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# **DIGITAL AFTERLIFE: CRAFTING LEGAL FRAMEWORK FOR INHERITING VIRTUAL REALM**

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## **Abstract**

"It is pertinent to note that India does not have a dedicated law on digital inheritance, which is indeed unfortunate, given the rapid adoption of and reliance on the digital data by Indians,"<sup>1</sup>. As the digital inheritance concept is contemporary concept and, there is no legislation currently in India it becomes paramount to study question of inheritance of how the assets are transferred. The paper attempts to showcase the role of ISPs, social media platforms, and several factors which necessitate the creation of a legislation. It starts with defining digital assets and briefing about the current position of digital inheritance law in India. The paper moves on to explain the problems associated with absence of legislation and bringing in the parallel with the countries having digital inheritance laws. Towards the end, the paper poses recommendations, and suggestions for potential legislation into being and thus answers the question of how the legislation would effectively address the current challenges and what is the imperative for development of such a legislation.

**Key Words:** Digital Wills, Inheritance, Digital Assets, Digital Inheritance Law, Intestate, Testamentary, Estate Planning.

## **Introduction**

In the contemporary era, there exists a multitude of forms through which individuals possess their assets, extending beyond physical manifestations to encompass digital assets. There stands no specific and rigid definition of Digital Assets which makes it difficult to classify anything on

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<sup>1</sup> Nishant Arora, *German Ruling A Real-Life Lesson For India On Digital Inheritance*, Moneylife, Jul 16, 2018, <https://www.moneylife.in/article/German-Ruling-A-Real-Life-Lesson-For-India-On-Digital-Inheritance/54696.html>.

digital platform as an asset as no governing legislation currently regulates such assets. However, a digital asset may be defined as anything that are stored digitally and have a unique identity, belonging to a legal person, and that can be used to realize their value.<sup>2</sup> The digital platforms have changed the biological setting of death in the society because of the existence of digital accounts and profiles on digital platforms even after the death of an account holder. It often happens that the people are not aware of the number of accounts or digital assets they own which disables them from efficient estate planning. Such problems bring in highlight the need for digital estate planning. Digital estate planning refers to making provisions for the allocation and delegation of authority to safeguard and manage digital assets. However, to execute the digital estate planning, there is a need for an instrument for enactment. In the case of physical property, this instrument is the Will governed by the Indian Succession Act, 1925<sup>3</sup> and the Indian Evidence Act, 1872<sup>4</sup> but, for digital assets, there is no such legislation present.

### **Current Legal Procedure of Inheritance**

Succession of property is made in two ways:

1. Testamentary Succession
2. Intestate Succession

As per the current position of Indian laws with regard to inheritance of digital assets is such that the intestate property may have problems and it may be difficult to regulate the inheritance due to absence of any legislation. However, to overcome the concerns of intestate property, one may suggest the alternative of creating a Digital Will as typically a will helps in the management of the assets after the death. Currently, as per Section 63, Indian Succession Act, 1925<sup>5</sup>, will is to be attested by two or more witnesses in a testator's presence and the testator (person making will) acknowledges that he has signed the will himself which is communicated to the witnesses. Read along is Section 68, Indian Evidence Act, 1872<sup>6</sup> which requires that if a document is required to be attested by law, it shall not be used as evidence until one attesting witness is called for the purpose of proving the execution of the will. These requirements mandated by the above-

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<sup>2</sup> Shalabh Agarwal & Asoke Nath, *A Comprehensive Study On Scope And Challenges In Digital Inheritance*, 7 INT'L J. SCI. RSCH. COMPUT. SCI. ENG'R & I. TECH. 98, 99 (2021).

<sup>3</sup> INDIAN SUCCESSION ACT, 1925.

<sup>4</sup> INDIAN EVIDENCE ACT, 1872.

<sup>5</sup> INDIAN SUCCESSION ACT, 1925, §63.

<sup>6</sup> INDIAN EVIDENCE ACT, 1872, §68.

mentioned statutes which requires physical presence of the witnesses and of the testator are only possible in physical scenarios and not online which deprives us of the hope towards the digital wills and protection of digital assets.

