Assessing assets: what's digital?

Estate planning & administration: Laura Walliss & Rosie Todd examine the many difficulties posed by digital assets

IN BRIEF

- It is essential to properly educate clients so that they understand exactly what digital assets are, as well as the issues which arise when considering estate planning and the possibility of passing them on (or not) on death.
- Although the debate is ongoing, legislation in this area is still woefully behind the times in addressing issues relating to digital assets.

It has always been difficult to persuade some people to acknowledge their mortality, focus on succession planning and to put in place a properly drafted will—even to deal with traditional assets such as their home or financial savings and investments. However, once any initial reticence had been overcome and a valid will executed, it was at least usually the case that those individuals—together with their personal representatives (PRs) and the future beneficiaries of their estates—could benefit from the luxury of relative certainty that what was set out in the will, would in fact come to pass. A key selling point of putting in place a well thought through will was that it would ease the future administration of a client's estate, making the process quicker, less stressful and (in terms of professional fees) cheaper.

The exponential rise of digital assets has upended that previous comfort. Current legislation, designed with more traditional asset classes in mind, simply isn't fit for purpose when it comes to digital assets. As a result, practical as well as technical issues can arise when PRs and their legal advisers attempt to administer estates containing digital assets.

There are certain things that we, as private client advisers, can do to improve the current status quo. However, there are also some issues which are simply outside our control.

Educating ourselves

First, we practitioners need to educate ourselves on digital assets—to understand what they are, how they can be owned and passed on, and the various issues which can arise in the context of estate planning and administration. However, unlike most other new areas of law on which we regularly need to familiarise ourselves, educating ourselves is not the end of the story. Indeed, at times it seems to only serve to create a deeper awareness of how much misunderstanding there is around digital assets, and how insufficient the law is to enable us to perform our duties properly and advise our clients as well as we would want.

Educating our clients

Although media headlines about digital assets now catch the eye on a weekly basis, and there is a better general understanding of digital assets, there are still a number of areas of confusion which can lead to difficulties in an estate planning and administration context.

Most clients we see are now at least familiar with the terms 'cryptocurrency' and 'NFT', even if they often don't understand exactly what these mean on a technical level. However, although cryptocurrency ownership is increasingly common, cryptoassets still represent only a very small fraction of digital assets generally. Most clients believe that if they do not own any cryptoassets, they own no digital assets at all, and therefore do not need to concern themselves with the topic when considering estate planning issues. This is almost always incorrect; most clients now have digital photos and videos (often stored in a cloud account), email and social media accounts, and even online gaming or financial accounts. All of these are digital assets and all need to be properly considered and provided for on death by providing for them in a client's will. Conversely, many people incorrectly believe that, in the same way that they used to own their physical record and book collections and so would be able to pass on their favourite songs and stories to their children, they now own the contents of their iTunes, Spotify, or Kindle libraries. This is sadly untrue—the files held in these libraries are held on licence only, which does not survive death and therefore cannot be inherited by anyone else.

Properly educating clients so that they understand exactly what digital assets are, as well as the issues which arise when considering estate planning and the possibility of passing them on (or not) on death, is essential. Although many digital assets hold only sentimental value, this does not make them any less important for most clients. Indeed, for many, once they start to think about their digital assets, it is often those with sentimental value which hold the greatest importance. This stands to reason: setting out in a will who can inherit our digital photos after our death and ensuring that they can actually access them (it will be seen below that this is not as easy as it should be) is the modern-day equivalent of saving the family photo albums from the proverbial fire.

Waiting for the law to catch up

One thing practitioners cannot directly control is the current lack of legislation in this area. It is not unusual for legislation to come after the event—the law is used to playing catch-up. However, the speed at which nimble tech start-ups and Silicon Valley giants can launch new digital assets and develop and change those which already exist simply can't be matched by lumbering and, in some instances, antiquated legal systems. Rather than catching up, the law in this area often seems to be falling further behind, and the gap between the digital assets which exist and are widely used and the law governing this area causes a number of difficulties for private client practitioners, PRs and others trying to navigate it.

In an estate administration context, the key difficulties caused by the general lack of legislation around digital assets manifest themselves most obviously when trying to identify and then access the digital assets of the estate.

Section 25 of the Administration of Estates Act 1925 (AEA 1925) requires PRs to collect in all the assets of the estate. To do this, PRs must first establish what there is in the estate. With traditional assets, this is relatively straightforward—most tangible assets of the deceased will be apparent on a visit to their property, and a search of their paperwork tends to unearth further bank accounts, investments etc. However, digital assets will usually not show up during the course of such a search—in most cases, the only evidence of their existence will be online. Many PRs may have no idea where to start even looking for such assets, let alone how to access, value, report and ultimately distribute them. A digital assets expert could be instructed to help locate the digital assets of the deceased. However, given that the value of such assets will often be of largely, if not exclusively, sentimental value, pragmatic questions arise as to the proportionality of incurring such a cost. However, where PRs decide not to engage an expert and it subsequently becomes apparent that one or more digital assets were overlooked, they risk opening themselves up to criticism (and possibly action) from disgruntled beneficiaries.

Even once identified, accessing online accounts after death is extremely difficult at present. Access is necessary both to understand what is in the estate and to enable the PRs to collect the asset and distribute it in accordance with the will. Under s 1 of the Computer Misuse Act 1990 (CMA 1990), it is an offence to knowingly access an online account without authority (which is usually that of the relevant internet service provider (ISP)). ISPs are most often based in the US and, due to the strict privacy laws there, such authority to access a deceased's online account is rarely given. In that scenario, PRs must resort to obtaining a court order in the relevant jurisdiction. This inevitably leads to additional expense, delay and frustration at an already difficult time.

Ironically, in these circumstances, PRs who are not professionally advised may be in a slightly better position than those who are. The offence under CMA 1990 requires knowledge that the access was unauthorised. Whereas a properly advised testator should be told not to share passwords with others, and properly advised PRs told not to use any that they may nevertheless have been given, it seems likely that in reality many lay PRs acting without professional advice will simply access the accounts of the deceased, remove what is required for the administration of the estate and close them down, with no one being any the wiser. While this may have pragmatic appeal, it is simply not possible for a professional adviser to advise that their clients break the law, and certainly no professional acting as executor themselves (usually nowadays through a trust corporation) would be able to take this action.

Even once identified and accessed, the practical difficulties around administering digital assets continue for PRs. Given how few existing wills were drafted with digital assets in mind, practical difficulties are often only found (to the extent they aren't entirely overlooked) during the course of an estate administration. For example, it is common for computer devices to pass under a chattels clause. However, the intangible digital assets stored on that device will not pass under the chattels clause and, unless specifically dealt with in the will, will otherwise fall into residue. Where the chattels beneficiary and residuary beneficiary are not the same, the PRs should remove all the digital assets from the device and pass them to the residuary beneficiary before wiping the device and passing that to the chattels beneficiary. It must be assumed that this is more honoured in the breach than the observance.

What next?

All is not lost. The education aspects around digital assets are ongoing. Professional bodies such as the Society of Trust and Estate Practitioners are steadily raising awareness among both practitioners and government bodies—teaching the former what they need to know about digital assets to properly advise clients, and lobbying the latter to plug the holes in the existing framework and properly legislate in this area to provide certainty. The Law Commission has an ongoing project considering digital assets and Ian Paisley MP's Digital Devices (Access for Next of Kin) Bill is slowly making its way through the parliamentary stages. It remains to be seen what legislation actually comes to pass, how long it takes and whether it is sufficient to improve the current situation. **NLJ**

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