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Divorcing and checking out of the mortal and physical world domain – online assets in limbo: A call for the regulation of the digital legacy

Summary

For the majority of people, an online existence has currently become an incontrovertible reality. This article explores the various ways of handling digital or online assets both before and after death. The article starts by describing possible definitions of digital or online assets, followed by a close and critical examination of the efficacy of measures initially put in place by service providers to regulate their relationship with online users. Various legislative provisions recently promulgated in a number of states in America are compared, critically evaluated and discussed, whereafter the existing provisions of the *Matrimonial Property Act* No. 88 of 1984, the *Divorce Act* No. 70 of 1979 and the *Administration of Estates Act* No. 66 of 1965 are closely examined with a view to testing and evaluating their effectiveness in dealing with digital assets both before and after death. The discussion culminates with a call for the amendment of the relevant South African provisions, while giving possible suggestions to the same effect.

Egskeiding en dood in die sterflike en fisiese wêreld – onsekerheid rondom aanlyn bates: 'n Beroep op die regulering van digitale nalatenskap

Vir die meeste mense is 'n aanlyn bestaan deesdae 'n onontkenbare realiteit. Hierdie artikel ondersoek verskeie maniere waarop digitale en aanlynbates voor en ná afsterwe hanteer kan word. Die artikel begin met moontlike definisies van digitale of aanlynbates, en word gevolg deur 'n deurtastende en kritiese ondersoek na die doeltreffendheid van die aanvanklike maatreëls waarmee diensverskaffers hul verhouding met aanlyngebruikers reguleer. Verskeie wetsbepalings wat kort gelede in 'n aantal Amerikaanse deelstate gepromulgeer is, word vergelyk, krities geëvalueer en bespreek. Die bepalinge van die *Wet op Huweliksgoedere* 88 van 1984, die *Wet op Egskeiding* 70 van 1979 en die *Boedelwet* 66 van 1965 word vervolgens van naderby beskou om die effektiwiteit daarvan in verband met digitale bates voor en ná afsterwe te evalueer. Die bespreking eindig met 'n aandrang op die wysiging van die betrokke Suid-Afrikaanse wetsbepalings en voorstelle te dien effekte.

1. Introduction

“Cyberspace pervades our daily lives. Social media sites, electronic communication, online banking, and e-commerce are integral to today’s lifestyle. A recent report suggests that 92% of Americans have an online presence by the age of two”.¹ The accuracy of this statement is further demonstrated by the following borrowed hypothetical scenario: Scott is a 40-year-old single man who, like many people, has a large online presence. Scott does all his banking online and never receives a bank statement in the mail. He has an investment account at a company that does not have a brick-and-mortar location. Scott pays his bills electronically, without receiving a hardcopy bill, and he pays some of his bills automatically on a monthly basis. He has several e-mail accounts and maintains his own website and blog. Scott buys and sells items online through Amazon and eBay, using his PayPal accounts to complete the transactions. He has an extensive photo and music collection that he stores online, and he is an active Facebook and Twitter user. Finally, because Scott prefers to not have papers lying around his house, he stores copies of all his medical, financial, tax and legal documents on a “cloud” server.²

From this perspective and given the obvious adverse practical implications that may arise if the hypothetical Scott were to divorce, die or even become incapacitated, digital assets constitute an integral part of human existence in the digital age that inarguably require concerted and decisive efforts towards their regulation in life and in the event of death, as well as their protection against possible unjust exploitation and illicit accessing and dealing. In particular, the duty to do so becomes even more necessary and critical in view of the worldwide increase in incidents of digital identity theft.³

The purpose of this exposition is to explore the various ways in which digital assets can be dealt with both before and after death, and possibly resulting in a call for their regulation in this regard. The article will conform to the following structural format. First, an attempt at a comprehensive definition of digital assets will be made. This will be followed by a close and critical examination of the efficacy of measures initially put in place by service providers to regulate the relationship between an online user and themselves and, lately, also making attempts at regulating the digital assets of the online user upon death.

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- 1 Stephanie Mach, comment on “Life after death: Why digital immortality is now an important factor in estate planning”. *The North Carolina Journal of Law and Technology* (NCJOLT) blog, comment posted on 17 February 2011. <http://www.ncjolt.org/staff/volume-12/stefanie-mach> (accessed on 18 April 2012).
 - 2 Copied from Brian A Boys, comment on “Digital estate planning”. Estate planning and probate blog, comment posted on 26 September 2011. <http://www.lexisnexis.com/community/estate-elderlaw/blogs/estateplanningandprobateblog/archive/2011/09/26/digital-estate-planning.aspx> (accessed on 20 June 2012).
 - 3 Berghel 2000:21.

A brief comparison, critical evaluation and discussion of various legislative provisions recently promulgated in a number of states in America will constitute the third part of this article. The fourth part will zoom in on the South African matrimonial and deceased estates landscape and entails a close examination of the existing provisions of the *Matrimonial Property Act*,⁴ the *Divorce Act*⁵ and the *Administration of Estates Act*,⁶ with a view to testing and evaluating the efficacy of these in dealing with digital assets both before and after death. Lastly, and in conclusion, a call will be made for the amendment of the South African provisions relating to this, with a view to regulating digital assets, and possible suggestions will be made in this regard.

