



From estate planning to estate administration legal challenges posed by digital assets

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DECLARATION

I declare that: "From estate planning to estate administration: legal challenges posed by digital assets" is my own work; that all sources used or quoted have been indicated and acknowledged by means of complete references, and that this mini-dissertation has not previously been submitted by me or any other person for degree purposes at this or any other university. I also declare the use of AI was aligned with the NWU guidelines and that all recommendations, ideas and writing is that of my own, all sources used is correctly referenced and or quoted.

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ABSTRACT

The rapid digitisation of wealth has introduced a novel asset class, namely digital assets, into the realm of succession law. From cryptocurrencies and non-fungible tokens to social media accounts and cloud storage, these intangible assets present unique challenges regarding identification, access and transfer upon death. South African legislation, specifically the *Administration of Estates Act* 66 of 1965 and the *Wills Act* 7 of 1953, was drafted in a pre-digital era and currently lacks explicit provisions for digital estate administration. This dissertation investigates the legal nature of digital assets, analysing whether they constitute "property" capable of inheritance, particularly in light of the Western Cape High Court's decision in *Bester v Mirror Trading International* 2023 3 All SA 101 (WCC), which classified cryptocurrency as intangible movable property in terms of the *Insolvency Act* 24 of 1936. It further critiques the contractual impediments imposed by Service Providers' Terms of Service, which often extinguish rights upon death, thereby conflicting with the principle of freedom of testation. Through a comparative analysis of the United States' *Revised Uniform Fiduciary Access to Digital Assets Act* of 2015 and Canada's *Uniform Access to Digital Assets by Fiduciaries Act* of 2016, this study proposes legislative reform for South Africa. It recommends the adoption of a "Digital Assets Access Act" to clarify fiduciary authority and advocates for practical estate planning measures, such as the use of sealed memoranda for security credentials, to prevent the permanent loss of digital wealth.

KEYWORDS

Digital assets, estate planning, deceased estates, law of succession, executors, fiduciary duties, *Administration of Estates Act* 66 of 1965

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LIST OF ABBREVIATIONS

4IR	Fourth Industrial Revolution
AI	Artificial Intelligence
AEA	Administration of Estates Act 66 of 1965
BLR	Baylor Law Review
CA	Copyright Act 98 of 1978
Cardozo L Rev	Cardozo Law Review
CFAA	Computer Fraud and Abuse Act of 1986
CGT	Capital Gains Tax
CJLT	Canadian Journal of Learning and Technology
ECTA	Electronic Communications and Transactions Act 25 of 2002
EPCPLJ	Estate Planning Community Property Law Journal
EU	European Union
EULA	End User License Agreement
FAIS	Financial Advisory and Intermediary Services
FPRJ	Financial Planning Research Journal
FNB	First National Bank
FSCA	Financial Sector Conduct Authority
FSR Act	Financial Sector Regulation Act 9 of 2017
L&D	Liquidation and Distribution

IP	Intellectual Property
IRS	Internal Revenue Service (USA)
JCLS	Journal of Civil Law Studies
JIPLP	Journal of Intellectual Property Law & Practice
JJS	Journal for Judicial Science
Mich Prob & Est Plan J	Michigan Probate & Estate Planning Journal
MTI	Mirror Trading International (Pty) Ltd (in liquidation)
NFT	Non-Fungible Token
P2P	Peer-to-peer
PAIA	Promotion of Access to Information Act 2 of 2000
PELJ/PER	Potchefstroom Electronic Law Journal
PKI	Public Key Infrastructure
POPIA	Protection of Personal Information Act 4 of 2013
RUFADAA	Revised Uniform Fiduciary Access to Digital Assets Act of 2015
SARB	South African Reserve Bank
SARS	South African Revenue Service
SCA	Stored Communications Act of 1986
ToS	Terms of Service
ToSA	Terms of Service Agreement
UADAFSA	Uniform Access to Digital Assets by Fiduciaries Act of 2016

ULC	Uniform Law Commission
ULCC	Uniform Law Conference of Canada
UFADAA	Uniform Fiduciary Access to Digital Assets Act of 2014
UNIDROIT	International Institute for the Unification of Private Law
USA	United States of America

CHAPTER 1 INTRODUCTION

1.1 Complexities of digital assets in estate planning and estate administration

1.1.1 Background

"Estate planning" has been defined as:

The arrangement, management and securement and disposition of a person's estate so that he, his family and other beneficiaries may enjoy and continue to enjoy the maximum from his estate and assets during his lifetime and after his death, no matter when death may occur.¹

The administration of deceased estates in South Africa is primarily governed by the *Administration of Estates Act* (hereinafter the *AEA*).² The *AEA* establishes the statutory machinery regulating the administration of deceased estates and mandates that all property belonging to certain categories of deceased persons must be administered under the supervision of the Master of the High Court.³ The *AEA* governs matters such as jurisdiction of the various Masters' offices, death notices, inventories, executor appointments and the preparation of liquidation and distribution (L&D) accounts.⁴ Its overarching objective is to ensure that a deceased estate is settled and distributed "as expeditiously and efficiently as is consistent with the best interests of the estate".⁵

The administration of deceased estates in South Africa is accordingly a regulated process of liquidation and distribution governed primarily by the *AEA*.⁶ This process represents a transition of the deceased's patrimony from individual ownership to a representative office for the purpose of settling liabilities and transferring the

¹ Botha *et al SA Financial Planning Handbook* 957.

² 66 of 1965; Harms *et al* "Administration of Deceased Estates" para 440. Meyerowitz *Administration of Estates and Their Taxation* para 1.1.

³ Harms *et al* "Administration of Deceased Estates" para 440. Meyerowitz *Administration of Estates and Their Taxation* paras 1.3-1.4.

⁴ Sections 4, 7 and 9 of the *AEA*. See also Meyerowitz and Cilliers *Administration of Estates and Their Taxation* paras 1.3-1.5.

⁵ Sehati 2021 *Cardozo L Rev* 749.

⁶ Harms *et al* "Administration of Deceased Estates" para 440.

residue to beneficiaries.⁷ The statutory process commences with the reporting of the death (section 7) and the delivery of any documents purporting to be a will (section 8).⁸ Once the Master issues Letters of Executorship in terms of section 14, the executor is vested with the legal authority to act on behalf of the estate.⁹ Central to this office is the peremptory duty established in section 26 of the *AEA*, which mandates that the executor must immediately take into their "custody or control" all property, books, and documents belonging to the deceased.¹⁰ This is not merely a procedural requirement but a substantive fiduciary obligation. The executor must identify and inventory assets (section 9 and 27), recover property unlawfully withheld (section 11), and ultimately prepare a Liquidation and Distribution account to the satisfaction of the Master and the South African Revenue Service (SARS).¹¹

In South African law, the executor's fiduciary duties are not derived from a single source but are a hybrid of common law principles and statutory codification. While the common law provides the standard of care, the *AEA* codifies the specific applications of these duties. Section 26 (the duty to take custody) and section 54 (removal for misconduct) are statutory expressions of the fiduciary obligation to protect the estate from waste.¹²

The administration of a deceased estate is a fiduciary responsibility grounded in the obligation to gather, secure and distribute assets. The Master of the High Court functions as the chief engineer supervising the entire process,¹³ while the executor

⁷ Harms *et al* "Administration of Deceased Estates" para 440; Meyerowitz *Administration of Estates and Their Taxation* paras 12.9-12.35; Norton Rose Fulbright 2023 <https://www.nortonrosefulbright.com/en-africa/knowledge/publications/83b1ba5b/the-role-of-an-executor-in-administering-an-estate>.

⁸ *Goss v Bennett* (GJ) (unreported) case number A5021/2022 of 31 May 2023 para 7. See also Meyerowitz and Cilliers *Administration of Estates and Their Taxation* paras 2.1-2.4, 3.1 and 3.4.

⁹ Harms *et al* "Administration of Deceased Estates" para 440; Meyerowitz and Cilliers *Administration of Estates and Their Taxation* paras 8.1-8.4; MPA 2025 <https://meyerattorneys.co.za/2025/09/02/crypto-estate-planning/>.

¹⁰ Section 26 of *AEA*; Ratiba 2013 *JJS* 27; Meyerowitz and Cilliers *Administration of Estates and Their Taxation* para 12.2.

¹¹ Ratiba 2013 *JJS* 41-42; *Goss v Bennett* para 8. See in general Meyerowitz and Cilliers *Administration of Estates and Their Taxation* paras 12.1-12.35.

¹² Section 26 and 54 of *AEA*; Ratiba 2013 *JJS* 27.

¹³ Harms *et al* "Administration of Deceased Estates" paras 440 and 442; Meyerowitz and Cilliers *Administration of Estates and Their Taxation* para 4.1.

acts as the technician, tasked with inventorying assets, paying off outstanding debts (removing friction), selling components if necessary (realising assets), creating a detailed account of all steps (the L&D account), and finally delivering the remaining parts (the residue) safely to new owners (the heirs).¹⁴ The executor is legally obliged to take control of all property belonging to the deceased and to liquidate and distribute the estate in accordance with the will or the laws of intestacy.¹⁵ However, the intangible nature of digital assets severely complicates this overarching duty by rendering compliance with several specific provisions of the *AEA* practically impossible.

Unlike physical assets, digital assets often leave no paper trail, making it exceptionally difficult for executors to identify and appraise them.¹⁶ Consequently, it becomes practically impossible for the executor to comply with sections 9 and 27 of the *AEA*, which mandate the lodging of an inventory reflecting "all property known" to belong to the deceased.¹⁷ This lack of a paper trail creates a liability trap, as the failure to identify hidden digital assets exposes the executor to personal liability for incorrect estate duty calculations.¹⁸ Furthermore, section 26 of the *AEA* imposes a peremptory duty on the executor to take all estate property into their custody or control.¹⁹ This statutory mandate cannot be practically fulfilled when digital assets exist on distributed ledgers or are locked behind encryption and multi-factor authentication; without the necessary private keys or passwords, the executor cannot assume *de facto* custody.²⁰

¹⁴ Harms *et al* "Administration of Deceased Estates" para 464; Meyerowitz and Cilliers *Administration of Estates and Their Taxation* paras 12.9-12.35.

¹⁵ Section 26 of the *AEA*.

¹⁶ AMAL 2024 <https://amal.co.za/digital-wills-and-the-legacy-of-digital-assets/>; Snapshots 2024 *Digital Estate Planning Guide* 4.

¹⁷ Sections 9 and 27 of the *AEA*. See in general Meyerowitz and Cilliers *Administration of Estates and Their Taxation* paras 6.1-6.6.

¹⁸ SD Law 2023 <https://www.sdlaw.co.za/articles/cryptocurrency-and-your-will/>.

¹⁹ Section 26 of *AEA*; Ratiba 2013 *JJS* 27; Meyerowitz and Cilliers *Administration of Estates and Their Taxation* para 12.2.

²⁰ *Bester* case para 57; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>; AMAL 2024 <https://amal.co.za/digital-wills->.

In addition, section 35 of the *AEA* obliges the executor to submit a precise Liquidation and Distribution account within six months.²¹ Because digital assets such as cryptocurrencies are extremely volatile, calculating their fair market value exactly at the date of death is practically impossible if the executor cannot access the account to retrieve historical transaction data.²² Finally, while section 11 of the *AEA* requires third parties in possession of estate property to surrender it to the executor, enforcing this against foreign digital service providers is practically impossible.²³ Such providers routinely invoke their own restrictive Terms of Service and privacy legislation (such as *POPIA* and *PAIA*) to deny fiduciaries access to the accounts, thereby halting the administration process and placing valuable estate property at risk.²⁴

South African law recognises wide freedom of testation, allowing testators substantial discretion to dispose of their property as they choose, subject only to limited statutory and common law restrictions.²⁵ This freedom is not absolute, but it is fundamentally anchored in the *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution).²⁶ The courts have affirmed that the right to property, protected under section 25(1) of the Constitution, encompasses the right of an owner to give enforceable directions regarding the disposal of their property upon death.²⁷ However, this constitutionally endorsed freedom is constrained by the common law principle that testamentary provisions must not be *contra bonos mores* (against public policy).²⁸ In the contemporary South African legal landscape, public

²¹ Section 35 of the *AEA*. See in general Meyerowitz and Cilliers *Administration of Estates and Their Taxation* paras 12.9-12.10.

²² Maureen *et al* 2025 *Aurelia: Jurnal Penelitian dan Pengabdian Masyarakat Indonesia* 943.

²³ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 47.

