Advising clients in a digital world: dealing with digital assets in wills and probate matters
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Introduction

Only a decade ago, the concept of making provision for a digital estate in your will would have seemed absurd. Making provision in wills for digital assets is now essential, because so much of our life, both professional and personal, has found its way into the digital sphere. An important question for all practitioners dealing with planning for death through will making and dealing with estates after death is to consider and discuss with their clients, what will happen to their digital estate on their death. This seminar covers both the practical and the legal aspects of a digital demise: what the law says on who actually owns digital assets; who has access to those digital assets on death and how the law in this area needs to be updated to keep pace with technology.

Aims & Objectives

This session is split into two halves; the legal and practical aspects of dealing with digital assets in wills and then the legal and practical aspects of dealing with digital assets when administering estates after a death.

1. Will drafting in the digital age - practical tips

Introduction and overview

The issues relating to digital assets are likely to impact upon your entire client base, young and old alike, at some point. The significant difficulty for the private client practitioner is that current laws which have covered traditional property, contract and estate issues do not adequately provide the necessary guidance and structure to address digital assets.

“what exactly does the term “digital assets” mean?”

A non-exhaustive list of digital assets can be drawn up.

What may be obvious to one of us may not be obvious to all of us.

The obvious assets:

• online bank accounts held with financial institutions
• online share trading
• online auction accounts (E-bay)
Other items you might not have considered:-

- Items on social networking sites and other social media
- Domain names and websites
- E-mail accounts (Hotmail, G-mail etc.)
- Gambling accounts
- Online game accounts including “Avatars”
- Photo sharing accounts / contents holders
- Personal medical records
- Share trading accounts
- Blogs
- Digital music
- Cloud storage
- Loyalty programme benefits e.g. Tesco ClubCard, air miles
- Businesses and client lists.
- Cryptocurrencies

In short, the above list grows as technology develops.

What actually are digital assets and what are traditional assets just represented in digital form.

Impact of the move to digital assets

Have technology providers done enough to keep up with death?

Some real life examples:

- Mac Tonnies - a second digital life
- Benjamin Stassen - Facebook
- Justin Ellsworth - Yahoo

In reality, many examples of the interaction of death and the digital world exist and

Any value?

Once the digital assets have been ascertained, it is paramount that you deal with them appropriately.

Previously we divided digital assets dealt with the different assets in
The groups are:

1. Digital assets with **financial** worth.
2. Digital assets with **sentimental** value.
3. Digital assets with **intellectual** value.
4. Digital assets with **social** value.

**Financial Value**

- Bank accounts, payment mechanisms, e-wallets;
- Shopping accounts; and
- Online trading accounts and gambling accounts.

Assets of financial worth have to be valued and a note of their value provided to HM Revenue & Customs when obtaining the Grant of Probate to deal with the deceased’s estate.

**Sentimental Value**

- Personal letters, notes, texts, e-mails etc.
- Photos and videos

These have little financial value but usually huge sentimental value. Sometimes these items are more important to the family than the cash in the bank. Having more sentimental than monetary value means we cannot put a value on this type of asset yet if our clients lost them it would have an emotional effect. Ten years ago this used to be families fighting over record collections, boxes of photo albums and collections of videos. Now each beneficiary gets a USB stick or flash drive with a copy of the deceased entire music collection, photograph’s and video media.

PWC report November 2013\(^1\) confirmed that one in five people have permanently lost personal photos and one in three have been unable to replace lost digital assets.

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Intellectual Value

- Domain names, website content, blogs etc.;
- IP rights (copyrights and trademarks);
- Digital Art;
- Digital content - manuscripts.

These are more difficult to value as goodwill associated with them may disappear with the death of the owner. However some intellectual value may yet to be explored and exploited. Consider drafts of manuscripts to novels, plays etc. that may yet be published.

Social Value

- Social media accounts;
- Gaming accounts;
- Avatars.

The critical point is they may have no physical value in themselves but may contain information that could lead to accessing information of value i.e. answers to typical security questions for access to bank accounts etc. (mother’s maiden name, dates of birth, etc.).

For some gaming accounts can actually have a monetary value - Age of Wulin avatar sold for $16k and World of Warcraft fans can sell their characters from $500 to $800 for characters on which some time was spent, to $5,000 for some well-equipped warriors.

Transition from Physical to Digital

When John Peel died in October 2004 he owned:

- 26,000 albums,
- 40,000 singles, and
- countless CDs.

These were all spread out of Peel’s office and took over a variety of rooms and outbuildings in his home “Peel Acres”.

The iPod ("the Walkman of the twenty-first century") was unveiled in October 2001 by Steve Jobs, CEO of Apple Inc. The original advertising announced it as a product that put "1,000 songs in your pocket".

Digital music storage means that we are unlikely to see a John Peel sized record collection again.

