

# DIGITAL SUCCESSION: ADDRESSING THE DISPOSITION OF JUAN'S ONLINE DIGITAL ASSETS UPON HIS DEATH\*

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## ABSTRACT

Online digital assets, which are intangible assets, form part of a person's inheritance. The existing laws on succession allow the transmission of one's digital assets to another upon his death either by will or by operation of law. Filipinos must be aware of this so they can better plan the disposition of these assets upon their death, if they wish to, and their heirs can account for these accordingly. However, considering that the idea of digital assets is an emerging concept and there is no jurisprudence yet on the matter, the authors address several legal issues on the succession of digital assets. These issues include defining digital assets, determining the question of ownership and transferability of said assets, and consequently confronting the issue on the rights of administrators, executors, or heirs to access the decedent's accounts and materials uploaded online in light of the privacy agreements the latter enters into with internet companies. Notwithstanding said issues, the Civil Code is sufficient to govern the transmission of digital assets.

## I. INTRODUCTION

If a person posted a video on Facebook, uploaded a picture on Instagram, or sent an electronic mail (email) on Gmail, he or she owns a

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digital asset. In this age, digital assets are everywhere. It is almost impossible to exist in today's world without owning, relying upon, referring to, or communicating through some form of digital asset. Moreover, "[m]any types of digital property are replacing—or have already replaced—outdated types of tangible personal property."<sup>1</sup> Elizabeth Sy explains the phenomenon of digital property succinctly:

We now live in a world where we can buy apparel online from bed at three in the morning, order food without having to make a phone call, and quickly deposit a check by photographing it with our smartphones. Some people may not even realize that a simple keyboard stroke, mouse-click, or tap on a touch-screen device may have the possibility of creating property.<sup>2</sup>

The Internet is increasingly becoming the main storage of our financial and personal lives, and the trend in technological developments and human behavior does not suggest a decrease in the future.<sup>3</sup> In fact, based on a global study conducted by McAfee,<sup>4</sup> "the average [I]nternet user has over [USD] 37,000 in digital assets across multiple devices. [I]n the United States, people value their assets, on average, at [USD] 55,000, a larger figure than anywhere else in the world."<sup>5</sup>

In the Philippines, around 58% of the total population have access to the Internet.<sup>6</sup> The average time these 60 million people spend online daily is 8 hours and 59 minutes—the highest in the world. The top online activities in the Philippines include logging on to social media like

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<sup>1</sup> Matthew Costello, *The "PEAC" of Digital Estate Legislation in the United States: Should States "Like" That?*, 49 SUFFOLK U.L. REV. S 429 (2016), citing Greg Lastowka & Trisha Hall, *Living and Dying in a Virtual World: Estate Planning for Digital Assets*, 284 N.J. LAW. 29 (2013).

<sup>2</sup> Elizabeth Sy, *The Revised Uniform Fiduciary Access to Digital Assets Act: Has the Law Caught up with Technology?*, 32 TOURO L. REV. 647 (2016). (Citations omitted.)

<sup>3</sup> James Ward, *Warning! Digital assets—The future is upon us* at 57, SCRIBD, available at <https://www.scribd.com/document/340725798/digital-assets-the-future-is-upon-us> (last accessed June 11, 2018).

<sup>4</sup> McAfee is an American device-to-cloud cybersecurity company and claimed to be the world's largest dedicated security technology company, see *McAfee Corporate Sheet*, MCAFEE, available at <https://www.mcafee.com/us/resources/brochures/br-mcafee-fact-sheet.pdf> (last accessed May 11, 2018).

<sup>5</sup> Sy, *supra* note 2, at 648 n.6.

<sup>6</sup> *PH spends most time online and on social media -report*, RAPPLER, Jan. 30, 2017, available at <https://www.rappler.com/technology/features/159720-ph-spends-most-time-online-and-on-social-media-report>.

Facebook, shopping using mobile money services, and watching videos.<sup>7</sup> Filipinos undoubtedly leave a digital footprint.

Considering how pervasive Internet use is and the amount of information and materials one uploads and downloads online, people ought to be concerned with what happens to their online digital assets after they die, as questions on transferability and access to these assets may arise later on. For instance, in the United States, the parents of a 21-year old man who committed suicide resorted to obtaining a court order against Facebook and Google to gain access to their son's online accounts in hopes of understanding why he committed suicide.<sup>8</sup>

Similarly, the family of Justin Ellsworth, a U.S. Marine killed in Iraq, sought access to his email account, but was refused by Yahoo!, Inc., citing the privacy preferences of the user as embodied in their agreement.<sup>9</sup> The deceased's father said, "I want to be able to remember him in his words."<sup>10</sup> Judge Eugene Arthur Moore of the Probate Court of Oakland County, Michigan, ordered Yahoo! to deliver the contents of any and all email, documents, and photos stored in the account of the Justin to his father via CD-ROM and written format.<sup>11</sup>

Evidently, online digital assets have economic and/or emotional or sentimental value.<sup>12</sup> As with any other form of property, the law abhors uncertainty in ownership.<sup>13</sup> Thus, upon death of the decedent, there must be someone who can exercise the attributes of ownership over the said assets.

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<sup>7</sup> Krista Garcia, *A profile of internet users in the Philippines*, RAPPLER, available at <https://www.rappler.com/brandrap/profile-internet-users-ph> (last accessed June 11, 2018)

<sup>8</sup> Emily Anne Epstein, *Family fights to access son's Facebook account after his suicide to finally gain closure over tragic death*, THE DAILY MAIL, June 2, 2012, available at <http://www.dailymail.co.uk/news/article-2153548/Family-fights-access-sons-Facebook-Gmail-accounts-suicide.html>.

<sup>9</sup> Jim Hu, *Yahoo denies family access dead marine's e-mail*, CNET, Dec. 21, 2004, available at <https://www.cnet.com/news/yahoo-denies-family-access-to-dead-marines-email/>.

<sup>10</sup> *Id.*

<sup>11</sup> Order to Produce Information, *In re Estate of Ellsworth*, No. 2005-296, 651-DE (Mich. Prob. Ct. Mar. 4, 2005).

<sup>12</sup> Heather Conway & Sheena Grattan, *The 'New' New Property: Dealing with Digital Assets on Death*, 2017, available at [https://pure.qub.ac.uk/portal/files/137420014/Digital\\_Assets\\_Grattan\\_and\\_Conway\\_final\\_.pdf](https://pure.qub.ac.uk/portal/files/137420014/Digital_Assets_Grattan_and_Conway_final_.pdf).

<sup>13</sup> *Yadao v. Yadao*, G.R. No. 6708, 20 Phil. 260, 261, Sept. 22, 1911.

The question now is whether our existing legal framework allows for the succession of online digital assets. When the work on the Civil Code began on May 8, 1947,<sup>14</sup> the Code Commission contemplated real and personal properties, such as parcels of land and jewelries. None of them could have probably conceived how technology would evolve at the rate it has. Nevertheless, succeeding to online digital assets is permissible under existing laws, because said assets are intangible properties, which form part of a person's inheritance.<sup>15</sup> However, there are several challenges to succession of digital assets, such as determining which online materials should be included in the estate and how to access them, considering the contending issue on privacy. These are some of the issues that the authors seek to address in order to encourage individuals to include online digital assets in their estate planning and to inform the heirs on the proper course of action and the legal basis thereof in case the decedent opted not to write a will.

