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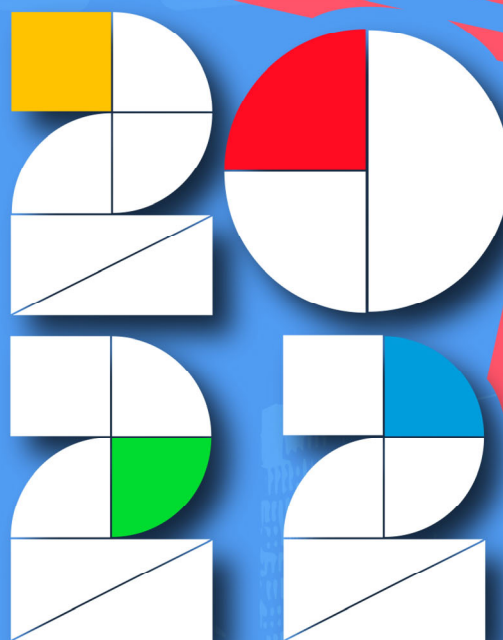
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Reengineering
Knowledge &
Creativity for
Global Excellence

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June



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TECHNOLOGY, SCIENCE, SOCIAL SCIENCES AND
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TeSSH 2022***

**Reengineering Knowledge and Creativity
for Global Excellence**

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30 June 2022
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Foreword

The papers compiled in these e-proceedings are papers presented online at Technology, Science, Social Sciences and Humanities International Conference 2022 (TeSSH I 2022) held on 30 June 2022 at Universiti Teknologi MARA (UiTM) Cawangan Kedah, Kedah, Malaysia. With the theme, ***Reengineering Knowledge and Creativity for Global Excellence***, the conference has brought together presenters of diverse background who shared their conceptual and empirical papers in broad areas that are subsumed under the fields of Technology, Science, Social Sciences and Humanities. These e-proceedings comprise current researches that were undertaken with the rigorous endeavour of knowledge enhancement to ensure that the world of academia will continue to flourish. It is thus hoped that readers will significantly benefit from knowledge contained in these proceedings.

TeSSH I 2022 and these e-proceedings would not have been possible without the great efforts from the presenters, and the generous support from the TeSSH I 2022 committee members and the Rector of UiTM Cawangan Kedah, Prof. Dr. Mohamad Abdullah Hemdi. A heartfelt gratitude is extended to all involved. It is hoped that these e-proceedings will be an impetus to stimulate further studies and research that benefit the society at large.

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Digital Inheritance: Legal Challenges in Malaysia

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ABSTRACT

Administration of digital assets or digital inheritance is one of the emerging areas of law especially in the digital era and the development of industrial revolution 4.0. The concept of digital inheritance would have seemed absurd within a decade ago. However, in recent years, a great deal of our property has been replaced by digital asset and a whole virtual estate may now exist upon death. Due to their unique characteristics, digital assets have now caused complication to the current administration of estates law and inheritance system which traditionally focused on the individual's tangible belongings, financial assets, and real estate. Hence, this paper aims to discuss the current legal framework and the challenges relating to the digital inheritance. For this purpose, the discussion adopts the doctrinal analysis by examining the existing primary and secondary materials including statutory provisions, case law and other legal and non-legal literature related to the digital inheritance. This paper concludes that a proper framework is needed to explain the meanings and establish legal provisions regarding the transfer of digital assets to the beneficiaries of the deceased since all these assets are new and have a unique nature that makes them special from other forms of tangible assets. Policies of social networks to regulate the digital account need to be developed as to settle the current challenges. The absence of regulatory actions towards regulating such area of law creates a lot of confusions. Hence, it is important to have legislative changes in the law by incorporating digital inheritance to the current legal system.

Key Words: digital, inheritance, digital assets, deceased estates, Malaysia.

INTRODUCTION

Administration of digital assets or digital inheritance is one of the emerging areas of law especially in the digital era and the development of industrial revolution 4.0. The digital world is evolving so fast and getting so popular that no one can run away from it. It is foreseeable that digital asset is picking up over the years, especially now that Generation X are at the stage where they have families and digital assets to leave behind. Based on the global study conducted by McAfee in 2016, the use of the internet has skyrocketed, where it was found that the average internet user has over \$37,000 in digital assets across multiple devices (Sy, 2016) Hence, it is generally easy to overlook the existence of the digital assets (Ashley, 2014) and their legal position after the death of the owner.

