



Reflections:

Dealing with Legal Issues of Digital Afterlife

Thought Leadership | by Chuks Okoriekwe

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Introduction

“The only certainty life contains is death” - Patricia Briggs

Man has come to accept this inevitable reality and legal systems have designed laws to manage deceased's affairs after his passage to the great beyond. Since the inception of the 21st century, there has been rapid advancements in Information Communication Technology (ICT) with regulation slowly playing catch up. This has brought to the fore the issue of certainty in the administration of Digital Asset (DA) upon the demise of a user of ICT. If for instance, Mr. A operates a digital wallet on Nairabox (an online digital wallet) with which he makes payment to merchants online or operates a bitcoin account, upon his death can such account devolve to his estate bearing in mind the non-transferability clause in the Terms of Service Agreement (ToS)?

The writer seeks to explore the legal regime for the administration of DAs in Nigeria vis a vis the Wills Act/Law and Administration of Estates Law of Lagos, development in other climes and proffers practical steps in protecting DAs after death.

Understanding Digital Assets

DAs have become increasingly significant due largely to continuous online presence of internet users. **Section 2 United States Revised Uniform Fiduciary Access to Digital Assets Act, 2015** (UFADAA), defines DA as an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record. These include: photos, emails, videos, texts, and online account information.

In Nigeria, the closest definition for DAs can be found in **section 45 Electronic Transaction Bill, 2015** (passed by the National Assembly and awaits the assent of the President) which defines electronic data to include all data created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic,

optical or by any other means, including non-paper means, that have capabilities for creation, recording, transmission or storage similar to those means. This is rather a more generic definition covering all forms of data under the Bill.

Nigeria's internet boom can be gleaned from a report released by Internet Live Stat in 2016 - showing significant increase from a meagre 78,000 internet users in the early 2000s to over 86 million users as at (July) 2016. This, coupled with the absence of any definitive legislation covering DAs and thus exposing Nigerians to the whims of cleverly crafted one sided standard form contract, could fuel the fire of potential controversy surrounding DAs in Nigeria.

Transferability of Digital Assets

The trend in most online platforms is to have a non-transferability clause in their account opening ToS which ordinarily bars third parties from access to user's profile or account. For instance, **Clause 4, paragraphs 8 and 9 and Clause 18, paragraph 6 of Facebook's Statement of Rights and Responsibilities** reads: *“You will not share your password (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize the security of your account. You*



will not transfer your account (including any Page or application you administer) to anyone without first getting our written permission. You will not transfer any of your rights or obligations under this Statement to anyone else without our consent.” By signing up a user account, user unequivocally surrenders the right to transfer his account to a third party without first making recourse to Facebook. Similarly, Google’s ToS in *Clause 1, paragraph 1.1 item c* provides: “... Customer may not sublicense or transfer these rights except as permitted under the Assignment section of the Agreement.”

Given the challenges encountered by third parties attempting to access deceased user’s account, it is often a battle less desirable for the families of the deceased, who already have their hands full dealing with emotional trauma of the loss of their beloved relative. Avoiding such would definitely help to assuage the survivors’ sense of grief and loss.

A particular instance involved the social media giant Facebook and the family of Alison Atkins whose parents after her death, in a bid to immortalise her fading memory unsuccessfully made attempts to gain access to her Facebook account. The request to have access to her account was turned down by Facebook using the **Stored Communication Act (SCA)** as a basis. The SCA extends the Fourth Amendment of the American Constitution by protecting privacy of account holder, effectively leaving the disposition of the deceased’s DAs at the mercy of social media platforms.

Although, this was before Facebook introduced its legacy contact option where a user can designate a contact as his legacy contact with the ability to: write a pinned post for deceased user’s profile, respond to new friend requests, update profile picture and cover photo, download a copy of what has been shared on Facebook. The legacy contact, however, has its limitations including; inability to log into deceased’s user account, remove or change post or anything shared on deceased’s user timeline, read messages or remove friends.

Passing Title in Digital Assets to Successors: Going through A Needle’s Eye

In Nigeria, succession is generally governed by the *Wills Act 1837*, *Wills Law* of the various States, *Administration of Estates Laws* of the various States and customary laws. Where a person dies testate (that is, the deceased made a Will before his demise), an application is made to the Probate Registry (if the Will was deposited at the Registry) for the reading of the Will. After the reading of such Will, the dispositions are determined and executors appointed by the deceased testator would proceed to make an application for Probate. Upon grant of



Probate by the Registry after paying the requisite estate fees, the executors can distribute the estate of the deceased in accordance with the provisions of the Will.