However, one might argue that the existence of the digital signatures may substitute the mandating provision of the physical presence of the testator and witnesses by using the digital signatures on the will thus, creating them digitally possible and calling them digital wills. Digital signatures are defined under Section 2(p) Information Technology Act, 2000<sup>7</sup> as authentication of any electronic records by a subscriber by means of an electronic method or procedure in accordance with provisions of Section 3, Information Technology Act, 2000<sup>8</sup>. However, as per the current law under Information Technology Act, 2000, wills which are defined under Section 2(h), Indian Succession Act, 1925<sup>9</sup> are not to be governed by the Information Technology Act, 2000 which is mentioned as per Section 1(4), Information Technology Act, 2000<sup>10</sup>. Summing up, the laws in India don't allow for Digital Wills to be recognized which means that the testamentary succession of digital assets is not possible in India.

### **Hindrances by Absence of Legislation**

The testamentary succession is not possible in India and, digital inheritance being a contemporary concept is not being talked about in the religious texts. Due to no legislation the bigger question shall be addressed which is with regards to the intestate digital property because the issues such as identity theft, copyright infringement, etc. arise to the digitally dead accounts and when they are not transferred to the legal heirs as they should have been. With the digital life, privacy becomes another concern of the people because each individual has secrets which are unknown to others during their lifetime and after their death, the invasion of their privacy becomes possible and can be a matter of concern due to the possible misuse of data.<sup>11</sup> As Internet Service Providers (ISPs) assume the role of intermediaries between digital assets and their respective holders, individuals are occasionally deceived by the arbitrary terms and conditions set forth by these providers. The absence of regulatory laws governing such providers, and their supervision over

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<sup>7</sup> INFORMATION TECHNOLOGY ACT, 2000, §2(P).

<sup>8</sup> INFORMATION TECHNOLOGY ACT, 2000, §3.

<sup>9</sup> INDIAN SUCCESSION ACT, 1925, §2(H).

<sup>10</sup> INFORMATION TECHNOLOGY ACT, 2000, §1(4).

<sup>11</sup> Shalabh Agarwal & Asoke Nath, *A Comprehensive Study On Scope And Challenges In Digital Inheritance*, 7 INT'L J. SCI. RSCH. COMPUT. SCI. ENG'R & I. TECH. 98, 99 (2021).

the relationship between ISPs and holders, in terms of succession and the transfer of legacy of assets becomes apparent.

Due to absence of digital inheritance laws, several social media platforms have started to bring provision to add their legal heirs or in other words, the people who can access their accounts after the account holder's death. Elaborating on the social media platforms, the celebrities have social media handles which have a worthy amount of income and after their death it becomes difficult to decide as to who manages their accounts further as these celebrities have prestigious reputation thus, the accounts have to be in good hands. As an illustration, Facebook has introduced a provision that enables account holders to designate individuals, at their own discretion, to assume the management responsibilities of their accounts. Similarly, Google permits the addition of up to ten legacy contacts who will receive notifications via email should the account remain inactive for a period ranging from three to eighteen months.<sup>12</sup> These provisions established by social media platforms indirectly safeguard the rights of individuals in cyberspace, particularly in nations like India where there is a dearth of legislation addressing digital inheritance.

In 2019, the report of Steering Committee on Fintech had recommended to re-engineer the legal processes in digital world.<sup>13</sup> In its recommendation, it said that the department of legal affairs should review the legal processes with respect to the financial services and also consider amending the permits of usage of the digital alternatives in cases, where the application of IT Act, 2000 is prohibited as per the 1<sup>st</sup> schedule of the IT Act, 2000, such as power of attorney, wills, etc. Consequently, it becomes evident that a comprehensive legislation for digital inheritance is necessary to address these concerns.

### **Drawing International Comparisons**

In other countries such as US, there exists a legislation named Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), which for the first time has recognized the existence of digital property as a property right in the same manner as in other rights in real and tangible personal

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<sup>12</sup> Shalabh Agarwal & Asoke Nath, *A Comprehensive Study On Scope And Challenges In Digital Inheritance*, 7 INT'L J. SCI. RSCH. COMPUT. SCI. ENG'R & I. TECH. 98, 102 (2021).

<sup>13</sup> Department Of Economic Affairs & Ministry Of Finance, *Report Of The Steering Committee On Fintech Related Issues*, Government Of India, (2019).

