CANADIAN LAWYERS WEBINAR

KEEPING PACE WITH DIGITAL ASSETS: PREPARING FOR THE FUTURE

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It appears that globally, the growth of digital assets by way of the ongoing digital revolution is currently outpacing legislation. While model legislation exists, many of the United States of America and almost all Canadian provinces have been slow to adapt to the fast-moving pace of technology. As the rapid growth of cryptocurrency has demonstrated, individuals have been amassing significant assets that are worthy of protecting. Legislation alone, however, is not enough to protect digital assets. Individuals' planning for the future require a mixture of digital estate planning and a legislative regime that recognizes fiduciary access to digital assets.

Introduction

Digital assets represent a rapidly developing area of law and commerce. Of significant importance is the impact that digital assets have on the administration of estates. Initially, the discourse centered on questions of whether digital assets were considered goods or information. Despite being in what can be considered the infancy of jurisprudence, there is much that is already known about digital assets.

In the broadest sense digital assets include a person's email accounts text messages, social network accounts, online banking and credit card accounts, electronic documents, cloud storage (such as iCloud, OneDrive), digital subscriptions or wallets, domain names, blogs, web pages, and virtual currencies.[1]

Digital assets can be primarily arranged in two categories; online accounts; and, files stored on an actual computer or server. There are also hybrid assets, such as mobile applications. These are hybrid in the sense that access to them is granted by signing into an online account with a username and password and gaining access to a distribution's server where files are uploaded and stored.[2]

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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]

2 See generally Edwin Cruz, "The Digital Inheritance of Mobile Apps: Where's the App for That?" (2016) 14 NW J TECH & INTELL PROP 111. [Cruz]

The development of digital assets across the globe has seen a tremendous rise of crypto assets and block chain technology. Among the latest developments are 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."[3] NFT's are special because they are unique and cannot be duplicated, making each piece incredibly rare. During the second week of May 2021, Christie's Auction House held a 'CryptoPunks,'[4] auction which sold nine works for over $16 million. The record NFT art sale price known to date is upwards of $69 million.[5]

Recent estimates have claimed that cryptocurrency assets now represent an industry worth $2.48 trillion.[6] Within this industry, it is estimated that 20% of all bitcoins (a specific crypto currency) are 'lost' meaning that the wallets containing them have not been accessed in over 5 years. Without factoring in the over 10,000 other cryptocurrencies on the market, this accounts for approximately 3.7 million in bitcoin, or, $140 billion in lost assets. These significant losses mean that a substantial number of crypto asset owners may be dying or becoming incapacitated without leaving their heirs a pathway to access these assets.[7]

Digital Asset Inheritance

A 2007 Microsoft study revealed that on average, participants had twenty-five online accounts that required passwords for access.[8] For estate

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3 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/

4 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

5 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

6 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

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

8 See generally, Alberto Lopez, "Posthumous Privacy, Decedent Intent, and Post-Mortem Access to Digital Assets," (2016) 24:1 Geo Mason L Rev 183, which looks at Dinei Florencio & Cormac Henry's study, "A Large-Scale Study of Web Password Habits" (2007) International World Wide Web Conference Committee, online: http://www.2007.org/papers/paper620.pdf [Lopez]

lawyers, who can access these accounts after death, is a never more important question. In cases of intestacy, unless the custodian of an account provides informal access, no one will be permitted access.[9] A recent report which published the results of a global survey of estate practitioners found that social media and email accounts top the list of the most-asked-about assets.[10] To demonstrate the real-life difficulties of password protected accounts and post-mortem access, consider the following recently publicized stories.

In 2014, Maureen Henry, had to obtain the order of a Judge to gain access to her late son, Dovi's social media accounts. Dovi Henry's last contact with his family was in April of that year. Three months later, 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 death of her son, including hiring legal counsel who helped her obtain the court order.[11]

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 on his Apple account. What's problematic is that the account is in Don's name. Carol is the executor and sole beneficiary of Don's estate. In early 2017, Carol contacted Apple after providing documentation proving she had the legal right to her husband's estate. Apple called back, informing Carol she needed a court order as

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9 Faye L. Woodman, "Fiduciary Access to Digital Assets: A Review of the Uniform Law Conference of Canada's Proposed Uniform Act and Comparable American Model Legislation" (2017) 15:2 CJCT, 204. [Woodman]

10 STEP, "Digital Assets: A Call to Action. Examining the risks and challenged posed by digital assets to estate planning and administration." Online: https://www.step.org/system/files/media/files/2021-09/stepdigitalassets_calltoaction.pdf [STEP]

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

providing the password to Don's account would contravene a U.S. law, the *Electronic Communications Privacy Act* of 1986.[12]

In 2018, Matthew Moody, the billionaire scion of the family that founded BNY Mellon Bank[13], died in a hotel room in Mexico before a scheduled stay at a rehabilitation facility. Matthew had struggled with an opioid addiction for decades. Before his untimely demise, Matthew turned a risky $2 million investment in the cryptocurrency XRP/Ripple into a record $1 billion profit. Matthew had reported that he kept the digital keys to his assets in cold storage in other people's names across various locations across the United States.[14] Matthew died leaving behind three children and without telling anyone about the private keys to his cryptocurrency wallet.[15]

In May of 2014, International best-selling author of *Pomegranate Soup*, Marsha Mehran, died unexpectedly in Ireland.[16] Her father Abbas sought to determine if she had any literary works remaining on her Google Chromebook. He sent four emails to Google but received no response. After hiring legal counsel, "Mr. Mehran obtained a CD from Google that included 200 documents written by his daughter."[17]

In 2018, Gerald Cotten, the CEO of the crypto exchange Quadriga, died suddenly at the age of 30, reportedly of Crohn's disease complications while on his honeymoon in India. Gerald died with the knowledge of the private keys to $250 million worth of personal and client's cryptocurrency.

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12 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

13 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.

14 *Ibid*.

15 *Ibid*.

16 See Annalisa Quinn, "Book News: Iranian Author Of 'Pomegranate Soup' Found Dead In Ireland" (2014) NPR, online: https://www.npr.org/sections/thetwo-way/2014/05/05/309718747/book-news-iranian-author-of-pomegranate-soup-found-dead-in-ireland

17 Lopez, *supra*, 185.

The Development of Digital Assets

We will explore the global development of digital assets by looking at newly created legislation and demands from the academic and legal communities in jurisdictions that are currently giving digital assets a closer look. After canvassing global developments, we will examine some of the technology available to individuals and practitioners to aid in the succession of digital assets such as the Artificial Intelligence ("AI") powered, eState planner.

Our paper will also include a checklist for practitioners and individuals to assist with digital planning and in identifying estate assets as well as provide a glossary of terms to help explain some of the technical terminology.

Global Development of Digital Assets

In North America, model acts created by the Uniform Law Commission and Uniform Law Commission of Canada provide a framework which jurisdictions can adopt. Across the globe, however, it is clear that the tide is rising, and that digital assets are outpacing legislation. In its most recent report on Digital Assets, the Society of Trust and Estate Practitioners ("STEP")[18] argues that "Legal systems need to provide clear rules around property rights of access by personal representatives."[19] In jurisdictions without the adoption of a model act or similar legislation, leading cases on access to digital assets prove that conflicts in this area can be arduously contentious, costly, and time-consuming.