The iPod can hold photo collections, music collections, books, and magazines.

Apple Music (Apple’s rival to Spotify) has new challenges as they no longer own the licence to the music downloaded but rather pay a fee to stream any music from the catalogue of songs at any time. The song remains in the cloud and not on the device.

Statistics

PWC Report values the UK value of digital assets at £25 billion. This is the sum total of our personal digital assets – ranging from photos of loved ones to episodes of our favourite TV programmes.

The UK spends over £50 billion each year online. Black Friday 2014 saw Amazon alone take 4 million orders worth £281m in one day. Not all were digital assets being purchased.

Photos of our loved ones are top of the list of things we like to store digitally (73%) followed by personal emails or other messages (69%) and music (57%).

Only 32% of people keep paper copies where information is stored digitally.

On average we own on our digital devices:

- 2,678 individual songs;
- 28 films and 30 TV shows; and
- 42 e-books.

Excelacom 2016 survey - “what happens each minute on the internet”\(^2\) found:

- Facebook - 701,389 Facebook logins;
- Netflix - 69,444 hours of material watched;
- E-mail - 150m e-mails sent;
- Uber - 1,389 Uber rides;
- App store - 51,000 App downloads from Apple;
- Amazon - $203,596 in sales;

Big Data is growing exponentially, as people demand more content, more speed and more data. These numbers are increasing every day, every minute and every second with clients wanting the benefits of technology and instant communications. This disruption leaves many opportunities for businesses, large and small. With technology and innovative, forward-thinking businesses can cut costs and significantly increase revenues. Ultimately, the customer experience and satisfaction rates will improve, ensuring future success.

**Why does this matter to private client lawyers?**

In drafting wills for our clients we have to know the assets that they have and how they want them to pass on their death. When the client ultimately dies we have to deal with the administration of their estate, which includes all assets; physical and digital.

**PRs duty to investigate**

Section 25 of the Administration of Estates Act 1925 imposes a basic duty upon the personal representatives to collect in the assets of the deceased’s estate. Personal representatives also have a duty to HMRC to correctly return the assets of the estate as at date of death. In addition PRs also have general fiduciary duties which will include acting in the best interests of the beneficiaries.

In each case where digital assets are known (or suspected) it will be necessary for the personal representatives to gather all of the relevant information. The personal representatives will need to consider the strength of any evidence of the existence of digital assets and the potential costs to the estate which will help to determine what action, if any is in the best interests of the beneficiaries. It is difficult to answer the “how far does the PRs duty to investigate extend?” question with certainty. It is likely to depend on the circumstances in each case.

Consideration will also need to be given as to the cost of dealing with digital assets by PRs against the practicality of individual beneficiaries dealing with them. The
PRs will also have to consider whether if they overlook the issues the beneficiaries may challenge the PRs for not taking action.

Given the duty which arises under Section 25 and that owed to HMRC clearly there is a considerable amount of legitimate detective work which can be and should be undertaken by the PRs. The PRs must then present the assets of the estate as they find them. One practical approach is to set out the relevant details in the estate accounts which are distributed to all beneficiaries. Digital assets with value should be documented, after all they may impact on the IHT calculation. That way all beneficiaries can see at first hand the assets in the estate (working of course on the basis that it is possible to establish this information). Engagement can then be encouraged as to whether any of the beneficiaries wish to take action to deal with digital assets themselves.

Useful questions

When meeting to discuss will instructions the practitioner should at an early stage gain a good understanding as to what digital assets exist.

Consider the following questions:-

1. Do you access any accounts solely via digital means?
2. What, if anything, which is deemed to be of sentimental value is stored online or on your computer?
3. Do you own any domain names?
4. Do you access social networking sites and do you have you own personal pages?
5. What e-mail accounts are registered to you?

Consider the use of a digital assets log.

Jurisdiction Issues

Digital assets are mostly stored on shared servers; the service providers may be based in a different country from their users, and they may store data on servers in many countries, making it unclear whose laws would apply.

As an example, just because a user dies in London with a Facebook or Twitter account, it does not mean that English law will apply in dealing with those digital assets. In the absence of clarity on which countries’ laws apply, how a digital service-provider deals with an asset following the death of the user becomes a matter for the provider’s terms of use. No uniformity exists so, in reality, each
separate digital service provider sits in final judgment when it comes to deciding the fate of the digital assets.

Consider, particularly if clients have valuable digital assets in which jurisdiction such assets are based. For example PayPal is registered as a Luxembourg bank while Yahoo’s headquarters are in the United States. If you are to draft a will which relates only to assets in England and Wales one should take great care that this is sufficient to pick up any relevant digital assets.

**Executors**

Traditionally practitioners have encouraged clients to select executors who they are confident will uphold their written wishes. However, the “traditional choice” of using a solicitor as executor might not be appropriate to protect various digital assets.