[https://www.meity.gov.in/writereaddata/Files/Dia\\_Presentation%2009.03.2023%20final.Pdf](https://www.meity.gov.in/writereaddata/Files/Dia_Presentation%2009.03.2023%20final.Pdf).

property<sup>14</sup>. RUFADAA was implemented to dictate how the assets of a dead individual would be managed. The act allows the owner of the assets to grant fiduciary access to the digital accounts upon the owner's death or incapacity.<sup>15</sup> Even in countries like UK, as per a study, it is revealed that the majority of the people online have neither planned anything for the eventuality and nor are aware of such an arrangement. Drawing on same lines, if a country like UK lacks awareness on digital legacy and inheritance then, in case of India which has such a humongous population and an ever-increasing number of people engaged on internet it would be difficult to manage the issues arising among the people due to lack of procedural law for inheritance and thus, creating conflicts regarding the inheritance of digital assets.<sup>16</sup>

### **Prescriptive Measures**

The primary purpose for introduction of digital inheritance legislation is the Dispute Resolution which is offered by the legislation as it shall include the various resorts to the violation of any right with respect to digital inheritance and any other violation concerned to the transfer of digital assets. The legislation must be inclined towards speedy disposal of suits and for the same it may even direct the establishment of courts that specially deal with the disputes relating to digital assets inheritance if it deems necessary. Existence of a comprehensive legislation would provide clear definition of digital assets and thus classify as to what qualifies as a digital asset and what does not. This would aid in the characterization of each digital asset and the delineation of ownership rights associated with them. By acknowledging the validity of digital wills, the legislation would safeguard digital assets and prevent fraudulent claims on dormant digital assets.

A digital inheritance legislation will not only regulate the Digital Will and its execution but, also, it would define the fiduciaries, as in case of the US Legislation, who shall have the access to the digital assets. It can also mention the rights and responsibilities of a fiduciary who is an original, additional, or successor personal representative, agent, trustee.<sup>17</sup> The pre-2005 amendment

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<sup>14</sup> Prashant Mali & Aswathy Prakash G, *Death In The Era Of Perpetual Digital Afterlife: Digital Assets, Posthumous Legacy, Ownership And Its Legal Implications*, NAT'L L. SCH. J. 124, 131 (2019).

<sup>15</sup> Alanna Pearl, *Everything You Need To Know About Including Digital Assets In Your Estate Plan*, LinkedIn, Aug 2, 2021,

<https://www.linkedin.com/pulse/everything-you-need-know-including-digital-assets-your-alanna-pearl>.

<sup>16</sup> Prashant Mali & Aswathy Prakash G, *Death In The Era Of Perpetual Digital Afterlife: Digital Assets, Posthumous Legacy, Ownership And Its Legal Implications*, NAT'L L. SCH. J. 124, 132 (2019).

<sup>17</sup> REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, §2(14)

position of the Hindu Succession Act<sup>18</sup> predominantly adhered to a patriarchal framework, thereby necessitating the establishment of a comprehensive legislation for digital inheritance in order to safeguard the interests of women in society. By doing so, this legislation would effectively mitigate the potential adverse impact of societal norms on women's rights and provide them with the necessary guarantees.

Another advantage of implementing digital inheritance legislation in India is that it would enable the country to align with global norms and fulfil the suggestions put forth by the Steering Committee in 2019. Furthermore, in light of technological advancements, it is imperative for a nation's legal framework to remain adaptable to these changes. This is because society often identifies loopholes within emerging trends and exploits them to their advantage. To counteract this, it becomes necessary to establish laws that regulate such trends. Earlier, in India inheritance tax was applicable but, was then abolished in 1985. However, to the contrary, digital assets could be taxed upon their inheritance for addressing issues like capital gain tax concerning the cryptocurrencies or any other digital investments and also to ensure responsible use and management of digital assets.

### **Conclusion**

Although, the process of bringing in a new legislation is a slow process but, it in the initial stage it reduces the issues to a certain extent and later amendments can be brought about in the legislation to cope up with the loopholes. India has however, hinted towards the meeting of global standards and coping with the recommendation of the steering committee as the Ministry of Electronics and Information Technology has proposed the 'Digital India Act 2023.' This proposed act has hinted towards the recognition of digital wills as per the brochure because the goal of the proposed act lists right to digital inheritance as one of the rights but, the act has not yet come into comprehensive statutory form which means that there is a need for deliberation for the structuring of the right as the brochure does not mention anything of the operation of the legislation but, just the right to digital inheritance. Also, the emergence of a legislation let alone is not beneficial but, the awareness amongst the people about their rights and responsibilities with respect to digital assets is of utmost importance. The above-mentioned recommendations and current problems of inheritance indicate the pressing need of a legislation for digital inheritance.

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<sup>18</sup> HINDU SUCCESSION ACT, 1856.