

SUCCESSION OF DIGITAL ASSETS: CHALLENGES AND PATH TO DELINEATE AN INDIAN FRAMEWORK

*- Smruti Kulkarni**

ABSTRACT

In the rapidly advancing digital world, the pertinent issue of what would happen to digital assets after a person passes away has become a pressing concern. The paper begins by examining the emerging significance of digital assets, their various categories and the immense sentimental and economic value that individuals attribute to such prized possessions. However, the traditional Indian succession laws have not been able to cope with the evolving socio-legal realities, which leave a gap in addressing the ownership, transferability and inheritance of digital assets. This paper examines the issues and challenges that arise in the inheritance of digital assets. These challenges include the ambiguity surrounding ownership rights, the loss of estate, and the arbitrary imposition of terms and conditions by online platforms. The burden is further increased due to the rampant identity theft and copyright violations, which complicate the landscape for smooth digital inheritance.

To address these challenges, the paper undertakes a comprehensive overview of the development of digital inheritance laws in multiple jurisdictions, such as the EU, the US, and the UK. Deriving from these specific regulations, it proposes a tailored regulatory framework for India, not only consisting of legislative measures, but also other alternative changes to navigate the complex of digital succession. The paper concludes by emphasising the imminent need to curate legislation specifically addressing digital inheritance provisions, reflecting the unique nature of digital assets. This would help in striking a balance between protecting an individual's fundamental right to privacy and the universal law of succession.

Keywords: Digital Assets, Intestate Succession, Digital Inheritance, Data Privacy, Indian Framework.

* Student, Gujarat National Law University.

INTRODUCTION

Over the past few years, succession laws across the world have not been immune to the challenges posed by evolving technologies, changing the socio-legal realities.¹ According to recent statistics, close to 66.2% of the global population uses the internet and thus spends a significant amount of time in the virtual world, inevitably leaving traces of digital assets.² The concept of digital assets has become an integral part of our contemporary existence. However, what happens to these assets when a person dies? The limited scope of traditional succession laws makes them inadequate to address issues concerning the ownership, transferability, and inheritance of digital assets, which have gained prominence globally, including in India.³

UNDERSTANDING DIGITAL ASSETS AND THEIR EMERGING SIGNIFICANCE

The term ‘digital asset’ has been a misnomer and thus does not have a widely accepted definition.⁴ ‘Asset’ is characterised by the existence of someone’s exclusive rights to own an object or property.⁵ Digital assets are property (information) stored in an intangible medium, accessed through tangible hardware technologies.⁶ The United States (hereinafter, ‘US’) Revised Uniform Fiduciary Access to Digital Assets Act (hereinafter, ‘RUFADAA’) defines it as electronic records in which individuals have rights or interests.⁷ It can be understood as “any digitally stored content or an online account, owned by a legal person”.⁸

¹ John H Langbein, ‘The Nonprobate Revolution and the Future of the Law of Succession’ (1984) 97(5) Harvard Law Review 1108.

² ‘Digital around the World’ (*Data Reportal*) <www.datareportal.com/global-digital-overview> accessed 2 August 2024.

³ Sahaj Mathur, ‘The Law of Succession and Inheritance in India: A Critical Appraisal of the Law Commission of India Consultation Paper on Reform of Family Law’ (2021) 1(1) Indian Journal of Law and Legal Research.

⁴ Agata Ferreira, ‘The Curious Case of Stablecoins—Balancing Risks and Rewards?’ (2021) 24(4) Journal of International Economic Law 755.

⁵ Secretariat of the United Nations Commission on International Trade Law, ‘Taxonomy of Legal Issues Related to the Digital Economy’ (*UNCITRAL*) <www.uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/digitaleconomytaxonomy.pdf> accessed 2 August 2024.

⁶ Jamie B Hopkins, ‘Afterlife in the Cloud: Managing a Digital Estate’ (2013) 5(2) Hastings Science and Technology Law Journal 209.

⁷ Joseph Ronderos, ‘Is Access Enough?: Addressing Inheritability of Digital Assets using the Three-Tier System Under the Revised Uniform Fiduciary Access to Digital Assets’ (2017) 18 The Tennessee Journal of Business Law 1031, 5.

⁸ John Romano, ‘A Working Definition of Digital Assets’ (*The Digital Beyond*) <www.thedigitalbeyond.com/2011/09/a-working-definition-of-digital-assets/> accessed 23 July 2024.

These assets can be categorised into various types, namely Personal digital assets holding immense sentimental and personal value (contacts, emails, social media profiles, posts, photos, documents stored in storage on devices), Financial digital assets having significant economic implications (details of digital financial transactions, virtual digital currencies like bitcoin), Professional digital assets having substantial commercial value (official email address, auction and customer databases, content management systems) and Technical digital assets that are critical to maintaining digital infrastructure (passwords, back-up data, cloud computing services).⁹ These varied notions of digital assets set them apart from the traditional perception of property and create complexity regarding the nature of their inheritance.¹⁰

INHERITANCE OF DIGITAL ASSETS: ISSUES AND CHALLENGES

The ownership and transferability of digital assets under succession laws present novel challenges and opportunities for the stakeholders. In the absence of clear legal frameworks, questions arise regarding the extent of ownership held by individuals over their digital assets and their ability to transfer or access these assets upon their demise.¹¹

Assets stored on electronic devices that are created by their owners can be inherited with relatively less complexity. The heirs who inherit these devices, under existing inheritance rules, will typically inherit the digital assets as well. One prevalent issue concerning these assets is that they are often password-protected or secured by way of biometric authorisation, the credentials for which are often not known to the descendants, as happened in the case of Leonard Bernstein,¹² an eminent musical artist.

Next in line are assets stored on online servers such as email accounts, social media accounts, dating sites, cloud services, etc. Contrary to the common perception of users that they ‘own’ their accounts, the terms and conditions prohibit disclosure to anyone other than the user, and some expressly prohibit inheritance.¹³ Such assets tend to be the most complex when it comes

⁹ Prashant Mali and Ashwathy Prakash G, ‘Death in the Era of Perpetual Digital Afterlife: Digital Assets, Posthumous Legacy, Ownership and its Legal Implications’ (2020) National Law School Journal 15(1) <www.repository.nls.ac.in/nlsj/vol15/iss1/8/> accessed 31 July 2024.