The practitioner should discuss with their client who they would trust to carry out their wishes with regard to their digital assets? Currently a ‘digital executor’ is not a legally binding or enforceable designation in England and Wales. As is so often the case it is useful to consider the progress made in the United States where the inclusion of a digital executor is more commonplace. Such an appointment is in addition to a traditional executor. The will precedent would then provide the digital executor with the following powers:-

‘*My Digital Executor shall have the power to access, handle, distribute and dispose of my digital assets.*’

(taken from an article entitled ‘Estate planning and administration in the digital age’ - Robert Dunn and Bailey Cavalieri)

Advice in the UK is that perhaps one can still achieve the appointment of a digital executors by ensuring that at least one of your named executors has the requisite skill set to follow your wishes which can either by formally documented or informally discussed.

**What skills should a digital executor have?**

- Committed to following your wishes.
- Tech savvy and competent in using the internet.
- Highly organised and good with detail.

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• Patient - the process may be all consuming requiring engagement with all sorts of different institutions in different jurisdictions.

• Are the assets mainly personal or mainly financial? This may sway your choice of executor.

• Would you trust your digital executor with access to all of your computer files, online accounts etc.?

What can be gifted under a will?

Under English law, information does not pass as property to a personal representative after the death of the deceased, *Boardman v Phipps* [1967] 2 AC 46, but rights associated with the information can vest in the personal representative. Where the information is digital, it exists as electrical signals rather than as an integral part of a physical form such as the words printed on the paper of a book.

Digital information can exist both locally, on devices that were owned and used by the deceased, and in a cloud, on devices that are connected to the internet and to which the deceased had been connected for the provision of digital and other services.

It is no longer sufficient to deliver a device (the iPhone, iPad or Apple Watch) to the relevant beneficiary without investigating what digital information is stored on that device and whether the deceased stored any digital information in a cloud. In some cases, information stored on a local device can provide the only clue to the existence of cloud stored information.

The significant difficulty for practitioners is that a traditional will structure will not necessarily be the correct vehicle to gift digital assets.

The deceased’s ownership of the device does not necessarily mean that he also owned all the rights associated with the information stored on it. He might have had only a licence to use the information—for instance a music track purchased from the iTunes Store; or he might have copied the information—for instance a digital photographic image or a digital video from someone else’s website or Facebook page.

The personal representative might not have any authority to pass on any such information to any beneficiary or purchaser of the device.

Even if the deceased did own the rights associated with the information on his device, those rights would not necessarily pass under a gift of it; they might be given separately.
For example, Ian dies and under his will he gives his iPad to his wife and the intellectual property rights associated with the next chapters of a book that he is contributing to his business partner Lucy. If a digital copy of the chapters are stored on Ian’s iPad, the personal representative might not have any right to transfer the iPad to Ian’s wife without deleting the digital copy of the chapters and they have to ensure that the digital copy of the chapters are transferred to Lucy before deleting from Ian’s iPad.

A real world example is an iTunes collection which is no more than a personal licence to use the music according to Apple’s terms of business. Apple has stated that such property dies with the person who bought it. The reason for this is that in paying for a music track, you do not actually buy the music. Instead you obtain a license to listen to that music, but the license is not transferrable.

A difficulty may arise because the testator has not digested all of the terms and conditions provided by the digital provider.

For example Google offers a plethora of online services including Gmail (email), Picasa (photo hosting and sharing), Google Plus (social networking), and Google Drive (document hosting). Given that they are all accessed via a single account, their policies as detailed in their support pages and are similar but not identical.

It is not possible to judge whether all online material in this example is considered equally confidential or whether, for example, Google might grant access to Picasa photo albums but not to more sensitive information such as that contained in Gmail folders.

It is also pertinent to point out that Google offers an Inactive Account Manager service by which an account holder can opt to have a trusted friend or family member sent an email in the event of their account being inactive for a certain period of time. The mail contains a link from which particular types of content, as defined by the account holder, can be downloaded.

**Precedents**

A general starting point for the practitioner is to treat digital assets in the same way as a gift of chattels. Current thinking is that either an outright gift could be made of the digital assets (to be defined) or alternatively a wider and more flexible gift can be made to executors with an accompanying memorandum of wishes.
“Gift of all digital assets to specified beneficiary”

I give to [name] all Digital Assets as defined below and held by me at the date of my death and not otherwise disposed of by the Will or any codicil thereto.”

“Gift of all digital assets to a specified beneficiary with non-binding request to deal with in accordance with memorandum of wishes”

I give to [name] all Digital Assets as defined below and held by me at the date of my death and not otherwise disposed of by this Will or any codicil thereto and request without imposing any trust or binding obligation that such digital assets be dealt with in accordance with any existing or future memorandum of wishes left by me.”