2. Digital assets defined

The rationale for defining digital assets is, to some extent, similar to that for ordinary assets; that is, as in a traditional estate planning and handling set-up. Accordingly, the first step to managing one's digital estate is to identify all digital assets. However, the thought-provoking phrase "digital or online asset" has not as yet been comprehensively defined in literature and as such has not yet enjoyed the benefit of a universally cast-in-stone type definition. In fact, as Stephanie Mach puts it:

Currently, scholars struggle to classify digital assets. Without this designation, contract and property law are unable to properly assign rights attributable to these assets. Without clear rights, proper distribution remains a problem. This law of digital inheritance remains largely undeveloped.⁷

Various definitions have been put forward; these vary mostly according to which aspect of digital asset is being emphasised at a particular point in time. At the one end of the spectrum, there are those that define the phrase in broader and more generic terms, thus emphasising the physical, form and appearance aspect of the concept. From this end, it follows, therefore, that "a digital asset is any item of text or media that has been formatted into a binary source that includes the right to use it".⁸ This definition will, therefore, view digital assets as being categorised into three major groups which may be defined and identified as textual content, images, and multimedia.⁹ Then there are those who define the phrase in terms of the value or commercial viability, exploitation and, sometimes,

4 *Matrimonial Property Act* 88/1984.

5 *Divorce Act* 70/1979.

6 *Administration of Estates Act* 66/1965.

7 Stephanie Mach, comment on "Life after death: Why digital immortality is now an important factor in estate planning". *The North Carolina Journal of Law and Technology* (NCJOLT) blog, comment posted on 17 February 2011. <http://www.ncjolt.org/staff/volume-12/stefanie-mach> (accessed on 18 April 2012).

8 Eklund 2011:<http://online.vrabweb.org/vrab/vol38/iss1/4>.

9 Van Niekerk 2006.

the protection attached thereto.¹⁰ With this definition, digital assets are classified in a wide range, as illustrated in the following adapted schematic representation.¹¹

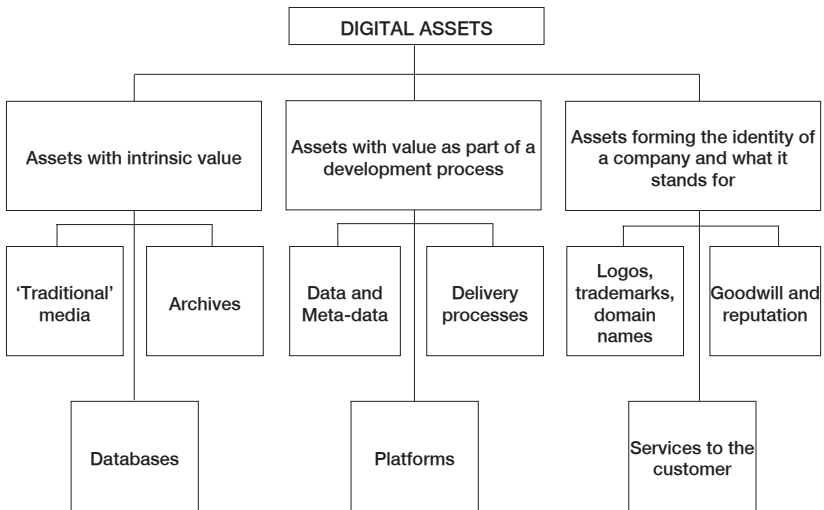


Figure 1: Digital assets identified and categorised by research participants

The third group consists of definitions that define the term *digital asset* in terms of the purpose for which a definition is being made or rather what the author of this article will term *purpose-oriented* (my italics) definitions. In this group, one can, for instance, place the numerous “working” definitions suggested by various bloggers for the purposes of addressing diverse blog topics as well as the legislative definitions as adopted generally for purposes of intestate succession and suggested by lawmakers in a number of states in America.

With regard to the bloggers’ working definitions, digital assets can be viewed as, first, being “any online account” and, secondly, being “any information, document and media stored on one’s computer or somewhere in the cloud”.¹² The first class of digital asset is constituted by all an individual’s online engagements which, typically, include issues such as social networking sites, e-mail accounts, photo-sharing sites and blogs. It also includes online accounts such as eBay, Yelp, PayPal, Go-daddy and others where a person may have sentimental or economically

10 Piper 2011.

11 Adapted from Piper 2011.

12 Nathan Lustig, comment on “What are digital assets? A definition of digital assets for digital estate planning”, comment posted on 4 May 2010. <http://blog.entrustet.com/2010/05/04/what-are-digital-assets-a-definition-of-digital-assets-for-digital-estate-planning/> (accessed on 18 April 2012).

valuable content. The second class of digital asset is made up of files that are stored on an individual's computer or in the cloud on a service such as Mozy. These files could habitually be business documents, family photos, personal journals, family recipes and a whole host of other information that a person would like to pass on to his/her heirs upon death.