¹⁰ Henk de Haan, *In the Shadow of the Tree: Kinship, Property and Inheritance among Farm Families* (Wageningen University 1994).

¹¹ Tobias Glas, *Asset Pricing and Investment Styles in Digital Assets* (Springer 2022) ch 2.

¹² ‘Digital Estate Planning Strikes a Chord with Music Industry’ (*MyLennium*) <www.mylennium.com/article/digital-estate-planning-strikes-chord> accessed 2 August 2024.

¹³ Natalie M Banta, ‘Property Interests in Digital Assets: The Rise of Digital Feudalism’ (2017) 38 Cardozo Law Review 1099; Shelly Kreiczer Levy and Ronit Donyets-Kedar, ‘Better Left Forgotten: An Argument Against

to inheritability, due to the protection of the deceased's personal privacy and the avoidance of possible liabilities.¹⁴ Some platforms have granted scope for pre-determining actions to be taken with the respective account post-mortem.¹⁵ However, a large majority do not provide such facilities.

The assets purchased from Internet Service Providers (hereinafter, 'ISPs') or online platforms like Amazon.com also pose difficulties, as they do not transfer ownership of the content but only a license to use it, further prohibiting a transfer to anyone else.¹⁶ Non-awareness among the users regarding the outrageous terms and conditions imposed by these platforms hinders them from transferring these assets.¹⁷ This, in essence, changes the very nature of succession rights over digital estates. Non-fungible tokens (hereinafter, 'NFTs') are based on blockchain, eliminating the counterfeiting of assets that are owned digitally, acting as ownership certificates of these digital assets.¹⁸ These have the potential to be transferable to the heirs upon the user's demise, but the framework for the same has to be derived.¹⁹

Another important instance is the decentralised ownership of cryptocurrencies that are impersonal, unrecorded and do not involve an ownership proof.²⁰ A crypto wallet cannot be used without a private key, and its transferability is subject to the user's privacy considerations.²¹ Testamentary succession of these assets is still possible, as the testator can store his public and private keys under separate documents that do not form an integral part of

'Treating Some Social Media and Digital Assets as Inheritance in an Era of Platform Power' (2019) 84(3) Brooklyn Law Review 703.

¹⁴ Johan David Michels, Dimitra Kamarinou and Christopher Millard, 'Beyond the Clouds, Part 2: What Happens to the Files You Store in the Clouds When You Die?' (2019) Queen Mary School of Law Legal Studies Research Paper 316.

¹⁵ Edina Harbinja, 'Post-mortem Social Media: Law and Facebook after Death' (*Ashton Research Explorer*, 2017) <www.publications.aston.ac.uk/id/eprint/37749/1/Post_mortem_social_media_law_and_Facebook_after_death.pdf> accessed 31 July 2024.

¹⁶ Doug Lichtman and Eric Posner, 'Holding Internet Service Providers Accountable' (2006) 14 Supreme Court Economic Review 221, 259.

¹⁷ *In re Varnado* No 356839 (Michigan Court of Appeals, 28 December 2021).

¹⁸ Iryna Davydova, Larsya Didenko and Viktoria Tomina, 'Legal Nature and Inheritance of Virtual Property in Ukraine and the World: Status Problems, Prospects' (2021) 10(2) *Ius Humani Revista De Rerecho* 1, 26.

¹⁹ Tiina Mikk and Karin Sein, 'Digital Inheritance: Heirs' Right to Claim Access to Online Accounts under Estonian Law' (2018) 27 *Juridica International* 117.

²⁰ Primavera De Filippi, 'The Legality of Blockchain Technology' (2022) 41(3) *Policy and Society* 358, 372

²¹ Oleksander Omelchuk, Inna Iliopol and Snizhanna Alina, 'Features of inheritance of cryptocurrency assets' (2021) 10(1) *Ius Humani Revista De Derecho* 103, 122.

the will, and which later can be transferred to those entitled under the will.²² However, intestate succession of cryptocurrency poses various issues, where external factors such as relation with descendants, knowledge and intention matter, and thus are yet to be explored.

The emergence of these types of digital assets provides for a novel understanding of changing realms of “property” under law and the changing socio-legal realities that must be catered to by innovation in legal frameworks.²³ As India embraces the digital age, it is crucial to navigate the legal, social, and ethical dimensions of digital asset succession. The testamentary and intestate succession laws of India, especially the Hindu Succession Act, 1956 (hereinafter, ‘HSA’), which governs inheritance matters for Hindus, play a pivotal role in shaping the legal framework surrounding succession, impacting a major chunk of the population.²⁴ However, it is essential to assess the applicability and its interpretation in the context of digital assets, which did not exist at the time of its inception.

This paper seeks to examine the implications of digital assets on intestate succession, privacy, and the preservation of personal legacies, and their impact on individuals, families, and legal professionals. It also analyses the scope and challenges associated with the succession of digital assets under the Indian succession laws, taking into account the evolving digital landscape in the country and its contemporary relevance. By exploring the global landscape surrounding digital asset succession and drawing on best practices that can be applied within the Indian legal framework, it proposes a tailored framework for governing the succession of digital assets in India.

DIGITAL ASSETS AND SUCCESSION IN INDIA

In India, the regulations for digital asset succession are at a nascent stage, and regulatory efforts should be made to establish regulations for their governance to ensure a smooth inheritance process.

INDIAN REGULATIONS GOVERNING DIGITAL ASSETS

Currently, India lacks specific laws governing digital assets, although some regulations primarily regulate financial digital assets. While there is no explicit prohibition on using or

²² AF Watkins, ‘Digital Properties and Death: What Will Your Heirs Have Access to After You Die?’ (2014) 62 Buffalo Law Review 193.

²³ Amnon Lehavi, ‘The Property Puzzle’ (2008) 96 Georgetown Law Journal 1987.

²⁴ Haardik J Rathore, ‘Inheritance of Property – An Overview under Hindu Law’ (2021) 1(3) Nyaayshastra Law Review.

trading Virtual Digital Assets (hereinafter, ‘VDAs’), including cryptocurrencies, they remain largely unregulated.