²⁴ Silberstein and Davies 2015 <https://www.massbar.org/publications/ejournal/ejournal-article/lawyers-journal-2015-february/defining-owning-and-accessing-digital-assets>.

²⁵ AMAL 2024 <https://amal.co.za/digital-wills-and-the-legacy-of-digital-assets/>; Boda, Beachen and Powell 2024 <https://www.lexology.com/library/detail.aspx?g=c10d2e18-0e9e-4d2a-98c8-169da39d8bef>.

²⁶ Hofmeyr and Paleker *The Law of Succession in South Africa* paras 7.35-7.36; Jordaan 2026 <https://www.moneyweb.co.za/financial-advisor-views/beyond-free-will-the-legal-limits-of-your-freedom-of-testation/>.

²⁷ De Waal "The Law of Succession and the Bill of Rights" 3G5.

²⁸ Jamneck "Freedom of Testation" 137; Jordaan 2026 <https://www.moneyweb.co.za/financial-advisor-views/beyond-free-will-the-legal-limits-of-your-freedom-of-testation/>.

policy is inextricably rooted in the Constitution and its foundational values of human dignity, the achievement of equality, and the advancement of human rights.²⁹ This constitutional dimension has been robustly traversed in recent case law. In *Minister of Education v Syfrets Trust Ltd*,³⁰ the court held that testamentary provisions which unfairly discriminate are contrary to public policy as reflected in the constitutional values of non-racialism and non-sexism.³¹ Furthermore, in *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal*,³² the Supreme Court of Appeal ruled that the constitutional imperative to remove restrictive clauses that conflict with public policy must take precedence over freedom of testation.³³ The Constitutional Court solidified this approach in *King v De Jager*,³⁴ determining that discriminatory testamentary bequests cannot accord with public policy, thereby illustrating the profound limits the Constitution places on a testator's private autonomy.³⁵

In the context of digital assets, this constitutional dimension is highly relevant. Custodians and service providers frequently utilise End User Licence Agreements (EULAs) and Terms of Service (ToS) that stipulate digital licences terminate upon the user's death and are non-transferable.³⁶ The enforcement of these private contracts mortis causa unilaterally overrides the testator's constitutionally protected right to dispose of their property, effectively disinheriting beneficiaries of assets that hold significant financial or sentimental value.³⁷ Consequently, it must be critically questioned whether such restrictive contractual clauses, which directly conflict with

²⁹ Jamneck "Freedom of Testation" 137-139; De Waal "The Law of Succession and the Bill of Rights" 3G11. See in general Hofmeyr and Paleker *The Law of Succession in South Africa* para 7.

³⁰ 2006 4 SA 205 (C).

³¹ De Waal "The Law of Succession and the Bill of Rights" 3G11; Hofmeyr and Paleker *The Law of Succession in South Africa* para 5.5.

³² (510/09) [2010] ZASCA 136 (1 October 2010).

³³ De Waal "The Law of Succession and the Bill of Rights" 3G11. Hofmeyr and Paleker *The Law of Succession in South Africa* para 5.6.

³⁴ 2021 4 SA 1 (CC).

³⁵ Jamneck "Freedom of Testation" 140; Hofmeyr and Paleker *The Law of Succession in South Africa* paras 5.7-5.10; 7.36.

³⁶ Woodman 2017 *CJLT* 205; P&C Attorneys/Advocates 2025 <https://focusedlaw.com/8-common-mistakes-to-avoid-in-digital-estate-planning/>; Ratiba 2013 *JJS* 35.

³⁷ Woodman 2017 *CJLT* 205; P&C Attorneys/Advocates 2025 <https://focusedlaw.com/8-common-mistakes-to-avoid-in-digital-estate-planning/>; Ratiba 2013 *JJS* 35.

the constitutionally anchored principle of freedom of testation, are *contra bonos mores* and unenforceable under South African public policy.³⁸

Traditionally, deceased estates have consisted of tangible physical possessions such as land (immovable property), movable property, as well as financial assets such as cash, bank accounts, investments and shares.³⁹ The *AEA* provides well-established procedures for executors to use for inventorying, valuing and distributing these assets.⁴⁰

However, contemporary estates increasingly encompass digital assets, defined as intangible, electronically stored items capable of possessing financial, sentimental, or intellectual property value.⁴¹ There is currently no universally accepted definition for "digital assets", and it is subject to various interpretations across academia.⁴² In the absence of a clear definition of digital assets, estate planners struggle to determine which assets should be classified as digital assets and which should not.⁴³

Digital assets may be broadly categorised into financial assets, personal property, intellectual property and gaming assets.⁴⁴ A comprehensive analysis and definition of each of these functional groups is provided in paragraph 2.3 of this study.

The emergence of these digital assets presents unique challenges for estate planning undertaken during the testator's lifetime, as well as for the subsequent

³⁸ Woodman 2017 *CJLT* 203-206.

³⁹ AMAL 2024 <https://amal.co.za/digital-wills-and-the-legacy-of-digital-assets/>; Boda, Beachen and Powell 2024 <https://www.lexology.com/library/detail.aspx?g=c10d2e18-0e9e-4d2a-98c8-169da39d8bef>.

⁴⁰ Sections 9-11, 35 and 47 of the *AEA*; Meyerowitz and Cilliers *Administration of Estates and Their Taxation* paras 12.9-12.12.35; FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; Mulder and Arends 2012 *Mich Prob & Est Plan* J 11.

⁴¹ Boda, Beachen and Powell 2024 <https://www.lexology.com/library/detail.aspx?g=c10d2e18-0e9e-4d2a-98c8-169da39d8bef>; FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>; AMAL 2024 <https://amal.co.za/digital-wills-and-the-legacy-of-digital-assets/>; Engelsman 2024 <https://engelsman.co.za/beyond-the-physical-addressing-digital-assets-in-your-will/>.

⁴² Pinch 2015 *WLR* 547.

⁴³ Conner 2011 *EPCPLJ* 304.

⁴⁴ Referring to Beyer 2015 *NAEPC Journal of Estate and Tax Planning* 28-29, Beyer and Cahn 2013 *NAELAJ* 138 and Cahn 2011 *Probate and Property Magazine* 36-37, where Beyer and Cahn identify four categories of digital assets, namely: personal assets; social media assets; financial assets; and business assets. See para 2.3 for a discussion of the different categories.

administration of the deceased estate.⁴⁵ Their intangible nature renders them difficult to identify, access, value, manage and ultimately transfer in the absence of explicit lifetime planning.⁴⁶

1.1.2 Motivation

As society becomes increasingly reliant on digital platforms, several critical challenges arise regarding the effective incorporation of digital assets into estate planning and estate administration, namely:

- a. *Identification, access and valuation:* Digital assets are often password-protected, encrypted, or hidden behind multi-factor authentication. Unlike physical assets, intangible assets may leave no paper trail, making it difficult for executors to identify, confirm and value them.⁴⁷ It is estimated that individuals may maintain up to ninety digital accounts, creating a significant risk that executors may overlook financially valuable or sentimental digital property.⁴⁸ Moreover, volatile assets such as cryptocurrencies raise complex valuation issues for estate duty and capital gains tax.⁴⁹
- b. *Tension between post-mortem privacy and the executor's duties:* Executors are obliged to gather and secure all property belonging to the deceased estate, but privacy laws regarding digital assets cause tension between the

⁴⁵ Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>; AMAL 2024 <https://amal.co.za/digital-wills-and-the-legacy-of-digital-assets/>; FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; Conner 2011 *EPCPL* 304-305; Pinch 2015 *WLR* 552.

⁴⁶ AMAL 2024 <https://amal.co.za/digital-wills-and-the-legacy-of-digital-assets/>; FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; Mulder and Arends 2012 *Mich Prob & Est Plan* J 12.

⁴⁷ Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>; AMAL 2024 <https://amal.co.za/digital-wills-and-the-legacy-of-digital-assets/>; FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>.

⁴⁸ Sehati 2021 *Cardozo L Rev* 750.

⁴⁹ FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>.

executor's obligations and the deceased client's privacy rights.⁵⁰ However, digital service providers frequently invoke privacy laws and Terms of Service (ToS) to restrict access to a deceased user's accounts.⁵¹ This may require costly court applications for access.⁵² Without access, executors may be unable to settle liabilities, retrieve important information, or realise valuable assets, and the administration of the estate may be unavoidably delayed.⁵³

- c. *Legal ambiguity and uncertainty in South Africa:* South African law does not expressly regulate digital assets in the context of deceased estates.⁵⁴ This absence of a clear legal framework leads to ambiguity and varied interpretations, placing executors in a difficult position as they navigate complex issues to protect the estate's interests.⁵⁵ Although the *AEA* contains a broad definition of "property", its application to digital assets has not yet been tested in South African courts.⁵⁶ Additionally, End User License Agreements (EULAs) for digital content (for example, e-books, music, movies) often stipulate that licences terminate upon death and are non-transferable, undermining testamentary freedom.⁵⁷
- d. *Risk of "digital limbo", loss or theft:* Without clear instructions, digital assets may become inaccessible, vulnerable to hacking, or permanently lost,

⁵⁰ Section 26 of the *AEA*; Erlank "Digital Property" (2021) 661; Pinch 2015 *WLR* 557; Sehati 2021 *Cardozo L Rev* 750-751, 758 and 780.

⁵¹ Pinch 2015 *WLR* 557; Erlank "Digital Property" (2021) 661.

⁵² Erlank "Digital Property" (2021) 664.

⁵³ Sehati 2021 *Cardozo L Rev* 750.

⁵⁴ FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; Pinch 2015 *WLR* 560; Mulder and Arends 2012 *Mich Prob & Est Plan J* 12.

⁵⁵ FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>.

⁵⁶ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 44-47.

⁵⁷ Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>; Schulenburg 2023 <https://pagelschulenburg.co.za/a-guide-to-digital-estate-planning/>; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 46; Conner 2011 *EPCPLJ* 318.

resulting in financial harm to the estate or emotional distress to beneficiaries.⁵⁸

These challenges, coupled with the absence of legislative guidance, highlight the urgent need for reform.⁵⁹ This research proposes to explore how existing South African estate law can be effectively adapted. A comparative study with jurisdictions that have already begun to address these issues, such as the United States of America (USA) and Canada, offers valuable insights.⁶⁰

The USA's *Revised Uniform Fiduciary Access to Digital Assets Act* of 2015 (*RUFADAA*), adopted by many states, represents a key attempt to bridge the gap between traditional estate law and digital realities.⁶¹ *RUFADAA* aims to balance user privacy with the executor's need for access, establishing a three-tiered hierarchy.⁶²

While *RUFADAA* is a step forward, it still presents limitations, particularly regarding its narrow definition of "digital assets", focusing on electronic records, and the ongoing power of service providers to influence access.⁶³ In contrast to the privacy-centric, tiered structure of *RUFADAA*, the Uniform Law Conference of Canada's (ULCC) *Canadian Uniform Access to Digital Assets by Fiduciaries Act* of 2016 (*UADAFAA*) employs a simpler approach based on default access and media neutrality.⁶⁴ Both models serve as the basis for the proposed South African reforms, the technical mechanics of which are analysed in detail in Chapter 5.

⁵⁸ Conner 2011 *EPCPLJ* 307-308; Sehati 2021 *Cardozo L Rev* 761; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>; AMAL 2024 <https://amal.co.za/digital-wills-and-the-legacy-of-digital-assets/>; FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>.

⁵⁹ Boda, Beachen and Powell 2024 <https://www.lexology.com/library/detail.aspx?g=c10d2e18-0e9e-4d2a-98c8-169da39d8bef>; Pinch 2015 *WLR* 560.

⁶⁰ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 44.

⁶¹ Sehati 2021 *Cardozo L Rev* 748 and 752; Hannah 2023 <https://www.deconcinimcdonald.com/estate-planning-law-report-june-2023how-will-the-revised-uniform-fiduciary-access-to-digital-assets-act-apply-to-your-estate/>.

⁶² Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-new-frontier-of-wealth-transfer/>; Sehati 2021 *Cardozo L Rev* 758-759; Szwajdler 2023 *IJLIT* 155 and 167. See para 5.2 for a more detailed discussion.

⁶³ Szwajdler 2023 *IJLIT* 155 and 167.

⁶⁴ Woodman 2017 *CJLT* 212. See para 5.3 for a more detailed discussion.

