

# Dealing with Digital Assets on Death:

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

**Presented by:**

Lindsay Histrop & Valentina Romano,  
(Student at Law)  
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# Digital Assets – Prologue

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## Bitcoin Example:

- Of a capped total of 21 m. Bitcoins, 18 m. have been “mined”
- Some sources estimate that as many as 3 m. bitcoins (~\$38 billion) 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

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## 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

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## 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

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## 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

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## 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

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## 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

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## 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

# Social Media Accounts

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## Definition

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

# The Law in Canada

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## 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

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## *Uniform Access to Digital Assets by Fiduciaries Act (UADFA)*

- 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 (UADFA)*

- **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

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## *Uniform Access to Digital Assets by Fiduciaries Act (UADFA), Cont'd*

- 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

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## 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

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## 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

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## Specific Examples

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

# Barriers to Access

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## 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

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No right of survivorship for digital assets

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Lack of legislation

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Privacy-oriented Terms of Service and User Agreements

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No immediate right to access, transfer or delete online accounts of a deceased

# Estate Planning Considerations

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- 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

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

# Estate Planning Considerations

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- 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

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## 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

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## 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

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## 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

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



The screenshot shows an Amazon.co.uk product page for a 'Cryptocurrency Will Kit for Bitcoin, Ethereum, ERC20, Bitcoin Cash. Pass on Your Cryptocurrency to Your Family' by Coincover. The product is priced at £99.00 and has 2 ratings. The product image features a family of six and lists key features: 'Guaranteed cryptocurrency recovery', 'Includes 2 notification cards', and 'Includes unique Cryptocurrency Will ID card'. The text below the image states: 'The internationally best selling, guaranteed recovery, Cryptocurrency Will Kit'. The product description on the right lists features such as 'The UK's best selling, guaranteed recovery, Cryptocurrency Will Kit', 'Guaranteed Cryptocurrency Fund recovery for loved ones', and 'Kit includes: One Unique Solid Metal Lifetime Card & Two personalised Beneficiary Cards'. It also mentions 'Unlimited Changes and Lifetime Key Storage Subscription' and 'Detailed Cryptocurrency Will Instruction Guide and Business Grade Secure Wallet'. A note indicates that the item is eligible for 'click and collect'.



**Questions?**



THANK YOU

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The next presentation will begin shortly