Through a number of proposed laws and other legislative actions, the Indian government has been aggressively seeking the regulation of VDAs.²⁵ In order to create a framework for official digital cryptocurrencies issued by the Reserve Bank of India (hereinafter, ‘RBI’) and to outlaw private cryptocurrencies not issued by the State, the Cryptocurrency and Regulation of Official Digital Currency Bill, 2021 is presently being considered by the Indian Parliament.²⁶

Additionally, to tax VDAs, the Income Tax Act of 1961 was revised in the Finance Bill 2022.²⁷ Anything that is produced using cryptography to provide a digital representation of value, such as a code, number, or token, falls under this description.²⁸ Standards for VDA advertisements have been released by the Advertising Standards Council of India, outlining permissible content, required disclosures and disclaimers.²⁹

The RBI’s proposal via a concept note to establish the digital Rupee as a Central Bank Digital Currency (hereinafter, ‘CBDC’) is one way in which the Indian government has made clear its intention to regulate VDAs.³⁰

Apart from financial digital assets, the Information Technology Act, 2000, governs all digital assets, data, and information in India. However, it’s not applicable to wills, dispositions, or testaments.³¹ Furthermore, the Digital Personal Data Protection (hereinafter, ‘DPDP’) Act 2023 is India’s comprehensive data protection law, regulating the processing, retention, and

²⁵ Gilead Cooper, ‘Virtual Property: Trusts of Cryptocurrencies and Other Digital Assets’ (2021) 27(7) *Trusts & Trustees* 622.

²⁶ Samvad Partners, ‘Law Governing Virtual Digital Assets – India Guide, 2022’ (*Legal 500*, 6 July 2023) <www.legal500.com/developments/thought-leadership/law-governing-virtual-digital-assets-india-guide-2022/> accessed 2 August 2024.

²⁷ ‘Memorandum Explaining the Provisions in the Provision of Finance Bill 2020’ (*Indian Budget*, 2020) <www.indiabudget.gov.in/budget2022-23/doc/memo.pdf> accessed 2 September 2024.

²⁸ Sohini Banerjee and KS Roshan Menon RM, ‘Defining Digital Assets for Private Law: Perspectives from the Global South’ (*Indian Journal of Law and Technology*, 15 February 2024) <www.ijlt.in/post/defining-digital-assets-for-private-law-perspectives-from-the-global-south> accessed 2 August 2024.

²⁹ Aishwarya Sandeep, ‘Digital Assets and Inheritance Laws’ (*Parenting and Law*, 12 September 2022) <www.aishwaryasandeep.in/inheritance-of-tenancy/> accessed 2 August 2024.

³⁰ FinTech Department, ‘Concept Note on Central Bank Digital Currency’ (*Reserve Bank of India*, October 2022) <www.conceptnoteacb531172e0b4dfc9a6e506c2c24ffb6.pdf.rbi.org.in> accessed 31 July 2024.

³¹ Prashant Mali and Ashwathy Prakash G, ‘Death in the Era of Perpetual Digital Afterlife: Digital Assets, Posthumous Legacy, Ownership and Its Legal Implications’ (2020) *National Law School Journal* 15(1) 124 <www.repository.nls.ac.in/nlsj/vol15/iss1/8/> accessed 31 July 2024.

protection of individuals' digital personal data. It imposes obligations on data fiduciaries, grants rights to data principals, and imposes penalties for non-compliance.³²

SUCCESSION OF DIGITAL ASSETS IN INDIA

In India, the classification of an asset as a property under the law depends on whether it is inheritable or transferable, either by way of a will or under personal intestate laws.

INDIAN INHERITANCE FRAMEWORK

In India, testamentary succession takes place via presentation of the deceased's will, whereas intestate succession is governed by personal laws.³³ All kinds of property, whether immovable or movable, ancestral or self-acquired, are inheritable under both methods.³⁴ For Muslims, the inheritance of property is governed by the traditional Muslim law comprising four sources, i.e. the Quran, Sunnah, Ijma and Qiyas.³⁵ The succession of properties for Hindus, Sikhs, Buddhists and Jains is governed by HSA. Whereas, when an individual disposes of their property by a will, the Indian Succession Act, 1925, governs the transfer of assets to designated recipients.³⁶

Most nations, including India, lack the legislative measures to enable the smooth succession of digital assets, leading to several challenges in this process of inheritance. As the monetary value of digital assets increases, the complexities in the succession process increase as well. One of the factors contributing to these legal gaps is the lack of precise definitions and legislation pertaining to digital estates, which may have to include debts and intellectual property.³⁷ Thus, the inheritance and transfer of digital assets after death is a pending challenge.

TESTAMENTARY DISPOSITION OF DIGITAL ASSETS

³² 'The Digital Personal Data Protection Bill, 2023' (*PRS Legislative Research*, 30 July 2024) <www.prsonline.org/billtrack/digital-personal-data-protection-bill-2023> accessed 2 August 2024.

³³ William S Holdsworth and C W Vickers, *The Law of Succession, Testamentary and Intestate* (The Lawbook Exchange 2006).

³⁴ *ibid.*

³⁵ Abdul Ghofur Anshori, 'Sources and Legal Principles of Islamic Inheritance' (2022) 2(2) *Journal Equity of Law and Governance* 157.

³⁶ Bhumika Indulia and Ridhi, 'Where There is a Will, There is Inheritance Law' (*SCC Times*, 27 October 2023) <www.seconline.com/blog/post/2023/10/27/where-there-is-a-will-there-is-inheritance-law/> accessed 2 September 2024.

³⁷ Maria Markova, 'A Digital Offer of a Real Estate – Nature and Rights of Intellectual Property/Problems and Solutions' [2021] (3) *Real Estate & Business* 163.