This study will exclusively focus on the following selected digital assets:

- a. *Cryptocurrency holdings and online financial accounts*: These digital assets are chosen due to their significant and increasingly recognised monetary value, tax implications and the unique challenges they pose regarding access (for example, private keys, lack of central authority) and transfer.⁶⁵
- b. *Social media accounts, e-mail accounts and cloud storage*: These digital assets are selected for their high sentimental value, pervasive use, the inherent privacy concerns they raise, and the common conflicts with service provider ToS regarding post-mortem access and management.⁶⁶
- c. *Digital content (for example, e-books, digital music, digital movies)*: These digital assets highlight the critical legal distinction between ownership and licensing, where contractual agreements often dictate non-transferability upon death, directly impacting testamentary freedom.⁶⁷

While this study considers estate planning, it does so primarily through the lens of administration. The research identifies that the primary failure in the current legal framework is the executor's inability to access and liquidate digital assets under the *AEA*.⁶⁸ Consequently, the estate planning recommendations proposed in this study are not broad financial planning strategies, but rather specific legal mechanisms,

⁶⁵ AMAL 2024 <https://amal.co.za/digital-wills-and-the-legacy-of-digital-assets/>; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>; Boda, Beachen and Powell 2024 <https://www.lexology.com/library/detail.aspx?g=c10d2e18-0e9e-4d2a-98c8-169da39d8bef>; IRS 2025 <https://www.irs.gov/businesses/small-businesses-self-employed/digital-assets#:~:text=A%20digital%20asset%20is%20stored,Infrastructure%20Investment%20and%20Jobs%20Act>.

⁶⁶ AMAL 2024 <https://amal.co.za/digital-wills-and-the-legacy-of-digital-assets/>; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>; Boda, Beachen and Powell 2024 <https://www.lexology.com/library/detail.aspx?g=c10d2e18-0e9e-4d2a-98c8-169da39d8bef>; Pinch 2015 *WLR* 549; Erlank "Digital Property" (2021) 661.

⁶⁷ Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>; Conner 2011 *EPCPLJ* 318; Schulenburg 2023 <https://pagelschulenburg.co.za/a-guide-to-digital-estate-planning/>.

⁶⁸ *Bester v Mirror Trading International (Pty) Ltd (in liquidation) t/a MTI* 2023 3 All SA 101 (WCC) para 41.

such as the "digital fiduciary power" clause and the "sealed memorandum", designed specifically to facilitate efficient administration.⁶⁹

The culmination of these friction points underscores the urgent need for comprehensive legislative reform. The practical consequences of the statutory lacuna and the conflicting principles identified above may be illustrated through the hypothetical estate of Ms Themba, an LLM candidate. From a methodological perspective, it must be clarified that this scenario does not constitute an empirical case study. Rather, it serves purely as an illustrative device employed within the broader doctrinal and functional analysis of this research. It is utilised as a problem-solving framework to practically demonstrate the tangible challenges an executor faces when attempting to identify, access, and administer digital assets under the current South African legal framework.

In this hypothetical scenario, Ms Themba had a valid will which made provision for the following distributions:

Ms Themba held approximately R500 000 in non-custodial Bitcoin stored in a private digital wallet bequeathed to her fiancé, Mr Sean Kolisi. She did not record her private key or seed phrase in her will to access this digital wallet. As the *AEA* provides no mechanism empowering an executor to compel disclosure or recover a non-custodial cryptographic key, the asset becomes effectively inaccessible and at risk of permanent loss. This exposes the executor to potential allegations of negligence for failing to safeguard estate property. Reliance on judicial inference, such as the classification of crypto assets as movable property in *Bester v Mirror Trading International*,⁷⁰ is insufficient to overcome the administrative barriers faced by executors of solvent estates.⁷¹

⁶⁹ MPA 2025 <https://meyerattorneys.co.za/2025/09/02/crypto-estate-planning/>; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>. See para 6.3.3 of this study.

⁷⁰ 2023 3 All SA 101 (WCC) (hereafter the *Bester* case).

⁷¹ The *Bester* case paras 41, 43 and 50. See para 2.4.2 of this study for a detailed analysis of the court's reasoning.

Ms Themba also bequeathed an extensive collection of licensed e-books and digital legal resources to her sibling, Mr Xane Themba, in her will. Because these assets are governed by EULAs imposing non-transferable, lifetime licences, they do not constitute property capable of devolving at death. The executor steps into the shoes of the deceased and, accordingly, possesses no more and no lesser rights than the account holder had, rendering the testamentary provision legally ineffective and undermining freedom of testation.⁷²

Finally, the executor required access to Ms Themba's university e-mail account and cloud storage to retrieve correspondence relating to a credited student account indebted to her by the university (a financial asset) and to access her unpublished dissertation drafts (intellectual property). The service provider refused access, citing the *Promotion of Access to Information Act (PAIA)*,⁷³ and the *Protection of Personal Information Act (POPIA)*.⁷⁴ Without explicit, prior consent, the executor was legally precluded from accessing the content.⁷⁵ This impediment not only delayed the administration of the estate but also placed valuable intellectual and financial property at risk of loss.

This example demonstrates that the challenges posed by digital assets are not isolated or theoretical but systemic and inherent in the current South African legal framework. The friction between the executor's duties, contractual restrictions and privacy protections leaves executors unable to perform core administrative functions without either breaching the law or failing in their statutory duties. As the hypothetical illustrates, valuable financial, intellectual and personal digital assets can be irretrievably lost despite clear testamentary intent. In the hypothetical scenario of Ms Themba, the executor faces the risk of being unable to recover a non-custodial Bitcoin wallet because the private key was not recorded.⁷⁶ While the

⁷² Silberstein and Davies 2015 <https://www.massbar.org/publications/ejournal/ejournal-article/lawyers-journal-2015-february/defining-owning-and-accessing-digital-assets>.

⁷³ 2 of 2000.

⁷⁴ 4 of 2013.

⁷⁵ PSG *Wealth Freedom of Testation and Digital Assets* 15-19; FNB 2025 <https://novuspressbulletin.co.za/blog/don-t-leave-your-digital-assets-out-of-your-estate-plan>; FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130>.

⁷⁶ *Bester* case paras 7-8.

Western Cape High Court in the *Bester* case confirmed that cryptocurrency constitutes "incorporeal, intangible, fungible, divisible and movable" property for the purposes of the *Insolvency Act*,⁷⁷ Ms Themba's estate is solvent. The *Bester* judgment assists in classifying the asset as property, but it does not automatically empower an executor in a solvent deceased estate to bypass technical encryption or the privacy policies of service providers without specific legislative authority.⁷⁸ The situation exposes a fundamental misalignment between traditional succession law and the realities of modern digital life. Accordingly, a coherent legislative framework is urgently required, one that provides executors with lawful mechanisms for access, aligns contractual and privacy regimes with succession principles, and ensures that digital assets are administered with the same certainty, efficiency and respect for intention that the law affords to traditional property.

1.2 Research question

This research is guided by the following research question:

How can South African estate law be reformed to incorporate selected digital assets into estate planning and the administration of a deceased estate?

1.3 Research aim and objectives

1.3.1 Research aim

To examine the legal challenges in digital asset estate planning and administration in South Africa and propose necessary legal reforms.

1.3.2 Research objectives

For the purpose of this research, two main objectives and a number of secondary objectives are identified.

⁷⁷ 24 of 1936 (hereafter the *Insolvency Act*); *Bester* case paras 45-46.

⁷⁸ *Bester* case para 49.

1.3.2.1 Main objectives

There are two main objectives. The first is to critically analyse the current legal position in South Africa regarding the inclusion of digital assets in estate planning and the administration of deceased estates. The second is to propose law reform that effectively incorporates selected digital assets into South African estate law, drawing on international best practices, particularly the USA's *RUFADAA* and Canada's *ULCC Uniform Act*.

1.3.2.2 Secondary objectives

As noted above, there is no universally accepted definition of what constitutes a digital asset, making it challenging to determine how such assets should be treated within an estate.⁷⁹ Also, ownership and transferability are not regulated by legislation. Therefore, the main objectives set out above can be achieved by attaining the following secondary objectives:

- i. To categorise and define selected digital assets (for example, cryptocurrencies, online financial accounts, social media, e-mail, cloud storage, digital content, websites and domain names) and evaluate their value and relevance in deceased estates.
- ii. To assess whether and to what extent digital assets are recognised as "property" in terms of the *AEA* and other applicable laws.
- iii. To evaluate the legal and contractual restrictions imposed by EULAs and ToS on the transferability of digital assets upon death.
- iv. To compare the South African legal position with jurisdictions like the USA and Canada, identifying strengths and limitations of foreign legislation in balancing user privacy, fiduciary/executor access and testamentary freedom.

⁷⁹ Conner 2011 *EPCPLJ* 304.

- v. To develop practical and legal recommendations for integrating digital assets into South African estate planning and administration frameworks.

1.4 Research methodology

This study will primarily consist of a literature review of both primary and secondary sources relating to digital assets, estate planning and estate administration. It will include a detailed examination of South African legislation, academic commentary, case law and legal principles applicable to the administration of estates, as well as the challenges posed by digital assets.

A functional approach to comparative legal research will be adopted. This methodology is particularly suited for cross-jurisdictional analysis, as it examines how different legal systems respond to common legal challenges, rather than merely comparing the formal wording or structural features of their laws. This approach facilitates the identification of practical solutions and legal mechanisms that can be adapted to the South African context.

In conducting this comparative analysis, the USA was selected due to its development of a comprehensive legislative model that balances post-mortem privacy and user intent via a structured access hierarchy.⁸⁰ Canada was selected for its contrasting approach to fiduciary access, which offers a more streamlined alternative to the American model.⁸¹ A full technical evaluation of these statutes is provided in Chapter 5.

1.5 Framework

Chapter 2 focuses on the definition and classification of digital assets. As digital assets represent a relatively new and evolving form of property, this chapter aims to establish a working definition suitable for estate law purposes. It explores various categories of digital assets, including cryptocurrencies, online financial accounts, social media profiles, email accounts, cloud storage, digital content, and domain

⁸⁰ See para 5.2.

⁸¹ See para 5.3.

names. The chapter considers their financial and sentimental value and evaluates whether they qualify as property within the meaning of the *AEA*. The chapter also explores the complexities involved in identifying, accessing and valuing these assets after death.

Chapter 3 analyses the legal and contractual obstacles to executor access and control over digital assets. Specifically, this chapter evaluates the impact of EULAs, ToS and privacy policies, which often govern the use of digital platforms and digital content. It explores how these contractual terms may limit the ability of executors or heirs to access or transfer digital assets, even when such access is necessary for estate administration. This analysis also considers the tension between the right to post-mortem privacy and the executor's duty to act in the best interests of the estate.

Chapter 4 critically evaluates the South African legislative framework as it pertains to the administration of digital assets. This chapter analyses the provisions of the *AEA*, as well as other applicable legislation, including the *Copyright Act*,⁸² the *Copy Right Amendment Bill*,⁸³ *PAIA* and the *POPIA*. It considers whether these statutes are sufficient to govern the management and distribution of digital assets, identifying areas where the law is ambiguous, outdated, or silent. The chapter also assesses whether South African courts have engaged with this issue and what principles can be inferred from existing case law.

Chapter 5 presents a comparative analysis with international jurisdictions, focusing primarily on the United States. Particular attention will be given to the *RUFADAA*, a model statute that has been widely adopted in the USA. The chapter will examine how *RUFADAA* balances privacy rights with executor responsibilities and provides mechanisms for post-mortem access to digital assets. It will also draw comparisons with other Commonwealth jurisdictions, such as Canada, to evaluate alternative

⁸² 98 of 1978.

⁸³ B 13B of 2017.

legal responses to similar challenges. The aim of this chapter is to extract lessons and best practices that could inform South African law reform.

Chapter 6 concludes the study by summarising the findings of the research and proposing concrete legal reforms and policy recommendations. This chapter suggests how South African estate law can be amended or supplemented to incorporate digital assets in both estate planning and administration. It also identifies areas for further research and advocates for greater public and professional awareness on the importance of including digital assets in estate planning.

CHAPTER 2 DEFINING AND CLASSIFYING DIGITAL ASSETS IN SOUTH AFRICAN ESTATE LAW

2.1 Introduction

Chapter 2 provides the theoretical and definitional foundation of this study. The primary objective of this chapter is to establish a robust working definition of "digital assets" tailored to South African estate law, thereby addressing the current conceptual ambiguity and the "proliferation of terms" in the legal literature. Building on this, the chapter establishes a comprehensive typology. It categorises digital assets into distinct functional groups to determine their specific legal and administrative relevance.⁸⁴ A central aim of this chapter is to evaluate whether digital assets satisfy the traditional *Pandectist* requirements of a "thing" (*saak*) or fall within the broad definition of "property" under section 1 of the *AEA*, which includes any contingent interest in property.⁸⁵ This chapter includes a detailed analysis of the Western Cape High Court's ruling in the *Bester* case, arguing that the court's classification of digital wealth as "intangible movable property" should serve as persuasive authority for the Master to accept these assets as distributable property.⁸⁶ Finally, the chapter explores the disconnect between the profound financial or sentimental value of these assets and the unique practical complexities fiduciaries face during discovery and valuation in an increasingly paperless world.⁸⁷

To determine whether digital assets fall within the ambit of the *AEA*, one must determine whether they constitute "property" or a "thing" in South African law. Silberberg and Schoeman⁸⁸ define a "thing" as a corporeal or incorporeal object outside the human body that is of value to a legal subject and is susceptible to human control. While traditional Roman-Dutch law emphasised corporeality

⁸⁴ See para 2.3.2 below.