## II. SUCCESSION OF ONLINE DIGITAL ASSETS UNDER PHILIPPINE LAW

### A. Definition of Digital Assets

A digital asset is defined as any item of text or media that has been formatted into a binary source that includes the right to use it.<sup>16</sup> The Revised Uniform Fiduciary Access to Digital Assets Act,<sup>17</sup> which is considered the leading legislation on digital assets in the United States, defines it as an “electronic record in which an individual has a right or interest,” but does not include the “underlying asset or liability unless the asset or liability is itself an electronic record.”<sup>18</sup> In turn, a “record” is defined as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”<sup>19</sup> Finally, “electronic” means “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.”<sup>20</sup> In other words, “digital assets comprise any information

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<sup>14</sup> I ARTURO TOLENTINO, CIVIL CODE OF THE PHILIPPINES 7 (1990).

<sup>15</sup> CIVIL CODE, art. 776. “The inheritance includes all the property, rights and obligations of a person which are not extinguished by his death.”

<sup>16</sup> Alp Toygar, Taipei Rohm Jr., & Jake Zhu, *A New Asset Type: Digital Assets*, 22 J. INT'L TECH. & INFO. MGMT. 112, 113 (2013).

<sup>17</sup> Hereinafter “RUFADAA.” See Sy, *supra* note 2, at 670.

<sup>18</sup> RUFADAA, § 2, par. 10.

<sup>19</sup> § 2, par. 22.

<sup>20</sup> Par. 11.

created that exists in digital form, either online or on an electronic storage device, including the information necessary to access them.<sup>21</sup>

Digital assets can be divided into five categories:<sup>22</sup> (1) electronic documents, such as email, text, Microsoft Word document, Microsoft excel spreadsheet, and Portable Document Format (PDFs); (2) social media outlets, such as Facebook, Twitter, Instagram, Linked-in, Snapchat, among others; (3) financial assets, such as PayPal, Google Wallet, Amazon, eBay, Robinhood, online bank accounts, YouTube Account that generates ad revenue, among others; (4) business assets such as digital customer information, databases, trademarks, trade secrets, websites, domain names, etcetera; and (5) miscellaneous assets like blogs, music, videos, online gaming, loyalty programs, to name a few.<sup>23</sup> Twenty years ago, “people passed items such as letters, photos, and videotapes from generation to generation. Today, these items are frequently stored digitally either on a hard drive or online account.”<sup>24</sup>

Despite not being defined by any law in the Philippines, digital assets, peculiar and unconventional as they may be, are considered property under the Civil Code. Property is an economic concept, meaning a mass of things or objects useful to human activity and which are necessary to life, for which reason they may in one way or another be organized and distributed, but always for the use of man.<sup>25</sup> All things that are or may be the object of appropriation constitute property.<sup>26</sup> In particular, digital assets are classified as intangible personal property.<sup>27</sup>

Property is classified as either real or personal. Real properties are those enumerated in Article 415 of the Civil Code,<sup>28</sup> while the rest are

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<sup>21</sup> Sy, *supra* note 2, at 650.

<sup>22</sup> *Id.*, citing Ashley Watkins, *Digital Properties and Death: What Will Your Heirs Have Access to After You Die?*, 62 BUFF. L. REV. 193 (2014).

<sup>23</sup> *Id.* n.30.

<sup>24</sup> *Id.*

<sup>25</sup> TOLENTINO, *supra* note 14, at 7.

<sup>26</sup> CIVIL CODE, art. 414.

<sup>27</sup> Intangible personal properties are “non-monetary assets that [cannot] be seen, touched or physically measured, which are created through time and/or efforts and are identifiable as separate assets.” See Jose Justin Santos, *E-Commerce and the Rise of the Online Business: The Identification and Valuation of Cyber Assets*, 57 ATENEO L.J. 1219, 1223 (2013), citing Monika Kothari et al., *Intangible Assets: A Study of Valuation Models*, RES. J. MGMT. SCI. 9, 9 (2013).

<sup>28</sup> CIVIL CODE, art. 415. “The following are immovable property:

“(1) Land, buildings, roads and constructions of all kinds adhered to the soil;

personal. Personal or movable properties can be further classified based on their form into tangible and intangible properties. Tangible, material, corporeal, or physical properties are those that are manifest to the senses, which we may touch or take, which exist in space, and have a body, whether animate or inanimate. All other things are intangible properties. Intangible personal properties are “non-monetary assets that [cannot] be seen, touched or physically measured, which are created through time and/or efforts and are identifiable as separate assets.”<sup>29</sup> While digital assets do not have physical attributes they nevertheless possess an economic reality.<sup>30</sup> Moreover, even though a digital asset lacks physical existence, this does not detract from its susceptibility to appropriation and use.

Digital assets also may have economic or income-generating value, or purely a dignitary, personal or non-economic value, or both.<sup>31</sup> Certainly, “many digital assets, such as bitcoin, commercial domain names, and similar property, have an ascertainable value that must be included as part of the administration of the estate of an incapacitated individual or a decedent.”<sup>32</sup> As previously mentioned, “[i]n a 2011 McAfee survey,

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“(2) Trees, plants, and growing fruits, while they are attached to the land or form an integral part of an immovable;

“(3) Everything attached to an immovable in a fixed manner, in such a way that it cannot be separated therefrom without breaking the material or deterioration of the object;

“(4) Statues, reliefs, paintings or other objects for use or ornamentation, placed in buildings or on lands by the owner of the immovable in such a manner that it reveals the intention to attach them permanently to the tenements;

“(5) Machinery, receptacles, instruments or implements intended by the owner of the tenement for an industry or works which may be carried on in a building or on a piece of land, and which tend directly to meet the needs of the said industry or works;

“(6) Animal houses, pigeon-houses, beehives, fish ponds or breeding places of similar nature, in case their owner has placed them or preserves them with the intention to have them permanently attached to the land, and forming a permanent part of it; the animals in these places are included;

“(7) Fertilizer actually used on a piece of land;

“(8) Mines, quarries, and slag dumps, while the matter thereof forms part of the bed, and waters either running or stagnant;

“(9) Docks and structures which, though floating, are intended by their nature and object to remain at a fixed place on a river, lake, or coast;

“(10) Contracts for public works, and servitudes and other real rights over immovable property.”

<sup>29</sup> Santos, *supra* note 27, at 1219.

<sup>30</sup> *Id.*

<sup>31</sup> Conway & Grattan, *supra* note 12.

<sup>32</sup> Michael Walker, *The Uniform Digital Assets Law: Estate Planning and Administration in the Information Age*, 52 REAL PROP., TR. & EST. J. 51, 54 (2017).