For the testamentary disposition of property by instruments like a will, the Indian Succession Act, 1925 is applicable. This law lacks specific provisions for the inheritance of digital assets by the deceased's legal heirs.³⁸ Thus, for addressing the challenges for the transfer of digital assets, including social media profiles, email addresses and other financial digital assets, to a deceased person's heirs, the Indian Succession Act, 1925 is not equipped with the necessary legal procedure or rules.³⁹

Digital assets, however, can be considered transferable property, and legal heirs may obtain access to them by presenting service providers with the appropriate legal procedure and documentation as prescribed by the service providers.⁴⁰ When access is requested, service providers might deny access, claiming that the request violates their terms and conditions, leaving the family with no choice but to resort to the tedious remedy of a court order.⁴¹ And in India, with heightened red-tapism and bureaucratic pressure, it is imperative to obtain a succession or a legal heir certificate before petitioning the courts for such an order, which makes the entire process cumbersome and expensive.⁴²

INTESTATE SUCCESSION OF DIGITAL ASSETS

The Hindu traditional law classifies property into two categories: self-acquired and ancestral. The members of a family, by birth are entitled to a share in the ancestral property.⁴³ In case an individual acquires a separate property through his own hard work and skills, it is classified as self-acquired property, and that individual has complete authority of disposal over that property.⁴⁴ It is up to him whether or not to transfer it to his descendants.⁴⁵

Earlier, the property would devolve through the Rule of survivorship among the coparceners of the family.⁴⁶ However, post the 2005 Amendment Act, in case a person dies intestate, the

³⁸ Michael D Walker, 'The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age' (2017) 52 Real Property, Trust and Estate Law Journal 51.

³⁹ Suzanne B Walsh, 'Coming Soon to a Legislature Near You: Comprehensive State Law Governing Fiduciary Access to Digital Assets' (2014) 8 Charleston Law Review 429.

⁴⁰ Victoria Blachly, 'Planning for Fiduciary Access to Digital Assets' (2015) 29 Probate & Property 56.

⁴¹ Alberto B Lopez, 'Death and the Digital Age: The Disposition of Digital Assets' (2016) 3 Savannah Law Review 77.

⁴² Titu Ionascu, 'Certificate of Heir – The Role and Legal Nature' (2020) Annals Constantin Brancusi U Targu Jiu, Juridical Sci Series 143.

⁴³ Archana Parashar and Amita Dhanda, *Redefining Family Law in India: Essays in Honour of B. Sivaramayya* (Routledge 2009).

⁴⁴ *ibid.*

⁴⁵ Gunther-Dietz Sontheimer, *The Joint Hindu Family: Its Evolution as a Legal Institution* (South Asian Studies 1997).

⁴⁶ *ibid.*

property devolves upon his legal heirs in accordance with the rules mentioned under HSA⁴⁷ The property includes all kinds of assets owned by the deceased, whether movable or immovable. HSA does not classify the categories of properties as inheritable by the legal heirs. Hence, the inheritance of digital assets can pose a challenge, as there are no legal provisions or judicial precedents in India addressing inheritance of digital assets under intestate succession.⁴⁸ Under the Muslim law, all kinds of property, movable as well as immovable, can be inherited. The law does not distinguish between corporeal or incorporeal property or ancestral or separate property due to the absence of the concept of joint family or coparcenary.⁴⁹ The property succession, like the Hindu law, is based on traditional principles and hence does not incorporate provisions regarding the intestate succession of digital assets.

CHALLENGES AND ISSUES WITH THE SUCCESSION OF DIGITAL ASSETS

The lack of legislative as well as judicial reforms with regard to express provisions for the inheritance of complex digital assets raises several concerns for the data users, their families, and their legal heirs. These complexities hamper the process of transferability and inheritance of digital assets.

BURDEN ON MEMBERS AND LEGAL HEIRS

Accessing and managing a deceased person's digital assets and internet accounts can be extremely difficult for family members and legal successors.⁵⁰ Access to an individual's account after death is subject to the policies and procedures of various platforms, including Gmail and Yahoo.⁵¹ These platforms frequently need abundant legal documentation, including

⁴⁷ Suhasini Chowdhury, 'Interpretation of Law of Succession and Inheritance under Hindu Succession Act and Indian Succession Act' (2021) 3 Indian Journal of Law and Legal Research 1.

⁴⁸ Nasir Afghan, 'Succession in Family Businesses: Kinship Culture and Islamic Law of Inheritance' (2011) 6 Business Review 104.

⁴⁹ Srushti Kulshreshtha, 'Islamic Rules of Intestate Succession: A Detailed Explanation' (*iPleaders*, 12 December 2020) <www.blog.ipleaders.in/islamic-rules-intestate-succession-detailed-explanation/> accessed 2 August 2024.

⁵⁰ Ian M Hull, Suzana Popovic-Montag and Nick Esterbauer, 'Planning Considerations for Digital Assets' (2019) 38 Estates, Trusts and Pensions Journal 250.

⁵¹ Hayder Shkara, 'Social Media – What Happens to Our Online Data after We Die?' (*Walker Pender*, 1 July 2023) <www.walkerpendersonline.com/what-happens-to-your-social-media-when-you-die> accessed 26 August 2024.

death certificates and court decrees.⁵² Mourning family members may not possess the technical or legal know-how to handle these procedures, making the process tedious, taxing, and upsetting.

A second complicating factor is the presence of encrypted and password-protected files, which may require certain tools or abilities to access.⁵³ Services like Digital Asset Protection Trusts, provide the option to name trusted individuals who can access digital assets after one's death, offering a possible solution, but many people fail to proactively establish such trusts or maintain accurate records of passwords and access information.⁵⁴ As a result, the lack of regulation pertaining to the protection of digital assets in cases of intestacy continues to be a serious issue, putting families and legal heirs in a difficult and ambiguous situation when attempting to manage and distribute these assets properly.

LOSS OF ESTATE

In the absence of specific instructions, digital assets that are overlooked by executors or heirs could depreciate, costing the estate money.⁵⁵ Furthermore, people may erroneously believe they have property rights to particular digital assets—such as email accounts—only to discover that these rights expire upon death.

Terms of service agreements, which often exclude valuable assets like iTunes files from estate planning, because they are classified as nontransferable, add to the legal uncertainty.⁵⁶ Further, since these agreements are legally binding, the heirs might not be allowed to access or maintain revenue-generating websites or blogs without a court order.⁵⁷

Internet-based companies face additional difficulties due to the dynamic nature of digital assets. They have to deal with the intricacies of asset succession while safeguarding against fraud and illegal access.⁵⁸ Given these obstacles, it is imperative that laws be put in place to protect the

⁵² Elizabeth Holland Capel, 'Conflict and Solution in Delaware's Fiduciary Access to Digital Assets and Digital Accounts Act' (2015) 30 Berkeley Technology Law Journal 1211.

