

STEP JOURNAL

Downloaded on 9th August 2024 - 19:59

The great digitiser

Helen Bradford-Swire asks how practitioners can effectively support clients in understanding how to identify, safeguard and report digital assets

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In its ongoing work around the complexities of digital assets in estate planning STEP's research has revealed some concerning trends. Around six in ten people told STEP that they have not considered their digital assets in their succession planning. Meanwhile, 60 per cent of practitioners have dealt with client questions about digital assets and 25 per cent have had clients who had experienced difficulties accessing digital assets of a family member.

The Law Commission of England and Wales (the Law Commission) is undertaking ongoing research and in February 2024 launched a call for evidence on private international law in the context of digital assets.^[1] In 2023, it recommended that a distinct legal category of personal property should be formally recognised to cope with intangible cryptocurrencies and non-fungible tokens.^[2] Responding to the Law Commission's findings, STEP warned: 'The nuances of digital assets still require further work to explore the conflicts in cross-jurisdictional legislation, especially in relation to the location of digital assets and the question of jurisdiction over disputes.'

Inconsistent and out-of-date legislation across countries globally, with no international standard relating to digital assets, continues to be one of the main causes for both practitioners and clients in dealing with digital assets.

This is slowly changing, with the Financial Action Task Force (FATF) driving the implementation of its Recommendation 15 on the regulation of virtual assets and virtual asset service providers (VASPs). However, its March 2024 report notes that many countries have yet to fully implement the rule,^[3] leaving significant loopholes globally that criminals and terrorists exploit for illicit financing.

Unifying the rules

The FATF report requests that jurisdictions prioritise implementing its standard, with Recommendation 15 requiring countries to understand the risks that virtual assets create and suggesting that VASPs

should be licensed and under the same compliance and regulatory regime as other financial service providers and institutions. However, creating such a unified standard is easier said than done. Countries are not bound to legislate FATF recommendations and many choose to apply them in vastly different ways.

‘Regulations vary significantly around the world and are constantly being updated’, notes Dave Madan TEP,[\[4\]](#) Deputy Chair of the STEP Digital Assets Special Interest Group (SIG) Steering Committee. ‘The EU was the first to take measures requiring crypto-providers to protect clients against fraudulent activity. Other countries are working out their regulations between regulators, governing bodies and the courts. Tax treatment also varies across countries. All countries have a similar goal: protecting businesses and clients against fraudulent activity and creating measures to prevent illicit activity. However, how each country approaches this has been slightly different and has also been an uphill battle against the principle of decentralised, community-regulated cryptocurrency.’

‘There is much confusion among clients when it comes to the constantly evolving reporting obligations of holders of virtual assets’, agrees Frank Downes TEP,[\[5\]](#) Digital Assets SIG Steering Committee Member. ‘A major problem the digital asset holder faces is identifying the applicable jurisdiction that applies to a particular virtual asset: in one sense they do not have a jurisdictional base, as they exist in cyberspace. This leads to inconsistency in reporting and potential overlap between regulatory authorities.’

It is not simply the jurisdiction of the asset that causes issues. Complexity also arises when the clients themselves are ever more globally mobile and operate multi-jurisdictionally. Some international organisations are in the process of formulating guidance principles to address the diversity of virtual assets within the various legal frameworks across the world – STEP, too, has discussed a possible ‘hub’ drawing together the diverse legislative requirements – but such projects are currently embryonic.

Life after death

However, countries are starting to understand that it is vital for individuals to plan for what happens to their virtual assets, from crypto-assets to photos and ‘memories’, after they die.

Governments in Australia, Canada, the EU, the UK and the US have all been discussing the possibilities around digital assets succession planning; examples being the US *Revised Uniform Fiduciary Access to Digital Assets Act*, Canada’s *Uniform Access to Digital Assets by Fiduciaries Act* and EU Regulation (EU) 2023/1114 on markets in crypto-assets.

However, in federated jurisdictions such as Australia, Canada and the US, estate legislation remains the responsibility of individual states and provinces and not all of them will adopt a unified federal law. Downes points out that some states are leaps and bounds ahead of others in their planning: New

South Wales' Law Reform Commission has begun to explore what legislation may be required, while other Australian states and territories have yet to address digital assets in the context of estate planning at all.