From the legislative perspective, it must pertinently be noted that several states narrowly¹³ considered the concept of digital assets with the following results: Rhode Island¹⁴ and Connecticut¹⁵ limited the scope of digital assets to e-mail accounts; a 2007 Indiana¹⁶ statute included an "electronically stored documents of the deceased" as forming part of digital assets; a 2010 Oklahoma¹⁷ statute covers the broader notion of digital assets in that it makes provision for the "control of certain social networking, micro blogging or e-mail accounts" and the same applies to the 2011 Idaho bill.

What the above various approaches evince and seem to suggest is simply that the phrase "digital assets" has both narrow and wide meanings and that either meaning is determined and/or influenced, *inter alia*, by the angle from which one is approaching it or where one stands, and most importantly, the purpose for which a definition is made. What is also clear from the above definitional approaches is the fact that the wider sense of the phrase will most certainly include e-mails and for that matter any electronically stored document of an individual.

3. Service providers' initiatives

The starting point, in this instance, is the famous¹⁸ case of a US marine (Justin Ellsworth)¹⁹ killed in combat, the facts of which are briefly as follows. Justin was a 20-year-old US marine stationed in Iraq. On 13 November 2004, he was killed by a roadside bomb in the part of Iraq

13 It must be emphasised and borne in mind that all of the states under discussion were dealing with the concept in the context of intestate succession.

14 *Rhode Island Code* (§33-27-1), Access to decedents' electronic mail accounts.

15 *Connecticut Public Act* No. 5-136 (§45a-334a). Access to decedents' electronic mail account.

16 *Indiana Code* SB 0212, 2007 (§29-1-13-1.1). Duty of custodian to provide electronically stored documents to personal representative.

17 *Oklahoma Title* 58(§269). Executor or administrator powers.

18 Other cases in the same category include that of Marine Lance Cpl. Karl R. Linn, 20, of Chesterfield, Virginia, who died on 26 January 2005 of wounds received as a result of enemy action in Al Anbar Province, Iraq. He was assigned to the Marine Corps Reserve's 4th Combat Engineer Battalion, 4th Marine Division, headquartered in Lynchburg, Virginia. Similarly, his e-mail and Web hosting company, Mailbank.com Inc, while empathising with his family, refused to divulge any information about his accounts. Full details are available at <http://www.fallenheroesmemorial.com/oif/profiles/linnkarlr.html> and <http://www.washingtonpost.com/wp-dyn/articles/A58836-2005Feb2.html> (both accessed on 4 August 2012).

19 *In re Ellsworth*, No. 2005-296, 651-DE (Mich. Prob. Ct. 2005).

called Fallujah. Mr and Mrs Ellsworth wanted to collect e-mails that their son wrote and received while in Iraq in an apparent attempt to create a scrapbook of e-mails sent to him for future generations, a scrapbook that would be incomplete without all the e-mails that Yahoo was holding. In that capacity, they approached Yahoo with a request to be allowed access to their deceased son's e-mails. Yahoo refused to give out the marine's password, declaring, *inter alia*, that doing so would effectively violate its privacy rules which prohibited the distribution of passwords to anyone but the user. The parents took Yahoo to court. An emotional legal battle ensued, ultimately resulting in the court ordering Yahoo to retrieve the e-mails for the parents.

The above case highlights two distinctly significant issues. First, the fact that the parents had to go to court to retrieve the deceased's e-mails, which caused a storm of discussion on the internet and in the media, clearly points to there being rules in place or rather the existence of rules which are at least applied by the service providers and which also appear to certainly be going against public sentiment and expectation. Secondly, and most importantly, the fact that the court had to ultimately rule against the service providers clearly suggests that there might be some shortcomings in such rules or, put differently, the rules adopted by most, if not all service providers. This then brings us to the investigation of the service providers' terms of reference, as well as the determination of their efficacy.

3.1 Service providers' terms of reference

Generally, most internet service providers require that users agree and consent to the terms of service during the sign-up process. However, there is a noticeable disparity in official policies, which vary from internet provider to internet provider. In that regard, company policies can, therefore, be classified into two broad categories.

There are, on the one hand, those companies that do not make provision for the transfer of accounts upon death. In fact, companies such as Yahoo referred to above have terms of service with a clear indication that survivors have no rights to access the e-mail accounts of the deceased. For that matter, under a section titled "No Right of Survivorship and Non-Transferability", account holders must, in fact, agree that the "contents within [their] account[s] terminate upon ... death".²⁰

20 Yahoo! terms of service. <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (accessed on 4 August 2012). By the same token, "Facebook's terms of service clearly indicate that it will not issue login and password information to family members of a person who has died. A family member can contact Facebook and request the dead person's profile be taken down or turned into a memorial page. If the family chooses a memorial page, the account can never again be logged into". Alissa Skelton, comment on "Facebook after death: What should the law say?". The Mashable, comment posted on 26 January

On the other hand, there are those companies that make provision for the transfer of the contents of e-mail accounts upon death with proper documentation. Despite their privacy policies and contractual limits²¹ on account holder ownership of account content, service providers such as Hotmail, Gmail and America Online allow heirs to obtain access to a deceased's e-mail account content on the presentation of certain documentation. These service providers generally require some proof of relationship before the account is transferred. Hotmail, for example, requires heirs to present documents proving legal relationship to the deceased, a photocopy of the driver's licence and death certificate of the deceased, and a document that answers six identification questions such as date of birth of the deceased, "for verification purposes".