Canada

In Canada, digital assets have been addressed through model legislation. In 2016, the *Uniform Access to Digital Assets by Fiduciaries Act* was adopted by the Uniform Law Commission of Canada as the model legislation. Section 3 (1), of the Act holds that a fiduciary has the right to access all of the decedent's digital assets, unless specified otherwise in a

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

[19] STEP, supra.

will. The Act takes the stance of media neutrality, and as Emily Lynch has argued, is consistent with Quebec's *Act to establish a legal framework for information technology* which formalizes the principle of technological neutrality (granting the same legal treatment to documents regardless of their form). Ontario's *Electronic Commerce Act,* also recognizes technological neutrality.[20] The drafters of the Uniform Act were clear to specify that fiduciary access in Canada is not barred by privacy laws.[21] Section 3 (1) holds that default access is the basic rule.[22]

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.

Curiously, the only jurisdiction in Canada to adopt the model legislation is Saskatchewan, with their *Fiduciaries Access to Digital Information Act*[23] (the "*Fiduciaries Access Act* ") which came into effect on June 29, 2020. The *Fiduciaries Access Act* defines digital assets[24] and grants fiduciaries the right to access a decedent's digital assets. The *Fiduciaries Access Act* also establishes who qualifies as a fiduciary.[25] 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.[26] What's more, the *Fiduciaries Access Act* also provides clarity and protection for account holders: to make a request, a fiduciary may request access from the account holder in writing[27] and so long as the custodian complies with the *Act*, the

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20 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]

21 Woodman, *supra*, 207.

22 *Ibid*, 212.

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

24 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"

25 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.

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

27 *Ibid*, 8 (1).

fiduciary is protected from liability for any loss incurred with respect to digital assets.

In Alberta, Digital Assets are partially addressed through the *Estate Administration Act*[28] which references 'online accounts' in the context of the duties of an estate trustee in identifying estate assets and liabilities.

Critics of the model legislation argue that it tends to dangerously favor access, over privacy (in contrast with two versions of the American Model Act developed by Uniform Law Commission). Additionally, some have commented that the model act needs an 'online tool' provision, which would serve as a solution to the problem of a person who dies intestate and has not yet had an administrator appointed by the court.[29] Arguing for the promotion of efficient estate administration, Emily Lynch calls for the implementation of a rebuttable presumption against access to a decedent's digital data. According to Lynch, amended legislation could provide a mechanism through which a representative could request access to a digital asset or account by simply satisfying a 'good cause' requirement, being required to adduce a legitimate interest in justifying access.[30]

The treatment of digital assets in Canadian jurisprudence so far has been focused on crypto assets and their interpretation for the purposes of asset recovery. Some decisions have granted Interim preservation of property orders (IPO) where crypto assets have been stolen or misrepresented. In a representative case, *Shair.com Global Digital Services Inc. v Arnold,*[31] an application was brought where the plaintiff alleges the defendant, a former officer and employee of the plaintiff, illegally converted company property in the form of digital currencies.[32] In that case, the court denied the request for

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28 SA 2014, c E-12.5.

29 Woodman*, supra*, 216.

30 *Lynch*, *supra*, 159.

31 2019 BCSC 870.

32 Defendant was hired in May 2011, became secretary and Vice President in 2015, purchases $18,500 in Bitcoin for the company between the period of June – August 2014. Employment ended in April of 2017, in December 2017 the plaintiff realized the defendant had not returned their laptop or upload the digital wallet with the currency to their server. The defendant unsuccessfully argued that his computer died, and the information was lost.

a Mareva injunction, yet granted a global preservation order after applying the four-element test.[33]

In the legal troubles leading up to the untimely death of Gerald Cotten, the CIBC Bank, sought an interpleader order regarding $25.7 million it had frozen related to intended cryptocurrency transactions by hundreds of individuals on an exchange operated by Quadriga CX.[34] In that case, CIBC froze accounts opened by a platform connected to Quadriga called Costodian when it determined the business operated as a money service.[35] The disputed funds were placed with the court after it was agreed that CIBC met the onus of demonstrating that adverse claims have been made against the disputed funds. In this interesting decision, the court noted that, "Cotton's refusal to answer relevant questions leads me to draw an adverse inference that Depositors have not been credited with QuadrigaCX bucks in their online wallets."[36]

In 2019, the Ontario Securities Commission (the "OSC") released a report concluding that Gerald Cotton had committed fraud and that most of the customer funds had been spent in the last two years leading up to his death.[37] According to the OSC, over 76,000 clients were owed a combined $215 million in assets. A 10-month investigation by the OSC's multi-disciplinary team of Enforcement Branch Staff analyzed Quadriga's trading and blockchain data, concluding that the bulk of the shortfall was attributed to Gerald Cotten's fraudulent activity.[38] It has been alleged that Gerald faked

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33 The four element test derived from *McKnight v Hutchinson*, 2011 BCSC 36 at paras 145 – 146 : a) the plaintiff has a proprietary interest in property in issue, b) the plaintiff's belief that property is threatened with disposition is reasonable, c) substantial question to be tried as to whether the plaintiff may ultimately be entitled to call of the partnership property in question, and d) balance of convenience favours the granting of the order.

34 *Canadian Imperial Bank of Commerce v Costodian Inc. et al*, 2018 ONSC 6680. [*CIBC*]

35 *CIBC, supra*, at para 3 where it is stated that between December 2017 and February 2018, 388 individuals or corporations made 465 deposits worth $67 million into Costodian's accounts.

36 *CIBC*, *supra*, at para 34.

37 Barbara Shecter, "OSC: Quadriga founder Gerald Cotten carried out cryptocurrency fraud by himself" (June 11, 2020), Postmedia Network Inc., online: https://www.saltwire.com/nova-scotia/business/osc-quadriga-founder-gerald-cotten-carried-out-cryptocurrency-fraud-by-himself-461043/

38 See the Ontario Securities Commission, "QuadrigaCX - A Review by Staff of the Ontario Securities Commission" Online: <http://www.osc.ca/quadrigacxreport/> where they conclude that Mr. Cotten opened Quadriga accounts under aliases, credited himself with fictitious currency and crypto asset

his own death, with investors and their legal counsel still to this day pressing the RCMP to exhume his remains.[39]

Finally, in the Canadian Criminal Law context, courts have wrestled with the question of whether Bitcoin companies are subject to the same principles as financial institutions in the context of search and seizure and return of seized goods as seen recently in Prince Edward Island.[40] Judges have also struggled with determining whether a crypto asset is considered a 'good' for the purposes of conversion or wrongful detention.[41] Recently, a decision in British Columbia defined Bitcoin as a form of currency in a summary judgment where the defendant was alleged to have failed to pay the plaintiff for the exchange of 50 bitcoins.[42]

United States of America

In the United States, questions regarding digital assets have begun to take prominence. For example, the question of whether a digital asset can be regulated by the International Trade Commission categorized as a 'good' was recently addressed.[43] There have also been succession questions concerning what tax consequences follow the transfer, or donation of digital assets.[44] On April 20, 2021, the U.S. House of Representatives passed the *Eliminate Barriers to Innovation Act of 2021*, HR 1602 which directs the Commodity Futures Trading Commission and the Securities and Exchange Commission to jointly establish a digital asset working group to investigate

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balances which he traded Quadriga clients. When the price of the crypto asset changed, Mr. Cotten sustained real losses and covered the shortfall with other clients' deposits; in effect operating like a Ponzi scheme.

