



RESEARCH ARTICLE

NAVIGATING THE LEGAL VOID: DIGITAL ESTATE PLANNING IN INDIA'S DEVELOPING LEGAL SYSTEM

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Abstract

With the proliferation of digital technology and the increasing use of the internet, digital assets have become an integral part of our lives. In today's world, it is common to have a digital presence in the form of online accounts, email, social media, and cloud storage. These digital assets, along with traditional assets, need to be protected and managed in the event of death or incapacity. This is where digital estate planning comes into play. This research paper aims to explore the importance of digital estate planning and the laws surrounding it in India. The paper begins by defining digital estate planning and identifying the types of digital assets that need to be protected. It then discusses the potential consequences of failing to plan for digital assets and the importance of having a digital estate plan in place. The paper then examines the laws in India that govern digital estate planning. It finds that while there is no specific legislation on digital estate planning, existing laws such as the Information Technology Act and the Indian Contract Act, provide some guidance on the management and distribution of digital assets. The paper also discusses the challenges associated with digital estate planning in India, including the lack of awareness about the importance of digital estate planning, the absence of a centralized registry for digital assets, and the difficulty in accessing and managing online accounts after the owner's death. Finally, the paper concludes that while the laws in India are evolving to address digital estate planning, there is still a long way to go. It recommends that individuals take proactive steps to manage their digital assets and seek professional help to create a digital estate plan that addresses their specific needs. In conclusion, digital estate planning is a critical aspect of modern-day estate planning. This research paper highlights the importance of having a digital estate plan in place and identifies the laws in India that govern digital estate planning. It also highlights the challenges associated with digital estate planning in India and provides recommendations for individuals to protect their digital assets. As technology continues to evolve, it is essential to stay informed and take the necessary steps to manage our digital lives effectively.

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Introduction:-

We are living in the 21st century, almost every person on planet earth has a revolutionary device called the smartphone, and the amount of digital footprint we leave behind while using such is huge. It is a general notion that Digital Assets is limited to Cryptocurrencies, Non-Fungible Tokens, or Digital Contracts, but also includes images, videos, audio files, graphics or every other thing which can be accessed digitally.

From 2019, with the debut of telecommunication giant Jio, the burgeoning of the cyberspace in India is huge. We have seen a huge growth, whether it is in terms of investing digitally to owning digital assets, or the increased numbers of Meta Accounts. As the time is passing, these digital assets are becoming immensely valuable to the modern society. As per the reports of the Internet and Mobile Association of India, there are around 451 million active internet users in India, which makes India the second largest country of internet users after China.¹ While trumpeting 2 billion active users on Facebook (later Meta), Facebook said more than 175 million people declare they "love" something on the site daily, and an average of more than 800 million people hit Facebook's "like" button. Facebook leads the pack with more than 2 billion active users in the beginning of 2020.²

Man dies but the digital legacy left behind exists for long, perhaps till that technology does not cease to exist. The number of dead people on Facebook may outnumber the living within 50 years, according to an extreme-case analysis by academics from the University of Oxford.³ Even though a person is dead, somewhere in these devices or technologies they exist.

Digital Assets: Definition & Its Types

There does not exist a rigid definition or proper legal definition as per Indian laws to define digital assets, but one may classify it as something which is stored electronically in binary values.

One of the best definitions is found in a proposed Oregon statute: "Digital assets" means text, images, multimedia information, or personal property stored in a digital format, whether stored on a server, computer, or other electronic device which currently exists or may exist as technology develops, and regardless of the ownership of the physical device upon which the digital asset is stored. Digital assets include, without limitation, any words, characters, codes, or contractual rights necessary to access the digital assets.⁴

As per the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA 2014), Section 870 of the Act, "Digital asset" means an electronic record in which an individual has a right or interest. The term "digital asset" does not include an underlying asset or liability unless the asset or liability is itself an electronic record. A "record," however, means information that is recorded on a tangible storage device or stored on an electronic or other medium and is removable in a perceptible form.⁵

Depending on the medium of storage, the digital asset can be tangible and intangible. Broadly they can be classified as:

1. Personal Digital Assets: These include one's electronically stored personal contacts in mobile phones, personal emails which an individual receives, photos, videos, content stored in social media accounts etc.
2. Financial Digital Assets: These include cryptocurrencies, Non-Fungible Tokens, e-Wallets, virtual debit/credit cards, virtual bank accounts etc.
3. Professional Digital Assets: These include a professional's website, domain name, blog, customer data base, social media handles and other Content Management Systems.
4. Technical Digital Assets: these include the software technologies, device network, device backup logs, tokenized inventory of account data & passwords, etc.