This divergent and confusing state of service providers' terms of reference effectively rendered the environment ripe for entrepreneurial adventure. In true commercial spirit, entrepreneurs who generally are always alive to the next big thing, seized and took advantage of the opportunity created by the gap described above and left by the companies such as Yahoo, and this has, of course, led in recent years to a new crop of businesses springing up to help people avoid the Yahoo scenario. Companies such as San Francisco-based Legacy Locker and Entrustet in Madison enable an online user to designate a "digital executor", who is generally someone who gets access to everything from the user's Facebook

2012. <http://mashable.com/2012/01/26/digital-assets-after-death/> (accessed on 8 August 2012).

- 21 Hotmail, for example, requires the users to acknowledge its right to "terminate the Agreement at any time also that the user's rights to use the MSN Web Sites will immediately cease upon such termination and that any information they may have stored on the msn websites may not be retrieved later" MSN WEBSITE TERMS OF USE AND NOTICES. <http://privacy2.msn.com/tou/default.aspx> (accessed on 4 August 2012). The Gmail terms of use similarly imply that account holders do not possess any property interest in their accounts. According to the 2007 version of Gmail terms of use. http://mail.google.com/mail/help/terms_of_use.html ("Google may at any time and for any reason ... terminate your account. In the event of termination, your account will be disabled and you may not be granted access to your account or any files or other content contained in your account although residual copies of information may remain in our system."). YouTube also lists their policy for deceased users in its help documents which appears as follows: "If an individual has passed away and you need access to the content of his or her YouTube account, please fax or mail us the following information: [Your full name and contact information, including a verifiable e-mail address, The YouTube account name of the individual who passed away, A copy of the death certificate of the deceased, A copy of the document that gives you Power of Attorney over the YouTube account, If you are the parent of the individual, please send us a copy of the Birth Certificate if the YouTube account owner was under the age of 18. In this case, Power of Attorney is not required], John Romano, a comment on "So what *does* happen to your digital assets after you die?", The digital beyond, comment posted on 21 December 2010. <http://www.thedigitalbeyond.com/2010/12/so-what-does-happen-to-your-digital-assets-after-you-die/> (accessed on 9 August 2012).

page to any number of travel photos the user may have stashed on photo-sharing websites. These people are given authority to execute an online user's wishes on what accounts stay open, get transferred to someone else or get deleted forever.²² Moreover, Legacy locker not only provides a storage space for wills, farewell letters and other such documentation, but also a master list of user names and programs for online bank accounts, social networking sites and document repositories. Subscribers to the service create a list of their online profiles and passwords, be it the log-in details for their computer, banking service or even their iTunes music store account, and nominate a "beneficiary" to receive this information in the event of their untimely demise.²³

3.2 The efficacy of the service provider's terms of reference

Although a number of service providers have put in place the regulatory initiatives, as examined above, their application in practice has created numerous problems which definitely tend to work against both the service providers and the online users.

The first problem relates to the nature of the relationship between the online user and the service providers and the legal implications thereof. As indicated right at the beginning of the exposé, an online account has of late become an inherent requirement of social engagement. In addition, the various online service providers require acceptance of the pre-drafted policies before an account is created. It goes without saying that, in most instances, users will blindly agree to the terms of service required to create an online profile and as such unknowingly enter into an unduly influenced contract. In such scenarios, service providers are bound to find themselves faced with myriad claims by online users who, due to their powerlessness to negotiate the terms of contracting and subject to unequal bargaining power, could argue that the contracts entered into are unenforceable under the law of contract and as such apply to have the said contracts set aside.

Secondly, the basic tenet of online account engagement is the logon password which is required to access information. Needless to say, anxiety over identity theft²⁴ makes people hesitant to write down or provide others with the required codes. Whereas documentary proof of tangible movable assets (which, as indicated in the hypothetical scenario above, tend to be fewer in number) can mostly be locked in safe deposit boxes, passwords and security answers are instead and almost invariably

22 McClatchy Newspapers, "Digital assets often forgotten after death". *Weekly Herald*, 1 January 2012. <http://www.heraldnet.com/article/20120101/BIZ/701019953> (accessed on 9 August 2012).

23 Claudine Beaumont, a comment on "Legacy locker: Logging off in peace". *The Telegraph*, comment posted http://www.telegraph.co.uk/technology/5131134/Legacy-Locker-Logging-off-in-peace.html#disqus_thread (accessed on 9 August 2012).

24 Berghel 2000:21.

tucked away in an online user's memory, making it increasingly difficult for intended beneficiaries to assemble the entire estate of the deceased person. Given that some service providers refuse collaboration with the intended beneficiaries, resulting in lack of access to password-protected assets or even lack of knowledge of their existence, virtual wealth is surely bound to expire when online users do die.