⁸⁵ Geyer 2023 *PSLR* 152.

⁸⁶ Geyer 2023 *PSLR* 152; *Bester* case para 29.

⁸⁷ Dobra *Riding the Digital Wave: an executor's Fiduciary Duty towards Digital Assets* 2-3.

⁸⁸ Muller *et al Silberberg and Schoeman* 19.

(tangibility), modern commercial reality recognises incorporeal things (such as rights and shares) as property.⁸⁹

However, to fully grasp the legal status of digital assets within succession law, a clear doctrinal distinction must be drawn between objects of property rights (real rights) and mere personal rights. A real right confers direct legal control over an object and is enforceable *erga omnes* (against the whole world).⁹⁰ In contrast, a personal right (*jus in personam*) originates from an obligation or contract and is only enforceable between the contracting parties due to the privity of contract.⁹¹ In the context of digital wealth, users frequently fall victim to an "illusion of ownership"; when a user ostensibly "purchases" digital content such as an e-book or digital music, they typically do not acquire a real property right in the underlying asset.⁹² Instead, the transaction is governed by an EULA or ToS that grants them a mere personal right, a limited, non-exclusive licence to access and use the content.⁹³ Because these contractual licences are strictly personal and routinely contain non-transferability clauses that terminate the user's rights upon death, no proprietary interest ever vests in the user.⁹⁴ Consequently, these personal rights cannot be transferred to heirs, effectively removing the digital asset from the deceased estate and thwarting the executor's administrative mandate.

This chapter includes a detailed analysis of the Western Cape High Court's ruling in the *Bester* case, arguing that the court's classification of digital wealth as "intangible movable property" should serve as persuasive authority for the Master to accept these assets as distributable property.⁹⁵ Finally, the chapter explores the disconnect between the profound financial or sentimental value of these assets and the unique practical complexities fiduciaries face during discovery and valuation in an

⁸⁹ Erlank 2015 *PER/PELJ* 1778.

⁹⁰ Erlank "Digital Property" (2021) 645.

⁹¹ Erlank "Digital Property" (2021) 645;

⁹² Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 17 and 25.

⁹³ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 17 and 53

⁹⁴ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 25 and 53.

⁹⁵ *Bester* case para 49.

increasingly paperless world.⁹⁶ While the "illusion of ownership" and restrictive contractual licences effectively remove many digital assets from a deceased estate, decentralised crypto assets present a distinctly different proprietary paradigm. Regarding these specific assets, the *Bester* case provided crucial judicial guidance. However, it must be clarified that the court did not decisively settle the legal status of crypto assets for all purposes in South African law; rather, it settled their status specifically for the purposes of section 2 of the *Insolvency Act*. The court accepted that while cryptocurrency lacks corporeality, it possesses the characteristics of being "intangible, fungible, divisible and movable". The court held that excluding such assets from the definition of property would lead to an absurdity, in which valuable digital wealth could not be liquidated for the benefit of creditors.

Therefore, digital assets of this nature satisfy the traditional common law requirements for a "thing" (saak).⁹⁷ They hold substantial financial value, they exist independently of the person, and, crucially, they are susceptible to human control through the exclusive possession of a cryptographic private key.

2.2 The challenge of defining and classifying digital assets

The initial step in managing a digital estate, mirroring the traditional setup, is the identification of all relevant assets.⁹⁸ However, the phrase "digital or online asset" has yet to be comprehensively defined or enjoy a universally established definition in legal literature or legislation.⁹⁹ Scholars continue to grapple with their classification, complicating the assignment of rights under property and contract law, which is a significant obstacle to proper distribution.¹⁰⁰ Crucially, the South

⁹⁶ Dobra *Riding the Digital Wave: an executor's Fiduciary Duty towards Digital Assets* 2-3.

⁹⁷ Erlank "Digital Property" (2024) 129.

⁹⁸ Ratiba 2013 *JJS* 29.

⁹⁹ Ratiba 2013 *JJS* 29; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* iii; Sylvester *An overview of the regulation and management of cryptocurrency in South African inter vivos and testamentary trusts* 2.

¹⁰⁰ Ratiba 2013 *JJS* 29.

African legislature has yet to classify what constitutes a "digital asset", resulting in an underdeveloped concept of a "digital asset".¹⁰¹

2.3 Working definitions and classifications

In its broadest sense, digital assets are generally understood to be information stored in an intangible form on computers or similar technological devices.¹⁰² They constitute electronic records in which an individual has a right or interest.¹⁰³ A general working definition suggests a digital asset is:

any digital file on a person's computer, along with online accounts and memberships.¹⁰⁴

Various classifications have been proposed, often varying based on the specific aspect being emphasised.¹⁰⁵

- a. *Categorisation by form*: Some view digital assets as three major groups, namely textual content, images and multimedia, emphasising the physical, form and appearance aspect.¹⁰⁶
- b. *Categorisation by value/purpose*: Definitions may emphasise commercial viability, exploitation and protection, or may be purpose-oriented, reflecting the specific goal of the definition.¹⁰⁷
- c. *Academic categories*¹⁰⁸: A widely accepted academic model categorises digital assets into four groups, namely

¹⁰¹ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* iii and 3.

¹⁰² Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 9; Dobra *Riding the Digital Wave: an executor's Fiduciary Duty towards Digital Assets* 2-3.

¹⁰³ Sections 10-13 of *RUFADAA*; Sehati 2021 *Cardozo L Rev* 23; Hannah 2023 <https://www.deconcinimcdonald.com/estate-planning-law-report-june-2023how-will-the-revised-uniform-fiduciary-access-to-digital-assets-act-apply-to-your-estate/>.

¹⁰⁴ Conner 2011 *EPCPLJ* 303-304.

¹⁰⁵ Ratiba 2013 *JJS* 29; Sehati 2021 *Cardozo L Rev* 23.

¹⁰⁶ Ratiba 2013 *JJS* 29.

¹⁰⁷ Ratiba 2013 *JJS* 30.

¹⁰⁸ Beyer 2015 *NAEPC Journal of Estate and Tax Planning* 28-29; Cahn 2011 *Probate and Property Magazine* 36-37; Beyer and Cahn 2013 *NAELA* 138.

- *Personal assets:* Information stored on electronic devices or uploaded to online accounts, typically sentimental (e.g., photos, videos).¹⁰⁹
 - *Social media assets:* Accounts used to communicate or interact online (e.g., Facebook, Twitter, Gmail).¹¹⁰
 - *Financial assets:* Wealth stored digitally, encompassing online bank accounts, shopping sites (Amazon, eBay, PayPal), and modern cryptocurrencies.¹¹¹
 - *Business assets:* Accounts and services used for commercial purposes (e.g., websites, domain names, blogs used to generate income).¹¹²
- d. *Legislative distinction:*¹¹³ This approach segments digital information into two distinct categories to address access and control, namely "digital accounts" (online platforms like social networks, e-mail, financial management accounts) and "digital assets" (electronic content or files stored on devices).

2.3.1 Common types of digital assets

Digital assets are remarkably varied, encompassing both financial and non-financial items, as briefly mentioned in Chapter 1. Examples include the following:

- a. *Financial digital assets:* This includes cryptocurrencies (such as Bitcoin, Ethereum and NFTs), online banking accounts, investment portfolios, digital

¹⁰⁹ Beyer and Cahn 2013 *NAELAJ* 138; Pinch 2015 *WLR* 550-551.

¹¹⁰ Pinch 2015 *WLR* 550-551; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 11-12.

¹¹¹ Pinch 2015 *WLR* 550-551; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 12-13.

¹¹² Pinch 2015 *WLR* 550-551; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 13.

¹¹³ HB 1945, 108th Gen Assemb, 2d Sess Tenn 2013; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 14 and 61.

payment platforms (ApplePay, PayPal), loyalty points and monetised social media accounts.¹¹⁴

- b. *Personal digital property*: These assets often hold high sentimental value, such as e-mail accounts, social media profiles, digital photographs, videos, cloud storage files (Google Drive, Dropbox, iCloud), and personal blogs/journals.¹¹⁵
- c. *Intellectual property and digital content*: This covers copyrights, patents, trademarks, domain names, website ownership, e-books, digital music, digital art and software applications.¹¹⁶
- d. *Gaming and virtual assets*: This refers to in-game items, virtual currencies and online gaming accounts that fall into this category.¹¹⁷ Notably, certain cosmetic items in video games can be tradable and possess significant monetary value, demonstrating a compelling financial aspect even within virtual worlds.¹¹⁸

2.3.2 Financial and sentimental value

Digital assets are unique in that they possess both significant financial and sentimental value.¹¹⁹

¹¹⁴ Maureen *et al* 2025 *Aurelia: Jurnal Penelitian dan Pengabdian Masyarakat Indonesia* 942-945; Erlank "Digital Property" (2021) 663; FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>.

¹¹⁵ Maureen *et al* 2025 *Aurelia: Jurnal Penelitian dan Pengabdian Masyarakat Indonesia* 942-945; Erlank "Digital Property" (2021) 663; FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>.

¹¹⁶ AMAL 2024 <https://amal.co.za/digital-wills-and-the-legacy-of-digital-assets/>; Engelsman 2024 <https://engelsman.co.za/beyond-the-physical-addressing-digital-assets-in-your-will/>; Erlank "Digital Property" (2024) 125; Erlank "Digital Property" (2021) 635.

¹¹⁷ Boda, Beachen and Powell 2024 <https://www.lexology.com/library/detail.aspx?g=c10d2e18-0e9e-4d2a-98c8-169da39d8bef>.

¹¹⁸ Boda, Beachen and Powell 2024 <https://www.lexology.com/library/detail.aspx?g=c10d2e18-0e9e-4d2a-98c8-169da39d8bef>; FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; Erlank "Digital Property" (2024) 125.

¹¹⁹ Maureen *et al* 2025 *Aurelia: Jurnal Penelitian dan Pengabdian Masyarakat Indonesia* 942-945; Engelsman 2024 <https://engelsman.co.za/beyond-the-physical-addressing-digital-assets-in->

- a. *Financial (monetary) value*: Assets such as cryptocurrency, websites, domain names and computer code can represent substantial wealth, potentially generating income that must be accounted for by the estate.¹²⁰ The failure to secure access to valuable crypto assets, for instance, can lead to the asset being rendered permanently inaccessible, resulting in economic loss for the heirs, even if estate duty was levied on the declared value.¹²¹
- b. *Sentimental value*: Assets lacking a direct monetary return – such as digital photos, e-mails and social media accounts – hold profound emotional significance, serving as a digital legacy and preserving memories.¹²² Loss of access to these assets can cause emotional distress for beneficiaries.¹²³

2.4 The status of digital assets as "property" in South African law

A fundamental challenge confronting South African estate law is the classification of digital assets as "property", a necessary precursor for assigning rights and ensuring inheritability.¹²⁴

2.4.1 Definitional ambiguity in existing legislation

Current South African estate legislation, including the *AEA*, does not explicitly define digital assets or address their administration, leading to ambiguity and interpretive variance.¹²⁵ The *AEA*, however, defines "property" broadly, including "any contingent

your-will/; Dobra *Riding the Digital Wave: an executor's Fiduciary Duty towards Digital Assets* 3; Erlank "Digital Property" (2021) 654.

¹²⁰ Maureen *et al* 2025 *Aurelia: Jurnal Penelitian dan Pengabdian Masyarakat Indonesia* 942-945; De Beer 2025 <https://www.estateadmins.co.za/managing-digital-assets-in-your-south-african-estate-plan>.

¹²¹ Old Mutual Wealth 2025 <https://www.dailymaverick.co.za/article/2025-11-20-safeguarding-digital-wealth-crypto-as-a-component-of-uhnw-estate-planning/>.

¹²² Maureen *et al* 2025 *Aurelia: Jurnal Penelitian dan Pengabdian Masyarakat Indonesia* 942-945; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>.