¹Megha Mandavia, India has second highest number of Internet users after China: Report, THE ECONOMIC TIMES, Sep. 26, 2019, <https://economictimes.indiatimes.com/tech/internet/india-has-second-highest-number-of-internet-users-after-china-report/articleshow/71311705.cms?from=mdr> (last visited Feb 27, 2023).

²Facebook bigger than 3 of the world's biggest countries, (2017), <https://www.cbsnews.com/news/facebook-users-2-billion-biggest-countries/> (last visited Feb 27, 2023).

³Dead could outnumber living on Facebook within 50 years, SKY NEWS, <https://news.sky.com/story/dead-could-outnumber-living-on-facebook-within-50-years-11706879> (last visited Feb 27, 2023).

⁴Gerry W Beyer, Web Meets the Will: Estate Planning for Digital Assets, 42 28 (2015).

⁵Julia S. Kharitonova, Digital Assets and Digital Inheritance, 1 LAW & DIGITAL TECHNOLOGIES 19 (2021).

In a restricted sense, digital assets should be said as a new economic object which is established using digital technologies.

The absence of any rigid and proper legal definition brings us to a grey area wherein it gets difficult to ascertain that if the user completely owns the account or just the content which is stored in that particular account. Nobody knows how to legally store all the digital information legally. Storing the digital information could be a wrong, such as a copyright or intellectual property breach. Because of the legal ambiguity in the digital storage area the archivists are over cautious, and they are not productive enough. Much information is not classified or stored properly because of the legal uncertainty.⁶

Digital Estate Planning

A digital estate plan is a document wherein our online information regarding our digital assets, digital accounts are stored. It is a structured information source which can be followed by the legal successors, to identify the legal assets of the demised.

It is truly very unpleasant and disheartening to think about your own morality. According to study by Experian they found that half of the American adults don't have a will, this situation not only is prevalent in America but in India also, people die intestate and there is a certain dispute over inheritance of their properties.

As of May 2022, over 4.7 crore cases are pending in courts across different levels of the judiciary. Of them, 87.4% are pending in subordinate courts, 12.4% in High Courts, while nearly 1,82,000 cases have been pending for over 30 years.⁷ In light of such a situation, it is very difficult for an individual to approach the court to declare them as a successor.

Planning your estate is crucial to ensure that your desires are respected and to ease the burden on your loved ones after your passing. In addition to having standard estate planning paperwork such as a will or trust, it is also wise to prepare for the fate of your digital accounts as our lives increasingly become intertwined with the internet. Since you don't have ownership rights over most digital accounts, they are not subject to your will in the same way as assets that you do possess.

The Need for Law on Digital Estate Planning

The case of Rachel Thompson and Apple⁸ brings to light the critical issue of digital asset inheritance planning. The case shows the potential negative consequences of failing to make provisions for digital asset access after one's death. With many valuable and cherished memories, photos, and videos now stored online, it is increasingly necessary to ensure that digital assets are included in one's estate planning.

Moreover, the case also demonstrates the differences in laws governing digital assets in different countries. While Mrs. Thompson was able to obtain a court order in the UK, in the US, accessing a deceased user's online accounts without proper authorization can lead to criminal charges. These differences further emphasize the importance of seeking legal counsel to ensure that one's digital assets are inherited according to local laws.

Mrs Thompson's case is among the first of its kind in the UK and, after handing down the ruling, Judge Jan Luba called for a simpler way to settle such cases stating that companies should owe a "digital duty of care" to grieving families.⁹ Creating a digital asset estate plan is crucial for anyone who has digital assets. However, this can be a challenging task due to the intangible and intangible nature of digital assets. These assets are often spread across

⁶ Alp Toygar, Cyber law and digital asset inheritance: A new concept, digital assets, and what will happens to digital assets after death?, THESES DIGITIZATION PROJECT (2013), <https://scholarworks.lib.csusb.edu/etd-project/4043>.

⁷ Sumeda, Explained | Over 47 million cases pending in courts: clogged state of Indian judiciary, THE HINDU, May 10, 2022, <https://www.thehindu.com/news/national/indian-judiciary-pendency-data-courts-statistics-explain-judges-ramana-chief-justice-undertrials/article65378182.ece> (last visited Mar 3, 2023).

⁸ Author: Heather Warnock, Rachel Thompson has won her case against Apple | MitchellsRobertson, (2019), <http://www.mitchells-robertson.co.uk/blog/rachel-thompson-won-case-apple/> (last visited Mar 7, 2023).

