

Dealing with Digital Assets on Death: An Update

Who owns them? Who can access them? What can be done to protect them?

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December 1st, 2021



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Digital Assets – Prologue

Bitcoin Example

- Of a capped total of 21 m. Bitcoins, 18.77 m. have been “mined”
- Some sources estimate that as many as 3 m. bitcoins (~\$170 billion USD) are irretrievable
- Due to:
 - Lost retrieval codes (“private keys”)
 - Lost USB’s where the only records are stored
 - Owner death without leaving the private keys accessible to executors or next of kin



Digital Assets – Prologue

Cryptocurrency Market Expanding

- Wealthsimple now offers 34 different cryptocurrencies on its investing platform
- Some popular ones include:
- **Etherium**
- **Litecoin**
- **Ripple**
- **Cardano**
- **Dogecoin**



Digital Assets – Prologue

Non-Fungible Tokens

- Since our last Toolbox Non-Fungible Tokens have expanded into other asset classes.
- A Non-Fungible Token is a token stored on the blockchain
- Blockchain itself is a secure distributed database with redundancy, immutability, and clarity into tracking data or ownership.

Digital Assets – Prologue

Non-Fungible Tokens Cont...

- A token proves ownership of an asset.
- For example, a deed to your house is a sign of ownership to that plot of land and building.
- In the case of the first digital token, Bitcoin, a single Bitcoin is the title of ownership to the underlying value of the Bitcoin.

Digital Assets – Prologue

Non-Fungible Tokens Cont...

- Mike Winkelmann, known as @Beeple, is a renowned artist who has worked with Nike and Apple
- Winkelmann sold a collection of many of his works combined into a masterpiece, titled *EVERYDAYS: THE FIRST 5000 DAYS at Christie's* for **\$69 million**.
- These transactions occurred on Ethereum, a blockchain.

Digital Assets – Prologue

Non-Fungible Tokens Cont...

- Winkelmann's art itself was simply digital images.
- Why do people buy NFTs? it is feasible to collect royalties and resell the NFT in the future for profit
- see: <https://www.thomsonreuters.com/en-us/posts/legal/non-fungible-tokens-legal/>

Digital Assets - Prologue

Death of a CEO

- In December 2018, Gerald Cotten, CEO of QuadrigaCX, Canada's largest cryptocurrency exchange died suddenly at age 30
- Mr. Cotten was the only person who had passwords to ~115,000 customers' digital wallets
- Approximately C\$140m in digital currency held in safe keeping was deemed inaccessible
- Auditors found irregularities and managed to retrieve C\$33 m. in missing funds
- RCMP asked to exhume the body (Dec. 2019)

Defining and Categorizing

Digital Assets vs. Digital Accounts

- Classification is difficult: fluid, ever-growing
- Digital asset: a singular file
- Digital account: mechanism used to control and access the file

Defining and Categorizing

What is a Digital Asset

- The file itself
- Photos, videos, blog posts, emails,
- Microsoft Office documents, music
- collections, playlists, tweets, etc.
- Potential value: customer invoices, health and medical records, tax documents



Defining and Categorizing

Digital Accounts

- Used to access files
- Email accounts, social network accounts, file sharing accounts, software licenses
- Can be separated into three categories:
 - Currency Accounts
 - Virtual Property Accounts
 - Social Media Accounts



Currency Accounts

Definition

- Holds currency that may be converted into fiat money
- PayPal, eBay, loyalty program accounts, cash-back programs, cryptocurrency (e.g. Bitcoin), etc.
- May be transferable to heirs or beneficiaries

Virtual Property Accounts

Definition

- Accounts that hold digital content
- No ownership in assets – just a license to use
- iTunes music collections, Kobo or Kindle library
- Contra physical counterparts (CDs, physical books)
- May not be transferable to heirs or beneficiaries but this changing

Social Media Accounts

Definition

- Accounts that contain information likely of personal or commercial interest
- Email, Facebook, Instagram, Twitter, Pinterest or LinkedIn account

The Law in Canada

General

- No general right of survivorship
- No federal or Ontario legislation on estate administration of a person's digital assets
- Only Alberta has legislation specifically ensuring representatives of a deceased's estate have access to administer digital assets

The Law in Canada

Uniform Access to Digital Assets by Fiduciaries Act (UADAF)

- Proposed in 2016 by the Uniform Law Commission
- Provides fiduciaries with default access to digital assets held by a deceased or incapable person
- Does not distinguish between types of fiduciaries (legal representatives, attorneys or guardians)

The Law in Canada

Uniform Access to Digital Assets by Fiduciaries Act (UADAF)