¹²³ Conner 2011 *EPCPLJ* 307-308; Sehati 2021 *Cardozo L Rev* 761.

¹²⁴ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 44; Pinch 2015 *WLR* 545-546 and 560.

¹²⁵ FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>.

interest in property".¹²⁶ Scholars (such as Ratiba¹²⁷) suggest that, by conventional construction, online assets could arguably be included within this comprehensive definition, leaving the matter of proper construction open to the courts and the eventuality of judicial activism.

2.4.2 Judicial and regulatory classification of crypto assets

Although general digital assets lack specific legislative classification, South African judicial and regulatory bodies have provided significant clarity regarding crypto assets.

- *Regulatory stance:* SARS classifies crypto assets as intangible assets subject to taxation, requiring that gains and losses be declared.¹²⁸ For estate purposes, SARS regards them as movable assets that must be included in the estate's net value for estate duty based on their market value at the date of death.¹²⁹ In addition, the Financial Sector Conduct Authority (FSCA) classified crypto assets as a "financial product" in terms of section 1 of the *Financial Advisory and Intermediary Services Act (FAIS Act)*,¹³⁰ signifying a move toward regulation akin to traditional financial instruments.
- *Judicial precedent (insolvency):* A critical inquiry is whether digital assets qualify as "property" under South African law. As previously mentioned,¹³¹ in the *Bester* case, the Western Cape High Court was tasked with determining whether Bitcoin fell within the definition of "property" in section 2 of the

¹²⁶ Section 1 of the *AEA*; Ratiba 2013 *JJS* 41-42; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 46.

¹²⁷ Ratiba 2013 *JJS* 41-42; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 46.

¹²⁸ *Bester* case paras 45-46; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* iii; Sylvester *An overview of the regulation and management of cryptocurrency in South African inter vivos and testamentary trusts* 36-37.

¹²⁹ SARS 2025 <https://www.sars.gov.za/individuals/crypto-assets-tax/>.

¹³⁰ 37 of 2002 (hereinafter *FAIS Act*); CMS 2025 <https://cms.law/en/int/expert-guides/cms-expert-guide-to-crypto-regulation/south-africa>; the *Bester* case para 14; Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 38.

¹³¹ See para 1.1.2 of this study.

Insolvency Act.¹³² The court concluded that cryptocurrency possesses the characteristics of being "a thing, incorporeal, intangible, fungible, divisible and movable".¹³³

The court relied on the "always speaking" doctrine of interpretation, holding that courts must interpret legislation in light of technological developments to determine if novel situations fit within the statutory language.¹³⁴ Consequently, the court reasoned that excluding crypto assets from the definition of property would lead to an "absurd result" where valuable digital wealth remains shielded from creditors.¹³⁵ While this judgment is a watershed moment, it must be critically analysed in the context of solvent deceased estates. The *Bester* case dealt specifically with the *Insolvency Act*, where the definition of property is exceptionally broad to protect creditors.¹³⁶

A critical anomaly arises where creditors of an insolvent estate currently possess a clearer legal claim to digital assets than the heirs of a solvent estate. The *AEA* does not contain a definition of property identical to the *Insolvency Act*. Consequently, reliance on the *Bester* case alone is insufficient. It is submitted that without legislative intervention aligning the *AEA* definition with the *Bester* precedent, executors of solvent deceased estates remain vulnerable to challenges from service providers who may argue that digital assets do not constitute "property" for the purposes of a Liquidation and Distribution (L&D) account.¹³⁷

As previously noted, the *AEA* defines property broadly to include "any contingent interest in property".¹³⁸ However, the strict requirement of corporeality in the

¹³² *Bester* case paras 45-46; Mahomed 2023 <https://www.fluxmans.com/article/cryptocurrency-property-defined-insolvency-act-nafeesa-noor-mahomed>.

¹³³ *Bester* case paras 45-46; Sylvester *An overview of the regulation and management of cryptocurrency in South African inter vivos and testamentary trusts* iii.

¹³⁴ *Bester* case para 49.

¹³⁵ Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 48-49.

¹³⁶ Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 48-49.

¹³⁷ Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 48-49.

¹³⁸ Section 1 of the *AEA*.

traditional law of things poses a theoretical hurdle to the recognition of digital assets.¹³⁹ It is submitted that this definition must be interpreted in harmony with the fiscal statutes governing deceased estates. Specifically, the *Estate Duty Act*¹⁴⁰ levies estate duty on the "worldwide property" of a natural person, expressly including incorporeal property.¹⁴¹ SARS has confirmed that crypto assets constitute "financial instruments" subject to income tax and capital gains tax,¹⁴² and by extension, are included in the dutiable value of an estate.¹⁴³ Academic commentary strongly supports this harmonisation; as Erlank argues, digital property forms part of a person's total patrimony and is inherently of interest to tax authorities, thus necessitating its inclusion in the estate administration process.¹⁴⁴

It would result in a legal absurdity if the State, through SARS, classified digital assets as "property" for the purpose of collecting Estate Duty, while the Master of the High Court simultaneously refused to recognise them as "property" for the purpose of distribution to heirs in the L&D account.¹⁴⁵ Roman highlights this precise legal anomaly, noting that failing to recognise cryptocurrency as property in solvent deceased estates, while doing so in insolvent estates, creates an untenable situation where creditors are afforded greater legal protection than heirs.¹⁴⁶ Therefore, the rationale in *Bester*, which explicitly warned against the "absurd result" of excluding valuable digital wealth from statutory definitions of property,¹⁴⁷ should be applied to solvent estates to ensure consistency between the collection of taxes and the distribution of the residue.¹⁴⁸

¹³⁹ Muller *et al Silberberg and Schoeman* 19.

¹⁴⁰ 45 of 1955 (hereafter the *Estate Duty Act*).

¹⁴¹ Section 3(2) of the *Estate Duty Act*. See also the *Bester* case para 41.

¹⁴² *Taxation Laws Amendment Act* 23 of 2019; Vumazonke and Parsons 2023 *SAJEMS* 2.

¹⁴³ SARS 2025 <https://www.sars.gov.za/individuals/crypto-assets-tax/>.

¹⁴⁴ Erlank "Digital Property" (2021) 66-661.

¹⁴⁵ See the *Bester* case para 49 regarding the "absurd result" of excluding crypto assets from the definition of property.

¹⁴⁶ Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 48-49.

¹⁴⁷ *Bester* case para 46; Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 48-49.

¹⁴⁸ *Bester* case para 49.

Furthermore, as Erlank¹⁴⁹ argues, the traditional view that ownership requires a physical object is increasingly outdated in the digital age and is arguably a fallacy in South African law. Erlank¹⁵⁰ suggests that digital objects should be recognised as "virtual property" because they mimic real-world objects in function and rivalrousness: if one person owns and controls a specific Bitcoin or digital file, others are excluded from it.

However, applying this proprietary classification uniformly to all digital assets is doctrinally flawed. A critical distinction must be drawn between digital objects capable of independent control and those subject to the restrictive contractual frameworks of service providers. While decentralised crypto assets function similarly to corporeal things and can arguably be classified as objects of ownership (holding real rights), digital media such as e-books, licensed software, or digital music are fundamentally different.¹⁵¹ Users do not acquire ownership of these assets; rather, they acquire a limited, non-exclusive, and non-transferable personal right (a licence) governed by an EULA or ToS.¹⁵² Because these assets merely constitute personal contractual rights against the service provider rather than proprietary assets, they generally terminate upon death, meaning they do not form part of the deceased's estate for transfer purposes.¹⁵³

However, the routine enforcement of these restrictive contractual provisions *mortis causa* creates a profound conflict with the constitutionally protected principle of freedom of testation.¹⁵⁴ It is submitted that succession law must prevail over these standard-form contractual restrictions, and that such clauses should potentially be challenged as *contra bonos mores* (against public policy) within the South African

¹⁴⁹ Erlank "Digital Property" (2021) 637-638.

¹⁵⁰ Erlank "Digital Property" (2021) 635; Erlank "Digital Property" (2024) 128-129.

¹⁵¹ Erlank "Digital Property" (2021) 646; Booyens *The impact of privacy policies and terms of service* 52-53.

¹⁵² Erlank "Digital Property" (2021) 646; Booyens *The impact of privacy policies and terms of service* 53.

¹⁵³ Erlank "Digital Property" (2021) 646; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 46 and 53; Conner 2011 *EPCPLJ* 318; Edwards and Harbinja 2013 *Cardozo Arts & Ent LJ* 3; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-trans>.

¹⁵⁴ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 29; see para 3.2.1.

legal context.¹⁵⁵ This public policy challenge is anchored on two primary grounds: misleading terminology and the arbitrary destruction of economic value.¹⁵⁶ Firstly, service providers frequently employ misleading terminology by presenting consumers with a "buy" or "purchase" option that is distinct from a "rent" option, thereby creating a reasonable expectation of ownership.¹⁵⁷ A contractual clause hidden within a voluminous ToS that covertly converts this purported sale into a non-transferable, lifetime licence acts to the severe detriment of the consumer.¹⁵⁸ Secondly, unlike a physical book or CD which effortlessly passes to an heir, the strict enforcement of these ToS clauses results in the arbitrary destruction of economic value upon the user's death.¹⁵⁹ By unilaterally extinguishing the asset, the service provider is not merely enforcing a licence; they are actively destroying financial value that would otherwise rightfully reside in the estate's residue.¹⁶⁰

Consequently, permitting a private contract of adhesion to effectively disinherit a beneficiary unilaterally overrides the testator's constitutionally protected right to dispose of their property.¹⁶¹ It is strongly argued that such an outcome constitutes an arbitrary deprivation of property under Section 25 of the Constitution.¹⁶² Therefore, in the context of deceased estates, succession law and the imperative to uphold a testator's final wishes must supersede the restrictive terms of service imposed by digital platforms.¹⁶³

¹⁵⁵ Du Toit 2022 *JCLS* 385-386; see para 3.2.1.

¹⁵⁶ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 29 and 53; Barron and Heaton *Willamette Management Associates Insights* 17; Booyens *Freedom of Testation and Digital Assets* 11; Pinch 2015 *WLR* 561; see para 3.2.1.

¹⁵⁷ Woodman *CJLT* 205; Ratiba 2013 *JJS* 35; P&C Attorneys/Advocates 2025 <https://focusedlaw.com/8-common-mistakes-to-avoid-in-digital-estate-planning/>; See para 3.2.1.

¹⁵⁸ Woodman *CJLT* 205; Ratiba 2013 *JJS* 35; P&C Attorneys/Advocates 2025 <https://focusedlaw.com/8-common-mistakes-to-avoid-in-digital-estate-planning/>; See para 3.2.1.

¹⁵⁹ Woodman *CJLT* 205; Ratiba 2013 *JJS* 35; P&C Attorneys/Advocates 2025 <https://focusedlaw.com/8-common-mistakes-to-avoid-in-digital-estate-planning/>; See para 3.2.1.

¹⁶⁰ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 29; see para 3.2.1.

¹⁶¹ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 29.

¹⁶² Du Toit 2022 *JCLS* 385-386.

¹⁶³ Du Toit 2022 *JCLS* 385-386.

To resolve this interpretive gap and ensure executors possess the necessary authority to administer both proprietary digital wealth and contractual digital interests, it is submitted that the definition of "property" in section 1 of the *AEA* must be statutorily amended. Drawing on the legislative frameworks established by the American *RUFADAA*,¹⁶⁴ and the Canadian *UADFA*,¹⁶⁵ the following amendment is proposed for insertion into the *AEA*:

'Property' includes any digital asset, which means an electronic record in which an individual has a right or interest, whether of a proprietary or contractual nature, that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means.

By adopting this explicit statutory wording, the legislature would unequivocally empower the executor to take control of the digital estate, bridging the chasm between traditional succession law and modern digital realities.

2.5 Complexities in identification, access and valuation post-mortem

The intangible nature of digital assets introduces severe practical and legal hurdles for executors and fiduciaries, revolving around identification, access and valuation.¹⁶⁶ These complexities do not merely create administrative inconvenience; they directly frustrate the executor's ability to perform specific, peremptory statutory duties prescribed by the *AEA*. Firstly, the lack of a physical paper trail severely complicates the executor's duty to identify and inventory "all property known" to belong to the deceased, as mandated by sections 9 and 27 of the *AEA*.¹⁶⁷ Secondly, the practical barrier of accessing password-protected or encrypted digital accounts thwarts compliance with section 26 of the *AEA*, which obliges the executor to take immediate custody or control of all estate property.¹⁶⁸ Finally, the extreme volatility of certain digital assets, coupled with restricted access to transaction histories, compromises the executor's duty under section 35 of the *AEA* to accurately

¹⁶⁴ Section 2(10) of *RUFADAA*.