39 See Keith Doucette, "Tales from the crypto: Clients want to see human remains of QuadrigaCX founder" (December 19, 2019), Canadian Press, online: https://www.investmentexecutive.com/news/industry-news/tales-from-the-crypto-clients-want-to-see-human-remains-of-quadrigacx-founder/

40 *R v Jahanshahloo,* 2018 CarswellPEI 122.

41 *Copytrack Pte Ltd v Wall,* 2018 BCSC 1709

42 *Nelson v Gokturk*, 2021 BCSC 813, para 9 where the Honourable Madam Justice Tucker held that, "Bitcoin (or 'BTC') is a form of cryptocurrency. A cryptocurrency is a digital asset that is designed to function as a medium of exchange using strong cryptography to secure financial transactions, control the creation of additional units, and verify the transfer of assets."

43 *Clear Correct Operating LLC v International Trade Commission,* 810 F.3d 1283 (Fed. Cir. 2015).

44 Victoria Blachly, *Uniform Fiduciary Access to Digital Assets Act: What UFADAA Know*, 29 PROB. & PROP., July-Aug. 2015, at 8, 10

and issue a report analysing the legal and regulatory framework and development in the U.S. in the area of digital assets.[45]

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.[46] Additionally, the *Computer Fraud and Abuse Act* (the "*CFAA*") which prohibits the unauthorized access to computers serves as a major barrier. 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.[47]

- ***Legislation***

The model legislation on digital assets in the United States, the *Uniform Fiduciary Access to Digital Assets Act* (the "*Uniform Act*") was approved by the Uniform Law Commission in 2014. The *Uniform Act* grants fiduciaries broad access to digital accounts. However, Delaware was the only state to adopt a version of the *Uniform Act*.[48] This first attempt at model legislation was heavily opposed by Internet Service Providers.[49] In response, the ULC changed its proposal and created the *Revised Uniform Fiduciary Access to Digital Assets Act* (the "*Revised Act*") which "requires account holders to affirmatively bequeath digital assets in order for those assets to be transferred upon their deaths."[50] If an individual makes no arrangements for

[45] Margo H.K. Tank, Mark F. Radcliffe, "Achieving Digital Transformation and Securing Digital Assets" (May 20, 2021) DLA Piper Publications – Blockchain and Digital Assets News and Trends

[46] 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)

[47] Sheridan, *supra*, 367.

[48] *Ibid*, at p. 368.

[49] Natalie M Banta, "Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age" (2019) 71:3 Baylor L Rev 547, at 570 "They feared that transmitting data after an account holder's death to a decedent's heirs would violate the Stored Communications Act, a federal act that imposes civil liability on companies that share customer's electronic communications with unauthorized third parties." [Banta Feudalism]

[50] Banta Feudalism, *supra*, at p. 571.

their assets, then they are held to the standard procedures of individual service providers.

It has been argued that the *Revised Act* provides unclear language in attempting to describe just what actions the fiduciary may take with respect to digital assets. Additionally, some critics have commented that the structure of the *Revised Act* means that custodians have complete discretion to insist on a fiduciary obtaining a court order before granting access to a digital asset (creating a potentially cost prohibitive access issue).[51] Additionally, the *Revised Act* permits the custodian to select the manner of disclosure, leading in the end to potential administrative delays in the settlement of estates.[52] Finally, questions remain regarding how much authority a fiduciary actually has, since the *Revised Act* requires custodians to disclose information to the fiduciary about the user's digital assets, yet, does not grant accompanying powers to engage in transactions with property.[53]

There has been a succession of recommendations to properly amend the *Revised Act*. First, it has been argued that in circumstances of non-protected digital assets, "…a fiduciary should be able to take possession of, control, manage, use, distribute, transfer, or otherwise dispose of any digital assets of a deceased user not subject to protections under federal privacy laws."[54] While the *Revised Act* mandates disclosure of any non-protected digital assets, there is uncertainty concerning notification of the default access that is provided to a fiduciary. Clarification in this process through legislation would provide better access for fiduciaries.[55]

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51 Sheridan, *supra*, at p. 377.

52 *Ibid*, at p. 378 "custodians continue to include forum selection and choice of law provisions in their terms of service agreements in an attempt to override well-settled probate law and prioritizes the laws of the decedent's domicile in matters related to estate administration."

53 *Ibid*, at p. 379.

54 *Ibid*, at p. 380.

55 *Ibid*, at p. 380 where the Sheridan argues that "In order to give full effect to this default provision and make non-protected assets automatically available to the fiduciary, a fiduciary's authority over non-protected digital property should be interpreted more broadly."

Additionally, it has been argued that the *Revised Act* ought to be amended so as to limit the ability of a custodian to request a court order prior to disclosing non-prohibited digital assets in unusual circumstances with some critics arguing that, "Recent New York cases indicate that custodians will treat the court order as a de facto requirement for disclosure of non-protected digital assets to the fiduciary."[56]

Finally, some have contended that the *Revised Act* or similar legislation should address the nature and extent of terms of service agreements,[57] arguing that, "Enforcing forum selection and choice of law provisions in terms of service agreements may be contrary to public policy when the matter involves the estate proceeding of a deceased user."[58] Some have argued that other states should follow the lead of Delaware, in addressing potential conflicts that may arise out of pre-emption clauses.[59]

- ***Wyoming***

Wyoming is the only jurisdiction in the world to define digital assets in reference to the common law concept of 'intangible personal property.' On April 5, 2021, Wyoming enacted HB0043 (effective July 2021) which further defines a digital asset and identifies it as an intangible asset under the classification of UCC Article 9. In it's 2019 legislative session, Wyoming sauthorized and passed 13 blockchain-friendly laws to become effective, including legislation that outlines property rights for digital asset owners. In contrast, the UCC only addresses the rights of digital assets owned through securities intermediaries,[60] whereas, Wyoming classified digital assets as

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56 *Ibid*, 382.

57 *Ibid*, at 387-388 where the author argues that most Terms of Service Agreements are drafted in a manner that is advantageous to the custodian – viewed as contracts of adhesion – courts may find many terms unconscionable – frequently include broadly worded provisions in Terms of Service Agreements.

58 *Ibid*, 392.

59 *Ibid*, at 393, which looks at 12 DE Code § 5004 (2015), "(c) A choice-of-law provision in an end user license agreement is unenforceable against a fiduciary action under this chapter to the extent the provision designates law that enforces or would enforce a limitation on a fiduciary's access to or control over digital assets or digital accounts that is void under subsection (b) of this section."

60 Lacey Shrum, "Wyoming: Move over, Delaware!" (2019), Vela Wood blog, online: https://velawoodlaw.com/wyoming-move-over-delaware/

property,[61] and divides these assets into three categories of intangible property within the Uniform Commercial Code.[62] In response, the UCC asked the State of Wyoming to set aside SF 00125 (which deviates heavily from model legislation). Representative Tyler Lindhom, and Senator Ogden Driskell, as Co-Chairmen of Wyoming's Blockchain Task Force, responded in kind with a letter clarifying the legislation and denying the request.[63]

In May of 2021, Two Ocean Trust partnered with Anchorage Digital[64] and announced their joint plans to deliver the first of its kind trust and estate planning solution for crypto asset holders – COIN (Crypto Optimized Irrevocable Non-grantor).