- Digital asset: any type of electronically stored information, including:
 - information stored on a computer or other digital device,
 - content on websites, and
 - digital property rights (e.g. domain names, material created online)
- Account holder: individual who has entered into a service agreement with a custodian
- Custodian: person who holds, maintains, processes, receives, or stores a digital asset of an account holder (i.e., an online service provider)

The Law in Canada

Uniform Access to Digital Assets by Fiduciaries Act (UADAF)

- Fiduciary can access, control and copy the digital asset
- A power of attorney, trust, will or court order can alter this default position
- Any service agreement that limits the fiduciary's access would be voided, unless the account holder accepts its terms and consents in a separate agreement

The Law in Canada

Privacy Laws

- Privacy rights continue after death
- Custodians are governed by the federal Personal Information Protection and Electronic Documents Act (PIPEDA)
- When does PIPEDA allow an organization to disclose personal information without that individual's consent?
- PIPEDA does not compel custodians to disclose personal information in estate administration

Barriers to Access

Terms of Service and User Agreements

- Restrictive policies
- May prohibit access to estate trustees
- May deny estate trustees the ability to deal with content

Barriers to Access

Specific Examples

- Virtual Currency / E-Commerce
- Accounts:
 - Amazon, Bitcoin, PayPal
- Virtual Property Accounts:
 - Apple, Kindle
 - Licensed, not owned

Barriers to Access

Specific Examples Cont...

- Points:
 - Aeroplan, Air Miles, Shopper Optimum Points
- Social Media Accounts:
 - Google (includes Gmail), Microsoft, Hotmail, Facebook, Twitter, LinkedIn, Instagram

Barriers to Access

Specific Examples Cont...

- No right of survivorship for digital assets
- +
 - Lack of legislation
- +
 - Privacy-oriented Terms of Service and User Agreements
- =
 - No immediate right to access, transfer or delete online accounts of a deceased

Recent Changes – Barriers to Access

Apple

- Apple's website now alerts people to request a Court Order to obtain access to a deceased family member's account.
- The Court Order must state the following:
 - The name and Apple ID of the deceased person.
 - The name of the next of kin who is requesting access to the decedent's account.
 - That the decedent was the user of all accounts associated with the Apple ID.
 - That the requestor is the decedent's legal personal representative, agent, or heir, whose authorization constitutes "lawful consent."
 - That Apple is ordered by the court to assist in the provision of access to the decedent's information from the deceased person's accounts
- Apple no longer opposes these orders, they just want the public to do it so that Apple can say they never violated anyone's privacy willingly.



Recent Changes – Barriers to Access

Facebook

- Facebook has a facility where you can designate someone to have access to your account posthumously/dormant
- Facebook also has an option to either remove or “memorialize” a deceased’s account



Recent Changes – Barriers to Access

Gmail

- Gmail also allows access by an alternative person
- However Gmail is still governed by Google's policy:

“We recognize that many people pass away without leaving clear instructions about how to manage their online accounts. We can work with immediate family members and representatives to close the account of a deceased person where appropriate. In certain circumstances we may provide content from a deceased user's account. In all of these cases, our primary responsibility is to keep people's information secure, safe, and private. We cannot provide passwords or other login details. Any decision to satisfy a request about a deceased user will be made only after a careful review.”
- Very important to plan in advance



Estate Planning Considerations

- Digital assets are taxable like any other asset:
 - subject to estate administration tax;
 - tax on capital gain on death, etc.
- Digital property will generally vest in the deceased's personal representative(s) (executor or estate trustee)

Estate Planning Considerations

- Access to the digital property is typically a challenge for the estate trustee
- For example, crypto currencies which are
- accessed via virtual wallets needing a private key
- Access to password protected electronic devices can prove impossible

Estate Planning Considerations

- It is possible to lose the Bitcoin wallet or delete the Bitcoins and lose them forever.
- There have also been thefts from websites that provide remote storage service for Bitcoins
- Owners are reluctant to give anyone the access codes, even loved ones

Estate Planning Considerations

Steps to Consider

- An inventory of all digital assets should be maintained
- A record of usernames and passwords be maintained and kept up to date in a secure place
- Location of usernames and passwords should be shared with executor/next of kin (subject to contractual restrictions by digital providers)

Estate Planning Considerations

Steps to Consider

- Will should address the disposition of digital assets
- Will should provide the Executor with specific authorization to access digital assets, usernames and passwords
- (sample clause annexed)

Estate Planning Considerations

Challenges for the Executor

- Practical challenges facing an Executor: Where and how does one locate and realize cryptocurrency?
- “Coin Cover”, for example, has created what it describes as one of the world's first cryptocurrency wills <https://www.coincover.com/wills>
- They advertise an "indestructible" card which has information about the client's cryptocurrency
- If the client dies, the executor contacts Coin Cover, with a unique number on the card, and a death certificate.