American households valued their digital assets at nearly \$55,000.<sup>33</sup> For an estate subject to [...] estate taxes, the value of such property will need to be determined and included on the pertinent estate tax returns. Likewise, such property may need to be separately listed on any required inventories of a decedent's estate."<sup>34</sup>

On the other hand, "[m]any other forms of digital assets have no extrinsic economic value, but may have tremendous sentimental value. For example, most photographs are now created by digital cameras and stored in some digital form, often within a user's account with an online provider such as Facebook, Instagram, Flickr, and Photobucket."<sup>35</sup> From the point of view of the deceased's family, it is very important to locate and secure the digital assets of the deceased including those with sentimental value.<sup>36</sup>

The point has already been made that digital assets are rapidly replacing personal possessions as items of property with a high sentimental value for the deceased's family. Being unable to access these items can be frustrating and upsetting for surviving relatives at what is already an emotionally difficult time, and risks "the story of the life of the deceased [...] be[ing] lost forever."<sup>37</sup>

## B. Importance of Considering Digital Assets in Succession Law

### 1. *Respecting the Right of the Deceased to Control His Property After Death*

The last right that the law grants to a person is the right to control the disposition of his assets after his death. It is the policy of the law to respect the decedent's wishes as to what happens to his property upon his death, and more specifically, to whom the property goes. As it stands today, the practice of Online Service Providers (OSPs)<sup>38</sup> is to delete a

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Walker, *supra* note 32.

<sup>36</sup> Conway & Grattan, *supra* note 12.

<sup>37</sup> *Id.*

<sup>38</sup> An organization that provides an information service over the Internet. Examples are search engines, cloud storage services and application service providers. See *Online Service*, PC MAGAZINE ENCYCLOPEDIA, at <https://www.pcmag.com/encyclopedia/term/55988/online-service> (last accessed June 19, 2018). See also *Online Service Provider*, WEBOPEDIA, at [https://www.webopedia.com/TERM/O/online\\_service\\_provider.html](https://www.webopedia.com/TERM/O/online_service_provider.html) (last accessed June 11, 2018).

decedent's account and all the contents that might be contained therein without allowing the decedent the option to transfer or bequeath such in any way. These agreements go against the policy of the law to accord as much freedom to the decedent regarding the disposition of his estate.

## 2. *Avoiding Uncertainty in Ownership*

One might argue that it would be more convenient for digital assets to be completely disregarded in the settlement of a decedent's estate. After all, these assets are most often depicted as floating in a cloud. However, regardless of the ephemeral form they take, digital assets are still properties. The policy of the law is to avoid creating a vacuum in the ownership of property. Applying this policy to digital assets, a gap in the ownership of digital assets should likewise be avoided. To prohibit the transfer of digital assets by succession would cause uncertainty as to the ownership of these assets when the owner dies.

The concept of avoiding uncertainty in the ownership of property is embodied in several statutory provisions, such as the imposition of a limit to the redemption period in case of a foreclosure,<sup>39</sup> or of a sale by a co-owner or by an adjoining owner.<sup>40</sup> The law likewise limits the period to exercise the right to repurchase in a *pacto de retro* sale.<sup>41</sup> Moreover, the law creates a presumption of ownership over movables in favor of the person who possesses the same.<sup>42</sup> In succession law, in particular, the Civil Code enumerates the heirs to whom the property should pass in case of intestate or legal succession to prevent property from becoming *res nullius*.<sup>43</sup>

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<sup>39</sup> Act No. 3135, § 6. "In all cases in which an extrajudicial sale is made under the special power hereinbefore referred to, the debtor, his successors in interest or any judicial creditor or judgment creditor of said debtor, or any person having a lien on the property subsequent to the mortgage or deed of trust under which the property is sold, may redeem the same at any time within the term of one year from and after the date of the sale[.]"

<sup>40</sup> CIVIL CODE, art. 1623. "The right of legal pre-emption or redemption shall not be exercised except within thirty days from the notice in writing by the prospective vendor, or by the vendor, as the case may be."

<sup>41</sup> Art. 1606. "The right referred to in article 1601, in the absence of an express agreement, shall last four years from the date of the contract." *See* art. 1601. "Conventional redemption shall take place when the vendor reserves the right to repurchase the thing sold, with the obligation to comply with the provisions of article 1616 and other stipulations which may have been agreed upon."

<sup>42</sup> Art. 541. "A possessor in the concept of owner has in his favor the legal presumption that he possesses with a just title and he cannot be obliged to show or prove it."

<sup>43</sup> Art. 1011. "In default of persons entitled to succeed in accordance with the provisions of the preceding Sections, the State shall inherit the whole estate."



Pursuant to this policy, digital assets should not be dismissed and left to become *res nullius* in the settlement of a decedent's estate.

### *3. Assisting Heirs in Settling the Estate*

The settlement of an estate is easier on paper than in practice. Even if the decedent wrote a will, the executor, administrator, or heirs would still have the task of making an inventory of the decedent's assets. Considering that a vast assortment of assets exists, and that globalization has made it relatively easy for one to own properties situated in other countries, this can be a daunting responsibility. Some have opined that locating digital assets on the Internet is virtually impossible.<sup>44</sup> "When individuals are prudent about their online life," as they should be, "they have many different usernames and passwords for their numerous accounts."<sup>45</sup> "This is the only way to secure identities, but this devotion to protecting sensitive personal information can wreak havoc on families upon incapacity or death."<sup>46</sup> By guarding his digital assets carefully during his lifetime, the decedent may have inadvertently deprived his heirs of these digital assets.

To acknowledge digital assets as part of the estate of the deceased would be to allow a person to avail of succession laws to plan the disposal of his digital assets upon his death, thus assisting the heirs in fully settling the estate of the deceased despite the additional barrier created by password protection. To treat digital assets as properties constituting the estate of the deceased would be to make available more remedies to the heirs. Simply stated, if a decedent is aware that his digital assets can be disposed of like any other property for the purpose of succession, he would be able to do so. Even if he does not, the heirs will have less difficulty obtaining access to the digital assets because they won't be grasping blindly for a legal remedy, as executors, administrators, and heirs can look to the existing laws on succession.

### *4. Preventing Financial Losses*

Technological advancements have made it possible to carry out commercial transactions over the Internet. Many business dealings depend

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<sup>44</sup> Ward, *supra* note 3.

<sup>45</sup> Gerry Beyer, *Web Meets the Will: Estate Planning for Digital Assets*, 42 NAEPC J. OF EST. & TAX PLANNING 28, 29 (2015).

<sup>46</sup> *Id.*

on digital assets. Conway and Grattan illustrate probable financial losses the estate may suffer in the event that digital assets are mishandled, mismanaged, or disregarded altogether:

Consider the unexpected death of the keyman individual of a small business. Delay in accessing fundamental information which is held online in respect of a small business may sound the death knell for that business's very survival. What of the personal representative who distributes the deceased's estate before becoming aware of the large online gambling debts which render the estate insolvent? Or the personal representative who is facing penalties from HMRC for a negligent inheritance tax return because he/she is considered not to have properly investigated the extent of the digital estate? What if the personal representative's alleged failure to safeguard the digital estate on death has resulted in various losses caused by a consequential identify theft?<sup>47</sup>

#### *5. Protecting One's Privacy*

The fear that allowing succession of digital assets will violate a decedent's privacy is more apparent than real. In actuality, if succession of digital assets is permitted, the private contents of digital assets will be better protected. Rather than disregarding digital assets, these should pass to the executor, administrator, or heirs, who are bound by law to act in a fiduciary capacity towards the assets of the estate. If need be, such as by the express instruction of the decedent, the executor, administrator, or heirs can destroy all digital assets which are prejudicial to the decedent, because they are in a position of trust in relation to the former. "Without designating appropriate people to take care of electronically stored materials, the wrong person may come across this type of information and use it in an inappropriate or embarrassing manner."<sup>48</sup> Aside from that, if those assets will not pass onto the heirs, the OSPs, who have no fiduciary relationship with the decedent, may be able to use the assets in a manner prejudicial to the decedent.

