treated differently to a will which meets the formal requirements when it comes to the client's digital records. This is because it is proposed that Probate will always be needed to confer title on an executor appointed under an informal will. If the Commission's recommendations are adopted, an extra advantage of formality is that an executor appointed by a formal will has title to administer digital records whether or not there is a grant of representation. **LSJ**