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DEALING WITH TRICKY DIGITAL ASSETS

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1. Introduction

The law surrounding digital assets is new, and rapidly developing, due to the relatively novel and quickly evolving nature of these "tricky assets", which can also turn out to be incredibly valuable.

Many, if not most, "digital assets" as we think of them today have only come into existence this century, and in the majority cases, only over the last decade. The quality and quantity of digital assets is subject to rapid and constant change on an exponential scale, as technology and accessibility to digital assets develops at a torrid pace. All of this means that new legislation and common law needs to develop, adapt and evolve quickly in order to keep up with these new assets, and how they change and differ from more traditional forms of property.

Unfortunately, the development of legislation in this area has not kept up with the development in the technology. Throughout North American legal jurisdictions, there is no comprehensive legal regime providing certainty regarding how such digital assets are to be dealt with or accessed by third parties, including after the original owner has died or lost capacity, which can be especially problematic in the context of wills and estates.

The lack of a comprehensive legal regime in this area means that it can be difficult or impossible for the estate trustees or personal representatives of an original owner of digital assets to access, control or administer these electronic assets, after the original owner is no longer able to do so.

Generally, digital assets include a person's electronic correspondence (emails and text messages), their social network accounts (Facebook, Twitter, Instagram), electronic documents, digital subscriptions, webpages, blogs, domain names, virtual currencies (Crypto, Bitcoin, etc) or other digital assets such as Non-Fungible Tokens (NFTs)[1]. These assets can be extraordinarily valuable, and in some cases far more valuable than the traditional assets a person may own.

The issues with these assets, from a trusts and estates law perspective, is that they are very easily lost or misplaced by their owners, and they are not easily accessible by the

[1] Patricia Sheridan, "Inheriting Digital Assets: Does the Revised Uniform Fiduciary Access to Digital Assets Fall Short?" (2020) 16:2 Ohio St Tech L J 363, at 365. [Sheridan]

"personal representatives" of the owners, whether it be their estate trustees, POAs or other fiduciaries, after the original owner dies or loses capacity to deal with the assets.

The remainder of this paper will discuss digital assets generally, hurdles that estate trustees face in accessing and administering this novel form of property, and the legal regimes that are in place or contemplated in Canada and the United States that are meant to address these issues and assist fiduciaries in dealing with these "tricky assets".

2. The Rise of Digital Assets & Impact on Estates

From the perspective of estate law, of significant importance is the impact that digital assets can have on the administration of estates and the complications or difficulties that such assets can present to executors looking to secure, administer and distribute such assets in accordance with a testator's will.

An executor can run into trouble as they attempt to access, manage or distribute these digital assets, especially if a testator has not given sufficient thought to, or made the requisite planning, to ensure their personal representative can easily access and administer these assets after they die.

This difficulty results mostly from the fact that these assets are not accessible in the same way that traditional assets are. They require passwords, keys, usernames, access codes or some form of digital authority in order to access. Further, there is not a comprehensive, uniform legal regime in place that applies to or allows for such access, or authorizes estate trustees to access and control digital assets that were owned by a deceased. At least not yet in Ontario and most parts of Canada.

Typically, issues arise when the codes or keys that are required to access the digital assets have been misplaced or lost by a testator, or where a testator has failed to identify the whereabouts of these access keys to their personal representatives, rendering the assets completely inaccessible. Furthermore, unless the testator, during their life, somehow establishes that their personal representative is to have the authority to access these assets, the estate trustee may not be able to access them without a court order, given the lack of legislation providing for broad fiduciary access to digital assets.

The lack of legislation in this area presents a problem, especially given the rapid growth of the digital asset industry around the globe.

The development of digital assets across the globe has seen a tremendous rise recently, in particular as crypto assets, including in the form of an ever-growing number of cryptocurrencies, and block chain technologies have become more sophisticated and widespread. Among the latest developments is the rise in popularity of the non-fungible

token ("NFT"). An NFT is "a digital certificate of ownership recorded on Ethereum blockchain, a decentralized public ledger that's impossible to retroactively modify."[2]

NFT's are special, and quite valuable, because they are unique and cannot be duplicated, making each piece rare. Last year, Christie's Auction House held an auction of NFT works, which saw the sale of nine works for over $16 million.[3] The record NFT art sale price known to date is upwards of $69 million.[4]

It goes without saying that digital assets have the potential to be incredibly valuable. Recent estimates have claimed that cryptocurrency assets alone, which only form one subset of digital assets, now represent an industry worth upwards of $2.48 trillion worldwide.[5]

The issue for estates and estate trustees, is that these assets can often be "lost" or "neglected" by their original owner or rendered inaccessible due to lack of maintenance. This can result in the digital asset becoming lost, either to the original owner while living, or to their estate trustee after they die as a result of estate planning that does not properly account for the transition of these digital assets from the original owner to the personal representative of their estate.