¹⁶⁵ Section 1 of *UADFA*.

¹⁶⁶ Ratiba 2013 *JJS* 39.

¹⁶⁷ Sections 9 and 27 of the *AEA*.

¹⁶⁸ Section 26 of the *AEA*.

value the assets for the purpose of submitting a precise Liquidation and Distribution (L&D) account.¹⁶⁹

2.5.1 Identification and discovery

From an administration perspective, the ambiguity regarding the definition of "property" creates a significant liability trap for executors. In South African jurisprudence, the courts strictly enforce the executor's fiduciary duty to independently verify and secure all estate assets before drafting the L&D account. Case law demonstrates that fiduciaries who fail to properly identify assets or who submit incorrect L&D accounts face severe judicial sanctions, including immediate removal from office under section 54 of the *AEA* and punitive *de bonis propriis* costs orders.¹⁷⁰ For example, in *Ngwenya and Others v Masango*,¹⁷¹ an executrix who neglected her statutory duties regarding the L&D account was ordered to pay the costs of the application personally. Similarly, in *Beukman v Pieterse*,¹⁷² systemic administrative delinquency in lodging the account led to the immediate removal of the executors and punitive cost orders. Furthermore, in *Thomson & De Kock Construction Company (Pty) Ltd v Terblanche*,¹⁷³ the court set aside a confirmed L&D account because it reflected uncollected funds, highlighting the legal danger of accounting for assets without holding *de facto* control over them. Should an executor fail to identify or secure a digital asset (such as a crypto-wallet) due to definitional ambiguity or a lack of technical access, they risk replicating these exact administrative failures and incurring personal financial ruin.

While SARS has clarified that it regards crypto assets as "financial instruments" for income tax and Capital Gains Tax (CGT) purposes,¹⁷⁴ the *AEA* does not explicitly list digital assets within its definitions.¹⁷⁵

¹⁶⁹ Section 35 of the *AEA*.

¹⁷⁰ Section 54(1)(a)(v) of the *AEA*.

¹⁷¹ [2022] ZAGPJHC 254 (26 April 2022).

¹⁷² [2024] ZAWCHC 391 (26 November 2024).

¹⁷³ [2020] ZAWCHC 55 (19 May 2020).

¹⁷⁴ SARS 2025 <https://www.sars.gov.za/individuals/crypto-assets-tax/>.

¹⁷⁵ See Meyerowitz and Cilliers *Administration of Estates and Their Taxation* para 5.32.

This creates a dangerous disconnect. If an executor fails to identify and include a non-custodial crypto-wallet in the inventory because they viewed it as "virtual" rather than "property" in the traditional tangible sense, they risk non-compliance with the *Estate Duty Act*. As mentioned, estate duty is levied on the "worldwide property" of a natural person.¹⁷⁶ Consequently, an executor who overlooks these assets due to definitional uncertainty may be held personally liable for the underpayment of estate duty and the submission of an incorrect L&D account to the Master.¹⁷⁷ The administration process is therefore compromised not only by the technical inaccessibility of the asset, but also by the legal uncertainty surrounding its classification as dutiable property.

The executor's initial duty to identify and inventory all assets is challenging because digital accounts leave little to no paper trail.¹⁷⁸ With the average user maintaining close to ninety digital accounts, executors face a high risk of overlooking financially valuable or sentimental property.¹⁷⁹ Listing explicit access credentials in a public will or estate documents that become public record is hazardous, risking identity theft and the security of the entire estate.¹⁸⁰

To mitigate this severe security risk, estate planners must implement practical mechanisms that separate the legal authority to administer the estate from the technical credentials required to access it. Firstly, planners should utilise a "dual-document strategy".¹⁸¹ Under this approach, the testator executes a formal, physical will that legally distributes the estate and grants fiduciary authority, but creates a separate, highly confidential "sealed memorandum" or digital inventory containing the actual usernames, public wallet addresses, and the locations of hardware wallets or seed phrase.¹⁸² This memorandum is explicitly referenced in the will to ensure the

¹⁷⁶ SD Law 2023 <https://www.sdlaw.co.za/articles/cryptocurrency-and-your-will/>.

¹⁷⁷ Section 10(2) of the *Estate Duty Act*; SARS *Administration of Deceased Estates*; SD Law 2023 <https://www.sdlaw.co.za/articles/cryptocurrency-and-your-will/>.

¹⁷⁸ FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; Mulder and Arends 2012 *Mich Prob & Est Plan J* 12.

¹⁷⁹ Sehati 2021 *Cardozo L Rev* 750.

¹⁸⁰ FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; Conner 2011 *EPCPLJ* 420.

¹⁸¹ Conner 2011 *EPCPLJ* 420.

¹⁸² Conner 2011 *EPCPLJ* 420; see Chapter 6 for more in-depth discussion.

executor is aware of its existence, but it is not attached to the testamentary writing, thereby keeping the sensitive data secure and out of the public record.¹⁸³ Secondly, testators can employ technological solutions such as encrypted password managers (for example, LastPass, 1Password, or Bitwarden) that feature built-in "emergency access" or "legacy contact" protocols.¹⁸⁴ These platforms act as a digital "dead man's switch"; they allow a designated trusted contact to request access to the digital vault, which is automatically granted if the account owner does not deny the request within a pre-defined waiting period (such as seven days).¹⁸⁵ Finally, testators can utilise secure digital vaults provided by financial institutions, such as FNB's NAV Vault, which allow for the encrypted storage of documents and credentials that can be securely accessed by the executor upon the presentation of the necessary death and appointment certificates.¹⁸⁶ By employing these mechanisms, the testator ensures that the existence of the assets is known for the L&D account, while the means of access remain protected against public exposure.

2.5.2 Access and control

Even upon discovery, gaining control over accounts is difficult due to contractual restrictions and security measures:

- a. *Passwords and security:* The use of passwords and modern security features, particularly two-factor authentication systems relying on the deceased's mobile device, often locks executors out of accounts.¹⁸⁷ Crucially, a digital executor clause or explicit testamentary consent in a will does not provide sufficient lawful authorisation to eliminate this risk. Because service providers' Terms of Service (ToS) strictly prohibit password sharing and third-

¹⁸³ Conner 2011 *EPCPL* 320; see Chapter 6.

¹⁸⁴ Walk-in wills unknown <https://walkinwills.com/blog/digital-assets-in-estate-planning-the-most-overlooked-crucial-step/>.

¹⁸⁵ Holbron 2026 <https://holbornassets.co.za/blog/south-africas-proposed-crypto-rules-and-the-risk-of-digital-expropriation/>.

¹⁸⁶ FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; FNB 2025 <https://novuspressbulletin.co.za/blog/don-t-leave-your-digital-assets-out-of-your-estate-plan>.

¹⁸⁷ Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>; Dobra *Riding the Digital Wave: an executor's Fiduciary Duty towards Digital Assets* 8.

party access, logging in with the deceased's credentials constitutes a breach of contract. Consequently, even with the deceased's explicit consent, the access remains technically 'unauthorised' under anti-hacking legislation, leaving the executor legally exposed.¹⁸⁸ The *Cybercrimes Act* specifically criminalises gaining unauthorised access to computer systems or data.¹⁸⁹

- b. *Terms of Service Agreements (ToSA)*: Service provider policies, often framed as contracts of adhesion, frequently conflict with testamentary intent.¹⁹⁰ These agreements commonly prohibit the transfer of accounts to third parties, overriding the legal rights of heirs to inherit assets.¹⁹¹ This highlights the inherent conflict between traditional inheritance law, which favours the testator's intentions (freedom of testation); and contract law, which binds the user to the ToS.¹⁹² It is submitted that succession law must unequivocally take precedence in this conflict. Freedom of testation is a constitutionally protected right, anchored in section 25 of the Constitution, which guards against the arbitrary deprivation of property. Permitting a private, standard-form contract of adhesion to unilaterally extinguish proprietary rights upon death effectively disinherits beneficiaries and destroys economic value. Such an outcome is arguably *contra bonos mores* (against public policy). Therefore, where digital assets hold tangible economic or sentimental value, the testator's constitutionally endorsed right to dictate the devolution of their

¹⁸⁸ Barron and Heaton *Willamette Management Associates Insights* 13; Sheridan 2020 *Ohio St Tech LJ* 367-368.

¹⁸⁹ Shepherd 2025 <https://schoemanlaw.co.za/password-based-hacking-the-legal-implication-for-businesses/#:~:text=The%20Cybercrimes%20Act%20is%20the,stolen%20or%20unlawfully%20obtained%20passwords.&text=Although%20partially%20superseded%20by%20the,broadening%20the%20scope%20of%20liability.&text=For%20businesses%2C%20POPIA%20creates%20direct,personal%20information%20under%20the%20Act>.

¹⁹⁰ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* iii; P&C Attorneys/Advocates 2025 <https://focusedlaw.com/8-common-mistakes-to-avoid-in-digital-estate-planning/>; Maureen *et al* 2025 *Aurelia: Jurnal Penelitian dan Pengabdian Masyarakat Indonesia* 943.

¹⁹¹ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* iii; Maureen *et al* 2025 *Aurelia: Jurnal Penelitian dan Pengabdian Masyarakat Indonesia* 943.

¹⁹² Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>; Schulenburg 2023 <https://pagelschulenburg.co.za/a-guide-to-digital-estate-planning/>; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 46; Conner 2011 *EPCPLJ* 318.

estate must supersede the restrictive, boilerplate provisions imposed by digital service providers.

- c. *Privacy concerns:* Digital intermediaries often invoke privacy policies and laws to deny fiduciaries access to accounts, particularly those containing electronic communications like e-mails and social media content.¹⁹³ This raises the complex issue of whether privacy rights survive death (post-mortem privacy).¹⁹⁴ Under traditional South African common law, the right to privacy is classified as a personality right that extinguishes upon death in accordance with the maxim *actio personalis moritur cum persona*.¹⁹⁵ However, the emergence of the digital era necessitates a reconsideration of this stance, especially given that the Supreme Court of Appeal in *Ex Parte BoE Trust Ltd*,¹⁹⁶ recognised that the foundational constitutional value of human dignity—which is inextricably linked to privacy—extends beyond death.¹⁹⁷ In the statutory realm, South African privacy authorities present a stark contradiction. *POPIA* explicitly restricts its protection of "personal information" to an identifiable, living natural person, thereby creating a statutory lacuna that excludes deceased individuals from its protective ambit.¹⁹⁸ Conversely, *PAIA* expressly recognises post-mortem privacy. Sections 34 and 63 of *PAIA* mandate the refusal of access to records if disclosure would result in the "unreasonable disclosure of personal information about a third party, including a deceased individual".¹⁹⁹ This legislative inconsistency exacerbates the "digital limbo" executors face, as service providers frequently invoke these overlapping privacy concerns to deny access to a deceased user's digital assets.

¹⁹³ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* iii.

¹⁹⁴ Booyens *Freedom of Testation and Digital Assets* 15-16.

¹⁹⁵ Rajpal 2016 *Without Prejudice* 42.

¹⁹⁶ 2013 3 SA 236 (SCA).

¹⁹⁷ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 48.

¹⁹⁸ Section 1 of POPIA; Rajpal 2016 *Without Prejudice* 51.

¹⁹⁹ Section 34(1) and 63(1) of *PAPIA*; Booyens *The impact of privacy policies and terms of service* 49.

2.5.3 Valuation challenges

In South African estate law, the valuation of assets for the L&D account is governed by well-established procedures within the *AEA*.²⁰⁰ The process is supervised by the Master of the High Court, while the executor is responsible for the detailed accounting of all administrative steps.²⁰¹ Traditionally, assets are valued based on their fair market value as of the date of the deceased's death.²⁰² This "date-of-death value" is the standard used for compliance with the *Estate Duty Act*, which levies duty on the "worldwide property" of a natural person.²⁰³ Applying this fixed statutory principle to digital assets such as cryptocurrency, which are notoriously volatile and can fluctuate dramatically within hours, presents a significant practical challenge. To comply with the strict date-of-death standard for Estate Duty purposes, it is submitted that executors must rely on historical market data from reputable cryptocurrency exchanges to determine the fair market value at the exact date of the holder's death.²⁰⁴ To avert disputes with SARS or beneficiaries, executors must meticulously document their chosen valuation methodology, capturing "proof of funds" snapshots or exchange statements to substantiate the declared value to the Master of the High Court.²⁰⁵ However, a crucial distinction must be drawn between this date-of-death valuation and the actual realised value. If the executor liquidates the crypto asset during the administration process, any extreme fluctuation in value between the date of death and the date of sale must be reflected as actual proceeds in the Liquidation and Distribution account for the accurate calculation of Capital Gains Tax (CGT).²⁰⁶ As Erlank,²⁰⁷ correctly notes, due to the massively fluctuating

²⁰⁰ Section 35 of the *AEA*. See in general Meyerowitz and Cilliers *Administration of Estates and Their Taxation* paras 12.9-12.10; 15.1-15.53.