⁵³ Brian W Sweigman, 'Catching up to Digital Media' (2013) 33 Estates, Trusts and Pensions Journal 64.

⁵⁴ Dickson WJ and Goldman DM, 'What is Better in Florida? A Will or a Trust?' (Florida Estate Planning Lawyer Blog, 2 February 2024) <www.floridaestateplanninglawyerblog.com/> accessed 2 August 2024.

⁵⁵ Chelsea Ray, 'Till Death Do Us Part: A Proposal for Handling Digital Assets after Death' (2013) 47 Real Property Trust & Estate Law Journal 583.

⁵⁶ Richard Ploss, 'Estate Planning for Digital Assets: Understanding the Revised Uniform Fiduciary Access to Digital Assets Act and Its Implications for Planners and Clients' (2018) 31(4) Journal of Financial Planning.

⁵⁷ Jamie P Hopkins, 'Afterlife in the Cloud: Managing a Digital Estate' (2013) 5 Hastings & Science Technology Law Journal 209.

⁵⁸ Gerry W Beyer and Kerri Nipp, 'Estate Planning for Cyber Property - Electronic Communications, Cryptocurrency, Non-Fungible Tokens, and the Metaverse' (2023) 16 Estate Plan & Community Property Law Journal.

interests of both individuals and corporations, standardise property rights in digital assets, and define inheritance procedures.⁵⁹

CONCERNS OF IDENTITY THEFT

With the increased popularity of social media platforms, there is a plethora of personal digital data easily accessible to the public, calling for risks like identity theft, wherein the individual's identity is stolen for fraudulent and illegal activities like obtaining credit card and Automated Teller Machine (hereinafter, 'ATM') details, and fabrication and misuse of the associated social security number.⁶⁰ This not only puts the deceased individual's identity at risk but also causes mental agony to the deceased's legal heirs. There are no particular classes of individuals who perpetrate these acts; they range from friends and next of kin to complete strangers. The fraudulent use of data for illegal activities like tax evasion and money laundering is highly lucrative and can take years to be detected and penalised. In such cases, the lack of legislation for the inheritance of digital assets makes them prone to identity theft, prolonging the agony of the deceased's family.

ISSUES REGARDING COPYRIGHT VIOLATION

The lack of a robust inheritance law specifically curated for digital assets raises concerns regarding ownership and transfer of assets like music, books, and online content.⁶¹ Users generally have limited control over the content they purchase by having a license only for personal use of the content, thereby restricting the transferability and inheritability of these assets for their legal heirs. Without the platform's permission, the user cannot bequeath the content to the legal heirs, as in the case of popular actor *Bruce Willis*, wherein he wanted to bequeath the data of iTunes to his daughter but was restricted by Apple's license agreement.⁶²

⁵⁹ McCarthy Laura, 'Digital Assets and Intestacy' (2015) 21 Boston University Journal of Science and Technology Law 384.

⁶⁰ White MC, 'Grave Robbing: 2.5 Million Dead People Get Their Identities Stolen Every Year' (*Business Time*, 2012) <www.business.time.com/2012/04/24/grave-robbing-2-5-million-dead-people-get-their-identities-stolen-every-year/> accessed 1 August 2024.

⁶¹ Bogle A, 'Who Owns Your iTunes Library After Death?' (*Slate Magazine*, 22 August 2014) <www.slate.com/technology/2014/08/digital-assets-and-death-who-owns-music-video-e-books-after-you-die.html> accessed 25 July 2024.

⁶² CNN BBG, 'Can Bruce Willis leave his iTunes music to his kids?' (CNN, 4 September 2012) <www.cnn.com/2012/09/03/tech/web/bruce-willis-itunes/index.html> accessed 25 July 2024.

However, in *Re Scandalios*⁶³, the Court clarified that the deceased's photographs stored in Apple accounts do not constitute "electronic communications" and hence, do not require the proof of user consent or court order in case of the user's death. This concern is highly significant with respect to cryptocurrency, where the loss of the private key could lead to permanent loss of the valuable digital asset. Additionally, online gaming platforms, YouTube videos, blog websites and other digital assets with financial value pose challenges in terms of ownership and protection.⁶⁴ Thus, there is an appalling need for a clear regulatory framework of inheritance, which could solve the concerns regarding copyright violations.

TREATING DIGITAL ASSETS THE SAME AS PHYSICAL PROPERTY RESULTS IN A BREACH OF PRIVACY

The biggest challenge in the non-enactment of legislation on digital inheritance lies in the tendency to treat digital assets like physical property, which can lead to a breach of privacy.⁶⁵ While arguments in favour of the Principle of Universal Succession⁶⁶ have been made, as observed in the *LG Berlin Facebook case*, the counter-argument entails that this approach fails to consider factors like the unique nature of digital assets and associated privacy concerns. Sometimes, it can also be the case that upon death, granting unrestricted access to inheritance by non-testamentary disposition, either to the legal heirs or to any third party, without explicit consent, may violate the individual's right to privacy, recognised as a fundamental right under Article 21.⁶⁷ Thus, the law needs to strike a balance between protecting privacy and addressing the complexities involved in the inheritance of digital assets to avoid this risk of unintended consequences.⁶⁸

OVERVIEW OF THE INTERNATIONAL FRAMEWORK

The international legal framework regarding digital inheritance is a patchwork of domestic legislations, precedents, and emerging legal theories that reflect the complexities of governing

⁶³ *In Re Scandalios* (2019) 2976/A (NY).

⁶⁴ Jeehyeon (Jenny) Lee, 'Death and Live Feeds: Privacy Protection in Fiduciary Access to Digital Assets' [2015] (2) Columbia Business Law Review 654.

⁶⁵ Rachel Pinch, 'Protecting Digital Assets after Death: Issues to Consider in Planning for Your Digital Estate' (2015) 60(2) Wayne Law Review 545.