For example, it is estimated that 20% of all Bitcoins (one of over 10,000 types of cryptocurrencies in circulation) have been 'lost', meaning that they have not been accessed in over 5 years. This accounts for approximately 3.7 million in lost bitcoin, or, approximately $140 billion in lost Bitcoin, not to mention other cryptocurrencies or e-assets that have also gone missing.

These significant losses mean that a substantial number of crypto-asset-owners may be dying or becoming incapacitated without leaving their heirs or personal representatives with a clear pathway to access these assets.[6] In many cases, the owner of digital assets may die without providing the requisite information or direction that would allow for the executor of their estate to access the assets, or even be aware that such assets exist.

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[2] Lauren O'Neil, blogTO, "Someone in Toronto just sold a digital home for more than $600k" Online: https://www.blogto.com/tech/2021/03/toronto-digital-house-nft-600k/

[3] Christies Auction House, "10 things to know about CryptoPunks, the original NFTs" (April 8, 2021), Online: https://www.christies.com/features/10-things-to-know-about-CryptoPunks-11569-1.aspx

[4] See Jacob Kastrenakes, "Beeple sold an NFT for $69 million" (March 11, 2021), The Verge, online: https://www.theverge.com/2021/3/11/22325054/beeple-christies-nft-sale-cost-everydays-69-million

[5] Olga Kharif, "Cryptocurrency's Value Surges to $45 Billion One Day After Its Debut" (May 11, 2021), Bloomberg, online: https://www.bloomberg.com/news/articles/2021-05-11/cryptocurrency-s-value-surges-to-45-billion-after-monday-debut

[6] Zachary Crockett, "Death, bitcoin, and taxes: A guide to post-life crypto", June 6, 2021, Issue #162, the Hustle

Often, estate trustees' ability to access digital assets that were owned by the Deceased is restricted by the protocol or procedure of the tech institution or application or database that has control over the assets. These gatekeepers will usually require designated authority established by the testator while living, or alternatively a court order, in order to allow an estate trustee to access a deceased's digital assets. And without comprehensive legislation in place allowing broad estate trustees access to digital assets that were owned by the testator, executors can find themselves faced with costly and lengthy court applications that are required to obtain orders necessary to gain access to the assets.

3. **Case Studies**

To demonstrate the real-life difficulties of password protected accounts and post-mortem access to digital assets, consider the following publicized stories.

In 2014, Maureen Henry, had to obtain a court order to gain access to her late son, Dovi's social media accounts. Dovi Henry's last contact with his family was in April of 2014. Three months later, under suspicious circumstances, his body was recovered from a Toronto Marina on Lake Ontario. Due to the state of decomposition, a positive identification wasn't made until late 2016. Since that time, Maureen Henry has been trying to find leads regarding the mysterious death of her son. One potential lead was reviewing Dovi's social media accounts and related messages, to determine what may have happened to him leading up to his death. However, companies like Facebook, Google and Bell required a court order to provide Maureen with access to her son's accounts. Maureen ended up hiring legal counsel who helped her obtain the court order to be able to access his social media accounts, in the hopes that those would shed some light into the circumstances of his death.[7] However, even once those orders were obtained, the tech companies in some instances did not immediately provide access to the digital files, on account of the fact that while Dovi was a Canadian citizen, his digital accounts were held in American locations and the companies' position was that a US court order would be required in order for the accounts to be released.