In relation to both precedents digital assets is defined as:-

“ ‘Digital Assets’ includes files and information stored on my digital devices including but not limited to my desktop and laptop computers, hard-drives, phones, tablets and any similar device. It also includes all files and information stored online via online storage sites and Cloud based storage as well as all my interest in email accounts, social network accounts, domain names, web-hosting accounts, digital music, digital video, digital photographs and my interest in PayPal, eBay and other equivalent online-only financial accounts. Furthermore it includes all similar digital or online assets which currently exist or may exist at the date of my death.”

Security issues

Due to people’s concerns about security, privacy and identity protection they are taking more care when managing their digital assets, including using an increased variety of user names and passwords which may be impossible to establish by anyone using conventional methods.

It is vital that practitioners do not advise clients to leave online passwords in wills. In any event passwords and log in details potentially go out of date very quickly and are unlikely to be of use in the event of death. There is a difference between leaving the necessary details of the various online assets rather than the specific details of how to access them.

PWC report shows 1 in 5 of us use the same password for everything. It is commonplace for passwords to be compromised somewhere - obviously having

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different passwords reduces the risk to clients if one of them ends up in the hands of criminals.

If during his lifetime the deceased gives password information to anyone, including his personal representative, its use before his death might constitute an offence under the Computer Misuse Act 1990, s.1, depending on a proper construction of the prohibition (which might be governed by the law of a jurisdiction outside England and Wales). If a testator were, for instance, to give his executor a sealed envelope containing a list of his accounts, usernames and passwords, not to be opened until after his death, that would be helpful to the representative in identifying the testator’s cloud accounts. Depending on the terms of service in any particular case this action should not, in respect of an account governed by English law, lead to the commission of any offence by the executor if he opens it after the death of the testator and uses the password information.

Confidentiality issues

If the deceased created a literary or artistic work in the course of his employment and saved that work as a file on a computing device owned by him, his employer may well be the owner of the intellectual property rights in that work (Copyright, Designs and Patents Act 1988, s.11(2)).

Furthermore, if the information comprised in the work constituted a trade secret, there was likely a duty of confidentiality on the part of the deceased towards his employer. If the personal representative transfers the device to a beneficiary or sells it without removing the confidential information, she could be guilty of infringement of the employer’s rights (Thomas Marshall (Exports) Ltd. v Guinle [1979] Ch 227).

The circumnavigation of the need for a will and to obtain Probate

Imagine an estate where there is no dispute amongst the beneficiaries, whether about the validity of the deceased’s will or it’s terms.

Imagine that there is no inheritance tax to pay by reason of the death of the deceased. The bulk of the estate is held in a bank account that is accessible online and the executor named in the will is aware of the username and password applicable to this online account. He wishes to use them to transfer the money in the account to an account in his name and then to administer it precisely according to law.

The personal estate of the deceased vested in the executor, who took his title from the will. If the contract between the deceased and the bank did not terminate on his death, the contractual rights became vested in the executor, but not if it did terminate. Generally, banking terms and conditions require a grant of
probate and exclude any authority for the executor to use the online banking service.

Under Computer Misuse Act 1990, s.1(1), the executor could be guilty of an offence if he accessed the online account without authority. It would have to be shown that he knew that access was unauthorised, which would include shutting his eyes to the obvious. A mistake of fact as to authorisation would be a good defence, provided that the executor’s belief was honestly held.

A determination of his knowledge would ultimately be a matter for magistrates, or a jury, after considering all the evidence.

For the purposes of the Proceeds of Crime Act 2002 (“the 2002 Act”), if it can be shown that the executor knows or suspects that he is acquiring money from the account as a result of criminal conduct, his acquisition could constitute money laundering within section 329 of the 2002 Act. If, however, the executor were to access the online banking facility without notifying anyone about the death of the deceased or his unauthorised access, his actions might never come to light. Even if they did, if he is able to show that he believed that he was authorised to access the account, the money obtained from the account would not be criminal property and he would not be guilty of money laundering.

The practitioner must advise executor clients (or non-clients collecting a deceased will) that they might be committing an offence under the Computer Misuse Act by accessing the bank account without obtaining a grant.

If the executor ignored the advice and went ahead, he would find it difficult to establish that he believed he was authorised and would be in danger of prosecution for computer misuse and money laundering. If the solicitor suspected that the executor would go on to access the account, he might wish to protect himself from committing an offence under section 750 of the 2002 Act by making a disclosure to the National Crime Agency.

2. Digital assets - administering the estate

Ascertaining Digital Assets

Due to people’s concerns about security, privacy and identity protection they are taking more care when managing their digital assets, including using an increased variety of user names and passwords which may be impossible to establish by anyone using conventional methods. When a person dies, this can be very difficult for the personal representatives who, as you are aware, have a duty to administer the estate, including those additional assets and particularly, financial ones. The situation is complicated further by the fact that digital assets are more likely to
come to light either later on in the administration process or not even come to light at all.