⁹ Social media – What happens to our online data after we die?, CLARION, <https://www.clarionsolicitors.com/articles/social-media-what-happens-to-our-online-data-after-we-die> (last visited Mar 7, 2023).

multiple platforms, each with different policies for account access, ownership, and transfer. The value of digital assets can also be difficult to determine, as it can be subjective and may depend on factors such as emotional attachment, social significance, or financial value. Third party Service providers will be extremely cautious before handing over any data of the deceased person to a claimant due to the data protection and Privacy concerns and stringent compliance of the applicable Data Privacy laws.¹⁰

To tackle these challenges, individuals can work with estate planning attorneys who have expertise in digital assets. They can guide individuals in identifying and listing their digital assets, including access credentials and instructions for the transfer or deletion of each asset. They can also provide valuable advice on the legal implications of digital asset inheritance and how to plan accordingly.

In conclusion, it is essential to recognize the significance of digital assets and the need to include them in estate planning.

Laws for Digital Estate Planning: India v. US

A will is a legal document that outlines the wishes of a person with respect to the distribution of their property and assets after they pass away. This document is considered crucial because it ensures that the testator's assets are distributed according to their wishes, and it can also minimize the chances of legal disputes between heirs.

Traditionally, wills have dealt with tangible assets such as property, money, and other valuables. However, with the advent of digital technology, a new kind of asset has emerged - digital assets. These assets may include login credentials for various online accounts, digital currencies, e-wallets, images and videos, emails, and other types of sensitive information that require protection and management after the owner's death.

In light of this, a digital will has become increasingly important in today's digital age. A digital will is similar to a traditional will, except that it deals specifically with digital assets. It outlines the testator's wishes with respect to the management and distribution of their digital assets after they pass away. This type of will can help to ensure that the testator's digital assets are handled appropriately and can also prevent unauthorized access or misuse of their sensitive information. The legislations in India presently do not recognize the concept of a 'digital will' or any other form of testamentary disposition by electronic means. The E-Sign under the Information and Technology Act provides for several exceptions from the general rule that documents required to be in writing may also be recorded electronically. As per Section 1(4) of the Indian Information Technology Act, 2000, nothing in the said Act shall apply to a will as defined in clause (h) of section 2 of the Indian Succession Act, 1925, including any other testamentary disposition by whatever name called.¹¹

In India, however, the legacy of digital assets has not received legal support till date. The Indian Succession Act of 1925 defines a will as "the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death." However, the term "property" in this definition does not include digital assets, leaving digital legacies without legal protection. This means that there is no legal recourse for the inheritance of digital assets through a digital will in India.

To address this issue, there is a need to expand the definition of property to include digital assets, and to recognize the importance of digital wills as a means of implementing the right of inheritance of digital assets. The Information Technology Act of 2000¹² does not apply to wills, leaving no legal framework for the inheritance of digital assets through a digital will. Thus, it is highly recommended that digital wills be recognized as a legally binding document for the inheritance of digital assets.

It is important to note that the legal framework for digital assets in India is still developing, and there may be changes in the future as regulators and policymakers continue to monitor the space.

¹⁰admin, Digital Inheritance, VAISHALI BHAGWAT, ADVOCATE (2022), <https://vaishalibhagwat.com/publications/digital-inheritance/> (last visited Mar 7, 2023).

¹¹Digital Wills In India: Legal Or Illegal - Wills/ Intestacy/ Estate Planning - India, <https://www.mondaq.com/india/wills-intestacy-estate-planning/879416/digital-wills-in-india--legal-or-illegal> (last visited Mar 7, 2023).

¹²Id.

The Western World, the US, already has certain acts which governs Digital Assets, RUFDA stands for the Revised Uniform Fiduciary Access to Digital Assets Act. It is a law that has been enacted in many U.S. states to provide a legal framework for managing digital assets after the owner of those assets passes away or becomes incapacitated. Digital assets can include a wide variety of online accounts, such as social media, email, and financial accounts.

RUFADAA is a redesigned version of the Uniform Fiduciary Access to Digital Assets Act (UFADAA), which aimed to provide Estate Executors and Trustees with the same online account access as the owner in the case of their death or incapacitation. RUFADAA establishes a foundation for how the State and an Executor, Fiduciary, or Attorney should handle a person's Digital Assets after incapacitation or death.¹³ RUFDA grants fiduciaries, such as executors, trustees, and agents acting under a power of attorney, the legal authority to access and manage the digital assets of a deceased or incapacitated person. The law also establishes procedures for how digital assets should be managed, including requirements for notice to providers of digital assets and procedures for obtaining access to them. The goal of RUFDA is to simplify the management of digital assets and ensure that fiduciaries have clear legal authority to access and manage them when necessary.