Where the deceased dies intestate (dies without a Will), the process becomes complex. The Personal Representatives of the deceased would make an application to the Probate Registry attaching the deceased’s death certificate, title documents to properties owned, evidence of financial account with banks, and other assets owned by the deceased as may be required by the registry. The Registry thereafter writes to the banks to ascertain the amount of money with them. Upon the grant of the Letters of Administration (LoA) after payment of the requisite estate fees, the administrators can thereafter have access to the assets listed in the LoA. It is noteworthy that where any of the deceased’s asset is omitted in the LoA, such would not be reckoned with as constituting part of the deceased’s asset for distribution.

The challenge therefore lies in the classification of DAs for the purpose of transmission to successors of the deceased user. **Section 1(1) Wills Law, Cap. W2 Laws of Lagos State of Nigeria 2003** (Wills Law) provides that: “it shall be lawful for every person to bequeath or dispose of, by his will executed in accordance with the provision of this law, all **property** to which he is entitled, either in law or in equity, or at the time of his death...” (emphasis supplied). Also, **section 25 Wills Law** further defined property to include: “... right of occupancy, sublease, sub-underlease and funds, securities for moneys, shares, debts, **chose in action**, rights, credits, goods and all other property whatsoever which by law devolved upon the executor or administrator and any share or interest therein.” In the same vein, **Section 1 Administration of Estates Law, Cap A3 Laws of Lagos of Nigeria 2003** defines property to include: “... a **thing in action** and any interest in real or personal property.”

Although, there is no direct classification of DAs under Nigeria’s laws, it can be said to constitute a chose in action. Per *Channel J. in Tokington v. Magee [1902] 2 K.B. at p.430*, opined “a chose in action is a personal right in property which can only be enforced by taking legal proceedings and not by taking physical possession.” DAs being electronic with user exercising personal rights, can therefore be enforced through an action in court. As provided under the laws examined above, in my humble opinion, DAs are therefore disposable to successors under a Will or upon intestacy.

Having established that DAs constitute chose in action, the question that arises thereafter is whether users’ DAs held in another jurisdiction (for example in the USA) are transferable? In a revolutionary legislation, after much debate, the United States’ Unified Law Commission revised the **UFADAA** to enable fiduciaries have access to the DAs of deceased/incapacitated users. By the way, the UFADAA has been enacted by 13 States in the USA. Under the UFADAA, there is an obligation on custodians (a person that carries, maintains, processes, receives, or stores a digital asset of a user - online platform owners/operators) to provide access to DAs to fiduciaries as provided under **section 5 UFADAA**.

Conclusion

However, it is instructive to note that the grant to the fiduciary is limited to access to the deceased/incapacitated user's DA and does not by any means constitute power to engage in transactions with such DAs. The UFADAA is only applicable to users who reside/resided at the time of death in a State that has enacted it into its laws as provided under **Section 6(4) (b) UFADAA**. The implication is that users outside the USA cannot reap the benefits provided under the Act, even if the custodians are based in a State where the Act is applicable.

It would appear that in Europe, there is yet to be a unified code to collectively regulate the transferability of DAs. Currently, the only recourse of users or fiduciaries as the case may be is to national laws where such is protected under general private law principles.

Transfer through Wills and Trust?

It is arguable whether transfer of DAs by the user to a third party in a Will or Trust Instrument does not violate the non-transferability clause in the platform's ToS. It is desirable that users device means to protect such DAs to avoid being lost, locked or frozen by online platforms since it constitute incorporeal property to which users have proprietary rights. Hence, while making plans to draft a Will, users who desire to transfer DAs should make provisions in their Will to enable the executors have unrestrained access to such DAs by providing user's name and password. Such clause in the Will must specifically grant the powers to access, distribute, handle, dispose, modify, delete and control the DAs to the executors of the Will. Alternatively, users may opt to create a *Digital Assets Trust* to manage the DAs. The trust arrangement would ensure the DAs are protected and transferred to successors as though the user was not deceased. Such trust arrangement is governed by a trust deed stating its objectives and instructions to the trustee.

Another issue that may arise in granting Probate or LoA on DAs is the estate fee that would otherwise be paid upon valuation of the deceased's estate to the State. Although, this is not the thrust of this article, the State stands the risk of substantial revenue loss in a situation where users convert their tangible assets into DAs through astute estate planning.

With emerging trends in the use of ICT, both users and governments need to take drastic steps to catch up with the pace of development. Given that conventional legislative action is slow, the National Information Technology Development Agency (NITDA) should set the ball rolling with championing policies and framework that protect users in Nigeria. The resultant outcomes/deliverables can thereafter be adopted by the various States in the administration of estates of their residents as may be applicable.

At the user's level, there should be provision for the transmission of his DAs in his Will where he intends his DAs to be retained by his estate upon his demise. This would prevent economic loss as well as protect the interest of his beneficiaries who might have developed sentimental attachment to his DAs.

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