#### *6. Honoring the Memory of the Deceased*

Many digital assets may not be inherently valuable, but are nevertheless valuable to family members who extract meaning from what

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<sup>47</sup> Conway & Grattan, *supra* note 12.

<sup>48</sup> Beyer, *supra* note 45, at 30.

the deceased leaves behind.<sup>49</sup> In the past, people kept special pictures, letters, and journals in shoeboxes or albums for their future heirs to keep and treasure.<sup>50</sup> For better preservation and sharing, this material is now stored on computers or online.<sup>51</sup> Instagram accounts have replaced picture frames; personal blogs and Twitter feeds have replaced physical diaries; and email messages have replaced letters.<sup>52</sup> Without alerting family members that these assets exist, and without telling them how to obtain access to them, the story of the life of the deceased may be lost forever.<sup>53</sup>

### C. Destiny of Digital Assets After Death

Currently, the transferability and access to a decedent's digital assets has not yet been squarely settled by Philippine law or jurisprudence. Thus, the rights of the executors,<sup>54</sup> administrators,<sup>55</sup> and/or heirs with respect to digital assets remain unclear.<sup>56</sup>

The fiduciary,<sup>57</sup> which refers to the executor, administrator or heirs in case of summary settlement of estate, needs access to the decedent's digital assets to properly settle the estate. Sy has emphasized the importance of determining the extent of this access:

There is a question of how broad this access should be. For the most part, Terms of Service Agreements (TOSAs) with OSPs prohibit access by anyone but the account holder. When an account holder dies, the person administering the estate must go through the process of obtaining a court order, which is time consuming, costly and without guaranteed results. Even if the fiduciary has the username and password for the account, the fiduciary could possibly face legal

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> An executor is a person nominated by a testator to carry out directions in his will and dispose of his property according to the will after his death. *See* AVELINO SEBASTIAN, JR., WILLS AND SUCCESSION 908 (2015).

<sup>55</sup> An administrator is one appointed by a court to administer an intestate estate. *See id.*

<sup>56</sup> Sy, *supra* note 2, at 654.

<sup>57</sup> BLACK'S LAW DICTIONARY 1864 (8th ed. 2004). "Fiduciary: someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure." *See id.*

consequences due to current electronic privacy and anti-hacking laws.<sup>58</sup>

Thus, before explaining the fate of digital assets under Philippine law, the authors will first discuss the nature of TOSAs and the pertinent provisions of RUFADAA, which is the one of the most comprehensive laws among various jurisdictions that addresses what happens to digital assets upon one's death.

### 1. *OSPs and TOSAs*

A TOSA is a “set of terms that users must agree to follow before using a service.”<sup>59</sup> Said agreements “cover a broad array of issues, such as copyright notices, marketing policies, and acceptable user behavior.”<sup>60</sup> Most OSPs provide strict terms “to protect the privacy of users, recognizing that people create accounts they do not necessarily want others to know about.”<sup>61</sup> TOSAs are a form of adhesion contracts, where “one of the contracting parties imposes a ready-made form of contract which the other party may accept or reject, but cannot modify.”<sup>62</sup>

For instance, Yahoo!'s TOSA provides a “No Right of Survivorship and Non-Transferability” stipulation which states, “You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.”<sup>63</sup> In the case of Facebook, it allows only for an account to be memorialized or permanently deleted.<sup>64</sup> Although memorialized accounts allow for friends and family to share memories after a person has passed away, they cannot log in to the account. If family members wish to access the content in a Facebook

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<sup>58</sup> Sy, *supra* note 2, at 654. (Citations omitted.)

<sup>59</sup> *Id.* at 655.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Polotan v. Ct. of Appeals, G.R. No. 119379, 296 SCRA 247, 255, Sept. 25, 1998.

<sup>63</sup> Sy, *supra* note 2, at 655, citing *Yahoo Terms of Service*, YAHOO!, available at <https://policies.yahoo.com/sg/en/yahoo/terms/utos/> (last accessed by source author Jan. 20, 2015).

<sup>64</sup> Sy, *supra* note 2, at 655, citing *What will happen to my account if I pass away?*, FACEBOOK, available at <https://www.facebook.com/help/103897939701143> (last accessed by source author Feb. 18, 2016).

account, they must obtain a court order. Nevertheless, Facebook describes this process as “rare” and without a guarantee.<sup>65</sup>

The decedent, during his lifetime, may think of disclosing his account name and password to the fiduciary so that the latter can access it. However, some TOSAs prohibit such disclosure. In the case of Facebook, Section 4 (8) of the Statement of Rights and Responsibilities provides that “[y]ou will not share your password (or in the case of developers, your secret key), let anyone else access your account.”<sup>66</sup> Facebook provides that anyone who violates the Statement will be prevented from using any of its services.<sup>67</sup> Therefore, there is a possibility that the account owner may never get his digital assets stored in his Facebook account. The account owner, however, may choose a “legacy contact,” or another person “who’ll be allowed to ‘pin a post on your Timeline’ after your death, such as a funeral announcement. The contact won’t be able to log in as you or read your private messages, but will be allowed to respond to new friend requests, update your cover and profile photos, and archive your Facebook posts and photos.”<sup>68</sup>

## 2. *Disposing Digital Assets under RUFADAA*

As discussed, the RUFADAA is one of the most recent and most significant legislative developments across several jurisdictions in the U.S. concerning the fate of digital assets upon one’s death.<sup>69</sup> Moreover, it is deemed as the most comprehensive law on the matter because it tackles both digital assets and privacy concerns.<sup>70</sup> The final draft of the RUFADAA was approved by the Uniform Law Commission (ULC)<sup>71</sup> on July 2015. As of April 2016, the “RUFADAA has been enacted in Colorado, Florida, Idaho, Indiana, Michigan, Oregon, Tennessee,

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<sup>65</sup> *Id.*

<sup>66</sup> Statements of Rights and Responsibilities, FACEBOOK, Jan. 30, 2015, *available at* [www.facebook.com/legal/terms](http://www.facebook.com/legal/terms).

<sup>67</sup> *Id.* at § 14.

<sup>68</sup> Jack Linshi, *Here’s What Happens to Your Facebook Account After You Die*, TIME, Feb. 2, 2015, *available at* <http://time.com/3706807/facebook-death-legacy>.

<sup>69</sup> *See* Conway & Grattan, *supra* note 12.

<sup>70</sup> *Sy*, *supra* note 2, at 650.

<sup>71</sup> The Uniform Law Commission was established in the US in 1892, and provides states with “non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law”; *see* Uniform Law Commission, *About Us*, UNIFORM LAW COMMISSION WEBSITE, *at* <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last accessed June 11, 2018).