**Tips**

- Practitioners must be fully aware that there may be online bank accounts as part of a wider banking relationship and therefore raise this with the deceased’s family, the personal representatives etc. so that they are aware of the same and can consider this further.
- Look through the deceased’s papers as a statement or tax certificate will identify these online bank accounts and the providers can then be notified in the usual way.
- Has the deceased made a note of various passwords etc. and other additional assets either with their will or left a digital legacy?
- When writing to financial institutions, particularly banks, it may be worth asking them to confirm whether the deceased had any online accounts.
- If there may be online businesses, the deceased’s accountant or financial adviser may be aware of the same in particular the financial value and the owners of such businesses. Again, paperwork hopefully should be found.
- Searching through the deceased’s records on their computer could also highlight digital assets.

However, there are accounts which are solely online, for example PayPal, and those can be difficult to find, particularly if friends and family are unaware such accounts ever existed. Even when the personal representatives are aware of the accounts there is also no uniform way to obtain the information required to administer the estate as each provider has its own rules. Some providers do have explicit policies on what will happen when an individual dies, others do not. When policies are in place, most of the time these have not been read when the system is used at the outset, as most consumers just click through the agreements.

**PayPal**

Personal representatives will need a cover letter, death certificate, grant of representation and photo identification to gain access to the deceased’s PayPal account.

**Online Businesses**

The future of these should have been considered at the outset when making a will and there is a need to consider access arrangements after death. Clients should have considered providing operation instructions and secure payments which are to continue after death in particular subscriptions to keep the business going.
Gambling

The money from winnings usually stays in the gambling account until a user requests for it to be transferred to their bank account or it can be retained for future gambling.

As to social media:

Facebook

Until recently there have been two options available when someone dies with an account with Facebook. Either the account can be deleted or it can be memorialised.

Facebook’s description of the latter option being “In the memorialised state, sensitive information such as status updates and contact information is removed from the profile, while privacy settings on the account are changed so that only confirmed, existing friends can see the profile or locate it in Facebook’s internal search engine. The wall remains so friends and family - who are already friends with the profile - can leave posts in remembrance. When memorialised, no one can log in to the profile.”

Recently Facebook have announced a new Legacy Contact Feature. The feature allows Facebook users to designate a person who will receive limited access post death to the account. In short that person becomes the manager of the Facebook profile. The feature has recently been rolled out in the USA and Canada. It has arrived in the UK and an international rollout is expected to follow.

Deletion or memorialisation both require proof of death and can be requested only by someone who can prove that they have authority to act on behalf of the deceased.

Twitter

In the event of the death of a Twitter user, the company can work with a person authorised to act on the behalf of the estate, or with a verified immediate family member of the deceased, to have an account deactivated.

However, Twitter’s policy relating to providing access to an account following the death of the account holder is very similar to that of Facebook traditionally pre the Legacy Contact Feature. For privacy reasons Twitter are not able to provide
access to a deceased user’s account regardless of their relationship to the deceased.

Again, Twitter is uncertain if they would permit such access in the event that provision was made in a will for someone to inherit online assets. However, unlike other services, much of the information on Twitter is public, so it is visible to anyone.

Google

Google offers a plethora of online services including Gmail (email), Picasa (photo hosting and sharing), Google Plus (social networking), and Google Drive (document hosting). Given that they are all accessed via a single account, their policies as detailed in their support pages, seem to be similar for all.

There are no hard and fast rules and each case is taken on merit so there might indeed be scope for an authorised person to gain access to the online assets of a dead account holder.

It is not possible to judge whether all online material is considered equally confidential or whether, for example, Google might grant access to Picasa photo albums but not to more sensitive information such as that contained in Gmail folders.

It is also pertinent to point out that Google offers an Inactive Account Manager service by which an account holder can opt to have a trusted friend or family member sent an email in the event of their account being inactive for a certain period of time. The mail contains a link from which particular types of content, as defined by the account holder, can be downloaded.

YouTube

This is now a subsidiary of Google meaning that it is possible to link to the Inactive Account Manager. Care needs to be taken as to when the YouTube account was created.

Cryptocurrencies

Cryptocurrencies are innovative payment networks which use technology to create instant peer-to-peer (P2P) transactions: in effect, they are a new type of money,

but without the backing of a sovereign state or a central bank, and free from any national government regulation or control. The use of cryptocurrencies as a medium of exchange is a new and evolving area, so determining legal status is something of a moveable feast.

Cryptocurrencies have a unique identity and cannot be directly compared to any other form of investment activity or payment mechanism. Bitcoin’s P2P network is free from central authority, and therefore all of the functions of the currency (such as the issue, transaction processing and the verification of holdings) are managed collectively by the network. Bitcoin transactions are recorded in a shared public database called a ‘block chain’. New Bitcoin is produced when a new block is attached to the chain.