²⁰¹ Harms *et al* "Administration of Deceased Estates" paras 440 and 442.

²⁰² Section 5 of the *Estate Duty Act* and s 9HA(1) of the *Income Tax Act* 58 of 1962. See also Meyerowitz and Cilliers *Administration of Estates and Their Taxation* paras 30.1-30.10.

²⁰³ Section 3 of the *Estate Duty Act*.

²⁰⁴ SD Law 2023 <https://www.sdlaw.co.za/articles/cryptocurrency-and-your-will/>.

²⁰⁵ Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 38; SD Law 2023 <https://www.sdlaw.co.za/articles/cryptocurrency-and-your-will/>.

²⁰⁶ MPA 2025 <https://meyerattorneys.co.za/2025/09/02/crypto-estate-planning/>; Brooks 2025 <https://coinledger.io/guides/crypto-tax-south-africa>.

²⁰⁷ Erlank "Digital Property" (2021) 665.

nature of these digital assets, their true financial value is often only definitively known once they have been realised and converted into traditional fiat currency.

Accurately valuing digital assets is critical for equitable distribution and compliance with SARS estate duty and capital gains tax requirements.²⁰⁸ The extreme volatility of assets such as cryptocurrencies and NFTs creates complex valuation issues, requiring the market value to be assessed precisely at the date of death.²⁰⁹ To ensure that these assets are accurately valued for estate duty purposes, executors should implement several practical steps. Firstly, an executor may obtain a professional valuation from a qualified appraiser or tax expert experienced in cryptocurrency. Secondly, they can utilise market data from reputable cryptocurrency exchanges to establish the exact trading price of the specific assets at the time of the deceased's death. Thirdly, executors may consult professional crypto services and specialised platforms that offer historical price data and valuation tools.²¹⁰ Regardless of the approach taken, it is a peremptory practical step that executors meticulously document their chosen valuation methodology and retain all supporting documentation, such as exchange statements and comprehensive transaction histories, to substantiate the determined value to the Master of the High Court and SARS.²¹¹

2.6 Conclusion

In summation, the proliferation of digital assets in the South African estate presents a fundamental challenge to the established legal framework. While judicial and regulatory developments offer a nascent structure for classifying crypto assets as property, the statutory lacuna regarding the definition, scope and fiduciary/executor access to the vast array of digital assets – especially those purely sentimental or governed by restrictive ToS – demands immediate legislative attention to ensure that the digital legacy of South African citizens is managed efficiently and in

²⁰⁸ FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130>

²⁰⁹ Maureen *et al* 2025 *Aurelia: Jurnal Penelitian dan Pengabdian Masyarakat Indonesia* 943.

²¹⁰ SD Law 2023 <https://www.sdlaw.co.za/articles/cryptocurrency-and-your-will/>.

²¹¹ SD Law 2023 <https://www.sdlaw.co.za/articles/cryptocurrency-and-your-will/>; FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>.

accordance with their testamentary wishes.²¹² To ensure legal consistency, it is submitted that digital assets must be unequivocally recognised as intangible property under South African succession law, extending the Bester precedent to solvent estates.²¹³ Consequently, the most urgent legislative reform required is the enactment of a statutory access framework that expressly empowers executors to bypass restrictive contractual terms and privacy barriers to lawfully take control of the digital estate.²¹⁴

²¹² FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; FNB 2025 <https://novuspressbulletin.co.za/blog/don-t-leave-your-digital-assets-out-of-your-estate-plan>; Conner 2011 *EPCPLJ* 307-308; Sehati 2021 *Cardozo L Rev* 750 and 761; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>; AMAL 2024 <https://amal.co.za/digital-wills-and-the-legacy-of-digital-assets/>; s47 of *AEA*; Erlank "Digital Property" (2021) 665; Schulenburg 2023 <https://pagelschulenburg.co.za/a-guide-to-digital-estate-planning/>; Will and Testament 2024 <https://www.willandtestament.co.za/what-happens-to-digital-assets-in-your-estate/>

²¹³ *Bester* case para 46; Erlank "Digital Property" (2021) 638.

²¹⁴ Ratiba 2013 *JJS* 43; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 66.

CHAPTER 3 CONTRACTUAL AND LEGAL IMPEDIMENTS TO FIDUCIARY ACCESS AND CONTROL OVER DIGITAL ASSETS

3.1 Introduction

The administration of a deceased estate necessitates the comprehensive gathering and management of all assets by the executor. The emergence of digital assets, however, interposes profound contractual and legal complexities, fundamentally challenging the traditional framework of succession law..²¹⁵ Specifically, this paradigm shift disrupts three core aspects of traditional administration: firstly, the classification of asset ownership, as many digital acquisitions merely confer non-transferable personal licences rather than real property rights; secondly, the executor's statutory mandate to gain access to and take custody of accounts, which is frequently thwarted by encryption and strict privacy laws; and thirdly, the enforceability of testamentary instructions, as private contracts of adhesion routinely override the testator's freedom of testation..²¹⁶ This chapter critically evaluates the binding contractual restraints, such as ToS and EULAs, and the resultant conflict with the executor's fiduciary duties, culminating in an analysis of the tension surrounding post-mortem privacy.

3.2 Contractual obstacles: the impact of EULAs and terms of service

The transferability and accessibility of digital assets are predominantly governed, not by testamentary law, but by private contractual agreements established between the user and the custodian (the service provider)..²¹⁷ These agreements function as the primary impediment to efficient estate administration..²¹⁸ It is

²¹⁵ FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>.

²¹⁶ Section 26 of the *AEA*; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 29 and 44-47; Erlank "Digital Property" (2021) 646).

²¹⁷ P&C Attorneys/Advocates 2025 <https://focusedlaw.com/8-common-mistakes-to-avoid-in-digital-estate-planning/>; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* iii and 8; Pinch 2015 *WLR* 550.

²¹⁸ P&C Attorneys/Advocates 2025 <https://focusedlaw.com/8-common-mistakes-to-avoid-in-digital-estate-planning/>; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 7.

submitted that it is doctrinally inappropriate for private contracts to unilaterally dictate the post-mortem transferability of digital assets, and that succession law must unequivocally take precedence over such contractual arrangements. ToS and EULAs are inherently contracts of adhesion—standard-form, non-negotiable agreements presented to the user on a "take-it-or-leave-it" basis.²¹⁹ Allowing these click-wrap agreements to supersede the South African law of succession effectively permits global service providers to bypass domestic legal protections and unilaterally extinguish proprietary rights upon a user's death. Because the freedom of testation is anchored in the constitutional protection against the arbitrary deprivation of property, enforcing restrictive contractual clauses that destroy the economic or sentimental value of an estate operates *contra bonos mores* (against public policy).²²⁰ Therefore, the statutory framework governing deceased estates, the fiduciary duties of the executor, and the testator's final wishes must prevail over the restrictive confines of private contractual privity.

3.2.1 *The "illusion of ownership": licensing models v proprietary reality*

A critical analysis of digital assets requires distinguishing between two distinct categories often conflated in estate administration: pure service access and quasi-proprietary assets. This issue is discussed below, and an explanation is given of the conflict with freedom of testation, and of public policy as opposed to unfair contract terms.

- *Pure service access v quasi-proprietary assets:* A sharp distinction must be drawn between purely licensed assets (such as a Spotify subscription, which is a service) and quasi-proprietary assets (such as permanent cloud storage of family photos or purchased e-libraries). By extinguishing the latter upon death, the service provider is not merely enforcing a licence but actively destroying value that would otherwise reside in the estate's residue. Furthermore, the strict enforcement of these clauses results in the arbitrary

²¹⁹ Section 26 of the *AEA*; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 29, 44-47; Erlank "Digital Property" (2021) 646.

²²⁰ Section 25 of the Constitution; Woodman 2017 *CJLT* 203-206; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 53.

destruction of economic value upon death, constituting a deprivation of property that may be challenged as arbitrary under section 25 of the Constitution.²²¹ In addition, where a service provider utilises misleading terminology, such as presenting a "buy" option that creates a reasonable expectation of ownership, a ToS clause that covertly converts this sale into a non-transferable life-use licence acts to the severe detriment of the consumer.²²² Because freedom of testation is constitutionally anchored, enforcing standard-form contracts that effectively disinherit beneficiaries and destroy estate value is arguably *contra bonos mores* (against public policy) and should be rendered unenforceable.²²³

- *The conflict with freedom of testation:* A fundamental tension exists between the user's perception of ownership and the legal reality of digital content. When a user "buys" digital music or e-books, they are often not acquiring ownership of the asset but rather a limited, non-transferable licence to use it.²²⁴ For example, Apple's ToS for iTunes explicitly state that the licence is non-transferable and that rights to the content terminate upon the death of the account holder.²²⁵ This contractual limitation means that a bequest of an iTunes library in a will is legally ineffective because the testator does not hold a proprietary right that can be transferred to an heir.²²⁶ This creates a conflict with the principle of freedom of testation, where the private contract (ToS) effectively disinherits the beneficiary by extinguishing the asset upon death.²²⁷ Consequently, under the current legal paradigm, digital assets governed by such licences do not form part of the estate for transfer

²²¹ Du Toit 2022 *JCLS* 385-386.

²²² Booyens *The impact of privacy policies and terms of services on a user's freedom of testation* 29 and 53; Pinch 2015 *WLR* 561.

²²³ Woodman 2017 *CJLT* 205-206; Ratiba 2013 *JJS* 35.

²²⁴ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 29 and 53; Barron and Heaton *Willamette Management Associates Insights* 17; Booyens *Freedom of Testation and Digital Assets* 11; Pinch 2015 *WLR* 561.

²²⁵ Erlank "Digital Property" (2021) 646; Woodman 2017 *CJLT* 205-206; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 29 and 53; Barron and Heaton *Willamette Management Associates Insights* 17.

²²⁶ Woodman 2017 *CJLT* 203-206.

²²⁷ Woodman 2017 *CJLT* 205; P&C Attorneys/Advocates 2025 <https://focusedlaw.com/8-common-mistakes-to-avoid-in-digital-estate-planning/>; Ratiba 2013 *JJS* 35.

purposes, despite the financial value they may represent to the testator.²²⁸ However, it is submitted that this passive acceptance of contractual disinheritance is legally untenable. To protect the constitutionally enshrined freedom of testation, South African succession law requires urgent legislative reform, akin to the Canadian *UADAFAA*, that introduces a statutory "override". Such reform would render boilerplate non-transferability clauses void as against public policy, unless the testator provided explicit, affirmative consent to that specific restriction separate from the general Terms of Service.²²⁹

- *Public policy and unfair contract terms:* A significant concern arises where contractual limitations imposed by ToS conflict directly with the principle of freedom of testation, which is a cornerstone of South African succession law.²³⁰ ToS often stipulate that rights are non-transferable and terminate upon death, as seen in Apple's iTunes agreement.²³¹ While a ToS is a binding contract *inter vivos*, its enforcement *mortis causa* effectively results in the disinheritance of beneficiaries regarding assets that may hold significant financial or sentimental value. To critique whether such ToS are contra bonos mores (against public policy) in the South African context, one must look to the constitutional protection of property and the jurisprudence governing private autonomy. Section 25(1) of the Constitution, protects against the arbitrary deprivation of property, a right which the courts have affirmed includes the freedom to dispose of one's assets upon death.²³² Furthermore, in watershed decisions such as *Minister of Education v Syfrets Trust Ltd* and *Ex Parte: BoE Trust Ltd*, the judiciary has established that public policy is now inextricably rooted in the Constitution and its foundational values, including

²²⁸ Woodman 2017 *CJLT* 205-206; Booyens *The impact of privacy policies and terms of services on a user's freedom of testation* 53.

²²⁹ Section 5 of the UADAFAA (2016); Booyens *The impact of privacy policies and terms of services on a user's freedom of testation* 66; Woodman 2017 *CJLT* 215.

²³⁰ Du Toit 2022 *JCLS* 385-386.

²³¹ P&C Attorneys/Advocates 2025 <https://focusedlaw.com/8-common-mistakes-to-avoid-in-digital-estate-planning/>; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* iii and 8; Ratiba 2013 *JJS* 35.