Washington, Wisconsin, and Wyoming. It has been introduced in eighteen states and will likely be introduced in more states.”<sup>72</sup>

The RUFADAA was a compromise between the ULC and the OSPs. The ULC revised the “original” UFADAA, which was approved by the ULC in 2014, because it was met by strong opposition from lobbyists of OSPs.<sup>73</sup> Mainly, the latter assailed the provision of the UFADAA, which states that fiduciaries have *presumptive* authority to access digital assets of the deceased.<sup>74</sup> They argued that the “default position of a decedent or incapacitated person was that their digital assets should *not* be disclosed to anyone, even to their fiduciary,” and that the “UFADAA should not override or supersede their TOSAs in any way.”<sup>75</sup> Due to the the strong objections, the UFADAA was only adopted in Delaware.<sup>76</sup> As a result, the “RUFADAA places great emphasis upon whether the deceased or incapacitated user *expressly* consented to the disclosure of the content of the digital assets, either through what the RUFADAA refers to as an ‘online tool’ or an express grant of authority in the user’s estate planning documents or power of attorney.”<sup>77</sup>

In particular, the RUFADAA provides for a three-tier system of priority of handling digital assets upon the decedent’s death. First, it will be ascertained whether the decedent utilized online tools. Some examples of online tools are Facebook’s Legacy Contact, Google’s Inactive Account Manager, and PasswordBox.<sup>78</sup> The RUFADAA allows OSPs to offer these online tools. It provides that the intent of the user expressed in online tools supersedes any contrary directions in a will, trust or power of attorney.<sup>79</sup> If the decedent did not avail of online tools, then his written direction in a will would govern. Lastly, if the user provides no direction as to digital assets in his will, the TOSA controls unless it is silent on fiduciary access, in which case other laws would control.<sup>80</sup>

### *3. Inclusion of Digital Assets in One’s Inheritance and its Treatment upon Death in Philippine Succession Law*

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<sup>72</sup> Sy, *supra* note 2, at 670.

<sup>73</sup> Walker, *supra* note 32, at 58.

<sup>74</sup> *Id.* at 59.

<sup>75</sup> *Id.* at 58. (Emphasis supplied.)

<sup>76</sup> *Id.* at 59.

<sup>77</sup> *Id.*

<sup>78</sup> Sy, *supra* note 2, at 667.

<sup>79</sup> *Id.* at 672.

<sup>80</sup> *Id.*

Before one inquires into the ownership of digital assets upon a user's death, it is of paramount importance to determine first who owns these assets during his lifetime. It would be immaterial whether or not digital assets are transferable by succession if their ownership did not pertain to the user before his death.

The account holder owns the content he has created and/or uploaded online, such as videos, photos and posts on social media sites. His intellectual property rights over said materials are protected by law.<sup>81</sup> The terms and conditions of use of most OSPs are consistent with this legal concept. YouTube provides that the "Youtube uploader" retains all of ownership rights over his content.<sup>82</sup> Also, the account holder owns all his tweets on Twitter. The Twitter Terms of Service provides, "[y]ou retain your rights to any Content you submit, post or display on or through the Services. What's yours is yours — you own your Content (and your photos and videos are part of the Content)."<sup>83</sup> Similar provisions are provided for in the terms of service of Facebook<sup>84</sup> and Instagram.<sup>85</sup> The fact that OSPs stipulate that they have the license to use, reproduce, distribute, prepare derivative works of, display, and perform the content uploaded, among others, does not detract from the account holder's ownership rights.<sup>86</sup> It is an attribute of ownership to be able to grant another person the right to use one's property. The owner of property has the right to possess, use, receive the fruits and accessories of, abuse and consume, dispose, and recover said property.<sup>87</sup> One who is entitled to use a thing may transfer such right of use to another. Beneficial use is separable from title. The transfer of beneficial use is not tantamount to divestment of title. In the

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<sup>81</sup> Daysheelyn Anne Brillo & Nadine Anne Escalona, *Succession in the Internet Age: Dissecting the Ambiguities of Digital Inheritance*, 89 PHIL. L.J. 835, 845 (2015); See INTELL. PROP. CODE, § 172.1.

<sup>82</sup> *Youtube Terms of Service*, YOUTUBE, May 25, 2018, available at <https://www.youtube.com/static?template=terms>.

<sup>83</sup> *Twitter Terms of Service*, TWITTER, May 25, 2018, available at <https://twitter.com/en/tos>.

<sup>84</sup> *Facebook Terms of Service*, FACEBOOK, Apr. 19, 2018 available at <https://www.facebook.com/terms.php>.

<sup>85</sup> *Instagram Terms of Use*, INSTAGRAM, Apr. 19, 2018, available at <https://help.instagram.com/581066165581870>.

<sup>86</sup> Hilary Osborne & Jaber Mohamed, *Who owns the content you upload online?*, THE GUARDIAN, Dec. 20, 2012, available at <https://www.theguardian.com/money/2012/dec/20/who-owns-content-you-upload>.

<sup>87</sup> *E. Rommel Realty & Dev. Corp. v. Sta. Lucia Realty Dev. Corp.*, G.R. No. 127636, 508 SCRA 12, 22, Nov. 24, 2006.

same way one can lease out real property and retain title over it, agreeing to grant the OSP license to use does not dispossess the account holder over title to digital assets.

The ownership over the account, however, is not yet a settled issue. Some argue that the End User Licensing Agreement (EULA) entered into must prevail.<sup>88</sup> Most EULAs provide that the OSP owns the account, and the account holder merely has the license to use the service. However, the contrary view posits that while ownership of the content and not the account might make sense, online profiles often represent much more than a collection of content. Sometimes the account itself has monetary value which benefits the account holder should be rightfully allowed to reap.<sup>89</sup> Sometimes the value is in the connections to other online accounts or the money-making potential of an account.

The authors agree that the OSPs own the online accounts. They do so by virtue of their ownership of the technology necessarily used to generate such online accounts. The ownership of the property gives rise to the ownership by accession to everything that is produced thereby. The software is the principal and the online account is the accession. This is consistent with a common stipulation among the TOSAs of OSPs such as Twitter.<sup>90</sup> This in no way affects the user's ownership of digital assets contained in the online account, which are intellectual creations of the account holder. However, practically speaking, this may bear on the exercise of ownership rights over the content therein. If the OSP refuses to give the heirs access to the online account, the heirs will be unable to access the digital assets as well. Thus, despite ownership over the online account, OSPs should allow reasonable access thereto for the purpose of succession of digital assets.

Having determined that digital assets consisting of content belong to the user, the authors proceed to discuss what happens to these assets upon his death. Digital assets owned by the decedent form part of his inheritance, because inheritance, as defined by law, includes all the property, rights, and obligations of a person which are not extinguished by his death.<sup>91</sup> Property rights over digital assets are not extinguished by death. Moreover, when a person dies, the existence of his digital assets are

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<sup>88</sup> Conway & Grattan, *supra* note 12.

<sup>89</sup> Toygar et al., *supra* note 16, at 116.

<sup>90</sup> *Supra* note 83.

<sup>91</sup> CIVIL CODE, art. 776.



technically not affected as they are properties independent of their owner. By their nature, these exist in devices completely distinct and separate from the life of the user.