- ***New York State***

In September 2016, New York State passed the *Revised Act*, which is now Article 13-A of the state's *Estates, Powers and Trusts Law* (the *"EPTL"*). The *EPTL* provides fiduciaries with the legal authority to access and manage digital assets of a deceased or incapacitated individual based on the model legislation.

In New York State Surrogate's Court, in the *Matter of Serrano*,[65] the court directed Google to provide the decedent's contacts and calendar information to the estate's voluntary administrator, but not to divulge the contents of any

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61 An act relating to digital assets – 34-29-102 – Classification of digital assets as property; applicability to Uniform Commercial Code; application of other law – (b) Consistent with W.S. 34.1-8-102 (a)(ix), a digital asset may be treated as a financial asset under that paragraph, pursuant to an agreement with the owner of the digital asset. If treated as a financial asset, the digital asset shall remain intangible personal property."

62 SF0125 – effective July 1, 2019 – The Act establishes the legal nature of digital assets within existing law, dividing these assets into three categories of intangible personal property and classifying these assets within the Uniform Commercial Code (UCC): (1) Digital Consumer Assets (UCC: general intangibles), (2) Digital securities (UCC: securities: investment property); and (3) Virtual currency (UCC: money).

63 In the letter it is stated that, "the indirect ownership regime is particularly risky for virtual currencies because it enables risky practices in intermediary omnibus accounts that can cause insolvency more easily than other asset classes." And, that Wyoming believes the Model Acts are not ready to be considered in any state.

64 Two Ocean Trust provides wealth management services to high-net worth individuals, family offices, and advisors and Anchorage Digital provides institutions with simple and secure participation in digital assets, all integrated with custody – it is America's first federally chartered crypto bank.

65 56 Misc. 3d 497 [N.Y. Surr. Ct. 2017].

emails. In Suffolk County New York in the *Matter of White,*[66] the decedent did not address disclosure of his digital assets in his will and did not activate Google's online tool; the court therefore, limited disclosure to the decedent's contact information stored and associated with the account.[67] In what has been called a landmark case in the *Estate of Swezey*,[68] Apple was ordered to allow a grieving husband access to his deceased husband's Apple account. In 2017, Ric Swezey, a former champion gymnast and Hollywood stuntman, died unexpectedly. Ric was survived by two young children and his husband Nicholas Scandalios, Vice President of the Nederlander Organization.[69] Ric had left all property to Nicholas in his will. Ric was an avid photographer who's family and artistic photographs were taken on an iPhone and digital camera and stored in his Apple account. Nicholas petitioned that it was their intention to transfer the property to a joint account, however, Ric died. In a ruling that clarified how to treat the succession of personal digital assets, the court relied on section 13(a)[70] of the New York *Estates, Powers and Trusts Law* and ordered Apple to turn over the digital property stored in Ric's iTunes and iCloud account.

- ***Massachusetts***

The State of Massachusetts has not yet adopted the model act. With that being said, this state saw a digital assets case work its way through all levels of its courts. In *Ajemian v Yahoo! Inc.,*[71] John Ajemian died in a bicycle accident, intestate. His two siblings were appointed co-personal representatives and subsequently sought access to his email account to identify assets of estate. Yahoo denied all requests pursuant to SCA and alternatively, to their own Terms of Service Agreement. In September of 2009, the personal representatives had their complaint in Norfolk Probate

66 2017 WL 8944064, 1 (N.Y. Surr. Ct. 2017).

67 Mondaq, "Recent Cases Highlight 'Digital Assets' as a New Frontier in Estate Planning and Litigation"

68 NYLJ 1/17/19

69 The Nederlander Organization was founded in 1912 and is one of the largest operators of live theatre and music in the United States of America. They currently operate a national network of nine theatres.

70 EPTL-13-A-1(i) holds that Digital Assets are "electronic record[s] in which an individual has a right or interest."

71 478 Mass. 169, 170 (2017)

and Family Court dismissed. The representatives appealed, and the Massachusetts Appeals Court reversed the initial decision and sent it back to Probate Court.[72] On remand, the Probate Court found that the emails were the property of the estate, however, the SCA prevented disclosure by Yahoo. The decision was appealed, and this time caught the attention of the Massachusetts Supreme Judicial Court who transferred the case to itself. The SJC concluded that the SCA in fact, did not prohibit Yahoo from disclosure and remanded the decision the Probate Court for further proceedings to make two determinations.[73] In 2018, Yahoo filed a petition for writ of certiorari, with the U.S. Supreme Court requesting petition to correct the SCJ's "expansive, flawed, and dangerous interpretation of a federal statute." In March of that year, the Supreme Court declined to weigh in, denying the petition.

Germany

Germany has no legislation addressing digital assets. In the European Union ("EU"), the closest that legislation comes to addressing digital assets is through the definition of 'digital content' in legislation on consumer rights[74] and a directive on payment services. European legislators have recently noted that a unique definition is needed moving forward.[75]

In both 2016 and 2017, German academics discussed digital assets at two important conferences.[76] In 2018, the governing political parties included the creation of a blockchain-strategy into their coalition agreement. In the 2019 session of the German Bundestag, it was proposed but not adopted, that legislators draft a law on "regulating access to digital heritage and

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72 Rebecca Tunney, "Estate Administration in the Era of Digital Assets: *Ajemian v. Yahoo Inc.*, 478 Mass. 169 (2017)" (2019) 100:3 Mass L Rev 71, 71. [Tunney]

73 Whether a valid contract was created between the decedent and Yahoo through Yahoo's Terms of Service and whether Yahoo has unfettered discretion to deny personal representatives' access.

74 Romana Matanovac Vuckovic & Ivana Kancelja, "Does the Right to Use Digital Content Affect Our Digital Inheritance?" (2019) 3 ECLIC 724, at 725. [Vuckovic]

75 Vuckovic, *supra*, at 741.

76 See Bashkatov, M., Heindler, F., Völkel, O., Yuksel, B., & Zimmermann, A., "A Comparative Analysis on the Current Legislative Trends in Regulation of Private Law Aspects of Digital Assets." (2019) Aberdeen Centre for Commercial Law, at p. 3 where the authors reference the 71st German Jurists' Conference (Deutscher Juristentag) in 2016 for which digital 'goods' was a topic and the 2017 Association of Civil Law Teachers Conference (Tagung der Zivilrechtslehrervereinigung).

harmonising it in the EU."[77] Between November 5-6 in 2020, the ERA's Annual Conference on European Succession Law met in Germany with the focus being, national inheritance law and digital estates.[78] Unfortunately, no legislative changes came out of this conference.

In 2015, a seminal case began in the Berlin Regional Court in Germany. The case raised the question of, "whether an account on a social network with all its communication content can pass to the user's heirs by way of universal succession, and, moreover, if and how access to the account has to be granted."[79]

The case involved fiduciary access to the social media accounts of a 15-year-old who died unexpectedly. On January 4, 2011, the deceased registered a Facebook account with the permission of her parents. On December 3, 2012, she was killed when she was struck by an incoming train at an underground station. It was assumed that she committed suicide, which led the driver of the train to bring action against the parents to compensate him for damages suffered as a result. To determine their daughter's state of mind, and to establish a timeline leading up to her death, it was necessary to access her social media. The parents were told by Facebook that they were unable to access the account because it had already been set to 'memorial' status, initiated by a user whose name could not be revealed to them because of data privacy protection concerns. On December 17, 2015, the Berlin Regional Court ruled that the parents could access the account, holding that the memorial state was invalid and caused unreasonable disadvantage to the heirs of the estate.[80]

In 2017, the Court of Appeal reversed the Berlin Court's judgment and dismissed the parents' action, holding that the contract between Facebook and the daughter concluded when she died and that the content of the

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77 Angelika Fuchs, "What happens to your social media account when you die? The first German judgments on digital legacy." (2021) 22 ERA Forum 1, 6. [Fuchs]

78 *Ibid*, 1.