Thirdly and closely connected to the above, the situation becomes more exacerbated by the fact that the law has, to a larger extent, remained distant to the problems posed by online engagements, effectively meaning that the law's position in such circumstances remains unclear. It is precisely because of this type of environment that companies such as Yahoo, while asserting full ownership of the user's content, continue to maintain that e-mail accounts are not transferable and can, therefore, not be inherited, thereby denying access to those mourning the loss of a loved one. In asserting this control upon a user's death, such companies are, in fact, depriving an online user's estate and his successors access to potentially significant and valuable intellectual property resources.

The fourth problem arising relates to the very nature of the digital content that is locked in as a result of some service provider's insistence on the non-transferability of online accounts contents as well as the implications thereof. At face value, there appears to be nothing wrong with deleting or locking in content that consists of e-mail messages related, for example, to simple greetings, and so on. However, in most instances, this seems far away from reality, because some digital assets have by their very nature real monetary value. In fact, according to Mach:

Purchased virtual goods through online role-playing sites, including Second Life, Entropia Universe, and World of Warcraft, have a U.S. estimated value over \$1 billion. This accumulated virtual wealth can be transferred back into real money. Deemed income by the IRS, cashed out role-playing accounts must be reported on tax returns.²⁵

This commentator further asserts that even those assets which *prima facie* are without market worth may, in fact, have tremendous sentimental value. In this regard, it is important to note that, in modern times, a significantly large portion of the population no longer develops pictures to be affixed to photo-album pages, but instead chooses to celebrate memories of people on cyberspace domains such as Facebook and Flickr. Therefore, as more information is stored online rather than in tangible form, heirs may desire virtual asset access to memorialise their loved ones. An additional consideration is that, as in the past when pictures on paper proved to be of tremendous help to contemporary historians, access to current intangible memoirs will also prove critical to future historians.

25 Stephanie Mach, comment on "Life after death: Why digital immortality is now an important factor in estate planning". *The North Carolina Journal of Law and Technology* (NCJOLT) blog, comment posted on 17 February 2011. <http://www.ncjolt.org/staff/volume-12/stefanie-mach> (accessed on 18 April 2012).

Lastly, it is maintained that purported solutions offered by companies such as Legacy Locker and Entrustet appear to be of temporary existence; especially if one bears in mind the possibility of such companies going to the grave ahead of, or contemporaneously with the online user, before the company can be called upon to fulfil its obligations.

The above scenario being the case, the next issue is the exploration of whether there are any legislative solutions to the above problem and, if any, a brief enquiry into their efficacy.

4. The legislative initiatives

From the point of view of the limited literature, there have indeed been some attempts in several American states aimed at regulating the legal position of digital assets, especially at the time of an online user's death. Five states in America have in place pieces of legislations in the above regard. The states in question are Rhode Island, Connecticut, Indiana, Oklahoma and Idaho. The next sections examine more closely and briefly discuss the legal provisions holding in each state.

4.1 Rhode Island

Rhode Island has in place the *Access to Decedents' Electronic Mail Accounts Act*, which was approved and became effective on 1 May 2007. The *Act* obliges all e-mail service providers to provide, to the executor or administrator of the estate of a deceased person who was domiciled in Rhode Island at the time of his /her death, access to, or copies of the contents of the e-mail account of such deceased person.²⁶ In terms of this law, the service provider must be furnished with

a written request for such access or copies made by such executor or administrator, accompanied by a copy of the death certificate and a certified copy of the certificate of appointment as executor or administrator and an order of the court of probate that by law has jurisdiction of the estate of such deceased person, designating such executor or administrator as an agent for the subscriber, as defined in the Electronic Communications Privacy Act, 18 USC 2701, on behalf of his/her estate, and ordering that the estate shall first indemnify the electronic mail service provider from all liability in complying with such order,²⁷

before this obligation can be triggered. The piece of legislation defines an e-mail account as including:

... all electronic mail sent or received by an end-user of electronic mail services provided by an electronic mail service provider that is

26 *Access to Decedents' Electronic Mail Accounts Act*:Chapter 33-27-3.

27 *Access to Decedents' Electronic Mail Accounts Act*:Chapter 33-27-3 (A) and (B).

stored or recorded by such electronic mail service provider in the regular course of providing such services; and any other electronic information stored or recorded by such electronic mail service provider that is directly related to the electronic mail services provided to such end-user by such electronic mail service provider, including, but not limited to, billing and payment information.²⁸

4.2 Connecticut

Connecticut's *Public Act* No. 5-136 provides for access to the deceased's e-mail account on precisely the same terms as Rhode Island above.²⁹ Seeing that the Connecticut legislation was approved on 24 June and became effective on 1 October 2005, exactly two years before the Rhode Island legislation came into existence, the inescapable conclusion is that Connecticut was obviously the first to legislate on these matters and that Rhode Island simply copied the Connecticut provisions as is and promulgated them, the only slight difference being that the court order provisions were expanded upon in the latter case.

