

How to handle digital assets after death – even if there’s a will

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Given that so much can go wrong when accessing digital assets, it’s not surprising that some jurisdictions have enacted legislation governing the treatment of these assets after death.

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Clients who experience the passing of a close family member or friend and find themselves unable to access that person’s non-banking digital accounts – even if they have a will – may be one of the most overlooked issues an advisor has to deal with.

The material these clients are seeking can vary widely from treasured family photos, travel reward points and businesses that rely on social media to generate revenue to cryptocurrency holdings that can run into the millions of dollars.

Richard Dri, senior wealth advisor and portfolio manager with Dri Financial Group at Scotia Wealth Management in Toronto, says questions about the retrieval of such material raise “a very timely issue” that’s rarely on advisors’ radar.

Having recently encountered a situation in which an executor-husband had to address the issue with his wife, just prior to her death, Mr. Dri has become more sensitive to both the emotional and financial difficulties that can arise. As a result, he now raises the question routinely with clients, including the possibility of appointing a special executor just for digital assets.

“It’s neglected,” he says, “and then it can be a huge [emotional] loss,” referring to material such as irreplaceable family photos.

Suzana Popovic-Montag, managing partner at law firm Hull & Hull LLP in Toronto, says that while most digital assets might be emotional or sentimental, there are a lot that have financial value.

“The problem is that if we don’t start planning, it’s going to be left to chance – first, whether they can be accessed [at all], and second, what’s going to happen to them,” she says.

Generally, executors have wide powers to settle an estate, such as obtaining access to online banking information. But that is not true of other digital assets, especially social media including assets on Google LLC, Apple Inc. and Facebook, now known as Meta Platforms Inc.

That can lead to an unintentional breach of the rules. The most common assumption is that others can use the access information, as if they were the deceased person, without consequences.

“That’s the self-help remedy, which is not necessarily legal,” says Ms. Popovic-Montag.

That’s because the account, in most cases, is governed solely by the terms set by the platform – and those terms generally strictly prohibit giving access to information to anyone, except for very limited purposes, such as creating an online memorial.

In addition, rules vary among platforms. Yet, when users are setting up accounts, Ms. Popovic-Montag notes, they tend to click through the instructions quickly, saying, “Yes I understand,” without ever reading the contract to which they’re agreeing.

“For the most part, there would not be repercussions [for pretending to be the deceased],” she says. “But there could be. So, we have to warn our clients that something could go wrong.”

‘Trickiest’ when the deceased owns crypto directly

Another class of digital assets often overlooked is cryptocurrencies.

Despite sometimes having huge values, many owners are not considering how these assets are to be dealt with by others, says Brian Mosoff, president and founding member of Canadian Web3 Council, a group that advocates for the use of cryptocurrencies, and chief executive officer at Ether Capital in Toronto.

He says the issue is not likely to arise if owners are buying structured products, such as funds with exposure to cryptocurrencies, or if they’re using a crypto exchange, as long as heirs or executors are aware of the location of the assets.

“The trickiest scenario is people who are holding the assets direct,” he notes, adding that most owners who use self-hosted crypto accounts tend to be younger, and have not given much thought to what happens after they die.

Yet, access can be very easy for anyone with the appropriate pin numbers and passwords. They may not even require the device the account is stored on.

“The responsibility is solely on the individual to give clear guidance to family members or whomever it will be passed to how they would access the assets, what they are holding and where,” he says.

Given that so much can go wrong when accessing digital assets, it’s not surprising that some jurisdictions have enacted legislation governing the treatment of these assets after death.

In the U.S., 47 states have adopted a uniform code that governs access to non-financial digital material by executors. And while Prince Edward Island and Saskatchewan have adopted a Canadian version, it’s unclear if, or when, any other provinces will follow suit.

That means in most provinces, non-owners remain shut out. Ms. Popovic-Montag notes that there have even been two cases in Canada in which court orders were needed to allow families to access digital accounts, often only photographs, even though wills existed.

She adds that such orders, which may cost \$10,000 to obtain, may even be modified or ignored by the platform in terms of what it is willing to share.

Noting that many platforms are a “law unto themselves,” she says they don’t feel bound by the authority of a will. “And they get away with it because that’s what we have to do to get access. So, we have [unreasonable] situations in which there are family photos, you want to share them with your family – and you can’t.”

Access to information should be ‘broken up’

When it comes to cryptocurrencies that are held directly, Mr. Mosoff notes, the biggest issue is fraud due to the ease with which these accounts can be retrieved. The access instructions for those dealing with the estate need to be “very clear and detailed,” he says, including the pin code, the backups of [passwords], and the name or a phone number of someone who is a friend or in the industry.

And because it is so easy to steal assets that are held this way – all that may be stopping a potential thief from accessing millions of dollars is a set of numbers and words – it’s crucial, he says, to ensure this information is broken up and stored in different locations.

A good option Mr. Mosoff advises is to use a safety deposit box for part of the necessary codes, leaving other information in a will, and requiring more than one person to be present when the full codes are retrieved and matched up.

Despite the hurdles, clients should still include the appointment of a digital executor in their will, who may be the same person as the general executor, Ms. Popovic-Montag says.

“It may not work, but it could,” she says. “If they change the legislation, or they change the case law, or things evolve, then perhaps it’s a wonderful thing to have in there.”

Ms. Popovic-Montag adds that it also creates an opportunity for advisors to raise the question of access to digital accounts when they are giving advice about substantial financial assets.

Mr. Dri says that his team is starting to think about digital assets more and more when looking at an estate in general.

“It’s something that people leave to the very, very end,” he says. “But that’s not the time to do it.”

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