79 Fuchs, *supra*, 1

80 *Ibid*, 2 where the Fuchs looks at the decision of the Berlin Regional Court in *LG Berlin*, 20 O 172/15, ECLI:DE:LGBE:2015:1217.20O172.15.oA.

account could not be passed to her heirs because of 'secrecy of telecommunications', a decision which has been met with much criticism.[81]

The parents' appeal was heard by the Federal Supreme Court (Bundesgerichtshof) in 2018. The Federal Supreme Court set aside the Court of Appeal's judgment and restored the Berlin Court's decision. The Bundesgerichtshof held that, user agreements for digital social media accounts are in fact inheritable; in this case, the user agreement between Facebook and the deceased was held to be a contract that passed to the heirs by operation of section 1922, para. 1 of the German Civil Code.[82] The Court also held that the relevant German provision on secrecy of telecommunications only applied to individuals or institutions that are not involved with the protected communications process.[83]

Six weeks after the 2018 judgment, Facebook provided the parents with the contents of the account in one massive 14,000-page file which was described as hardly readable and partially in English. The mother commenced a fresh action against Facebook. In 2019, the Berlin Regional Court released a decision in which it instructed that 'granting access,' meant that the mother could 'take note' of the contents of the account in the same way her daughter had in the past. The mother was subsequently granted access for a reasonable amount of time.[84] Facebook appealed, and in 2019 the Court of Appeal classified Facebook's behavior in delivering a 14,000-page document as 'brazen' but still found it's actions 'completely sufficient'. On appeal, the Federal Supreme Court explained its 2018 judgment, re-iterating that the mother had already been granted access to communication

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81 *Ibid,* 3 which looks at the Court of Appeal decision in *Kammergericht*, Judgment of 31 May 2017 – 21 U 9/16, ECLI:DE:KG:2017:0531"21U9:16:oA.

82 Library of Congress, "Germany: Federal Court of Justice Rules Digital Social Media Accounts Inheritable which references the decision of *BGH*, Judgment of 12 July 2018 – III ZR 183/17, ECLI:DE:BGH:2018:120718UIIIZR183.17.0 which held that, "Upon the death of the account holder, the user agreement passes to the heirs by operation of law, and the heirs are subrogated to the rights of the deceased, in accordance with § 1922 of the Civil Code. Access to the account is precluded neither by the post-mortem personality rights of the deceased, nor by the confidentiality of telecommunications, nor by data protection law."

83 Fuchs, *supra*, at p. 3.

84 *Ibid*, at p. 4 Fuchs discusses the decision of *LG Berlin*, Order of 13 February 2019 – 20 O 172/15, ECLI:DE:LGBE:2019:0213..20O172.15.00

content and with that, the ability to 'take cognisance' of the user account itself in the same way as the original authorized person.[85]

Since the 2020 decision of the German Federal Supreme Court, Facebook has updated and adapted its terms and conditions surrounding legacy content.[86]

France

In 2016, France enacted the *Digital Republic Act* ("*DRA*"), legislation which grants individuals significant rights to control what happens to personal data after death. Pursuant to this legislation, service providers must comply with an account holder's expressed wishes. The purpose of the *DRA*, is to secure user's rights to "consciously specify how they wish their personal data to be used after their death."[87] The *DRA* permits users to make post-mortem arrangements for their data at any point in their lifetime and places a duty on Internet Service Provider's to inform the user about what will happen to their data when they die and let them choose whether or not to transfer their assets to a third party of their choosing.[88]

On May 22, 2019, France updated legislation further, enacting Law No 2019-486, Plan d'Action pour la Croissance et la Transformation des Enterprises, otherwise known as the Action Plan for Business Growth and Transformation (the "PACTE").[89] According to the International Bar

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85 *Ibid*, at p. 5, Fuchs discusses the decision of *BGH*, Order of 27 August 2020 – III ZB 30/20, ECLI:DE:BGH:2020:270820BIIIZB30.20.0.

86 See Facebook's Terms where it provides that "You may designate a person (called a legacy contact) to manage your account if it is memorialized. Only your legacy contact or a person who you have identified in a valid will or similar document expressing clear consent to disclose your content upon death or incapacity will be able to seek disclosure from your account after it is memorialized." Online: <https://www.facebook.com/terms.php>

87 Shelly Kreiczer-Levy; Ronit Donyets-Kedar, "Better Left Forgotten: An Argument against Treating Some Social Media and Digital Assets as Inheritance in an Era of Platform Power." (2019) 84:3 Brook L Rev 703, 716. [Levy]

88 Levy, *supra*, at 717 which looked at *The Digital Republic Bill – Overview*, La Republique Numerique, online: http://www.republique.numerique.fr/pages/in-english [https://perma.cc/A8JD-3XFC]

89 See Sebastien Praicheux, "France introduces an innovative legal framework for digital assets." April 6, 2020, DLA Piper Productions, online: https://www.dlapiper.com/en/us/insights/publications/2020/04/finance-and-markets-global-insight-issue-18/france-introduces-an-innovative-legal-framework-for-digital-assets/, where Praicheux shares that the PACTE law "allows entities, under certain conditions, to issue digital assets that may grant certain rights to customers (excluding shareholder rights such as voting rights or dividends).

Association, the PACTE law introduces two new categories: 'tokens,' and 'digital assets' into France's Monetary and Financial Code ("CMF").[90] While the CMF at Article L54-10-1 does not actually define digital assets, it does enumerate the types of assets that fall within the category.[91] The PACTE law is significant in that it further defines digital assets in France as including tokens,[92] and virtual currencies.

United Kingdom

Despite having no legislation dealing with digital assets, there has been a lot of recent attention given to the subject in the United Kingdom. On November 18, 2019, The Chancellor of the High Court, Sir Geoffrey Vos[93], launched the UK's *Legal Statement on the Status of Crypto-assets and Smart Contracts* (the "*Legal Statement*"). The *Legal Statement* is based on public consultation undertaken by the UK Jurisdiction Taskforce ("UKJT"), one of six taskforces of the LawTech Delivery Panel, an "industry-led group supporting the digital transformation of the UK legal services sector."[94]

Digital assets include tokens (except those qualifying as financial instruments) and digitally registered assets, including cryptocurrencies, that are accepted as a means of exchange that can be transferred, stored or exchanged electronically through distributed ledger technology (DLT or blockchain)."

90 International Bar Association, "A French point of view: from crypto assets to digital assets," in Back to Banking Law Committee publications, online: https://www.ibanet.org/article/f59c675e-e95e-4c74-bdc3-ea5a42e8ef9c

91 IBA, *supra*, provides that, "The following are considered to be digital assets: (1) the tokens defined at Article L552-2 of the same code, apart from those that can be assimilated to financial instruments; and (2) any digital representation of a value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a currency being legal tender and does not have the legal status of a currency, but which is accepted by natural or legal persons as a means of exchange and can be transferred, stored or exchanged electronically."