Considering that digital assets form part of the decedent's estate, the question that ought to be addressed next is how to treat such in the settlement of the estate. Borrowing from the three-tier hierarchy system of the RUFADAA, and considering the existing provisions of Philippine law, the authors propose a waterfall of rules to be followed in the disposition of digital assets upon the user's death: *first*, to dispose of the digital assets according to the decedent's wishes as specifically set forth in online tools that he may have availed of; *second*, to distribute it in accordance with his will if he had written one; and *third*, to dispose it in compliance with the TOSA of the respective OSP, unless such agreement unduly restricts the descendability and devisability of digital assets. As will be discussed, following this approach would best implement the policy of the law to give primacy to the wishes and intention of the decedent within the bounds of the existing provisions of the Civil Code.<sup>92</sup>

First, using online tools is a viable option in our jurisdiction insofar as it allows account users to control who can access the account or cause its deletion after their death. A decedent would be acting well within his ownership rights if he availed of an online tool to have the account deleted upon his death. As the owner, he has the right to destroy his property or *jus abutendi*.<sup>93</sup> In such a case, the digital assets in the account would be destroyed and excluded from the estate. Thus, these need not be considered in the distribution of the decedent's estate. This is consistent with the right of a person to dispose of any and all of his assets before his death. Until one dies, his heirs, devisees, or legatees have no right to his estate, not even to their legitimes.

Online tools are options available either in the very same OSP or in separate websites for users to decide what happens to their accounts when they die.<sup>94</sup> These "allow the user, in an agreement distinct from the TOSA between the custodian and user, to provide directions for disclosure

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<sup>92</sup> See SEBASTIAN, *supra* note 54, at 716. See also, Rodriguez v. Borja, G.R. No. L-21993, 17 SCRA 418, 424, June 21, 1966, where the Supreme Court said that testacy is preferred over intestacy.

<sup>93</sup> Samartino v. Raon, G.R. No. 131482, 383 SCRA 664, 674, July 3, 2002.

<sup>94</sup> Sy, *supra* note 2, at 667, citing Alethea Lange, *Everybody Dies: What is Your Digital Legacy?*, CDT, Jan. 23, 2015, available at <https://cdt.org/blog/everybody-dies-what-is-your-digital-legacy/>.

or nondisclosure of digital assets to a third person.”<sup>95</sup> Facebook created an update letting users designate a Facebook friend as a “legacy contact” for their accounts, granting special postmortem access to the accounts.<sup>96</sup> The legacy contact will not be able to post on the decedent’s behalf or see his or her private messages, but will be able to download the decedent’s photos, and post a memorial note at the top of the decedent’s profile page.<sup>97</sup> Google launched the Inactive Account Manager by which its account holders can tell Google what they want done with their Google accounts in the event of their death.<sup>98</sup> Specifically, by using this feature, account holders can choose to have an account deleted after a certain number of months of inactivity, or they can designate a trusted contact to receive their data, among other options.<sup>99</sup>

One example of an online tool in a separate website is PasswordBox, which enables customers to store their digital assets online in order to be released to designated individuals upon the former’s death.<sup>100</sup> The account holder stores all passwords online and selects a digital heir. Once the account holder passes away, the digital heir then notifies PasswordBox of the death; PasswordBox validates the death certificate; the digital heir then receives access to the decedent’s online passwords and executes the decedent’s last wishes.<sup>101</sup> PasswordBox markets itself the Internet’s first “digital life manager.”<sup>102</sup>

Philippine laws on succession also allow the decedent to avail of an online tool designating a specific person, who shall be granted access to his online account in case of his death. This would not be contrary to the Civil Code as such designation is limited to access and would not transfer title to property. Executors, administrators, or heirs are not precluded from seeking from the designated fiduciary the transfer of digital assets contained in the online account. If the online tool is meant to bequeath ownership of digital assets, it is void and shall have no binding effect for

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<sup>95</sup> *Id.*, citing RUFADAA, § 2, par. 16.

<sup>96</sup> *Id.*, citing *What is a legacy contact?*, FACEBOOK, available at <https://www.facebook.com/help/1568013990080948>, (last accessed by source author Jan. 20, 2016).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*, citing *About Inactive Account Manager*, GOOGLE, available at <https://support.google.com/accounts/answer/3036546?hl=en> (last accessed by source author Jan. 20, 2015).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 647.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

failure to comply with the Civil Code provisions imposing formal requisites for a will.<sup>103</sup>

After recourse to online tools, the decedent's intention as to the distribution of his digital assets should be ascertained from his will. It is a fundamental principle that the intent or the will of the testator, expressed in the form and within the limits prescribed by law, must be recognized as the supreme law in succession.<sup>104</sup> Nothing in the law precludes a testator from including digital assets or any other kind of property in a will as long as the assets are sufficiently described.<sup>105</sup>

The last and possibly most complicated rule in the waterfall is to dispose digital assets in compliance with the TOSA of the respective OSP, unless such unduly restricts the descendability and devisability of digital assets. Unfortunately, most TOSAs prohibit the transfer of digital assets upon the user's death. In an article written in 2014, Natalie Banta<sup>106</sup> noted that digital assets "all have one striking similarity:" their "inheritability" is controlled by the TOSA, which typically "limit[s] the descendability and devisability of digital assets."<sup>107</sup> The TOSAs provide that if the account owner dies, the digital service providers will deactivate the account and no one can access it anymore.<sup>108</sup> To illustrate, below is a summary of the policy on death in the TOSA of various service providers:<sup>109</sup>

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<sup>103</sup> CIVIL CODE, arts. 804-806.

<sup>104</sup> *Seangio v. Reyes*, G.R. No. 140371-71, 508 SCRA 177, 187, Nov. 27, 2006.

<sup>105</sup> CIVIL CODE, art. 789.

<sup>106</sup> Natalie Banta is an Associate Professor of Law in Drake University and her areas of practice are Wills & Trusts, Property, Federal Income Tax, Family Law. Her academic works focus on issues concerning digital assets which include: *Property Interests in Digital Assets: The Rise of Digital Feudalism*, 38 CARDOZO L. REV. 1099 (2017); *Death and Privacy in the Digital Age*, 94 N.C. L. REV. 927 (2016); and *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 FORDHAM L. REV. 799 (2014).

<sup>107</sup> Conway & Grattan, *supra* note 12.

<sup>108</sup> Toygar et al., *supra* note 16, at 116.