In another social media case, Carol Anne Nobel of Toronto sought access to the Apple account she shared with her late husband, Don Nobel, who died of a rare spinal cancer in 2016. Before dying, Don asked Carol to finish writing his book, which was saved on his Apple account. What turned out to be problematic was that the account was actually held in Don's name and did not designate Carol as a secondary owner. Carol is the executor and sole beneficiary of Don's estate, yet she could not access the account because it was held in Don's name and Apple took the position that it could not release the account material without a court order, due to privacy concerns. In early 2017, Carol contacted

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[7] Josh K. Elliot, "Judge grants mother access to dead son's social media," CTVNews.ca, Thursday, October 12, 2017.

Apple after providing documentation proving she was entitled to her husband's estate. Apple informed Carol she needed a court order as providing the password to Don's account would contravene a U.S. law, the *Electronic Communications Privacy Act* of 1986.[8] This resulted in years-long court proceedings ensuing.

In 2018, Matthew Mellon, the billionaire scion of the family that founded BNY Mellon Bank[9], died suddenly in a hotel room in Mexico before a scheduled stay at a rehabilitation facility. Before his untimely demise, Matthew turned a risky $2 million investment in the cryptocurrency XRP/Ripple into a record $1 billion profit. Matthew reportedly owned approximately $500 million worth of the XRP cryptocurrency at his time of death. Matthew had told his friends and family that he kept the digital keys to his assets in cold storage (meaning storage disconnected from the internet) in other people's names across various locations across the United States.[10] Matthew died leaving behind three children and without telling anyone about the private keys to his cryptocurrency wallet or the location thereof.[11] This had the devastating result of seeing Matthew's immense crypto fortune lost forever, due to the fact that he had not shared the "keys" to his accounts or their location with his heirs, who could not locate them following his death.

In 2018, Gerald Cotten, the CEO of the crypto exchange Quadriga, died suddenly at the age of 30, while on his honeymoon in India. Gerald died with the exclusive knowledge of the whereabouts of the private keys to $250 million worth of his personal and his client's cryptocurrency. Cotten failed to share the information, location or particulars of the keys to those accounts with his friends, families, or personal representatives; and the assets have likely been lost forever.

4. Applicable Legislation

In North America, model acts created by the Uniform Law Commission and Uniform Law Commission of Canada provide a recommended framework or guide which jurisdictions can adopt if they so choose, to provide a legal regime controlling access to a deceased person's digital assets. However, very few jurisdictions have actually chosen to adopt this legislation, and it is clear that the prevalence of digital assets is outpacing legislation.

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8 Rosa Marchitelli, "Apple blocks widow from honouring husband's dying wish," CBC News, online: https://www.cbc.ca/news/business/widow-apple-denied-last-words-1.5761926

9 See Nathan Vardi, "The Last Days of Banking Heir Matthew Mellon," April 19, 2018, Forbes Magazine, online: https://www.forbes.com/sites/nathanvardi/2018/04/19/the-last-days-of-banking-heir-matthew-mellon/?sh=142c7b715d52, where it's explained that Matthew's great-great-great-grandfather, the Honourable Judge Thomas Mellon, founded Mellon Bank in Pittsburgh and became the patriarch of one of America's richest dynasties.

10 *Ibid*.

11 *Ibid*.

The model legislation in question is the the *Uniform Access to Digital Assets by Fiduciaries Act*, which was proposed over 5 years ago, but has yet to be formally adopted in any jurisdiction in Canada, outside of Saskatchewan.

Most legal commentators are of the view that this model legislation, or something similar, should be adopted in all Canadian jurisdictions to give testators and their personal representatives the peace of mind that digital assets will not be lost or locked upon the death of their owner.

In a recent report on Digital Assets, the Society of Trust and Estate Practitioners ("STEP")[12] argues that "Legal systems need to provide clear rules around property rights of access by personal representatives."[13], noting the clear gulf in legislation in this area.

In jurisdictions without such legislation, leading cases on access to digital assets prove that conflicts in this area can be arduously contentious, costly, and time-consuming. It can be terribly difficult for estate trustees to access assets without a court order; or, in the case of some cryptocurrencies, these assets can be lost forever if the keys are misplaced.

Even when a court order is obtained granting access to locked away digital files, the institutions that control the assets may still refuse to provide access, depending on the jurisdiction where the order was obtained and the jurisdiction where the electronic property is actually stored.