92 *Ibid*, Article L552-2 of the CMF "defines the token as any intangible property representing, in digital form, one or more rights that may be issued, registered, retained or transferred through a shared electronic recording device that makes it possible to directly or indirectly identify the owner of that property."

93 Courts and Tribunals Judiciary, "The Chancellor of the High Court, Sir Geoffrey Vos, launches Legal Statement on the Status of Crypto assets and Smart Contracts" (2019), where Sir Geoffrey Vos states that, "the objective, of course, is to provide much needed market confidence and a degree of legal certainty as regards English common law in an area that is critical to the successful development and use of crypto assets and smart contracts in the global financial services industry and beyond."

94 Yulia Makarova & Alistair Maughan, "Legal Statement on Cryptoassets and Smart Contracts: A Step in the Right Direction." (2020) 37:5 The Computer & Internet Lawyer 1, at 1.

The *Legal Statement* concluded that crypto assets do in fact constitute valid property in the form of intangible property and that smart contracts would be valid under English law.[95] The UKJT noted the impossibility of summarizing crypto assets into a single definition. However, in the *Legal Statement*, crypto assets are classified as possessing the following characteristics: intangibility, cryptographic authentication, use of a distributed transaction ledger, decentralization, and rule by consensus.[96] The UKJT was careful to note that crypto assets may have different characteristics, adopting the adage, 'no one size fits all'. Even though a crypto asset may not fall within the traditional definition of property, the *Legal Statement* held that this does not mean that crypto assets cannot be considered property.

In response to global trends, the Law Commission of the UK was recently asked by the government to make recommendations for reform which would ensure English law recognizes and enforces decisions on crypto assets and digital assets. Specifically, the Law Commission sought to consider whether digital assets are 'possessable.' The Law Commission published a call for evidence on April 30, 2021, with the call closing on July 30, 2021. Next steps include the publication of a consultation paper intended to consider and elicit proposals for law reform.[97]

In a case highlighting the reality of digital assets in modern commerce, applicants sought to obtain a Norwich-Pharmacal Order[98] alongside a proprietary injunction as part of proceedings brought to trace the payment in

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95 *Ibid.*

96 *Ibid.*

97 Law Commission, "Digital assets project" – Commercial and Common Law Team

98 A Norwich Pharmacal Order ("NPO") is a disclosure order available in England & Wales which allows information to be obtained from third parties who have become involved in someone else's fraudulent activity. It is often used where a victim does not know the identity of a wrongdoer but can point to a third party who has this information. (Pinsent Masons, "Disclosure: A Guide to Seeking Norwich-Pharmacal Orders," December 15, 2020, online: https://www.pinsentmasons.com/out-law/guides/disclosure-guide-seeking-norwich-pharmacal-orders). The name was taken from the decision in the case of Norwich Pharmacal Co. v. Commissioners of Customs & Excise, [1974] A.C. 133 (H.L.) at 175 where the original NPO permitted a pharmaceutical company to obtain the identity of a party secretly importing the company's patent-protected drug (Bennet Jones, "Norwich Orders," August 11, 2011, online: https://www.bennettjones.com/Publications-Section/Updates/Norwich-Orders).

a recent case involving the paid extortion of a Canadian insurance company by hackers demanding a Bitcoin ransom. The decision in *AA v Persons Unknown,*[99] focused on the applicability of a proprietary injunction and struggled with the problem of defining cryptocurrencies. This decision did, also however, define crypto assets (such as bitcoin) as property, holding that Bitcoin meets the four criteria set out in Lord Wilberforce's classic definition of property, in *National Provincial Bank v Ainsworth* 1965 1 AC 1175.[100] In reaching his final decision, the Honourable Mr. Justice Bryan canvassed the *Legal Statement* issued by the UKJT.[101]

After the decision in *AA*, the High Court in the case of *Ion Science Limited & Duncan Johns v Persons Unknown & Others,*[102] ordered a proprietary injunction, worldwide freezing order, and an ancillary disclosure order against unknown persons alleged to have committed acts of fraud.[103] The High Court, recognizing that digital assets are considered property, granted the relief sought in an *ex parte* application.[104]

Ukraine

On December 2, 2020, Ukraine's parliament passed the Bill on Virtual Assets No. 3637. This legislation officially recognizes a virtual asset as an intangible good that has value and can be regulated by the civil law. One aspect of the legislation is the regulation of cryptocurrencies and the exchanges that allow users to buy, sell, and store cryptocurrencies. An important piece of this legislation involves the inclusion of know-your-client

99 [2019] EWHC 3556 (Comm).

100 In *AA v Persons Unknown* [2019] EWHC 3556 (Comm), the court looked at the four criteria established in *National Provincial Bank*: (i) definable, (ii) identifiable by third parties, (iii) capable in their nature of assumption by third parties, and (iv) having some degree of permanence.

101 Bedell Cristin (blog), "Digital Assets in the BVI and the search for meaning: the argument in favour of statutory definition as 'intangible personal property'

102 (2020) Unreported, December 21, 2020, online: https://hsfnotes.com/litigation/2021/02/24/high-court-considers-where-cryptocurrencies-are-located-and-compels-disclosure-of-information-by-cryptocurrency-exchanges-outside-the-uk/

103 *Ibid*.

104 Martin Hevey, "High Court considers where cryptocurrencies are located and compels disclosure of information by cryptocurrency exchanges outside the UK" (2021) Herbert Smith Freehills (blog – Litigation Notes), online: https://hsfnotes.com/litigation/2021/02/24/high-court-considers-where-cryptocurrencies-are-located-and-compels-disclosure-of-information-by-cryptocurrency-exchanges-outside-the-uk/

procedures which require individuals to provide identification including their bank account information and digital wallet information. However, it should be noted that according to Ukraine's Central Bank, "The bill on Virtual Assets is riddled with significant gaps and conceptual errors that could create legal uncertainty."[105]

Russia

On July 31, 2020, the President of the Russian Federation, Vladimir Putin, signed Federal Law No. 259-FZ on Digital Financial Assets and Digital Currencies ("DFA"). This law regulates the issuance, recording, and circulation of digital financial assets. At Article 1, the law provides that "Digital financial assets are recognized as digital rights, including monetary claims and the possibility of exercising rights under equity securities."[106] Pursuant to Article 3 of the DFA, digital currency is defined as a digital code used for means of payment and as a savings tool.[107] The law defines the concept of digital currency as, "the collection of electronic data contained in the information system … in respect of which there is no person liable to each holder of such electronic data."[108]

New Zealand

New Zealand is another country with no digital assets legislation that has drawn global attention. In 2020, the New Zealand High Court held that cryptocurrencies, as well as digital assets, are a form of property capable of being held in trust. What's important about this decision is that it provides a fully reasoned decision on whether digital assets such as cryptocurrencies

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105 AZCoin News, "The Ukrainian Parliament has released an updated version of the Draft Law on Virtual Assets" June 20, 2021, online: https://azcoinnews.com/the-ukrainian-parliament-has-released-an-updated-version-of-the-draft-law-on-virtual-assets.html

106 TAdvisor, "Legislation on Digital Financial Assets and Digital Currency in Russia (259-FZ)," online: https://tadviser.com/index.php/Article:Legislation_On_Digital_Financial_Assets_and_Digital_Currency_in_Russia_(259FZ)#:~:text=On%20January%201%2C%202021%2C%20Law,cryptocurrency%20industry%20in%20our%20country

107 Library of Congress, "Russian Federation: New Bill Defines Cryptocurrency, Proposes Tax Regulations," online: https://www.loc.gov/item/global-legal-monitor/2021-01-11/russian-federation-new-bill-defines-cryptocurrency-proposes-tax-regulations/#:~:text=The%20bill%20requires%20that%20citizens,information%20about%20transactions%20with%20cryptocurrency

108 *Ibid*.

are property (and can be the subject of a trust – no other jurisdiction addresses this directly) and also addresses questions of the difference between "pure information" and "digital assets."