4.3 Indiana

The *Indiana Code* 29-1-13 (SB 0212, 2007), which was approved on 6 March and effected on 1 July 2007, deals with the electronically stored documents of the deceased, albeit on a much improved and slightly wider scale as opposed to the limited and narrow legal provisions holding in Connecticut and Rhode Island above. For instance, instead of being specific about making reference to service providers and thereby somehow its limiting application to service providers only, the Indiana legislation uses the wider term of *custodian* of such documentation, which is defined to include any person who electronically stores the documents or information of another person,³⁰ thereby practically casting the net of inclusivity slightly wider. Over and above the normal provisions for access triggered by applicable requests, the *Code* further provides for an additional obligation on the custodian in question, being that such custodian "may not destroy or dispose of the electronically stored documents or information of the deceased person for two (2) years after the custodian receives a request or order under subsection (b)".³¹ Furthermore, information to be disclosed is limited only to such information to which the deceased person would have been permitted access in the ordinary course of business by the custodian.³²

28 *Access to Decedents' Electronic Mail Accounts Act*:Chapter 33-27-2 (1) and (2).

29 *Public Act*:section 1(a)-(c).

30 *Indiana Code*:section 1.1(a).

31 *Indiana Code*:section 1.1(c).

32 *Indiana Code*:section 1.1(d).

4.4 Oklahoma

Section 269 of Title 58, as codified in the *Oklahoma Statutes*,³³ affords the executor or administrator of an estate the power, where otherwise authorised, to take control of, conduct, continue or terminate any accounts of a deceased person on any social networking website, any micro blogging or short message service website or any e-mail service websites. Needless to say, this legislation appears to be slightly more comprehensive compared to the ones previously discussed, in the sense that the legislation not only permits access to copies or contents, but actually expands the powers of the executor by, *inter alia*, enabling him/her to conduct and continue operating and, in some circumstances, even to terminate the online accounts of the deceased. This will obviously be beneficial to those accounts which, by their very nature, have to continue operating so as to maintain their value.

4.5 Idaho

Idaho's law, which was approved on 16 March 2011 and became effective on 1 July 2011, is virtually identical to that of Oklahoma.

4.6 Critical assessment of the legislative initiatives

The above efforts by the lawmakers in the states under discussion, though commendable, nevertheless enjoy a fair share of shortcomings. In the first place, some of them appear to be fairly inadequate, unsatisfactory and, moreover, lacking substance in the current fast-changing world. For example, both Connecticut's *Public Act No. 5-136* and Rhode Island's *Access to Decedents' Electronic Mail Accounts Act* of 2005 and 2007 require considerable updating, because they make no reference at all to blogs, online bank accounts, payment accounts, photo-sharing accounts, Facebook or other social media accounts. There is, therefore, a serious need to update the relevant pieces of legislation with a view to bringing them in line with the latest development in the digital age.

Secondly, with the exception of Oklahoma and by the same token Idaho, even those states that seem to have achieved the feat of containing all-encompassing definitions, nevertheless only provide for limited access to executors in the sense that such executor is merely entitled upon application thereof to the copies of contents of the deceased account without getting additional powers such as the power to operate accounts that are, by nature and definition, required to be kept alive and the value of which is enhanced by daily operation.

Thirdly, none of the laws discussed above has tried to reconcile its provisions with the rules and/or policies governing the relationship between the service providers and the deceased, let alone the existing

33 Approved on 21 April 2010 and became effective on 1 November 2010.

terms of reference that are purported to be agreed upon between the parties. As such, no effort is made to address, for instance, the perplexing questions of the ownership of e-mails, the copyright nature of the e-mails, the impact of service providers' terms of reference on such ownership and nature, and the concepts of fair use.

5. The South African legislative landscape

Two areas of private law in South Africa will form the subject matter for a closer inspection in this part of the exposition. The areas in question are marriages, more conveniently known as matrimonial law, and deceased estates, also aptly known as the law of succession. In this regard, relevant provisions of both the *Matrimonial Property Act*³⁴ and the *Divorce Act*³⁵ in the context of marriages, and the *Administration of Estates Act*³⁶ in the context of the law of succession, will constitute the focal point of this discussion.

However, it is worth noting, at this point, that the challenges posed by online or digital assets to the above legislation are generally threefold. In the first instance, there is the challenge of lack of definition of the phrases “assets”, “property” and/or “estate” insofar as it relates to the issue of whether online assets are included or not, that is, the inclusivity versus exclusivity thereof. Secondly, there is the challenge of knowledge or lack of it on the existence of online assets insofar as this relates to the practical application of the relevant provisions of the legislation in question. Thirdly, there are challenges pertaining to the accessibility of digital assets, even where there is knowledge of their existence.

5.1 The *Matrimonial Property Act* No. 88 of 1984

The first and foremost challenge that one comes across when dealing with the *Matrimonial Property Act* in this context is the conspicuous lack of an elaborate definition of the phrase “asset” and/or “property”. Instead, the definitions section³⁷ of the *Act* makes reference only to “joint estate”, as being the joint estate of a husband and a wife married in community of property. In addition, in the only instance where the term *property* is mentioned, reference is made to “separate property” as meaning property which does not form part of a joint estate. This being the case, it is, therefore, difficult to know whether property is used in the wider sense as to include digital assets or in a narrow sense to include only certain assets.