<sup>109</sup> Victoria Hockley, Rosanne Rocchi, Crystal Taylor, Sandra Enticknap, Jordan Regehr & Nathalie Marchand, *Digital Assets: Disposal, Rights and Succession in Canada*, THOMSON REUTERS, Mar. 1, 2015, available at [https://uk.practicallaw.thomsonreuters.com/2-600-0205?\\_lrTS=20180519083916177&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/2-600-0205?_lrTS=20180519083916177&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

Service provider	Terms of service and policy on death
Points	
American Express Membership Rewards	<p>The deceased Cardmember's account may be cancelled by the personal representatives or an Additional Cardmember can assume ownership of the deceased's account</p> <p>The Membership Rewards points accumulated by a deceased Cardmember may be reinstated to a new basic account or may be redeemed by the estate of the deceased Cardmember.</p> <p>Accrued points in Membership Rewards will be forfeited immediately on cancellation of all cards so points should be redeemed before cancelling the account.</p>
Social Media and Email	
Facebook	<p>Users may not transfer their account (including any page or application) to anyone without first obtaining the written permission of Facebook.</p> <p>Policy on death: Facebook's policy is to either "memorialize" or deactivate the account on receipt of proof of death (that is, death certificate or local obituary). Facebook will not provide the deceased's username or password to personal representatives or next of kin.</p>
Google (includes Gmail)	<p>Terms of use provide that use of the service is non-transferrable.</p> <p>Policy on death: Google may provide an authorised personal representative with the contents of the deceased's account on receipt of the deceased's death certificate, government-issued ID, and a court order showing that the personal representative is entitled to the contents of the account. Google will not provide the personal representative with access to the account.</p>
Instagram	<p>You agree you will not sell, transfer, license or assign your account, followers, username, or any account rights.</p> <p>Policy on death: In its privacy policy, Instagram asks you to contact them in the event of the user's death. Instagram states that all communication will take place via e-mail while working to remove the account. A personal representative must complete a form request to report a deceased person's account on Instagram, and provide</p>

	<p>proof of death, such as a death certificate or obituary. Instagram will not provide the deceased's account information to personal representatives.</p>
LinkedIn	<p>You agree not to sell, trade or transfer your LinkedIn account to another party.</p> <p>Policy on death: LinkedIn will close the deceased user's account and remove their profile on completion of a form provided on the LinkedIn website. As part of the process, personal representatives must provide, among other things, the member's name, the URL to the LinkedIn profile, the deceased's email address, the date of death, a link to an obituary and the company the deceased most recently worked at. LinkedIn will not provide personal representatives with the user's account information.</p>
Twitter	<p>Twitter's terms recognize that its users own the rights to all of the tweets they produce. However, Twitter will not give personal representatives access to a deceased user's account. Twitter will work with personal representatives to deactivate the user's account. As part of this process, Twitter states that it requires the deceased person's username, a copy of their death certificate, a copy of the personal representative's government-issued ID and a signed statement with additional required information.</p>
Yahoo! (includes Flickr and Delicious)	<p>No right of survivorship and non-transferability. You agree that your Yahoo! account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate on your death. On receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.</p> <p>Policy on death: Yahoo! will only turn over contents of account (such as e-mails) to next of kin if there is a court order to do so. Yahoo! will not provide next of kin or personal representatives with access to the account.</p>
YouTube	<p>These Terms of Service, and any rights and licenses granted hereunder, may not be transferred or assigned by you, but may be assigned by YouTube without restriction.</p> <p>Policy on death: YouTube will not provide personal representatives with account information or passwords.</p>

E-commerce	
Amazon	<p>Amazon or its content providers grant a limited, non-exclusive, non-transferable, non-sublicensable licence to access and make personal and non-commercial use of the Amazon Services.</p> <p>Policy on death: Amazon will close down an account on being provided with evidence of the member's death, such as a death certificate.</p>
Apple (including iTunes)	<p>Apple's terms and conditions do not specifically address what happens to the account on the death of the account holder. However, Apple's terms and conditions do prohibit the account holder from renting, leasing, lending, selling, transferring, distributing or sublicensing the licensed application.</p>
Bitcoins	<p>Bitcoins are a form of digital currency which can be transferred on the death of the user. In order to do so, the password to the user's digital "wallet" must be available to the deceased user's personal representative. If the password to the user's wallet is lost, the bitcoins will be lost forever, as there is no mechanism to retrieve a lost password.</p>
PayPal	<p>A PayPal account holder may not transfer or assign any rights or obligations without PayPal's prior written consent.</p> <p>Policy on death: To close the PayPal account of a deceased, the personal representative needs to fax to PayPal a cover letter for the request, a copy of the death certificate, a copy of the deceased user's legal documentation proving that the person making the request is authorised to act on behalf of the deceased and a copy of photo identification of the personal representative. The documentation will be reviewed and, if approved, PayPal will close the account and issue a cheque in the account holder's name if any funds have been left in the account.</p>

The TOSA of OSPs limiting the descendability and devisability of digital assets is contrary to public policy. First, allowing a TOSA to terminate the user's rights upon death, "threatens the very nature of succession law by allowing parties to opt out of one of the most

fundamental rights of property—the right to devise,” and in doing so strikes at the heart of our traditional understandings of personal property and ownership.<sup>110</sup> Highly critical of this approach, Banta conceded that provisions limiting the transmission of digital assets were probably not open to challenge based on the basic principle of freedom of contract, and the fact that there is full disclosure of the relevant terms to which the user gives express agreement when he or she signs up for the service. However, she went on to argue that contracts which severely restrict or prohibit an individual’s right to transfer his or her digital assets should be void as a matter of public policy because:

Private contracts controlling digital assets are not aimed at distributing digital assets according to an account holder’s testamentary intent. Instead of abiding by the principles of succession law, companies, through carefully drafted contracts, determine whether assets [...] are devisable by an account holder or are subject to company control and subsequently deleted or destroyed. We are allowing contracts to divest us of the ability to control our digital property and to redefine our property interests in digital assets.<sup>111</sup>

Second, the service contracts entered into by the OSPs and account owners are contracts of adhesion. The Supreme Court has defined a contract of adhesion as follows:

A contract of adhesion is one in which one of the contracting parties imposes a ready-made form of contract which the other party may accept or reject, but cannot modify. One party prepares the stipulation in the contract, while the other party merely affixes his signature or his "adhesion" thereto, giving no room for negotiation and depriving the latter of the opportunity to bargain on equal footing.

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These types of contracts have been declared as binding ordinary contracts, the reason being that the party who adheres to the contract is free to reject it entirely.

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<sup>110</sup> Conway & Grattan, *supra* note 12.

<sup>111</sup> Natalie Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 *FORDHAM L. REV.* 799, 826 (2014).

The binding effect of any agreement between parties to a contract is premised on two settled principles: (1) that any obligation arising from a contract has the force of law between the parties; and (2) that there must be mutuality between the parties based on their essential equality. Any contract which appears to be heavily weighed in favor of one of the parties so as to lead to an unconscionable result is void. Any stipulation regarding the validity or compliance of the contract which is left solely to the will of one of the parties, is likewise, invalid. It is important to stress that the Court is not precluded from ruling out blind adherence to their terms if the attendant facts and circumstances show that they should be ignored for being obviously too one-sided.<sup>112</sup>

Obviously, the TOSAs are prepared by the OSPs, who impose the agreement indiscriminately on all persons who seek to open an account. Usually, the terms are in fine print, riddled with legal jargon, and accessible only if the user actively seeks out its contents. A prospective account holder rarely reads the TOSA in its entirety. Even if he does read it, he does not have the option to bargain with the OSP in order to modify the terms of the agreement. Provisions, therefore, in TOSAs which “limit the descendability and devisability of digital assets”<sup>113</sup> can be considered adhesion contracts which are void for completely infringing upon the right of the decedent to dispose of his estate. This right to control the disposition of his estate should not be taken so lightly as to be considered waived so unceremoniously by the creation of an online account. Rights may be waived, but such waiver cannot be contrary to law, public order, public policy, morals, or good customs, or prejudicial to a third person with a right recognized by law.<sup>114</sup>

#### *4. Right to Access Digital Assets upon Death vis-a-vis the Issue on Privacy*

If the decedent owned digital assets, the executor, administrator, or heirs in case of summary settlement of estates must be given access to those assets in order for them properly settle the estate. However, OSPs normally prevent them from accessing the digital assets by raising the decedent’s right to privacy.