In *Ruscoe v Cryptopia Limited (in liquidation)*,[109] a cryptocurrency exchange was placed in liquidation in May 2019 after suffering a serious hack and experiencing a loss of $30 million worth of cryptocurrency from the exchange.[110] The application in *Ruscoe* concerned the liquidators request for guidance on the legal status of several cryptocurrencies held by Cryptopia, and particularly, whether these digital assets are held on trust by Cryptopia.[111] The court also held that the three elements which are required to give rise to a trust were all essentially met.[112] The court also examined a recent decision of the Supreme Court of Singapore,[113] which held that, "cryptocurrencies are not legal tender in the sense of being a regulated currency issued by government, but do have the fundamental characteristics of intangible property as being an identifiable thing of value."[114]

Australia

It has been commented that, "the growth of digital assets has outpaced state and Commonwealth legislation in Australia."[115] With that being said, the Attorney General has asked the New South Wales Law Reform Commission to review and report on laws concerning who can access a person's digital assets after death, or after becoming incapacitated and whether New South Wales needs new laws in this area. The report was informed by 15 preliminary submissions.[116] The preliminary submissions included the Law Society of NSW who argued it was appropriate to include the US model legislation's classification of four types of fiduciaries and suggested adding

109 [2020] NZHC 728. [*Ruscoe*]

110 *Ruscoe*, *supra*, para 7.

111 *Ibid*, at para 15.

112 *Ibid*, at para 128.

113 *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02, online: https://www.supremecourt.gov.sg/news/case-summaries/quoine-pte-ltd-v-b2c2-ltd-2020-sgcai-02

114 *Ibid*, at para 80.

115 New South Wales Law Reform Commission, "Access to Digital assets upon death or incapacity" (August 2018) Consultation paper 20, at p. 25.

116 *Ibid*, at p. 1.

a fifth which addresses small estates.[117] Alternatively, the Society of Trust and Estate Practitioners submitted its preference for the Canadian model, which they argue "makes fiduciary rights of access subject to the terms of the instrument appointing the fiduciary, not the terms of service agreement" and for its use of the 'last-in-time' priority system "ensuring a person's most recent instruction concerning the right to access a digital asset takes priority."[118]

The Law Reform Commission concluded that in Australia and NSW, it is unclear whether digital assets would constitute property under the *Succession Act* 2006 (NSW). The Commission argued that this could be resolved by simply amending the definition of property in the *Succession Act* or clarifying with legislation the circumstances surrounding digital assets and fiduciary access.[119]

One of the most important aspects of the latest consultation paper is its look at the rise of digital registers and digital planning tools. A submission by the Australian Communications Consumer Action Network and the NSW Trustee and Guardian advocates for the use of digital registries,[120] however, offers caution against directly listing account information on a service, and saving it for a letter or legal instrument.[121] The Report also addressed the use of Digital Legacy Services, websites where users store passwords and instructions that allow appointed individuals to access their digital assets.

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117 *Ibid,* at p. 29 where the suggestion to add a fifth: the executor or next of kin for small estates, also arguing that in these cases probate should not be required for small estates to enable a named executor or next of kin to access data

118 *Ibid*.

119 NSW recommends, "Clarifying in legislation what status instructions in a will have compared with other instructions in a will have compared with other conflicting directives that a person has made." Currently, "The *Probate and Administration Act* does not specifically address the question of access to a deceased person's digital assets."

120 NSW Law Reform Commission shares that, "A digital register is an inventory of a person's digital assets, including those stored in online accounts and on devices in which they record their account numbers, usernames, and directions about what they want done with their digital assets … In Australia, some service providers such as iiNet, Optus, and Telstra permit legal personal representatives to access someone else's account, provided they have permission from the account owner and can verify their identity."

121 NSW, *supra*, at p. 9.

Digital Planning Tools

A 2018 poll conducted by Angus Reid found that more than half of Canadians don't have a will and only 35 percent have one that is up to date, out of those without a will, 18 percent said it was simply too expensive.[122] With this is mind, it may be helpful to explore ways that the digital revolution is making the process not only easier to maintain, but affordable as well. One frequent insight, however remains, that is that online tools must be used in conjunction with an estate plan for cohesiveness.[123] This can become overwhelming to manage. One of the best ways to ensure this task does not get out of hand is by employing the use of powerful digital planning tools that are still simple to use.

- ***eState Planner***

In 2014, Jordan Atin and Ian Hull of Hull & Hull created an AI-powered tool that allows the user to build a will. Jordan Atin recently described the tool, eState planner, as "a simple process but extremely powerful. It covers every kind of conceivable option. But for the client it is straightforward, simple and visual."[124] The tool can be best explained in the three steps required to create a document. First, eState planner allows users to easily capture the necessary information through a digital questionnaire which is delivered through a secure portal. From here, the information is converted to a family tree in the portal. Next, the user can itemize, and drag and drop assets using a simplified interface. This is where a user (usually a Lawyer meeting with a client) will input the information on digital assets (for a full list of what to include see our checklist). In the final step, eState planner generates an easy-to-understand summary and exports editable legal documents. What's

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122 Aidan Macnab, "Innovations in estates law: How legal tech is revolutionizing law" (October 7, 2019), Canadian Lawyer Magazine, online: https://www.canadianlawyermag.com/practice-areas/trusts-and-estates/innovations-in-estates-law-how-legal-tech-is-revolutionizing-death/306132

123 Jennifer Zegel & Sharon Hartung, "Insight: Five signs that estate advisors aren't getting with the digital program." July 20, 2020, in Bloomberg Tax, online: https://news.bloombergtax.com/daily-tax-report/insight-five-signs-that-estate-advisors-arent-getting-with-the-digital-program-61

124 Macnab, *supra*.

notable about the tool are its versatile features. For example, the tool allows users to create One-Click Estate Plans for typical situations, which auto create the appropriate document.[125] The tool also allows for the creation of multiple wills, which is necessary to avoid paying excess probate fees on some assets.