One crucial provision in these laws is the obligation for the fiduciary to disclose the contents of electronic communications, including digital assets, to the executor.

The executor, in turn, has the right to access the deceased person's digital assets. However, before accessing the digital estate, the executor needs to get approval from the court. This court approval requires the executor to provide an explanation about the winding up of the digital estate, ensuring that the executor has a legitimate claim to access the digital assets.

In cases where a custodian is involved, and the fiduciary does not grant access to the digital assets through a will or power of attorney, the custodian must consult the terms of service of the agreement regarding the assets. This provision ensures that the custodian has the power to ask for court orders to access the digital assets and may restrict access to only necessary actions essential for winding up the estate.

Furthermore, custodians may charge certain fees for the services they provide in managing digital assets. These fees are justified as they help to recover the costs of managing the digital estate. It also ensures that the executor and other parties involved in the process are aware of the costs associated with managing digital assets, enabling them to make informed decisions about managing the digital estate.

The custodian's power to restrict access to digital assets only for "reasonably necessary" purposes is also a critical provision. This provision ensures that access to the digital assets is limited to only essential actions, preventing any potential misuse, or mishandling of the assets.

The Need for a Legislature on Digital Estate Planning & Recognition of Digital Assets

The laws that govern the management of digital assets after a person's death are necessary in ensuring that the transfer of ownership and management of these assets is conducted in a smooth and transparent manner. The provisions outlined in these laws, such as the obligation for the fiduciary to disclose the contents of electronic communications and the custodian's power to restrict access, ensure that the management of digital assets is conducted in a fair and just manner.¹⁴

In recent years, digital assets have become an increasingly significant part of people's lives. From cryptocurrencies and digital art to social media accounts and online businesses, the range of digital assets is vast and ever-growing. These assets can hold immense emotional, social, and financial value, making it imperative to consider their legal status in case of a person's death or incapacitation.

¹³#, An Ultimate Guide to Understanding RUFADAA - Clocr, (2022), <https://clocr.com/blogs/rufadaa/guide-to-understanding-rufadaa/>, <https://clocr.com/blogs/rufadaa/guide-to-understanding-rufadaa/> (last visited Mar 7, 2023).

¹⁴AN ACT CONCERNING THE CONNECTICUT REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, <https://www.cga.ct.gov/2016/sum/2016SUM00145-R01HB-05606-SUM.htm> (last visited Mar 7, 2023).

However, the current Indian legal system is not adequately equipped to handle the inheritance of digital assets. The Indian Information Technology Act of 2000 and the Indian Succession Act of 1956 were created in a different era, and they fail to address the unique challenges presented by digital assets. Primarily the term digital asset needs to be defined under the Information Technology Act, as well as the right to inherit digital assets.¹⁵

In order to provide legal certainty and ensure that digital assets are treated as any other form of property, there is a pressing need for amendments to be made to these laws. In particular, a definition of digital assets needs to be established, and the right to inherit them must be recognized.

Defining digital assets is not a simple task. Unlike physical assets, digital assets can have multiple aspects, and their value can be subjective. Some digital assets may have sentimental value, while others may have significant financial value. Additionally, digital assets can exist in a multitude of forms, including data, online accounts, intellectual property, and more.

Given the complexity of digital assets, a comprehensive analysis is required to determine the best approach to address their inheritance. To accomplish this task, it is vital to consider the perspectives of all stakeholders, including individuals, businesses, and legal experts.

Ultimately, recognizing digital assets and digital asset estate planning in India will provide individuals with a greater sense of control and certainty over their digital legacies. It will also create a legal framework that reflects the realities of the digital age and ensures that digital assets are treated fairly and equitably.

In conclusion, the recognition of digital wills as a means of managing digital assets after a person's death is of paramount importance in today's digital age. The Indian legal system must recognize the significance of digital assets and provide legal protection for the inheritance of digital assets through digital wills. This will ensure that the testator's digital legacy is handled appropriately and according to their wishes, and it can also minimize the potential for disputes and unauthorized access to sensitive information.

¹⁵ Mohammad Owais Farooqui, Bhavna Sharma & Dhawal Gupta, Inheritance of digital assets: Analyzing the concept of digital inheritance on social media platforms, 16 NOVUM JUS 413 (2022).