As well as mining, other activities involving cryptocurrencies include the buying and selling of the currency, and providing exchange facilities for parties to trade via the medium of Bitcoin rather than recognised national currency. A word of warning for all potential users of Bitcoin: the price of a bitcoin can unpredictable, increasing or decreasing drastically over a short period of time due to its novel nature. Bitcoin itself does not recommend the holding of substantial savings in Bitcoin: a holding should be treated as a high-risk asset, and an individual should never store more money in Bitcoin than they can afford to lose.

Bitcoins are stored in a ‘wallet’. Although in digital format, the Bitcoin wallet should be treated with the same care as a regular wallet, and like in real life, a wallet must be kept secure. Bitcoin is like cash for the internet and makes it very easy to transfer value anywhere in the world. Such transactions carry risk, and to allay users’ security concerns, Bitcoin provides extremely high levels of security.

As well as being used for trading, Bitcoin is often used to pay for goods or services - typically global digital or technology-based services. In the UK, a growing number of retail outlets and service providers such as pubs, cafes, clubs and restaurants - as well as the intended internet retailers - are beginning to accept payment via Bitcoin.

**Government taxes and regulation of Bitcoin**

The growth of the Bitcoin and other cryptocurrencies has attracted the attention of HM Revenue & Customs (HMRC), which is now looking at how they are regulated and, more importantly, of the exchequer, which is looking at how they are taxed.
In March 2014, HMRC issued Revenue & Customs Brief 9 (2014): Bitcoin and other cryptocurrencies (the brief)\(^7\) as a first step in regularising how these services are taxed. HMRC addressed the position on the tax treatment of income received from, and charges made in connection with, activities related to Bitcoin and other cryptocurrencies. It specifically dealt with the cryptocurrencies’ position regarding VAT, corporation tax, income tax and capital gains tax.

For the purposes of VAT, HMRC treats cryptocurrencies as a payment service rather than a currency. As with any other activity, the treatment of income received from, and charges made in connection with, activities involving Bitcoin and other similar currencies will be subject to corporation tax, income tax and capital gains tax, depending on the activities and the parties involved.

For individual taxes, whether any profit or gain is chargeable or any loss allowable will be looked at by HMRC on a case-by-case basis, taking into account the specific facts, with relevant legislation and case law being applied to determine the correct tax treatment.

The value of Bitcoin is unpredictable; its volatile nature is illustrated by the fact that, over the last five years, its value has fluctuated wildly, from 1 Bitcoin being worth only a few cents (US), to a peak of 1 Bitcoin being worth just short of $1,200 (£785). Currently, 1 Bitcoin is worth $689 (approximately £486)\(^8\). Given the often speculative acquisition of Bitcoin, an issue that remains to be resolved is whether gains made are taxable, and whether any losses which arise can be offset against traditional gains. Some commentators argue that the process is akin to gambling, with gains treated as ‘winnings’ and therefore tax-free.

The brief issued by HMRC does not specifically mention inheritance tax (IHT), but it is safe to assume that if a person held Bitcoin at the date of their death, HMRC would expect the value of the deceased’s Bitcoin to be subject to IHT as for any other asset of the estate. IHT forms contain no specific box for Bitcoin, nor any specific guidance on its placement. The best course of action for practitioners completing the IHT205 or IHT400 forms is to place the Bitcoin value in the sections entitled “cash including money in bank, building societies and National Saving” (box 11.1 on form IHT 205, with explanation in box 13) or in the “bank and building society accounts in the deceased’s sole name” (box 52 on form IHT 400, copied from box 1 of form IHT406) with explanation in the “Additional Information” section at the end of form IHT400.


\(^8\) Exchange rate correct 14 June 2016
The explanation should include: information about the Bitcoin account; the value of the Bitcoin in the account; and the exchange rate for the Bitcoins at the date of death. This information will enable HMRC to make a judgement based on the facts of the individual case. The brief does not give any specific advice on what method is to be used in order to value Bitcoin, nor is this covered in any guidance manual issued by HMRC. It is incumbent on practitioners to use their best endeavours to arrive at a valuation for the Bitcoins, and it is suggested that the value be marked as provisional.

**Administering Bitcoin following a death**

Valuing the Bitcoins of a deceased person is relatively easy; accessing the wallet and dealing with the Bitcoins is usually more complex. Due to concerns about security, privacy and identity protection, people are taking more care when managing their digital assets – for example, using an increased variety of user names and passwords to protect them, which may be impossible to establish by anyone using conventional methods. Accounts which are solely digital, for example Bitcoin, can be difficult to find, particularly if friends and family are unaware such accounts ever existed. Even when the personal representatives are aware of the digital assets, there is no uniform way to obtain the information required to administer the estate, as each provider has its own rules.