Estate Planning Considerations

Challenges for the Executor

- Another issue:
- Clarifying the source of funds.
- Some banks and foreign governments will be wary or accepting large cash deposits if the source of the funds cannot be traced due to money laundering and terrorist financing concerns

Estate Planning Considerations

Sign of the Times? This is Not an Endorsement!

The screenshot shows an Amazon.co.uk product page for the 'Coincover Cryptocurrency Will Kit'. The product image features a family of six and the text 'coincover Cryptocurrency Will Kit' and 'The internationally best selling, guaranteed recovery, Cryptocurrency Will Kit'. The product title is 'Cryptocurrency Will Kit for Bitcoin, Ethereum, ERC20, Bitcoin Cash. Pass on Your Cryptocurrency to Your Family'. The price is £98.00. The product is by Coincover, has a 5-star rating from 2 ratings, and is currently on sale for £98.00 (down from £79.00) with a £20 Amazon Gift Card as a reward. The product includes a Unique Solid Metal Lifetime Card & Two personalised Beneficiary Cards, Unlimited Charges and Lifetime Key Storage Subscription, and Detailed Cryptocurrency Will Instruction Guide and Business Guide Secure Wallet. The page also shows the Amazon.co.uk logo, search bar, and navigation links.

Cryptocurrency Will Kit for Bitcoin, Ethereum, ERC20, Bitcoin Cash. Pass on Your Cryptocurrency to Your Family
By Coincover
★★★★★ - 2 ratings

Price: £98.00

They used to £79.00 - get a £20 Amazon Gift Card as approval for the Amazon Platinum Mastercard. Terms apply.

Note: This item is eligible for **click and collect**. [Details](#)

Now £98 from £99.00 + FREE Shipping

- The UK's best selling, guaranteed recovery, Cryptocurrency Will Kit
- Guaranteed Cryptocurrency Fund recovery for loved ones
- Kit includes: One Unique Solid Metal Lifetime Card & Two personalised Beneficiary Cards
- Unlimited Charges and Lifetime Key Storage Subscription
- Detailed Cryptocurrency Will Instruction Guide and Business Guide Secure Wallet

[View more product details](#)

Estate Planning Considerations

Sign of the Times? This is Also Not an Endorsement!

Give the gift of choice. Shop holiday gift cards >

Electronics > Cell Phones & Accessories > Accessories > Cables & Adapters



Roll over image to zoom in

2in1 Kit for Trezor One Bitcoin/Cryptocurrency Wallet - Tailor Made Protective Case - USB Lanyard for Transport, Power and Data Transfer - Carabiner/Tether to Protect Against Loss

Brand: CAMKIX

★★★★★ 489 ratings

Price: \$9.99

Color Name: For Trezor One / Sleeve + USB Neck Lanyard + Tether Kit



- ✓ TREASURE YOUR TREZOR ► While the Trezor Wallet protects your cryptocurrency, the CamKix case will shield your Trezor against bumps and scratches.
- ✓ TAILOR MADE FIT ► The protective case will give your Trezor hardware wallet the appearance of a traditional wallet. The precision cut design assures a perfect fit, a clear view of the screen, easy control of the buttons and access to the USB port.
- ✓ USB CABLE / LANYARD ► Use the USB Lanyard as a cable to connect your Trezor One to your notebook. Finished using the Trezor? Convert the USB cable back to a lanyard to safely carry your Trezor One with you anywhere.
- ✓ DURABLE FAUX LEATHER ► The protective case is made from durable faux leather. It looks and feels like real leather, but is animal-free, low in maintenance and will keep its original shape and form.



Digital Assets Clause

My Trustees shall have the complete authority and absolute discretion to deal with my digital assets, including without limitation, full power to obtain, access, review, modify, delete, control and transfer:

- a. All digital assets that I may own at my death, including but not limited to, emails sent and received, email accounts, text, video and picture messages, digital music, digital photographs, digital videos, software licences, social network accounts, file sharing accounts, financial accounts, banking accounts, digital currency accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts, and similar digital items which currently exist or may exist as technology develops;
- b. All digital devices that I may own at my death, including but not limited to laptops, desktops, tablets, peripherals, storage devices, mobile telephones, smartphones and any similar digital device which currently exists or may exist as technology develops for the purposes of accessing, modifying, deleting, controlling, or transferring my digital assets; and
- c. Any passwords and other electronic credentials associated with my digital assets and digital devices described above.

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