

A Practical Guide to Dealing with Digital Assets

The issue of digital assets is one which has undergone a huge expansion in recent years and this has meant that practitioners have had to catch up with this rapidly changing and developing world. The way that assets are dealt with both after incapacity and after death has changed and this article seeks to provide some practical guidance to practitioners navigating their way through this new landscape.

Throughout this article, I will refer to dealing with assets on death for simplicity, but it should be read to include incapacity, as similar issues arise.

Defining a Digital Asset

As ever for lawyers, the place to start is with a definition. Very simply, a digital asset can be defined as any asset accessed or held online.

Digital assets can be separated into three broad categories:

1. Financial – for example, online bank accounts, online share dealing or investment accounts, online shopping or auction accounts and cryptocurrencies;
2. Social – for example, Facebook, Instagram and YouTube;
3. Sentimental – for example, photos and videos held in an iCloud account or similar.

This has been a developing area over the past number of years and the legal position is not yet settled either in the UK or internationally. There is legislation - the Property (Digital Assets etc) Bill ¹ - currently passing through Westminster which will help to clarify the legal status of digital assets. Broadly, the Bill provides that digital assets are to be considered personal property and therefore afforded the same legal protections as traditional personal property.

The Bill expands on the two existing distinct categories of property - "things in possession" (such as cars and money), and "things in action" (such as shares or debt) - to create a third category of property: a "thing (including a thing that is digital or electronic in nature)" (such as a crypto token).

Taking Instructions

Asking clients to consider their digital assets is not straightforward, even before we consider how to deal with those assets once they have been identified. The

traditional approach of probate solicitors who asked the relatives of the deceased person to bring in every piece of paper with a letterhead on it and then write to all of those companies is no longer practical. Increasingly, it is unlikely that there is a hard copy paper trail for the majority of assets.

To assist when taking instructions, I would recommend referring to the STEP Inventory for Digital Assets and Digital Devices ². This covers an extensive range of digital assets and will help to focus the mind of the client in relation to their digital estate.

The types of area in which clients may have digital assets are:

1. Online inventory management vaults and accounts, such as Legacy Concierge, MyWishes etc;
2. Email providers, for example, Gmail, Yahoo etc;
3. Social media platforms, such as Facebook, Instagram, LinkedIn etc;
4. Communication and collaboration platforms, including Whatsapp, Teams, Family Organiser etc;
5. Digital photos and video providers, for example, iCloud, Photobucket, Flickr;
6. Cloud-based data storage providers such as Citrix, Dropbox etc;
7. Household IT providers, such as Sky, BT, Virgin etc;
8. Password managers, for example, Apple Keychain, Last Pass etc;
9. Funeral, legacy and genealogy providers such as local undertakers, Ancestry.com;
10. Trading or hobby platforms, for example, gambling accounts, avatars and trading accounts;
11. Cryptocurrency, including Bitcoin, non-fungible tokens (NFTs) etc.

Care should be taken when dealing with digital assets. Passwords should be stored separately from inventory and there should be a discussion with the client as to how and when access can be provided. Password sharing is prohibited on most online accounts so an adviser should refer to the provider's terms and conditions to avoid any potential data breaches.

One of the other difficulties with digital assets is that they tend to change more quickly than traditional assets. It is quicker and easier to move investments to new accounts and passwords need to be frequently updated for most accounts. It can be difficult to keep track of these changes. The importance of keeping any inventory up to date should be emphasised to the client.

Identifying Assets

One of the most important steps after death is to secure the phone, tablet or laptop and ensure that they can be accessed. The responsibility for doing this falls legally to the personal representative. Where this is not the deceased's partner or other family member, this can be sensitive and care should be taken to ensure that relations are maintained to make this as smooth a process as possible.

Once access has been obtained, then information can be extracted to obtain a picture of the estate. An IT specialist may need to be consulted to go through the hardware to ensure everything is captured.

Care should be taken that if any of the logins pre-populate that this should not be deleted. This can be vital particularly for cryptocurrencies. It is also important to ensure that the deceased's email account can be legitimately accessed as it can be used to reset passwords to allow the personal representative to login to a particular website.

IHT considerations

Once the assets have been identified the next question is how to value the assets for inheritance tax purposes.

There are a number of different ways of valuing cryptocurrencies with NFTs being considered to be particularly difficult to value. This is very much a developing area. Valuation will also depend on whether access can be obtained to the cryptocurrency. If access cannot be obtained then the asset is "gone" and there is an argument that this should therefore be valued at zero for inheritance tax purposes.

The other point is that the value of cryptocurrencies tend to fluctuate more than traditional types of asset. This is a risk for a personal representative because if they cannot deal with the asset in a timely manner and the value suddenly drops, then they may be liable to a disappointed beneficiary who will only receive a fraction of what they expected to receive.

For cryptocurrency, HMRC has published guidance ³ advising that it is considered to be an asset of the deceased and subject to inheritance tax in the normal way.

Where IHT is to be paid, it must be noted that it is not possible to use cryptocurrency to pay the tax under HMRC's direct payment scheme.

Access

Once any inheritance tax is dealt with and the Grant obtained, it can still be difficult to access digital assets and encash them. There can often be international issues

depending upon where the digital asset host is located and a Grant in that jurisdiction may be required.

For cryptocurrency, using Bitcoin as an example, it is accessed using an address (similar to a bank IBAN) and a private key (which is the PIN). Both are stored in a digital wallet by the owner to be more safely retrieved. If the password for the digital wallet pre-populates on the deceased's iPad or laptop then access should be achievable. If the address and the key have not been either pre-populated, noted elsewhere by the deceased or saved with a third party professional custodian then access may be lost. If access cannot be obtained then the asset is gone and cannot be retrieved.

It is important that if you do have clients with cryptocurrency then there needs to be a discussion with them about to access the asset if they die. Generally, the cryptocurrency companies do not have a robust legacy service that will enable access after death and cannot be relied upon.

A different route to accessing digital assets would be to try to reset the passwords using the deceased's email address. If there is access for the personal representative without breaching the terms of use then they can do this directly; however, if the personal representative needs to deal with the email service provider to access the account then they will likely need a Court Order.

The Future

Against a rapidly evolving digital landscape, the message to clients is that their circumstances will be greatly improved if they make an Enduring Power of Attorney and a will and an inventory of their digital assets. This will undoubtedly make the administration of their estate much more efficient. The emphasis should be on educating clients to ensure that valuable assets are not lost whenever someone dies.

In wider policy terms, the international regulatory framework is currently very piecemeal. The US⁴ in particular are progressing legislation to put some order to the situation. This has not been fully completed yet and it is anticipated that this will be an evolving area for a number of years.

There is also increasing information-sharing between OECD countries, including the UK, to bring more cryptocurrencies within the tax regime³. This may assist the personal representatives of estates as it may be an additional source of information to try to piece together the assets of a deceased person.

- 1 [Property \(Digital Assets etc\) Bill \[HL\] - Parliamentary Bills - UK Parliament](#)
- 2 [Inventory for Digital Assets and Digital Devices | STEP](#)
- 3 [Cryptoassets Manual - HMRC internal manual - GOV.UK](#)
- 4 [Fiduciary Access to Digital Assets Act, Revised - Uniform Law Commission](#)