What is clear is that there is a desperate need for legislation to confirm who may access the digital assets of a deceased person, and how such access is to be granted or achieved; and, further, that in almost all jurisdictions in North America, the necessary legal systems have not been put into place, or the legislation is just in its infancy.

a. Canada

In Canada, post-mortem access to digital assets have been addressed through model legislation only. In 2016, the *Uniform Access to Digital Assets by Fiduciaries Act* was adopted by the Uniform Law Commission of Canada as model legislation.

Section 3 (1), of the Act holds that a fiduciary has the right to access all of the deceased's digital assets, in the manner the deceased would have been able to if alive. The Act takes the stance of media neutrality, and is consistent with Quebec's *Act to establish a legal framework for information technology* which formalizes the principle of technological

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12 STEP is the Society of Trust and Estate Practitioners. It was founded in 1991 by George Tasker and is headquartered in London, United Kingdom.

13 STEP, supra.

neutrality (granting the same legal treatment to documents regardless of their form). Ontario's *Electronic Commerce Act,* also recognizes technological neutrality.[14]

The drafters of the Uniform Act were clear to specify that fiduciary access in Canada is not barred by privacy laws.[15] Section 3 (1) holds that default access is the basic rule.[16]

The ULCC's Uniform Act governs four types of fiduciaries: personal representatives for a deceased account holder; an attorney appointed for an account holder who is the donor/grantor of the Power of Attorney; a guardian appointed for an account holder; and a trustee appointed to hold in trust a digital asset.

Unfortunately, since the model legislation was proposed in 2016, only Saskatchewan has adopted it as law, and all other Canadian provinces remain without a regime which grants broad fiduciary access to electronic assets.

(i) ***Saskatchewan***

The only jurisdiction in Canada to adopt the model legislation is Saskatchewan, with their *Fiduciaries Access to Digital Information Act*[17] (the "*Fiduciaries Access Act*") which came into effect on June 29, 2020. The *Fiduciaries Access Act* defines digital assets[18] and grants fiduciaries the right to access a deceased's digital assets. The *Fiduciaries Access Act* also establishes who qualifies as a fiduciary.[19] Right to access is only granted pursuant to instructions given in a will, letters of administration, guardianship court order, power of attorney, trust, or other court order.[20] What's more, the *Fiduciaries Access Act* also provides clarity and protection for account holders: to make a request for access, a fiduciary may request access from the account holder in writing[21] and so long as the custodian complies with the *Act*, the fiduciary is protected from liability for any loss incurred with respect to their dealings with or management of the digital assets in question.

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14 Emily Lynch, "Legal Implications Triggered by an Internet User's Death: Reconciling Legislative and Online Contract Approaches in Canada" (2020) 29 Dal J Leg Stud 135, 150-151. [Lynch]

15 Woodman, *supra*, 207.

16 *Ibid*, 212.

17 SS 2020, c 6. ["*Fiduciaries Access Act"*]

18 Fiduciaries Access Act, supra, Definitions – digital asset "means a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means"

19 An executor or administrator for a deceased account holder; a property guardian; a property attorney; or a trustee appointed to hold in trust a digital asset or other property; the Public Guardian and Trustee when acting in its capacity.

20 *Fiduciaries Access Act*, *supra*, 4 (1).

21 *Ibid*, 8 (1).

(ii) ***Alberta***

In Alberta, Digital Assets are partially addressed through the *Estate Administration Act*[22] which references 'online accounts' in the context of the duties of an estate trustee in identifying estate assets and liabilities. This codifies a fiduciary's responsibility, in the province of Alberta, to search out and secure online accounts when administering an estate in that province. However, the statute stops there in its reference to digital assets, and like in all other jurisdictions in Canada outside of Saskatchewan, there is no comprehensive regime in Alberta that allows for broad fiduciary access to digital assets.

b. <u>United States</u>

In the United States there is a larger emphasis on privacy laws surrounding a deceased person's digital assets, and a more comprehensive statutory regime protecting such privacy than exists in Canada, which can create difficulty when trying to balance the competing interest of granting fiduciary access to accounts.

