



The digital tsunami

SHARON HARTUNG PROVIDES ESTATE PLANNING ADVICE FOR THE DIGITAL AGE

THE SUDDEN DEATH in 2018 of the CEO of one of Canada's largest cryptocurrency exchanges made global news when it was alleged he had died without leaving anyone the 'digital keys' to the company's cryptocurrency wallet. It is estimated that some CAD180 million of clients' cryptocurrency reserves was lost.¹ Canadian regulators are now proposing regulation to deal with Canadian cryptocurrency exchanges,² but the events serve as a timely reminder to any practitioners involved in estate planning with regard to the proper management of digital assets.

This is a story of pre-planning best practice. Without a recovery password or adequate pre-planning, even the best tech professionals might never get into the CEO's encrypted laptop – if, indeed, the keys are stored on it at all.³ Then, to add insult to injury, as cryptocurrencies are both unregulated and managed by experts in a decentralised way, there is no central help desk that can help reset the password, and nor can the company's stakeholders turn to the law for help.⁴

There is a very real practical element to the technological management of digital assets. Without the necessary passwords, all the cybersecurity measures put in place during a client's lifetime will act as barriers imposed on the executor. Practitioners might be best advised to approach pre-planning of significant digital assets by assuming that passwords will not be available for whatever reason: legal, technical or otherwise.

In 2016, the Uniform Law Conference of Canada published its model legislation, the *Uniform Access to Digital Assets by Fiduciaries Act*.⁵ Its aim is to clarify the position of the fiduciary with respect to digital assets in Canada by codifying the 'colour of right' of the fiduciary to access a deceased person's digital assets. However, progress has been slow and, at the time of writing, no Canadian province or territory has formally adopted this law in its own provincial estate legislation.

PRACTICAL TIPS

By now, most readers will be familiar with the comprehensive definition of a 'digital asset' provided by STEP in its guide for the public⁶ on the topic, which sets out that a digital asset has many of the same characteristics as physical assets and property, such as financial and sentimental value.

A client may have wishes, preferences and intentions not just for their physical assets, but for their growing inventory of digital assets too, which could include family photos, parked web domains or loyalty points. The following are four key tips that practitioners should consider when faced with planning that involves a client's digital assets.

LEARN ABOUT THE CLIENT'S 'DIGITAL LIFE'

Ask your client if they use email or social media, and how they share family photos. Look for digital assets of both financial and sentimental value. Encourage them to identify their top three digital assets that would have the greatest impact if they were lost or inaccessible.

DIFFERENTIATING BETWEEN DIGITAL ASSETS

Explore how the client is using those three key digital assets and research their associated licensing agreements or terms of service (if they exist), as well as any pre-planning options that the service provider offers. If pre-planning is not offered, ask what paperwork the fiduciary will have to provide.

SEEK APPROPRIATE ADVICE

A legal advisor can advise a client on how to capture wishes and preferences about those digital assets (e.g. jurisdictional laws, fiduciary access and will inserts or clauses). For complex or cross-border digital estates, practitioners are advised to seek specialist advisors such as technical, tax, cross-border or local experts as appropriate. Remember, even

if the tech experts are on the fiduciary's side, due to jurisdiction-specific fiduciary access laws, they might not be legally authorised to access digital assets, even if they hold the passwords.⁷

DISCUSS TECH MANAGEMENT STRATEGIES WITH THE CLIENT

Encourage the client to consider user or technology management steps. These include documenting, testing or transferring digital assets before incapacity or death, and identifying and mitigating other risks that might prevent the fiduciary from carrying out their wishes.

Including an insert or clause to address the inclusion of digital assets in a will is a good first step, but it is not on its own sufficient estate planning for digital assets.

CONCLUSION

With ever-increasing numbers of people holding digital assets, a digital assets 'tsunami' is coming, and practitioners must be prepared. The recent events discussed at the beginning of this article may be used to encourage clients to think practically about the management of their digital estate. In addition, practitioners in Canada and elsewhere must pay close attention to jurisdiction-specific legal and tax developments.

¹ cnn.it/2Gt34Bt ² gam.ca/2Y10oBu ³ bit.ly/2XW05GI ⁴ bit.ly/2T7THd9 ⁵ bit.ly/2vyGIXG ⁶ bit.ly/2l3Dgh7; SIG members can also view a guide for practitioners via the SIG Member Portal at www.step.org/digital-assets-global-special-interest-group ⁷ See Kathleen Cunningham and Shelley Rhoads Perry, 'Access All Areas?', *STEP Journal* (Vol26 Iss4), pp.48-49



SHARON HARTUNG IS AUTHOR OF *YOUR DIGITAL UNDERTAKER*