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<sup>112</sup> Polotan v. Ct. of Appeals, G.R. No. 119379, 296 SCRA 247, 256, Sept. 25, 1998.

<sup>113</sup> Conway & Grattan, *supra* note 12.

<sup>114</sup> CIVIL CODE, art. 6.



In the United States, UFADAA presumes that the fiduciary has authority to access all of the decedent's digital assets. This broad access gives the fiduciary everything they need to take care of the estate, such as paying off bills and canceling subscriptions.<sup>115</sup> As previously discussed, said draft legislation was met with strong objections, especially from OSPs. Technology companies and privacy rights groups lobbied against the UFADAA.<sup>116</sup>

According to the Center for Democracy & Technology which published a joint letter with the American Civil Liberties Union, the Electronic Frontier Foundation, and Consumers Union, “[a]ny model that grants full access to all of a decedent’s digital accounts and information by default fails to address the unique features of digitally stored content and creates acute privacy concerns”.<sup>117</sup> They argue that “digital assets are not analogous to physical records. Since online accounts are generally accessed in private and with passwords, it is unlikely that consumers would expect others to have the power to access their communications unless they actually make that information available.”<sup>118</sup>

In fact, “[a]ccording to a NetChoice-commissioned survey conducted on January 27, 2015, more than 70% of Americans wanted private online communications to remain private after death. These Americans also believed that the law “should err on the side of privacy when individuals die without documenting their preference about how to handle their private communication and photos.”<sup>119</sup>

Due to the the strong opposition to UFADAA, the ULC came up with RUFADAA which harmonizes both the decedent’s right to privacy and the fiduciary’s access.<sup>120</sup> As previously discussed, RUFADAA considers the intent of the decedent by ascertaining whether he availed of online tools or looking at his will to know how his digital assets should be dealt with, rather than assuming that he consented to full access by the fiduciary of all of his digital assets.

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<sup>115</sup> *Sy*, *supra* note 2, at 664.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (Citations omitted.)

<sup>118</sup> *Id.* (Citations omitted.)

<sup>119</sup> *Id.* at 653. (Citations omitted.)

<sup>120</sup> *Id.* at 670.

In this jurisdiction, the executor or administrator settles the testate or intestate estate of the deceased, or the heirs in case of summary settlement of estates. An executor is a person nominated by a testator to carry out directions in his will, and dispose of his property according to the will after his death.<sup>121</sup> On the other hand, an administrator is one appointed by a court to administer an intestate estate.<sup>122</sup> One of the principal responsibilities of an executor or administrator to the heirs of the decedent and to the court is to prepare and return to the court an inventory of the assets of the estate, which may include digital assets, that have come into his possession and knowledge.<sup>123</sup> The purpose of this is to “aid the court in revising the accounts and determining the liabilities of the executor or administrator and in making a final and equitable distribution of the estate, and otherwise facilitate the administration of the estate.”<sup>124</sup> To achieve this purpose, it is necessary that the executor or administrator be given access by the Internet service providers to the digital assets of the decedent.

To address the issue on privacy, it is significant to highlight that the nature of the office of an executor or administrator is one of trust.<sup>125</sup> This was explained by the Supreme Court when it said that “an administrator occupies a position of the highest trust and confidence. He is required to exercise reasonable diligence and act in entire good faith in the performance of the trust.”<sup>126</sup> Thus, the executor or administrator is bound not only to guard against dissipation of the assets but also to ensure that the privacy of the decedent will be respected by handling with the utmost care and prudence the decedent’s digital assets that are placed under his custody, such as photos, emails and videos. However, in case the OSP still denies access, the court can order them to provide access to the extent necessary to settle the estate, while taking into consideration the decedent’s privacy.<sup>127</sup> In case of extrajudicial settlement of an estate that includes digital assets, heirs may request the OSPs to grant them access to the decedent’s digital assets.<sup>128</sup> However, if such request is denied, the heirs

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<sup>121</sup> SEBASTIAN, *supra* note 54, at 908.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* See RULES OF COURT, Rule 83, § 1.

<sup>124</sup> *Id.*, *citing* *Siy Chong Keng v. Collector of Internal Revenue*, G.R. No. 40921, 60 Phil. 493, 500, Aug. 31, 1934.

<sup>125</sup> *Id.*

<sup>126</sup> *Lao v. Genato*, G.R. No. L-56451, 137 SCRA 77, 85, June 19, 1985.

<sup>127</sup> See SEBASTIAN, *supra* note 54, at 908, *citing* *Junquera v. Borromeo*, G.R. No. L-18498, 125 Phil. 1059, 1068, Mar. 30, 1967.

<sup>128</sup> See RULES OF COURT, Rule 74, § 1.

may have to file a petition in court for issuance of letters of administration to order the OSP to grant access.

### III. CONCLUSION

The emergence of digital assets brought significant changes to the landscape of succession law. Before the digital age, estate planning involved tangible personal properties, traditional intangible personal properties, and real properties. However, with the advent of technology, where “almost every aspect of our lives is in some manner affected or controlled by information that is stored in an electronic form,”<sup>129</sup> every person must consider his digital assets in planning his estate. It is now undisputed that digital assets have economic and non-economic value. Thus, it would be in the best interest of the estate—and eventually the heirs—to allow for the proper disposition of digital assets upon the user’s death to prevent unnecessary financial losses. The peculiar nature of digital assets makes access difficult for the heirs. If digital assets are viewed in the context of the laws on succession, then heirs would have legal basis and less opposition from OSPs to gain access. As users tend to value the privacy of their digital assets, it is most consistent with maintaining the decedent’s privacy and honoring his memory if his digital assets were handled and distributed properly.

Although the drafters of the law on succession may not have foreseen the advancements in technology, the provisions of the law, as it stands today, are general enough to apply to digital assets. Digital assets are property in the legal sense, and all property can form part of a person’s inheritance. However, there still are issues that need to be addressed. As succession of digital assets is a relatively new concept, especially in the Philippines, issues such as the TOSA prohibiting transferability and access have not been answered yet by jurisprudence or legislation. Aside from following the waterfall proposed by the authors in the distribution of digital assets, there are other prudent measures that a person may consider in planning his estate. These include preparing a comprehensive inventory of his digital assets, storing digital assets in a drive or cloud and sharing access to such with a fiduciary, much like a survivorship agreement, or backing-up the digital assets in tangible media like a USB flash drive or external hard drive.

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<sup>129</sup> Walker, *supra* note 32, at 52.

Undoubtedly, Filipinos leave a huge digital footprint. The Internet is increasingly becoming the main storage of people's financial and personal lives, and the trend in technological developments and human behavior does not indicate that it is decreasing.<sup>130</sup> Thus, there is a pressing need to address legal issues surrounding the succession of digital assets in the Philippines. Hopefully, the discourse on this matter will continue to keep up with the changing landscape of our succession law brought about by the advent of technology and highlight the importance of knowing how to dispose of one's digital assets upon death, considering both their monetary and sentimental value.

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<sup>130</sup> Ward, *supra* note 3.