⁶⁶ Sandy L Zabell, 'The Rule of Succession' (1989) 31 Erkenntnis 283.

⁶⁷ A Fuchs 'What happens to your social media account when you die? The first German judgments on digital legacy' (2020) 22(1) ERA Forum.

⁶⁸ Marta Terletska, 'The Succession of Digital Assets in the EU' (2022) Tallinn University of Technology Bachelor's Thesis.

digital assets *post mortem*. Various jurisdictions are being assessed to understand the current inclination of stakeholders as to how the reigns of digital inheritance are to be governed, and what the implications of non-recognition of its need could be in the future.

EUROPEAN UNION

At present, there is no European Union (hereinafter, ‘EU’) document specifically governing the succession of digital assets, and therefore, the framework remains scattered across the regions. The *LG Berlin Facebook case* (as explored below), and a study conducted by the European Law Institute (hereinafter, ‘ELI’) titled “ACCESS TO DIGITAL ASSETS”,⁶⁹ assessing the possibility of adopting provisions from the US’s RUFADAA framework into the European context, are pertinent to the discussion. Additionally, jurisdiction-specific efforts are enunciated below, providing an understanding of the leading states’ positions on the matter.

FRANCE

France has taken the lead in recognising the imminent need for governing digital assets and thus came up with LAW NO. 2016-1321 OF OCTOBER 7, 2016, FOR A DIGITAL REPUBLIC (hereinafter “the French Digital Republic Act”).⁷⁰ This legislation, enacted in 2018, under Art. 63, regulates the treatment of personal data in digital form and its transferability after the demise of its owner. It allows heirs to access certain information to manage the inheritance and obtain digital assets of personal value, even in the absence of specific instructions from the decedent. This provides inspiration for other countries to govern digital assets in a way that satisfies the family members and does not violate the general principles of universal succession.⁷¹

GERMANY

Though the term digital inheritance is not recognised as a separate category in the legal framework of Germany, it is governed on the basis of principles of general or universal succession. A practical application of these principles in the present-day scenario was demonstrated when the Federal Supreme Court pronounced its judgement in the *LG Berlin*

⁶⁹ ‘ELI Principles on the Use of Digital Assets as Security’ (*European Law Institute*)
<www.europeanlawinstitute.eu/fileadmin/user_upload/p_elis/Publications/ELI_Principles_on_the_Use_of_Digital_Assets_as_Security.pdf> accessed 2 August 2024.

⁷⁰ French Digital Republic Act 2016.

⁷¹ Marta Terletska, ‘The Succession of Digital Assets in the EU’ (2022) Tallinn University of Technology Bachelor’s Thesis.

Facebook Case.⁷² In this case, the Court overturned the judgment of the Court of Appeal in Berlin and granted access to a girl's Facebook account to her parents. This case set the stage for a meticulous examination of the inheritance of digital assets and their interpretation under the universal law of succession.⁷³ The case also gave a green flag to recognising the inheritance rights of heirs of a deceased individual, as well as the scope of the right to privacy *post-mortem*. This case was also referred to by the Austrian court, where a wife was allowed to access the Apple iCloud services of her deceased husband.⁷⁴

ITALY

The Italian legislative framework governing the succession of digital assets relies partly on the principles of universal succession and is partly embedded in the provisions of its civil code. The legislative decree No. 101 of 2018⁷⁵, inspired by the General Data Protection Regulation (hereinafter, 'GDPR'), exclusively addresses the protection of data of living persons. This legislation, if not directly, addresses the concerns regarding digital inheritance and protects the data related to the deceased in the framework of their own interest. It provides a list of circumstances under which third parties can access the digital data of a deceased, including the right to access it for the purpose of correction, erasure, or transfer to other storage. Thus, the Italian framework for the succession of digital assets has been implicitly embedded in its decree, making room for providing access to the deceased's digital assets.

UNITED KINGDOM

The United Kingdom (hereinafter, 'UK'), the former arm of the EU, does not possess specific legislation regulating digital legacy and inheritance. A pertinent decision of the Central London County Court in the case of *Rachel Thompson v. Apple*,⁷⁶ in which the Court allowed the wife to access her deceased husband's account, gained significant popularity. The decision was

⁷² Oliver Noyan, 'German Supreme Court orders Facebook to allow pseudonyms' (*Euractiv*, 28 January 2022) <www.euractiv.com/section/data-protection/news/german-supreme-court-orders-facebook-to-allow-pseudonyms/> accessed 1 August 2024.

⁷³ Marta Terletska, 'The Succession of Digital Assets in the EU' (2022) Tallinn University of Technology Bachelor's Thesis.

⁷⁴ *ibid.*

⁷⁵ 'Decreto Legislativo 10 Agosto 2018, n 101' (*Gazzetta Ufficiale*) <www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2018-09-04&atto.codiceRedazionale=18G00129&elenco30giorni=false> accessed 1 August 2024.

⁷⁶ *Thompson v Apple Inc*, (WD Ark, No 3:11-CV-03009, 8 July 2011).

lauded by both officials and activist organisations⁷⁷ but it was not followed by any specific legislative action towards recognising the right to access digital property and its succession to the heirs of a deceased. The need for such legislation is evident in light of increasing lawsuits related to digital assets, including the one where the UK's High Court of Justice recognised NFTs as a type of digital property.⁷⁸

UNITED STATES

The United States has passed RUFADAA, which is considered to be a potential fundamental legislation for developing digital succession provisions across the world, notably in the EU. The US approach is more focused on curating preventive legislation to lower the post-factual disputes in the absence of information and guidance from the legal ascendants regarding their digital assets.⁷⁹ The provisions involve regulation of conduct of consumers, trustees and ISPs, recognising the heirs as 'fiduciaries', the maintainer of the account as 'custodian', and the deceased as 'owner of the account', while also providing mechanisms for further asset disposal and proper execution of will.⁸⁰

It is pertinent to consider that the 'fiduciary' under this Act has complete rights over the digital assets, which are defined as *"electronic records, not including an underlying asset or liability unless the asset or liability is itself a record that is electronic"*, equitable to that of the actual owner. It is evident that the legislation is quite balanced in its approach, harmonising privacy and personal rights of the deceased while preserving the principles of succession law and inheritance.

