

How do I gift my digital assets in my Will?

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What is a digital asset?

A digital asset can loosely be described as any item held in a digital format which a person holds a right over. Some examples of what constitutes a digital asset include bank accounts (not including the money in the account), cryptocurrency, websites, photos, social media accounts, and software.

There is no legislation at the moment in Australia which addresses the change of ownership of digital assets after death. But, given the prevalence of digital assets, it is possible that legislation will be put into place in the future to provide greater clarity.

What digital assets can I gift in my Will?

The law in this area is still under development, and it is therefore vague as to what assets can be gifted under your Will.

Currently, you are able to gift digital assets such as funds in online accounts (PayPal), but not email or social media accounts. As your Will may come under more open scrutiny following your death, your Will should never include any private login information or any passwords.

If you do have digital assets of significant value, you should seek advice from an estate planning lawyer to investigate options to ensure that they pass to your intended beneficiaries. Given the nature of digital assets often being primarily contractual rights from service providers, some effort may be needed to understand the underlying contractual terms.

Get help from an estate planning lawyer: 02 9997 2111

Why might I consider gifting digital assets in my Will?

Digital assets can be of significant value, whether it be sentimental value or monetary value.

In some circumstances, you may want to gift access to your digital assets to certain beneficiaries in your Will, such as access to photos stored in the cloud. Or you may want to ensure that any private information stored in a digital format is destroyed following your passing.

Planning what happens to digital assets after death

It is vital that you have provided instructions as to how you want your digital assets to be dealt with upon your death. This can assist your executors in identifying what digital assets you own and then distributing those assets in accordance with your instructions, including closing accounts where applicable.

There are a number of things that you can do to prepare for dealing with digital assets.

Compile and maintain a list of your digital assets

Compile a list of your digital assets and how you would like them to be dealt with following your death. This will be a reference point for your executors and where necessary reference to the digital asset may be made in your Will.

Otherwise, the list will assist your executor in identifying the assets to be dealt with. It would be good if the list was updated regularly too and you ensure your executor is aware of the list and how it can be accessed.

Have any digital assets valued

Having your digital assets valued can be a time saver for your executors upon your death and can make for a more timely distribution to your intended beneficiaries.

For those digital assets having a commercial resale value, this at least identifies its value at the time of making your Will although that value would need to be updated as at the date of death. It will also identify those digital assets that may have no or limited commercial value.

Check if your online service providers have legacy agreements or other access requirements after death

Some digital platforms such as some social media platforms do not allow for the transfer of ownership and instead require that you put in place a legacy contact. This means that following evidence of your death being provided, an access key is provided to the person you have

nominated for access.

You may need to carefully review the policies and service agreements of your social media accounts to better understand their legacy provisions regarding access to your accounts upon your death. Equally, often social media platforms have an automated deletion provision upon your death if this is what has been nominated by you, or it may apply by default.

Keep your important account information and passwords in a safe place

That is an obvious one, but it is also important that your executors or your nominated beneficiary know how to find those passwords following your death. It can be helpful to use an online password manager where some details can be shared with trusted users, or emergency access can be provided to a selected person (for example, your executor).

What might prevent access to your digital assets?

There are a number of matters that may impinge access to digital assets upon your death.

- The void of legislative framework regarding digital assets complicates matters. Sometimes access to your digital assets is prohibited by legislation. This makes including the gifting of digital assets in your Will complex, as the moving goalposts mean that a clause included in your Will may or may not be legally enforceable if it were to be challenged later.
- Policies and service agreements relating to digital assets change. Between the time of making your Will and the time of death, those policies and service agreements may change such as to contradict what you intended in your Will. There is currently no law in place regulating the construction of these service agreements.
- Privacy laws can be a hurdle for access to digital assets.
- Criminal law also requires consideration, as it may not be legal to access a digital asset upon death without permission.
- Assets can be encrypted, and sometimes even the organisations holding the digital asset cannot provide access to the assets without the password.
- Access to digital assets may require two or more multi-factor authentication, and if that includes facial recognition, then this will be problematic.

If a digital asset is unable to be accessed following your death, in some cases, a court order may be needed for access which can be timely and expensive.

Get help from an estate planning lawyer

Dealing with digital assets in your Will can be more intricate than a simple Will. Our estate planning team are able to guide you on how best to deal with your assets, including your digital assets.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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