Furthermore, cryptocurrencies, including Bitcoin, have no central control or body to regulate the way users pass and store their access keys. This means that users have no help or assistance should they lose their hard drive containing their wallet or forget their access key, and there is no one to contact for help in dealing with cryptocurrencies in the event of a user passing away without providing for their wallet to be accessed after their death. Further, Bitcoin has no shelf life, so unlike Facebook or Twitter, which delete accounts after six months of inactivity, Bitcoin accounts will lay dormant until they are re-woken.

Accessing the deceased’s Bitcoin will depend on how they handled their wallet. While Bitcoin users are advised to be careful about the security of their wallet, they are also advised to make an offsite backup of their wallet. This will enable them to pass their wallet to anyone that they choose after their death, in the same way that other property will pass.

If the user is the only person with access to the wallet, the Bitcoin will become lost in the network. It would be as if the user, like pirates of old, had buried a chest of gold in the middle of a desert island, made a map with ‘X marking the spot’ where the treasure is buried, and then lost the map.
If a client passes away with a Bitcoin holding, and even if the family is aware of the deceased’s Bitcoin and has access to the hard drive which contains the wallet, they still may not be able to gain access to the Bitcoin. Only the person who has the access codes has the ability to access the wallet. Control of the wallet is limited to those who know the impossible-to-guess, secret cryptographic private key. If no copies have been made, there is almost no hope of guessing what it is.

If no one other than the deceased had access to the wallet, the holding is essentially destroyed. The benefits of Bitcoin can also be its undoing: as this P2P network is in the public domain with no central authority to regulate its activity, no one can grant access to another person’s wallet to allow them to deal with it as part of the estate administration. This could be disastrous for beneficiaries, as the Bitcoin holding may be substantial, making the estate taxable to IHT, but it may not be possible to secure the holding to pass to the beneficiaries.

**Practical steps**

When making a will, your client’s instructions to dispose of their Bitcoin should be taken in the same way as the instructions for the disposal of any other assets they hold.

As with any form of online or digital assets, clients should be encouraged not to write down their passwords or access codes, but instead make a secure note of these, either through a software programme or service which stores passwords - so-called ‘digital lockers’. After the client passes away, the digital locker releases the passwords to the nominated recipients once confirmation of the death has been received.

One possible solution for cryptocurrencies would be to ‘shard’ the private access key into separate pieces and divide them between different individuals, so that no one person has all the component parts of the code required to access the wallet. Only once the Bitcoin wallet owner has passed away will the holders of the various shards of the key be able to piece them together to access the deceased’s Bitcoin wallet.

**The future of Bitcoin**

Some commentators and economists predict that Bitcoin will be the currency of choice for digital transactions, so we must appreciate that, in the future if not now, we will need to assist our clients and their estates in dealing with their Bitcoin accounts after they have passed away. There may even come a point,
maybe even in the not too distant future, when solicitors will accept payment of their fees for the production of wills in Bitcoin.

Any value?

As a result of the difficulty in ascertaining digital assets the completion of the IHT account will become ever more challenging.

- Digital legacies
  - Informally (see above, at the will writing stage)
  - Formally

Digital password solutions

In theory the preferred approach would be to use online digital inheritance arrangements. These are facilities for a person to have a password restricted access to their own unique area which they could then make a secure list of digital assets. The executors and beneficiaries are then left the access code to the online storage facility. There are a range of providers which offer this service. However practitioners should note that many cease trading after a relatively short life span.

Practitioners will also need to consider that updating the details remains key as out of date information is and can be worse than not having any records in the first place.

Executors and access rights

If passwords are provided what is the legal position if an executor logs-in as the deceased? The likelihood is that in the UK the executor could be committing an offence under the Computer Misuse Act 1990. Often executors will need to consider the relevant terms of the service agreement to understand post death transfer access.

The significant difficulty is the potentially vast starting points upon death for executors and family beneficiaries. Consider the John Peel example and the contrast between a record collection in the form of vinyl and that same collection being stored on an iPhone.

Practitioners will also be faced at some point with executors and/or family members asking the practitioner to access digital technology which belonged to the deceased e.g. laptop. In the good old days the initial first meeting with regard to the estate would have been quite simply for the family to bring in various
papers extracted from the deceased’s papers indicating assets and liabilities. These days the family may bring in an iPad, a laptop or even a digital watch. There are significant complications around who can access such items following the death of the deceased particularly when no provision has been made by the deceased during their lifetime.

**Biometric Passwords**

Technology continues to move on at an incredible pace. Consider the recent movement away from manual passwords to the use of a thumb or finger print. Quite simply it may be impossible to access digital devices without the password of the deceased.

**Where are we now**

We are often asked about making wills digitally by clients.