The second challenge relates to the practical implications of lack of knowledge pertaining to the existence or non-existence of digital assets or the deliberate concealment of their existence. The unpacking of the

34 *Matrimonial Property Act* 88/1984.

35 *Divorce Act* 70/1979.

36 *Administration of Estates Act* 66/1965.

37 *Matrimonial Property Act* 88/1984:section 1.

relevant sections of the *Act*, dealing more particularly with the concept of accrual, serves to illustrate the point. In this regard, section 3 of the *Act* creates a claim at dissolution of marriage by the spouse with the lesser accrued estate against the spouse with the more accrued estate. Section 4 of the *Act* further describes the accrual of the estate as being “the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage”, and goes on to exclude certain amounts and assets from the determination of the accrual of the estate. Needless to say, the word “assets” has, as indicated earlier, not been defined at all in the *Act*. Of further equal importance are the provisions of section 7 of the *Act*, which creates an obligation to furnish particulars of the estate:

When it is necessary to determine the accrual of the estate of a spouse or a deceased spouse, that spouse or the executor of the estate of the deceased spouse, as the case may be, shall within a reasonable time at the request of the other spouse or the executor of the estate of the other spouse, as the case may be, furnish full particulars of the value of that estate.

The practical result of all of the above is, of course, that this tends to open up scenarios in which the hypothetical Mr Scott (when alive) may maliciously choose not to disclose his online assets, or the executor of Mr Scott (when dead) does not have knowledge of the online assets and, as a result, does not disclose them. Consequently, Mr Scott’s (whether deceased or alive) online assets may invariably end up not being included in the determination of accrual. In this context, one can, therefore, not even begin to quantify the extent and level of unfairness and disadvantage that are bound to be visited upon the spouse with the lesser accrual who, in the first place, is the target of protection by the *Act*.

The third challenge, which is clearly occasioned and intensified by the lack of definitions of assets, is the conspicuous lack of provisions detailing procedures for accessing such online assets, even in cases where there is knowledge of their existence. This practically leaves the accessibility of such assets to be governed entirely by the service providers’ terms of reference, the efficacy of which are, as indicated earlier, really not worth writing home about.

5.2 The *Divorce Act No. 70 of 1979*

Similar challenges also arise in the case of the *Divorce Act*. Section 7 thereof, dealing with the division of assets, firstly empowers the court “in accordance with a written agreement between the parties to make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other”, and to order transfer of assets in circumstances set out in subsection 3 of the *Act*. The court is further enjoined to order forfeiture of benefits (practically exercisable in relation

to assets)³⁸ in terms of section 9.³⁹ It is interesting to note, however, that in all these scenarios it is by no means clear what is envisaged to form part of assets (the *Matrimonial Property Act* above is just as vague), nor is the word *asset* defined anywhere in the *Act*, except that subsection 7 deems a pension interest to be part of the assets. What this practically boils down to is, in fact, that it is possible for the court in any given circumstances to fail to make an order either of division, forfeiture or transfer on the mistaken belief that there are no assets to divide, forfeit or transfer when, in fact, such assets do exist and are in abundance, but are in the form of online assets as presented in our hypothetical example above. The converse is, of course, also true: it is perfectly possible for a court to also make an order that will ultimately be rendered ineffective, mainly as a result of the assets being locked up in the digital state or format, as is also apparent from the hypothetical situation given above.

Similarly, the lack of definitions of the term *assets* in the *Act* has led to the compounding of problems evinced by the absence of provisions regulating the accessibility of online assets.

5.3 The *Administration of Estates Act* No. 66 of 1965

Unlike the two *Acts* in the marriage domain discussed earlier, the challenges in the case of the *Administration of Estates Act* seem to be confined to knowledge of the existence of the digital assets in question and, to a limited extent, their accessibility. The *Act* under discussion defines property as including “any contingent interest in property”. Obviously, if one construes property in the conventional sense, then it is, of course, arguable that online assets are included and/or encompassed in the definition, and the *Act* can, therefore, be taken to cater for online assets in the broader sense. It is still, however, open for the legislature to come up with a definition that refers to specific types of online asset (as was done in the five American states discussed earlier) with a view to simplifying and/or making the processes relating to administration of deceased estates slightly easier. However, in the absence of such a provision, it appears that the matter will currently be left in the hands of the courts and the advent of judicial activism where the judiciary will be tasked with the proper construction of the term *asset*, which, of course, will have to be all inclusive.

A closer analysis of the relevant provisions of the *Act* under discussion raises the following questions which cannot all be answered with relative ease. First, section 9(1) deals with inventories and obliges people to make and endorse inventories in given circumstances. It is important to note that the section specifically refers to property in the Republic of South Africa. The question is, therefore, whether online assets at Twitter or a network residing and hosted in a foreign country as many are, qualify to be assets in the Republic of South Africa and as such amenable to being included

38 Marumoagae 2011:22.

39 *Ex parte De Beer* 1952 (3) SA 288 (T).

in the inventory as envisaged. It appears, therefore, that this question can only be answered by the legislature and as such be remedied by means of future amplification or the anticipated favourable interpretation by the judiciary.