In May 2017, Willful, another will-making app, was launched in Ontario. In 2019, it was reported that Willful has since expanded to cover all Canadian provinces. For consumers looking for a cost-effective tool to make a will, Willful offers packages that start at under 100 dollars and can be completed in twenty minutes, start to finish. Willful documents are also approved by lawyers in each province.[126]

- ***Registries***

Another important tool in digital planning are the use of Registries. In Canada, some provinces offer will registry services. For example, in British Columbia, the Department of Vital Statistics maintains the will registry service. Applicants can use the registry to register the location of a will by filling a notice or to search for a notice as part of probating an estate. Applicants can include lawyers, notaries, trustees or individuals filing their own wills (provided they are 16 years or older, mentally capable of doing so). Anyone who provides the appropriate documentation and pays the $17.00 fee can search for a notice in British Columbia. Searches can be done by mail, online, or in person.[127]

In Quebec, the province makes frequent use of the Notary System. Quebec recognizes formal as well as holograph wills and notarial wills. A notarial will is drawn by a notary pursuant to articles 716 and 717 of the Civil Code of Quebec. The original will is kept by the notary and the Chambre des

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125 eState Planner, “All beneficiary designations, bequests, residue gifts and estate trustee appointments are auto created.” Online: http://www.estateplanner.com/features

126 Willful, “Online wills made easy” (2021), online: https://www.willful.co/

127 British Columbia Department of Vital Statistics, “Wills Registry” Online: https://www2.gov.bc.ca/gov/content/life-events/death/wills-registry

notaries maintains a register of notarial wills. In Quebec, notarial wills do not require probate and are reported to be more difficult to contest in court.[128]

In Ontario, online registry has been simplified through the private company, NoticeConnect, which began in the practice of letting creditors know about estates being administered. Working within the legal community, NoticeConnect was able to launch a will vault management tool service. NoticeConnect's Canada Will Registry allows users to register information about wills they have. As an added level of comfort, if someone does a search for a will, the law firm gets notification of the search and has within 30 days to respond, ensuring that only the right parties are provided access. What's helpful about the Canada Will Registry is that people can register their own wills and have the option of pdf searchable files. The ability to have back-ups of actual records comes in handy in-case the originals are ever destroyed. The Canada Will Registry offers a strong level of protection and piece of mind through its safeguards. When they last spoke to Canadian Lawyer Magazine in 2019, the Registry had 84,000 registered wills and 730 firms using the product.[129]

Similar to NoticeConnect, is the United Kingdom's 'National Will Register' which was created by the private company Certainty in 2006. The National Will Register is the Law Society of United Kingdom's endorsed provider and maintains the longest-established and largest register in the United Kingdom. It's Will Search function provides a recommended and accredited search process that searches for registered and unregistered wills (for later will existence). The will Registration search function protects Testator's beneficiaries by registering their documents. There are in excess of 8 million wills now in the system which continues to grow daily.

- ***Future Trends***

One of the big future trends to consider is the use of Blockchain and Smart Contract technology in wills. In a recent study, authors proposed the

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128 Sharon Davis, Hull & Hull LPP (blog), "Probate of a Quebec Notarial Will in Ontario," April 21, 2010, online: https://hullandhull.com/2010/04/probate-of-a-quebec-notarial-will-in-ontario/

129 Macnab, *supra*.

use of a cryptocurrency mechanism (blockchain technology) and smart contract technology to facilitate an online will system. The authors argue that "the architecture considers effectiveness and cost reduction."[130] According to the authors, in this arrangement assets are saved in blocks, providing more comprehensive will security and security protection that is non-tamper able. This is then combined with the use of smart contract technology, which makes the distribution of property automatic. In 2020, Bridget J. Crawford explored how blockchain, "could be harnessed to create a distributed ledger of wills that would maintain a reliable record of a testator's desires for the post-mortem distribution of estate assets."[131]

One often overlooked area of digital assets concerns the estates of developers of digital applications. In his article, "The Digital Inheritance of Mobile Apps: Where's the App for That?" Edwin Cruz highlights how, "law may not adequately address the issues that arise when an app developer fails to complete a formal transfer of his apps before death."[132] Apple estimated that total revenue for developers on the App store in 2013 was over $10 billion. In 2012-2013, the year-on-year growth of revenue from the global apps business was 62 percent.[133] With the growth of applications, and the complexity involved in their maintenance, developers should be planning their digital estates before it is too late.

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 and currency require careful attention and planning. Since digital assets continue to gain prevalence, individuals and

130 Chen C. et al., "Traceable Online Will System Based on Blockchain and Smart Contract Technology" (2021) 13 *Symmetry*, 466.

131 See generally Bridget J. Crawford, Blockchain Wills, 95 Ind. L.J. 735 (2020), online: https://digitalcommons.pace.edu/lawfaculty/1158/

132 Edwin Cruz, "The Digital Inheritance of Mobile Apps: Where's the App for That?" (2016) 14 NW J TECH & INTELL PROP 111, 114. [Cruz]

133 Cruz, *supra*, at p. 117.

practitioners alike need to be mindful of digital estate planning tools and legislation designed to protect digital assets and so too, fiduciary access.

Glossary of Terms

Crypto Assets	Crypto assets refer to the subclass of digital assets that operate using cryptography, which is an encryption technique that ensures the authenticity of the assets by preventing the possibility of counterfeiting or double spending. "A cryptocurrency is the native asset of a blockchain network that can be traded, utilized as a medium of exchange, and used as a store of value." Cryptocurrency assets are issued directly by the blockchain protocol on which it runs on. Cryptocurrencies typically serve as a medium of exchange or store of value. A medium of exchange is an asset used to acquire goods or services. A store of value is an asset that can be held or exchanged for a fiat currency at a later date without incurring significant losses in terms of purchasing power. Cryptocurrencies typically exhibit the following characteristics: - they are decentralized (or not reliant on a central authority but rather managed by code) - they are built on a blockchain or other distributed ledger technology (DLT) network – this allows the user to enforce the rules of the system in an automated manner - they utilize cryptography to secure the currency structure and network system (Gemini, Cryptopedia, "Digital Assets: Cryptocurrencies vs. Tokens" (2021) Online: https://www.gemini.com/cryptopedia/cryptocurrencies-vs-tokens-difference)
Blockchain Technology	"A blockchain is a public ledger of transactions that is maintained and verified by a decentralized, peer-to-peer network of computers that adhere to a consensus mechanism to confirm data. Each computer in a blockchain network maintains its own copy of the shared record, making it nearly impossible for a single computer to alter any past transactions or for malicious actors to overwhelm the network. Sufficiently decentralized blockchains do not rely on centralized authorities or intermediaries to transact globally, securely, verifiably, and quickly, making technology like cryptocurrency possible." (Gemini, Cryptopedia, "Glossary: Blockchain" (2021) Online: https://www.gemini.com/cryptopedia/glossary#blockchain)

Artificial Intelligence	"It is the science and engineering of making intelligent machines, especially intelligent computer programs. It is related to the similar task of using computers to understand human intelligence, but AI does not have to confine itself to methods that are biologically observable." (John McCarthy, "What is Artificial Intelligence?" (2004) Online: https://homes.di.unimi.it/borghese/Teaching/AdvancedIntelligentSystems/Old/IntelligentSystems_2008_2009/Old/IntelligentSystems_2005_2006/Documents/Symbolic/04_McCarthy_whatisai.pdf) For an in-depth look at Artificial Intelligence, visit the IBM website on the subject. (IBM Cloud Learn Hub, "Artificial Intelligence (AI)" Online: https://www.ibm.com/cloud/learn/what-is-artificial-intelligence)
Initial Coin Offering	An Initial Coin Offering is an event where security tokens may be sold to raise funds for an idea or business model. Interested investors can buy tokens with regular currency or another cryptocurrency. The tokens have no value when the investor purchases them but may be exchangeable in the future for a new cryptocurrency to be launched or discounts to a future proposal. (Financial and Consumer Services Division of New Brunswick, "Crypto Assets and Cryptocurrency" (2021) Online: https://fcnb.ca/en/investing/crypto-assets-and-cryptocurrency)