Similarly, in some Canadian provinces there is some privacy legislation that addresses the issues of trustees and executors accessing a deceased's digital assets. 'Alberta and British Columbia essentially give fiduciaries the same disclosure rights as the deceased individual, while Québec allows fiduciaries to make certain disclosure requests', explains Demetre Vasilounis TEP,[\[6\]](#) Digital Assets SIG Steering Committee Member. 'However, the current federal privacy legislation that applies to all other provinces and territories [the *Personal Information Protection and Electronic Documents Act*] is silent on this issue. Although there is now some helpful provincial legislation, there is very little jurisprudence to guide its application.'

There are additional barriers to enacting uniform legislation to deal with estate planning and digital assets: there is little consistency among the various social media providers and online platforms, for example, when it comes to accessing a deceased's digital assets.

Further, such legislation also does not solve the issue for assets where no custodian is involved, such as decentralised cryptocurrencies and non-fungible tokens (NFTs).

'Access to these assets is more of a technology implementation issue than a legislative issue', says Vasilounis. 'The onus is on the individual to ensure that their executors and trustees have the logistical ability to access the crypto-assets, for example by way of private keys. The legislation can compel certain parties facilitating digital assets to act in a certain way, but proper planning is still the prevailing factor for avoiding these types of issues.'

Practitioner support

The role of the practitioner is therefore a vital one in helping clients to navigate their reporting obligations in life and their succession planning for their estate. 'Most clients do not have awareness about the increasing necessity to plan for digital assets, either during life in the event of incapacity or at death,' says Jennifer Zegel TEP,[\[7\]](#) Digital Assets SIG Steering Committee Member. 'Raising awareness of the planning needs in this area is crucial to avoid potential loss of data or information, protect privacy, and avoid unexpected delays, costs or other access issues.'

‘Many clients may not at first be familiar with the expression “digital assets” and perhaps might not necessarily consider themselves to have any such assets’, agrees Jack Burroughs TEP,^[8] Digital Assets SIG Steering Committee Deputy Chair. ‘Examples are most helpful to explain what digital assets are and why they are important. A client might need prompting to realise that digital assets include things like photographs, saved in their phone, computer or cloud storage, and to understand the risk that those assets might not be available to their loved ones when they die. At that point, they may realise why they need a plan in place to deal with them.’

Zegel adds that practitioners should stay informed and educated about the developments and work closely with clients to establish their digital behaviour. ‘It is not a one-size-fits-all approach and can be very simple or quite complex depending on the digital assets and interests owned’, she explains. ‘Building up a network of subject matter experts, technologists, and other professionals to have as part of a toolbox of advisors to address the various digital planning needs that will arise is also crucial.’

Calling for change

Alongside supporting clients – and each other – in an ever-evolving world, practitioners can also be influential in driving the change that is required in legislation.

‘We are in a position to lobby for changes that will make the process of dealing with digital assets more manageable’, argues Burroughs. ‘This means encouraging governments around the world to provide legislation for fiduciary access in appropriate circumstances, balanced against individual privacy rights. It also means encouraging service providers to ensure their policies and procedures empower users to make meaningful decisions about who, if anyone, will gain access to their online accounts after they die or lose capacity.’

Madan points to the work STEP is doing in driving this change: ‘We are actively working on building educational material to help support practitioners in this effort. As practitioners, once we can speak a common language on the subject, we can work on developing solutions for our clients.’

[1] <https://lawcom.gov.uk/digital-assets-call-for-evidence-and-draft-legislation/>

[2] Law Commission *Digital assets: Final report* (June 2023, PDF) <https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2023/06/Final-digital-assets-report-FOR-WEBSITE-2.pdf>

[3] *Status of implementation of Recommendation 15 by FATF Members and Jurisdictions with Materially Important VASP Activity* <https://www.fatf-gafi.org/content/dam/fatf-gafi/publications/VACG->

[Table-Jurisdictions-2024.pdf.coredownload.pdf](#)

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