*“Can I make my will on my computer and store it there rather than having to print it out and sign it and then keep it safe?”*

This is where the law is really behind the times. Going back to Roman times a will was orally given in front of 7 witnesses, at the time of the crusades this reduced to 5. Henry VIII took it to 3 witnesses and the current Wills Act (from the first year of Queen Victoria’s reign) made the will in writing with two witnesses with the growth of literacy in England.

English position on will making – can we make a digital will? In short, under section 9 of the Wills Act 1837 the answer is “no”.

A will may be written on any material; wills written on items as egg shells, cereal boxes, and walls where all held to be valid. In writing is liberally interpreted but must be physically signed by the person making the will. The will can be handwritten or typed.

As to the form of the signature, a mark may suffice, as may an unfinished signature, or initials if it appears that that testator intended to sign.

**Recent foreign case law of interest**

This is where the law in England can take a leaf out of its former colonies. Australia took the Victoria legislation and has done many wonderful things with it.
Looking at a few cases from Australia points to where we could go with this in the future.

A note to practitioners - the cases below were not decided in the jurisdiction of England and Wales.

**Will made on an iPhone**

This was on the basis of exceptional circumstances and doesn’t (as reported in some papers) open the floodgates to people using mobile phones for do-it-yourself wills.

The Supreme Court of Queensland, Australia ruled that the will typed into an iPhone but not written out, signed or witnessed would stand.

This was on the basis of exceptional circumstances and doesn’t (as reported in some papers) open the floodgates to people using mobile phones for do-it-yourself wills.

The case itself is very sad; Karter Yu, a young international student was living and resident in Australia away from home and family, after an intense personal crisis (but not elaborated upon in the judgment) died on 2 September, 2011 by taking his own life.

Before his final act he used the “Notes” app on his iPhone to tap in a will and his final goodbyes to friends and family. The will named his brother as executor and set out clearly the distribution of his estate.

The brother, as executor, could not execute the will’s instructions as it did not comply with legal requirements (such as the will being in writing, signed and witnessed) and application was made to the court in Queensland to admit the will to probate.

Although the will was not witnessed the court found it had been created on the iPhone by the deceased with the clear intention of it being legal and operative before he tragically ended his life moments later.

There were special factors in this decision but they do not mean others can use a mobile phone to prepare a DIY will and expect it to be valid.
Will contained in a Word document

Daniel Yazbek a Restaurateur worth $3mAUD left a will in a Word document saved as “will.doc”. The will was prepared prior to an overseas trip in 2009. The deceased took his own life in 2010. The deceased’s brother took their parents to Court claiming that the ‘will.doc’ should be upheld notwithstanding that the required signature and two witnesses were not present. The parents argued that their son had died intestate.

In finding that the will could be admitted as an informal will the following considerations were relevant:-

1. Notwithstanding that the name at the end of the document was typed in accordance with the rest of the will rather than as an electronic signature the fact that the document was named as will.doc supported the inference that the deceased had created it and intended it to be his final wishes.
2. The deceased had informed several others that he held a will on his computer.
3. Forensic evidence confirms that the computer was password protected and the deceased was the only one to create, edit and access the document.
4. The deceased had accessed and not changed the document a fortnight before he died suggesting that he was satisfied with the content.

Will on a DVD recording

This case involved a video recording on a DVD made in contemplation of an individual taking his own life. The DVD had been labelled “My Will”. The substance of the recording on the DVD demonstrates that the DVD itself without any more formality on the part of the deceased would operate upon his death as his will. He says that that he's no good with paperwork and that he hopes that his recording will be sufficiently legal to operate to dispose of his property.

The informal will was found to exist.

The Future for England & Wales - Law Commission Wills Project

The Law Commission recently commenced with a project on wills with the aim to report, make final recommendations and prepare a draft Bill by early 2018. A consultation paper is due Spring 2017.

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The following extract is taken from the status report on the Law Commission website.

“This project will review the law of wills, focusing on four key areas that have been identified as potentially needing reform:

1. testamentary capacity,
2. the formalities for a valid will,
3. the rectification of wills, and
4. mutual wills.

It will consider whether the law could be reformed to encourage and facilitate will-making in the 21st century: for example, whether it should be updated to take account of developments in technology and medicine. It will also aim to reduce the likelihood of wills being challenged after death, and the incidence of litigation. Such litigation is expensive, can divide families and is a cause of great stress for the bereaved.”

How we can help

While this may be a new area to many private client practitioners the Law Society Private Client Section and the Wills & Equity Committee have been considering issues on behalf of clients and practitioners for several years. Private client solicitors provide a range of integrated services both around the preparation of a will and the administration of an estate where digital issues are relevant. Our aim is to provide our practitioners with relevant guidance with the necessary confidence that we are experts in this area. This will follow from the Law Society shortly.

Ian Bond
June 2016