Secondly, the provisions of subsection 2(a) are of great significance in that the Master may

... require any person to make, ... and to deliver or transmit to him, within the period specified in the notice, an inventory in the prescribed form of all property known by such person to have belonged at the time of the death to the deceased; ... the joint estate of the deceased and the surviving spouse; ... the massed estate concerned.

Arguably, if one were to apply a properly generous construction and interpretation to this legal provision, it appears that the subsection would cover online assets as it does not contain a restriction to property in the Republic, the operative phrase, of course, being “all property known”. In the third instance, section 11 deals with temporary custody of property in deceased estates and provides thus:

Any person who at or immediately after the death of any person has the possession or custody of any property, ... or document which belonged to or was in the possession or custody of such deceased person at the time of his death--a) shall, immediately after the death, report the particulars of such property, ... or document; b) shall, unless the Court or the Master otherwise directs, retain the possession or custody of such property, ... or document, until an interim curator or an executor of the estate has been appointed or the Master has directed any person to liquidate and distribute the estate: Provided that the provisions of this paragraph shall not prevent the disposal of any such property for the *bona fide* purpose of providing a suitable funeral for the deceased or of providing for the subsistence of his family or household or the safe custody or preservation of any part of such property; c) shall, upon written demand by the interim curator, executor or person directed to liquidate and distribute the estate, surrender any such property, ... or document in his possession or custody when the demand is made, into the custody or control of such executor, curator or person: Provided that the provisions of this paragraph shall not affect the right of any person to remain in possession of any such property, book or document under any contract, right or retention or attachment.

The question that immediately arises and may be the subject of interpretation is whether, in its current format, the section can be used by the master, executor or the courts successfully to force the service providers to deliver online assets of the deceased for administration purposes. Despite there being no judicial precedent on the aspect, it appears to the present writer that a face-value reading of the provisions of the section may clearly and appropriately enable the executor to indeed

demand and, where applicable, approach the courts for an order obliging the service providers in question to surrender any online property or document in their possession subject to the rights reserved in the section and in their favour. In other words, the legal status normally attaching to letters of executorships may provide sufficient reason for service providers to deviate from their terms of reference. This is still, of course, subject to the practical consideration that legal proceedings to that effect may, in certain circumstances or where applicable, and as required by civil procedure rules, have to be instituted in foreign courts.

6. Recommendations for South Africa

Arising from the above investigation, the following recommendations can be put forward for South Africa.

First, it is proposed that the legislature consider the codification of digital or online assets by either inserting provisions dealing with them into various existing pieces of legislation or creating a new legislation altogether, which would be solely dedicated to regulating all aspects of digital or online assets. Regard should be had to the various legislation of the American states discussed earlier in the exposition as examples relating to the “how” part of the codification process.

Secondly, depending on which way the legislature goes when dealing with codification, it is also proposed that the legislature take extreme care to ensure the creation of legislative provisions that are up to date and in accordance with the latest developments in the digital era. By doing so, the legislature will generally avoid falling into the trap of locking the relevant legislative provisions in time in similar fashion with the Connecticut’s *Public Act No. 5-136* and Rhode Island’s *Access to Decedents’ Electronic Mail Accounts Act* of 2005 and 2007, respectively, both of which have been discussed earlier.

Thirdly, in the case of deceased estates, the legislature must create provisions that fully expand on the access rights of the executor. Accordingly, provisions relating, *inter alia*, to the applicable procedures, allowing executors the right to operate online accounts, and obliging service providers to preserve, safeguard and/or archive contents of online assets and so forth, could be considered.

Fourthly and lastly, it is highly recommended that the legislature try and reconcile the proposed legislative provisions with the service providers’ terms of reference, by addressing the specific issues pertaining to, for example, the ownership of e-mails, the copyright nature of the e-mails, the impact of service providers’ terms of reference on such ownership and nature, the concepts of fair use and so on, and subjecting, where possible, the relevant terms of reference to the legal provisions holding in a particular digital assets legislation.

7. Conclusion

Currently, for the majority of people, an online existence has become an incontrovertible reality. The web is accordingly full of thousands of web-user profiles containing information which tends, *inter alia*, to be sensitive, valuable and sometimes sentimental. This type of information is at times referred to as online or digital assets. Despite the fact that online or digital assets have not been adequately defined in the literature or in legal circles, it is nevertheless acknowledged as a real possibility that after the death or impairment of the user, the safety of such online and digital assets may be adversely compromised as a result mainly of the face value lack of ownership of such assets, as well as the existence of ineffective legal policies in this regard. This currently endemic problem of what to do with the online or digital assets on death and impairment of the user is only now being addressed precisely because the dilemma of ownership of digital or online assets has become an issue affecting millions. Whereas only five states in America have taken the lead in legislating for what happens to digital assets after the death of a user, and while other jurisdictions such as South Africa are lagging behind on this, it remains to be seen whether the law on this issue will ever be settled.

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