With regard to the question of testamentary versus intestate succession under the US jurisprudence for digital inheritance, RUFADAA portrays a pro-user approach and allows access to accounts by the heirs, even in the case of non-compliance. For instance, recently, the Supreme Court of Massachusetts in a significant case of *Ajemian v. Yahoo! Inc.* granted the

⁷⁷ Prashant Mali and Ashwathy Prakash G, 'Death in the Era of Perpetual Digital Afterlife: Digital Assets, Posthumous Legacy, Ownership and its Legal Implications' 2020 15(1) National Law School Journal <www.repository.nls.ac.in/nlsj/vol15/iss1/8/> accessed 31 July 2024.

⁷⁸ *In Re LLC* (Rev2) [2022] EWHC 773.

⁷⁹ Naomi Cahn, Christina Kunz and Suzanne Brown Walsh, 'Digital Assets and Fiduciaries' in John A Rothchild and Edward Elger (eds), *Research Handbook on Electronic Commerce Law* (Edward Elgar Publishing Ltd 2016).

⁸⁰ *ibid.*

relatives access to the account of a deceased in the absence of a documented will.⁸¹ Though the statute has gained considerable recognition across the region, there are various drawbacks and challenges, such as circumstances where ISPs unilaterally delete the traces of an individual's records or the contradictions with the right to privacy and copyright.⁸²

From the above overview, it is evident that the international legal landscape of digital inheritance is evolving. While some countries have made significant strides, others are still grappling with how to integrate digital assets into their legal frameworks. The diversity in approaches highlights the need for harmonisation, particularly in an increasingly globalised world where digital assets often transcend national boundaries.⁸³

For India, the challenge will be to craft legislation that respects the privacy of the deceased and the rights of the heirs while also considering the global nature of digital assets. It is crucial for Indian policymakers and experts to understand and evaluate these international developments and ensure that a tailored legal system is prepared to handle the complexities of digital inheritance in the Indian context.

PROPOSING A TAILORED FRAMEWORK FOR INDIA

Drawing insights from the detailed comparative analysis of the international leaders, it is necessary to tailor a regulatory framework governing the inheritance of digital assets, specific to the Indian context. The debate between creating a new legislative measure versus adopting alternative measures that do not require changes in the legal framework should not hinder the way towards a balanced model. Both these approaches, although they cannot exist in a vacuum against each other, are imperative for a flexible, broader legislative action to exist, with alternatives subsisting alongside to improve the efficiency of the process of succession.⁸⁴

⁸¹ *Ajemian v Yahoo! Inc* 84 NE3d 766 (Mass 2017).

⁸² Emily Lynch, 'Legal Implications Triggered by an Internet User's Death: Reconciling Legislative and Online Contract Approaches in Canada' (2020) 29 Dalhousie Journal of Legal Studies 161.

⁸³ Ilaria Viarengo, 'Managing cross- border "digital succession" in the digital era' (2023) 7 EU and Comparative Law Issues and Challenges Series <www.hrcak.srce.hr/ojs/index.php/eclic/article/view/28257> accessed 2 August 2024.

⁸⁴ Aishwarya Sandeep, 'Digital Assets and Inheritance Laws' (*Parenting and Law*, 12 September 2022) <www.aishwaryasandeep.in/inheritance-of-tenancy/> accessed 2 August 2024.

LEGISLATIVE MEASURES

After a meticulous examination of the challenges faced by other jurisdictions and their regulatory response, it has become imminent for India to adopt clear policies and act towards developing a refined framework for digital inheritance. Following the signals of advanced frameworks like that of US and France, and the precedent-based approach of Germany and the UK, a potential framework can be designed for India that addresses the issues and fills the prevalent gaps such as the one in the Indian Succession Act that governs disposition by way of will and other personal succession acts governing intestate succession.⁸⁵

In pursuance of the same, it is pertinent that a novel legislation be drafted by Indian lawmakers, like that of the US, that would specifically encompass and govern the succession of digital assets for all sects and communities. This legislation would be a comprehensive framework including all the religions, as restricting the same to personal laws would hinder its harmonious implementation.⁸⁶ Since India professes personal laws for the devolution of property in case of intestate succession, the scope of amendment is limited in the existing laws, such as HSA or the uncodified Muslim Personal laws. Hence, an altogether new comprehensive digital inheritance framework is the need of the hour to solve all the technological complexities that the existing laws do not address.

India can consider having its own Fiduciary Access to Digital Assets Act (hereinafter, ‘FADAA’) that would recognise the heirs of the deceased as ‘fiduciaries’ and inherit his/her digital assets. Further, Indian policymakers and analysts can refer to the study conducted by the EU titled “Access to Digital Data”. The case of LG Berlin Facebook acts as a persuasive precedent for the Indian courts that can be utilised by the advocates if similar circumstances arise. The dilemma of jurisdiction, whether a writ can be invoked if digital giants deny the heirs access to the digital assets of the deceased, should also be explored in greater detail.⁸⁷ The universal principles of succession mandate such a practice, and following the courts of the EU, the UK and the US, the Indian courts have to recognise such rights in lieu of striking a balance between universal laws of succession and the fundamental right to privacy.

⁸⁵ Prashant Mali and Ashwathy Prakash G, ‘Death in the Era of Perpetual Digital Afterlife: Digital Assets, Posthumous Legacy, Ownership and its Legal Implications’ (2020) 15(2) National Law School Journal <www.repository.nls.ac.in/nlsj/vol15/iss1/8/> accessed 31 July 2024.