Basically, digital inheritance is a process of transmitting or transferring the deceased assets or digital media in the form digital assets to the deceased's beneficiaries. The process includes understanding what digital assets and rights exist and dealing with them after a person has died. Inheritance right can be subscribed to the economic role of a right. It embraces items that typically represent economic or proprietary interests, and which usually can be ascribed a pecuniary worth, expressed through its price. Rights in this sense can be also transferred upon the others during the lifetime of the entitled person or at least after her demise (Grochowski, 2019).

The concept of digital inheritance would have seemed absurd within a decade ago. However, in recent years, a great deal of our property has been replaced by digital asset. Our photographs, music collection and written correspondence have been replaced by digital picture, online music collections, and emails respectively. It was an emerging and complex area of succession law as often social media and tech companies owned the contents of the accounts. As such, inheriting photo albums and music collections is becoming a murkier area in the digital age. Other asset that still exist in traditional form are now controlled through digital format such as online banking and electronic investment of financial assets such as cryptocurrencies. Digital assets of a financial nature are more easily claimed if they are connected to a bank account. However, assets such as cryptocurrency accounts are trickier because there is no central agency in control (Tan, 2018; Zulhuda & Sayuti, 2017). It is interesting to note that, the internet-based virtual currencies like Bitcoin have been cautiously welcomed by the Malaysian regulators (Di Salvo, 2019,). Bank Negara Malaysia in 2019 has made an obvious effort to put some regulations on cryptocurrencies with the introduction of the Capital Markets and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019. This new regulation classifies digital currencies, tokens, and crypto assets as securities, placing them under the Securities Commission's authority (Bank Negara Malaysia, 2019). Despite the increasing role those digital assets play in our lives, no governing law has been stipulated in Malaysia regarding estate planning of digital assets (Goh & Lim, 2014).

Hence, it can be said that with a whole virtual estate may now exist upon death. Due to their unique characteristics, digital assets have now caused complication to the current administration of estates law and inheritance system which traditionally focused on the individual's tangible belongings, financial assets, and real estate (Walker, 2017). This is so as there is a fundamental distinction exists between current tangible asset recognized under the law and digital assets. Current administration of estates law appears to fall short of adequately addressing the rights of heirs and personal representatives to digital asset especially the consequences of an unexpected or untimely death.

LEGAL FRAMEWORK

Prior to the emergence of digitalisation, the process of administration of deceased estates was limited to only the tangible belongings of the person which was regulated by several statutes. The administration of estates is a process of collecting and gathering in the deceased's estate in facilitating the procedure of transmitting and transferring to the rightful owner left by the deceased. The foundational framework for administration of deceased estates and inheritance law under Malaysian law can be found in the Probate and Administration Act 1959, Small Estates (Distribution) Act 1955, Distribution Act 1955, Rules of Court 2012, and many others. These statutes are not sufficient to govern the current legal issues as no provisions can be found in relation to the digital assets or digital inheritance.

Generally, there are two regimes in place to regulate the law of inheritance which are testate succession and intestate succession. The testate succession is done by the execution of testamentary documents such as will, codicil and trust documents by a testator to appoint a personal representative with several instructions on the method to manage the estate after his death. While in the intestate setting, a deceased estate is passed onto his heir in a specified order as provided by the operation of law that is through the enforcement of rule of intestacy in pursuant to Distribution Act 1958 for non-Muslim and rules of faraid for Muslim. It happens when a person died without leaving any will (Noor, 2017). Hence, it is important to note that, personal representative is one of the main players in the estate administration. He plays an essential role to ensure that the deceased estate is well managed expeditiously and efficiently. It is knotted with the governing law on the estate administration in Malaysia under Probate and Administration Act 1959 that mandated the appointment of person to the office of executorship or administrator ship as personal representative before the deceased's estate can be legally dealt with. Their existence reflects the wealth of a deceased person and the way their estate will be managed after their death (Noor, 2017).

Nevertheless, by the emergence of digitalisation era, the usual role of personal representatives involves identifying the deceased's assets, paying the deceased's debt, and distributing the deceased's assets according to the Last Will and Testament (Halim, 2018) is totally revamped. The traditional process of wrapping up the estate requires a search of the deceased's records such as accounts and bills. These records are identified through stored records or subsequently received mail. However, the emergence of the digital world results in less paper trail.

Currently, the rights of personal representatives regarding digital assets are unclear. The need of personal representatives to access deceased's online accounts to properly administer estates must be recite with a question of how broad this access should be (Hand, 2018). With the growth of technology, the court may be called upon to venture into less familiar waters. The digital assets which have proved the most problematic to deal with after death are social media and email accounts as several recent cases have illustrated. In the 2015 case of *in re Facebook Ireland Ltd*, Landgericht Berlin, No. 20 O 172/15 the Berlin Regional Court granted the parents of a deceased minor access to her online profile to regulate the inheritance of digital assets in what was considered one of the first judicial considerations of how digital assets are dealt with after death. In that case, the deceased had reportedly given her account login details to her parents before her death but the company, having been informed of her death by a Facebook friend, "memorialised" her account after which it was effectively frozen and could only be deleted or remain unaltered, even in circumstances where the login details were known by a third party (in this case her parents) (Hand, 2018).

