

Article Information

Authors: Donna Benge, Rod Jones

Service: Estate & Succession Planning, Estate Administration, Privacy

Sector: Private Clients

Digital Assets - what's the fuss?

A recent American case, where executors of an estate took action against Yahoo Inc. for the release of the deceased's electronic email account (a "digital asset") is interesting on several fronts.

Whilst one of the legal issues of the case, whether the Stored Communications Act prevented Yahoo from disclosing the deceased's personal privacy interest, is not relevant to Australia it highlighted the issues between the protection of privacy rights and data asset protection after one's death vs the rights of an executor (or for that matter any legal personal representative - LPR) to access that information as part of the administration of an estate.

The court's interpretation of what was meant by "lawful consent" to the disclosure of information under the Stored Communications Act is not relevant to this article but it does highlight the issue of whether an LPR, in either their role as an attorney or an executor, can access a person's digital assets.

Perhaps the real question is - do you want your attorney or executor to access this information as part of their fiduciary role?

If yes, consideration should be given to providing them with consent in either your Will or Power of Attorney - at least this provides them with written authority to do so. Whether this is sufficient for the actual service provider e.g. Facebook is another matter.

If no, again it may be wise to express your wishes in writing.

But will this automatically allow your LPR to access you digital information and follow your wishes?

The Yahoo case highlighted some relevant issues:

- It acknowledged that one of the fundamental duties of an LPR is to "take possession" of property of an estate. The Court found it would be difficult to interpret any Federal legislation in such a way that would override existing State based probate legislation and common law that prevented an LPR in providing lawful consent and to carry out his or her duties.
- It was accepted that email communication within a provider's account was "property" of the deceased that could be collected by the LPR.
- It was noted that the terms of any service agreement entered into when an account is opened may confer a right on the service provider e.g. Yahoo/Google to terminate any of its user accounts whilst they are alive, and this could even occur after the death of the user thereby preventing an LPR from gaining access. The Yahoo service agreement gave them the right to terminate a password, remove and discard content and to deactivate or delete an account and files.
- Is the service agreement, that we all sign up to, a factor in determining the rights of the LPR. Was the service agreement a valid contract that trumped the rights of an LPR?

Whilst this was not formally resolved one Judge asked the question whether boilerplate language that a user must accept "as is" before they are granted user access binding in any event - the argument being that it could be against public policy and therefore not enforceable? It was noted that Yahoo could not delete information from a clients account after Court action had been commenced.

Where does this get us in Australia?

- The issue of access to digital assets should occur as part of any estate planning conversation.
- Instructions and/or consent should be provided to your intended LPR, either via your Will or Power of Attorney, to either take control of, or access your digital assets. The LPR then has informed consent to take or not take action.
- Whether a service provider will comply with the request of your LPR may depend on other matters including the terms of any service agreement that has been accepted or even whether the service provider is subject to the jurisdiction of Australian courts.
- Whilst many US States have enacted legislation that deals with fiduciary rights concerning digital assets there is no current Australian law that directly addresses the issue.
- The NSW Law Reform Commission notes that a number of laws may be relevant including Contract law, Private International law, Criminal Law, Privacy law, Property law, Copyright law, Succession law and Estate administration law. It further notes that the growth of digital assets has outpaced State & Federal legislation in Australia with legislation in the US being enacted in most States!