⁸⁶ *ibid.*

⁸⁷ *ibid.*

ESTABLISHMENT OF DIGITAL ASSET MANAGEMENT

In addition to the legislative amendments, establishing a robust digital asset management (hereinafter, ‘DAM’) system can be crucial for ensuring the successful testamentary disposition of existing digital assets. The first step is to conduct a comprehensive audit of the existing digital assets to understand the categorisation and purpose of the assets.⁸⁸ It is advisable to create a repository or inventory of all the digital assets, including the instructions by the owner for access and disposition, thereby ensuring the maintenance of such property on/after the owner’s death. A pre-death audit allows for the identification of any possible concerns and thereby ensures that the owner’s wishes are successfully executed. For assets like PayPal accounts or revenue-generating websites, security is of paramount concern. Hence, it is advisable to involve an executor or DAM advisor to assess the value of the estate and facilitate the transfer or payment of dues, if any.⁸⁹ Thus, sharing such plans and inventory with family members to make DAM advisors is key to making it user-friendly. A DAM strategy can help by setting different levels of permissions based on user roles, meaning that only people with the requisite role or responsibilities could be granted access to the digital asset, thereby restricting others. In the UK, James Norris in 2015 founded the Digital Legacy Service Association, a steady stream of online services wherein the legacy account offers an individual, opportunity to digitally store their life story, leave messages to loved ones and record their last will.”⁹⁰ Such initiatives not only promote the successful inheritance of digital assets by testamentary disposition, but they also preclude all those assets that the owner wants to protect from being inherited in the absence of a will, owing to privacy and security issues.

ALTERATION OF TERMS AND CONDITIONS

The German Bundestag was tasked with the creation of the specialised legislation regulating access to digital heritage and harmonising it in the EU by the court in the LG Berlin case.⁹¹ The ideal objective was to introduce several measures that result in the alteration of the “terms

⁸⁸ Daniel Haberly and others, ‘Asset Management as a Digital Platform Industry: A Global Financial Network Perspective’ (*Science Direct*, 24 August 2019) <www.sciencedirect.com/science/article/pii/S0016718519302520> accessed 27 July 2024.

⁸⁹ Gerry W Beyer and Naomi Cahn ‘When You Pass on, Don’t Leave the Passwords behind: Planning for Digital Assets’ (2012) 26(1) Probate and Property 40 <www.ssrn.com/abstract=1980887> accessed 27 July 2024.

⁹⁰ I Richard Ploss, ‘Estate Planning for Digital Assets: Understanding the Revised Uniform Fiduciary Access to Digital Assets Act and its Implications for Planners and Clients’ (2018) Journal of Financial Planning.

⁹¹ A Fuchs, ‘What happens to your social media account when you die? The first German judgments on digital legacy’ (2021) 22(1) ERA Forum 2, 3.

and conditions” contracts between a user and the service provider by completely prohibiting the non-inheritability of the content and digital assets.⁹² The draft wanted to move towards the introduction of the unified digital certificate of inheritance.⁹³ A similar approach can be followed in India, wherein the digital platforms can be made to alter the existing contracts and conditions to pave the way towards efficient and hassle-free succession of the digital assets by giving due regard to security and privacy complexities.

OTHER ALTERNATIVE SOLUTIONS

Another alternative to legislation involves the setting up of Digital Asset Protection (hereinafter, ‘DAP’) trusts, which enable individuals to transfer ownership of digital assets such as online credit card access, passwords, and investment accounts to a revocable trust. This allows successors and the legal heirs to effectively manage and distribute assets without violating the terms and conditions of the digital platforms.⁹⁴

Additional options include personal sharing of digital information such as account details, crypto pass keys, social media platform passwords and other relevant secured details of the digital assets with the legal heirs or family members, thereby garnering the requirement by social media platforms regarding the user’s consent clauses.⁹⁵ Further, maintaining cloud as well as offline back-up in the form of documented details makes it easier to devolve the property in case of disposition by will. In the absence of a formal will, the use of substantial compliance and the dispensing power theories may provide a legal framework to support the intestate disposition of property.⁹⁶ Hence, by undertaking these alternative methods, proactive steps can be taken to ensure the efficient desired succession of the digital assets.

⁹² ibid.

⁹³ Marta Terleska and Titu Ionascu, ‘Certificate of Heir - The Role and Legal Nature’ [2020] Annals Constantin Brancusi U Targu Jiu Juridical Sci Series 143.

⁹⁴ Sylvie L F Richards, ‘Estate Planning for Your Digital Assets, Part 2: Using a Revocable Living Trust’ (5 April 2012) <www.richardsesq.wordpress.com/2012/04/05/estate-planning-for-your-digital-assets-part-2-using-a-revocable-living-trust/> accessed 31 July 2024.

⁹⁵ Jonathan J Darrow and Gerald R Ferrera, ‘Who Owns a Decedent’s E-Mails: Inheritable Probate Assets or Property of the Network?’ (2007) 10 NYU Journal of Legislation & Public Policy 281, 305.

⁹⁶ Alyssa A DiRusso, ‘Testacy and Intestacy: The Dynamics of Wills and Demographic Status’ (2009) 23(1) Quinnipiac Probate Law Journal 36, 37, 54.

CONCLUSION

The last decade has marked a rapid development and widespread utilisation of internet services worldwide. As the paper elaborates, a major part of our lives is spent online, and the same involves the use of tons of digital assets. These assets are of various types and have economic, social and emotional value. Thus, their succession needs to be governed and streamlined.

The existing common and personal succession laws of India cannot accommodate the advent of evolving realities that come with digital inheritance. As portrayed, non-regulation of devolution of these assets poses a myriad of issues and challenges, such as burden on heirs of the deceased, loss of estate, copyright violation, identity theft, breach of privacy, etc.

Internationally, there has been a progression towards recognising the need for such inclusion, and the leading states of the EU, the UK and the US have been taking steps in harmonising laws related to access to digital assets and their inheritance, in line with the common law principles of universal succession. The German case of LG Berlin Facebook, the study conducted by the EU on Access to Digital Assets and the legislation passed by France and Italy are a source of derivation for the imminent need of recognising these voids in India. Further, a specific legislative improvement can be deduced from the US's RUFADAA, which serves as a leading legislation for digital inheritance and succession with a nuanced user-centric approach of recognising all the rights of stakeholders and striking a balance.

The proposed recommendations provide for experts' views and the author's understanding of the gaps in the Indian succession framework and call for various improvements through legislative measures, the establishment of a Digital Asset Management system, and other alternative solutions. Adopting these recommendations would support the Indian lawmakers to curate a tailored framework akin to that of the US, governing the succession of digital assets and thus laying the foundation and preserving the integrity of principles of universal succession, specific to the Indian context in this digitally globalised world.