LEGAL CHALLENGES

The challenges for the existing legal framework, entailed by the Internet revolution, to a growing extent tackle also on the problems of inheritance law. There is a lack of legal framework as regard to digital inheritance. Legislation systems often fail to determine the posthumous status of accounts (Mirshekari et al. (2020); Watkins, 2014; Tarney, 2012). Indeed, many questions have arisen following the emergence of technology, which has remained unanswered by legal and legislation systems (Varnado, 2014). The legal issues surrounding digital inheritance are as follows.

Firstly, the problem of inheritability of digital assets may include the issue of ascertaining what constitute digital asset. As digital assets are a new type of assets, they are evolving and increasing over time, and nobody succeeds to identify or precisely explain the meaning of it although there are a few different definitions provided for such assets (Grochowski, 2019). There is currently no universal definition of a digital assets or digital estates (Conner, 2011; Carroll, 2012). Basically, digital asset may literally include data, text, e-mails, documents, audio, video, images, sounds, social media content, social networking content, codes, health care records, health insurance records, computer source codes, computer programs, software, software licenses, databases, or the like, including the usernames and passwords, created, generated, sent, communicated, shared, received, or stored by electronic means on a digital device.

In the administration of estates in Malaysia, the bone of contention is the determination of the extent and types of property that shall be regarded as the deceased's estate before it can be distributed to the rightful legal heirs (Arshad & Halim., 2014). A deceased's estate is defined a compilation of assets and liabilities owned by the deceased prior to distribution by testamentary document or rule of intestacy. It may include movable and immovable property, tangible and intangible property, any interest in any property, any debt, and anything in action and any other rights or interest whether in possession or not. Coulson (2008) explained that the estate of the deceased comprises all the property that he owns, whether ownership is so substance or corpus of a thing or merely of its usufruct or income. Halim (2018) explained that an estate refers to all money and property that a person owns, especially everything that is left when he dies. Therefore, in the emergence of industrial revolution 4.0 era, intangible asset such as digital asset, cryptocurrency such as bitcoin and intellectual property may also be included in the type of deceased estate.

On that premise, the digital assets should be ascertained and defined, to ensure that their value can be deal appropriately. Cruz (2016) grouped digital assets into two broad categories, firstly online account and secondly files stores on a computer or server. Cahn (2011) categorized digital

assets in terms of four distinct categories namely personal, financial, business, and social media. Digital assets can be split up into five categories: electronic documents; social media outlets; financial assets; business assets; and miscellaneous assets (Sy, 2016). Perrone (2012) observed that digital assets may include digital images from photographs, electronic bank and investment account statements, e-mail records and associated passwords, and social media accounts such as Facebook, Linked-In, Twitter, and YouTube. Ian (2017) divided the digital asset according to its values, namely digital assets with financial worth, digital assets with sentimental value, digital assets with intellectual value, and digital assets with social value. Most of this asset are being kept in clouds (Aziz & Noor, 2016). In other words, a non-exhaustive list of digital assets can be drawn up such as online bank accounts held with financial institutions, online share trading, online auction accounts (E-bay), Items on social networking sites and other social media and many others.

The other basic question raises a host of legal issues around ownership, privacy, access to usernames and passwords, the duties of personal representatives when administering the deceased estates as well as multiple territorial jurisdictions. The question of inheritance of an account is also interconnected with succession over assets stored on this account. Access to an account may be a prerequisite for exercising entitlements over particular assets, e.g., to download an item subjected to one's intellectual property right, such as a photograph or a video recording. In other words, the problem of digital inheritance exceeds also beyond the traditional domain of private law succession rules and constitutes a compound nexus, which combines elements of inheritance, contract, and public law such as privacy and data protection. (Grochowski, 2019, Conway & Grattan, 2017).