The main barrier to accessing digital assets in the United States includes the *Stored Communications Act* ("*SCA*") which is part of the *Electronic Communications Privacy Act* and does not permit the disclosure of the contents of communication which is stored, carried by, or maintained by a service, in order to protect a users' privacy.[23] Additionally, the *Computer Fraud and Abuse Act* (the "*CFAA*") which prohibits the unauthorized access to computers serves as a major barrier to fiduciary access to digital assets. Under the *CFAA*, violation occurs when anyone who is not the owner accesses an online account in violation of the providers terms of service agreement. The *CFAA* provides no specific exemption for fiduciaries.[24]

These privacy concerns, that are protected in both the US and Canada (but to a greater extent enshrined in the US) can contradict or operate in conflict to the need for estate trustees to access digital information upon the death of the original owner. In both countries, unless plans are made in advance to allow for a personal representative or estate trustee to access an account-holder's digital assets post-mortem, their estate trustee could be faced with costly and lengthy litigation in order to gain access to those assets: this is especially the case given the lack of legislation allowing for such access, and in many cases legislation which expressly prohibits any third-party access.

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[22] SA 2014, c E-12.5.

[23] Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (2012) (Codified as amended at 18 U.S.C. §§ 2510-22, 2701-12, 3121-27)

[24] Sheridan, *supra*, 367.

c. **Tech Company Tools**

Some tech companies have taken this legislative gap respecting access to a testator's digital assets into their own hands. For example, in December of 2021, Apple released its iOS 15.2 update which, in part, included a "*Legacy Contact*" feature which allows iPhone or Apple customers to designate individual(s) (known as "Legacy Contacts") who may access the users' Apple Account when they die.

Essentially, the Legacy Contact feature allows iPhone users to designate the beneficiary(ies) or trustee(s) of their Apple Account. Users can add up to five people as their "legacy contacts" who will be authorized to access the user's Apple Account when the user dies.

Legacy contacts, once named, are then provided with an 'access key'. Upon the death of the original account holder, legacy contacts may upload the access key to Apple's webpage (digital-legacy.apple.com) along with a certificate of death, which is then reviewed by Apple. Following a review and approval process conducted by Apple, the legacy contact may create a new password and is provided with access to the deceased's Apple Account and all the valuable data therein.

This relatively new tool could be used by digital account holders to provide relief to executors or surviving friends or family who are looking to access a deceased person's digital information, without the need to obtain a court order to do so.

As discussed above, without a comprehensive legal framework in place, a court order may otherwise be required to gain such access without other planning from the deceased.

This is one example of tech corporations taking the difficulty of fiduciary access to digital access into their own hands, as necessary in light of the paucity of legislation that governs this area. If there continues to be a legislative gap in this area, we may see more tech companies implement similar tools for their users to provide post-mortem access to select contacts.

5. Conclusion

Having canvassed the development of digital assets across the globe, it is clear that the growth of online accounts, social media, and the emergence of new forms of digital property, such as cryptocurrencies and NFTs, require careful attention and planning. Since digital assets continue to gain prevalence, individuals and practitioners alike need to be mindful of digital estate planning tools and legislation designed to protect digital assets and so too, fiduciary access.

This is especially the case given the relatively slow pace with which legislation has developed to keep up with the rapidly growing industry and prevalence of digital assets.

As a result of this legislative gap, digital assets can often be lost upon the death of a testator, or the personal representative of the deceased's estate can be "locked out" or prevented from accessing valuable digital assets.

The sizable risk of lost electronic assets only increases the importance of testators and their advisors taking the extra step of making sure that they make proper plans for the transfer of their digital assets, that accords with the laws in their jurisdiction and in the jurisdiction where the digital assets are actually held.

Fortunately, the potential for costly loss of digital assets can be avoided with proper planning and diligence by will-makers, their advisors and their personal representatives. Such planning includes notifying appropriate family, friends and/or personal representatives of the nature, location and means-of-access for one's digital assets. A detailed inventory of digital assets, that is kept in a known and secure location, and details instructions for how your heirs can find and access all of those assets, particularly the codes and keys needed to access highly encrypted assets like cryptocurrency, can also be useful in ensuring that such assets are not lost upon the owner's death.

Finally, legislators and legal commentators should continue to advocate for a comprehensive legal regime to be formally adopted, which provides broad and clear rules as to how and when and by whom a deceased's digital assets may be accessed upon their death[25].

[25] This paper was drafted, in part, with reference to an earlier publication of Kimberly Whaley of Whaley Estate Litigation Partners, and Ian Hull of Hull & Hull LLP