Secondly, there will be issue of standing or 'locus standi' and access to the digital assets. The issue of getting access to the deceased's account, especially, to its publicly unavailable content should be considered. The administration of estates in Malaysia mandated the appointment of personal representatives to manage the deceased estates (Noor & Aziz, 2019). The complexity of controlling the online storage such as Dropbox or Google Drive Apps and dissemination of personal data on the Internet, continues when the owner pass away. The heir will not have access to the passwords necessary to deactivate profiles and delete or remove information (Brucker-Kley et al., 2013). This is so as the deceased's ownership of the device does not necessarily mean that he also owned all the rights associated with the information stored on it. The deceased might have had only a license to use the information such as a music track purchased from the iTunes Store; or he might have copied the information such as a digital photographic image or a digital video from someone else's website or Facebook page. In this event, the personal representative of deceased estate might not have any authority to pass on any such information to any beneficiary or purchaser of the device. If the passwords are provided and within the knowledge of personal representatives, the legal implication if he logs-in to the deceased account on behalf of deceased would amount to criminal offences under Penal Code and Computer Crimes Act 1997. In other words, even if the personal representative has the username and password for the account, the personal representative could possibly face legal consequences due to electronic privacy and antihacking laws (Marc & Christian (2007).

At the same time, the intricacy continues where the platform providers or internet service providers follow different practices (Aziz, 2017) and their terms and conditions vary considerably (Brucker-Kley et al., 2013). Without specific laws to address digital assets, the decision to allow access to social media accounts after the user's death depends on the service provider (Tan, 2018). For example, Google offers a variety of online services including Gmail (email), Picasa (photo hosting and sharing), Google Plus (social networking), and Google Drive (document hosting). Given that they are all accessed via a single account, their policies as detailed in their support pages may be similar but not identical (Ian, 2017). This intersection may invite problem with cyber law as provided under Communications and Multimedia Act 1998 and Digital Signature Act 1997. For instance, section 205 of Communications and Multimedia Act 1998 provides for the prohibition on the provision of content applications service, whilst section 66 of Digital Signature Act 1997 provides for the authentication of digital signatures.

Thirdly, jurisdiction issues. Digital assets are mostly stored on shared servers and the service providers may be based in a different country from their users. For instance, just because a user dies in Malaysia with a Facebook or Instagram account, it does not mean that Malaysian law will

apply in dealing with those digital assets. In the absence of clarity on which countries' laws apply, how a digital service-provider deals with an asset following the death of the user becomes a matter for the provider's terms of use (Edwards & Harbinja, 2013; Kinealy, 2014). The issue of forum in convenience can be invoke in this matter.

Fourthly, security and privacy issues. Due to people's concerns about security, privacy, and identity protection they are taking more care when managing their digital assets, including using an increased variety of usernames and passwords which may be impossible to establish by anyone using conventional methods (McCarthy, 2015; Malgieri, 2018). This issue will invoke interaction and infringement of rights as provided under section 7 to section 12 of Personal Data Protection Act 2010 that provides the notice and choice principle, disclosure principle, security principle, retention principle, data integrity principle and access principle.

Fifthly, confidentiality issues. If the deceased created a literary or artistic work in the course of his employment and saved that work as a file on a computing device owned by him, his employer may well be the owner of the intellectual property rights in that work (Aziz & Noor, 2008). If the personal representative transfers the device to a beneficiary or sells it without removing the confidential information, he could be guilty of infringement of the employer's rights. This is relevant also to the academicians due to the requirement to insert element of industrial revolution 4.0 in course assessment plan and the use of web 2.0 applications in teaching and learning environment (Aziz, Noor & Mohamed, 2018). This issue will invoke interaction and conflict with Employment Act 1955 and Copyright Act 1987.

CONCLUSION

The law has given digital assets little attention, which may result in an unsettled area of law. In the absence of any relevant legal framework, the best solution to assist the unadministered digital assets of the deceased is by way of making a will instructing the personal to manage the digital assets. Since the concept of bequeathing e-affairs in Malaysia is still at its infancy stage, a person in bequeathing online assets must carefully consider all accounts and communicate details to permit access to his or her personal representatives (Goh & Lim, 2014). However, making a will does not resolve the issue of a person dies intestate or without a will (Tan, 2018).

A framework is needed to explain the meanings and establish legal provisions regarding the transfer of digital assets to the beneficiaries of the deceased since all these assets are new and have a unique nature that makes them special from other forms of tangible assets. Policies of social networks to regulate the digital account need also to be developed as to settle the current challenges. The absence of regulatory actions towards regulating such area of law creates a lot of confusions. With the rigorous development of information technology and the emergence of the industrial revolution 4.0, the time is ripe for the legislature to give a proper attention to develop a legal framework for digital inheritance. Hence, it is important to have legislative changes in the law by incorporating digital inheritance as been suggested by Hopkins (2013) in the current system of administration of estates in Malaysia. If legal institution failed to manage the digital asset, the issue may contribute to the growing of unclaimed estates that have become a national concern and a major recurring problem in administration of estates (Halim et al., 2018). It is important to note that the last thing that bereaved families want are bureaucratic hurdles and legal uncertainty.

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