²³² *Ex Parte: BoE Trust* case para 26; Du Toit 2022 *JCLS* 385-386

human dignity and property rights.²³³ It is submitted that permitting a private, standard-form contract of adhesion to unilaterally extinguish proprietary rights upon death bypassing the *Wills Act*,²³⁴ operates to arbitrarily deprive the estate of value and offends the constitutionally endorsed freedom of testation. Consequently, such restrictive clauses should be challenged as *contra bonos mores* and rendered unenforceable.²³⁵

It is submitted that such restrictive clauses in ToS agreements may be *contra bonos mores* and potentially unenforceable under South African law for two reasons, namely misleading terminology and the destruction of value:

- *Misleading terminology*: As stated above, where a service provider presents a "buy" option distinct from a "rent" option, creating a reasonable expectation of ownership, a contractual clause that covertly converts this sale into a non-transferable life-use license acts to the detriment of the consumer.²³⁶ As stated above, where a service provider presents a "buy" option distinct from a "rent" option, creating a reasonable expectation of ownership, a contractual clause that covertly converts this sale into a non-transferable life-use license acts to the detriment of the consumer.²³⁷ While traditional South African contract law, as established in *S v De Blom*,²³⁸ dictates that parties cannot easily avoid obligations due to their own neglect in reading standard terms, the *Consumer Protection Act*²³⁹ introduces robust safeguards against deceptive representations regarding the nature of rights acquired by a consumer in standard-form agreements.²⁴⁰ Consequently, where a service

²³³ *Syfrets* case paras 23-24; *Ex Parte: BoE Trust* case paras 27-29.

²³⁴ 7 of 1953

²³⁵ Woodman 2017 *CJLT* 205-206; Booyens *The impact of privacy policies and terms of services on a user's freedom of testation* 53.

²³⁶ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 29 and 53; Barron and Heaton *Willamette Management Associates Insights* 17; Booyens *Freedom of Testation and Digital Assets* 11; Pinch 2015 *WLR* 561.

²³⁷ *Consumer Protection Act* 68 of 2008; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 30

²³⁸ 1977 3 SA 513 (A).

²³⁹ 68 of 2008.

²⁴⁰ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 23-24

provider actively promotes misleading proprietary rights to the severe detriment of the user's estate, it is argued that these unconscionable ToS clauses should be subjected to judicial scrutiny and potentially rendered void under South African consumer protection legislation.²⁴¹

- *Destruction of value:* Unlike a physical book which passes to heirs, the strict enforcement of these ToS clauses results in the arbitrary destruction of economic value upon death.²⁴² To determine whether this constitutes an arbitrary deprivation of property under section 25 of the Constitution one must first establish whether a digital licence qualifies as constitutional "property". It is submitted that it does. Unlike the traditional private law of things, which has historically emphasised corporeality, South African constitutional jurisprudence adopts a wide interpretation of property that encompasses incorporeal assets, including economically valuable personal and contractual rights.²⁴³ Therefore, if a testator possesses a digital library worth R50 000, the deletion of this asset upon death, purely on the basis of a click-wrap agreement, effectively destroys tangible economic wealth. This unilateral extinguishment of a vested economic interest constitutes a deprivation of property that may be challenged as arbitrary under section 25(1) of the Constitution.²⁴⁴

3.3 Legal and regulatory barriers to executor access

Even when an executor is explicitly named in a will and possesses the necessary access credentials (for example, passwords), privacy and contract laws, coupled with custodian policies, erect significant barriers to accessing digital accounts.²⁴⁵ It is submitted that a statutory digital access framework, similar to those utilised in

²⁴¹ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 30.

²⁴² Woodman *CJLT* 205; P&C Attorneys/Advocates 2025 <https://focusedlaw.com/8-common-mistakes-to-avoid-in-digital-estate-planning/>; Ratiba 2013 *JJS* 35.

²⁴³ Erlank "Digital Property" (2021) 637; Van der Walt *Constitutional Property Law* 114-115.

²⁴⁴ Du Toit 2022 *JCLS* 385-386.

²⁴⁵ Sheridan 2020 *Ohio St Tech LJ* 367.

international jurisdictions, would definitively resolve this problem.²⁴⁶ A dedicated statute, drawing on comparative models such as the United States' *RUFADAA* and Canada's *UADAFAA*, is urgently recommended to provide executors with clear, legally enforceable mechanisms for access.²⁴⁷ Such legislative codification would explicitly expand the executor's access rights, outline lawful procedures, and oblige service providers to preserve and disclose assets necessary for estate administration.²⁴⁸ By enacting this framework, South Africa could effectively override restrictive custodian policies and ensure that fiduciaries are no longer left at the mercy of service providers' Terms of Service.²⁴⁹

3.4 The tension between post-mortem privacy and executor duty

The most acute philosophical and practical conflict in digital inheritance is the tension between the deceased user's expectation of privacy and the executor's statutory duty to the estate and beneficiaries.²⁵⁰

3.4.1 The executor's obligation to the estate

An executor is obligated to act in the best interests of the estate, prevent waste, and distribute property efficiently.²⁵¹ This obligation is fundamentally anchored in section 26(1) of the *AEA*, which imposes a peremptory statutory duty on the executor to take into their custody or control all property, books and documents belonging to the deceased.²⁵² Furthermore, under the common law, as established in the seminal case of *Sackville-West v Nourse*,²⁵³ (hereinafter the *Sackville-West*

²⁴⁶ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 49 and 65; Ratiba 2013 *JJS* 43; FNB 2025 <https://novuspressbulletin.co.za/blog/don-t-leave-your-digital-assets-out-of-your-estate-plan>; See para 4.4.

²⁴⁷ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 49 and 65; Ratiba 2013 *JJS* 43; FNB 2025 <https://novuspressbulletin.co.za/blog/don-t-leave-your-digital-assets-out-of-your-estate-plan>; See paras 4.4 and 5.5.

²⁴⁸ Ratiba 2013 *JJS* 43; see para 4.5.

²⁴⁹ Klein and Parthemer 2016 *Probate and Property Magazine* 5; Wickenden 2018 *STEP* 18.

²⁵⁰ Sehati 2021 *Cardozo L Rev* 746; FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>.

²⁵¹ Sehati 2021 *Cardozo L Rev* 749 and 751-752.

²⁵² Section 26(1) of *AEA*; Ratiba 2013 *JJS* 27.

²⁵³ 1925 AD 516.

case) and reinforced in *Clarkson NO v Gelb and Others*,²⁵⁴ an executor occupies a fiduciary position and must exercise the utmost good faith and the solicitude of a prudent person of business in obtaining possession and securing the estate's assets.²⁵⁵ This duty extends to identifying, protecting and accessing the deceased's digital assets, whether they hold significant financial value (for example, cryptocurrency) or immense sentimental value (for example, family photographs, journals, or personal correspondence). Failure to pursue accessible digital assets risks breaching this fiduciary duty and can lead to financial loss or identity theft.²⁵⁶

3.4.2 *The debate over post-mortem privacy*

The tension between an executor's duty to take assets into custody or control and the deceased's right to privacy is critical. However, to determine the validity of this stance in South African law, one must examine the common-law maxim *actio personalis moritur cum persona* (a personal right of action dies with the person). Under traditional South African common law, personality rights, which encompass the right to privacy, are inextricably linked to the legal subjectivity of a living person; consequently, these rights are definitively extinguished upon death.²⁵⁷ This common-law position is mirrored in statutory law, as the *Protection of Personal Information Act* 4 of 2013 (*POPIA*) explicitly restricts its protection of personal information to "an identifiable, living, natural person".²⁵⁸ Therefore, privacy rights do not survive death in South African law. As scholars such as Sehati²⁵⁹ correctly argue, the right to post-mortem privacy is often overstated and legally misplaced when it obstructs the administration of an estate. Because the deceased's right to privacy is extinguished, service providers cannot legitimately rely on statutory privacy to deny access; rather, they are enforcing private ToSA under the guise of privacy protection. The fiduciary/executor has a legal duty to manage the estate's

²⁵⁴ 1981 1 SA 288 (W) para 293.

²⁵⁵ Harms *et al* "Administration of Deceased Estates" para 440.

²⁵⁶ Dobra *Riding the Digital wave: an executor's fiduciary duty toward digital* 11-12.

²⁵⁷ Neethling 2005 *CILSA* 210-245; Rajpal 2016 *Without Prejudice* 42.

²⁵⁸ Section 1 of the POPIA; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 50.

²⁵⁹ Sehati 2021 *Cardozo L Rev* 748, 763; Edwards and Harbinja 2013 *Cardozo Arts & Ent LJ* 102.

assets, and denying access to digital accounts can result in financial loss and the inability to settle debts. While *POPIA* protects the personal information of living persons, its application to the deceased is ambiguous, leaving service providers to default to non-disclosure to avoid liability.²⁶⁰

- a. *Common law tradition:* Under traditional common law, the right to privacy is viewed as a personal right that expires upon death (*actio personalis moritur cum persona*), meaning a deceased person cannot be legally defamed or have their privacy invaded.²⁶¹
- b. *The digital dilemma:* The digital era necessitates a reconsideration of this traditional approach, leading to the emergence of post-mortem privacy, the right of an individual to protect and control their reputation, dignity, confidential information, and legacy after death.²⁶² Personal digital assets, such as e-mails or social media posts, are voluminous, easily shared, and intrinsically intimate, often revealing sensitive information the deceased never intended for certain individuals (including the executor) to see.²⁶³ It is submitted that South African law should neither recognise an absolute new form of post-mortem privacy that paralyses estate administration, nor should it grant executors unfettered access to highly personal communications. Instead, a statutory balancing mechanism is required, drawing upon the distinction between the "catalogue" and "content" of communications found in the *RUFADAA*.²⁶⁴ Under this balanced approach, executor access to the catalogue of communications (the metadata necessary to identify assets and creditors) must take priority by default to allow fiduciaries to fulfil their statutory mandate. Conversely, a limited post-mortem privacy right should protect the substantive content of private communications, restricting

²⁶⁰ Department of Human Settlements 2024-2025 *PAIA Manual* 46-47 and 73.

²⁶¹ Sehati 2021 *Cardozo L Rev* 763; Edwards and Harbinja 2013 *Cardozo Arts & Ent LJ* 102 and 119.

²⁶² Rajpal 2016 *Without Prejudice* 41; Edwards and Harbinja 2013 *Pro Cardozo Arts & Ent LJ* 85.

²⁶³ Edwards and Harbinja 2013 *Cardozo Arts & Ent LJ* 85; Sehati 2021 *Cardozo L Rev* 753.

²⁶⁴ Sheridan 2020 *Ohio St Tech LJ* 364-365; Sehati 2021 *Cardozo L Rev* 763.

executor access to the body of messages unless the testator provided explicit, affirmative consent for such disclosure.²⁶⁵

- c. *Service provider stance:* Service providers frequently invoke privacy concerns to deny access, arguing that they are fulfilling a contractual obligation to protect the user's privacy, as established in their ToS.²⁶⁶ This is often preferred over the alternative of premature deletion of accounts, which can destroy valuable records.²⁶⁷ However, it is submitted that service providers must not be permitted to unilaterally prioritise these private contractual obligations over South African succession law. Allowing a standard-form contract of adhesion to supersede the executor's statutory duty to take custody of estate assets subverts the administration process and undermines the testator's constitutionally protected freedom of testation.²⁶⁸ Therefore, rather than leaving fiduciaries at the mercy of foreign service providers, South Africa requires robust legislation that compels custodians to provide executor access. Such legislation should follow the approach of the Canadian *UADAFAA*, which expressly voids any contractual provision limiting fiduciary access unless the user provided separate, affirmative consent to that specific restriction.²⁶⁹
- d. *Privacy in South African law:* South African legislation, specifically *POPIA*, protects the personal information of identifiable, living or juristic persons, but does not explicitly extend this protection to deceased individuals.²⁷⁰ This statutory lacuna contributes to legal uncertainty, leaving the executor and

²⁶⁵ Sections 2 and 8 of the *RUFADAA*; Klein and Parthemer 2016 *Probate and Property Magazine* 5.

²⁶⁶ Schulenburg 2023 <https://pagelschulenburg.co.za/a-guide-to-digital-estate-planning/>; Maureen *et al* 2025 *Aurelia: Jurnal Penelitian dan Pengabdian Masyarakat Indonesia* 942-943.

²⁶⁷ Edwards and Harbinja 2013 *Cardozo Arts & Ent LJ* 89 and 92.

²⁶⁸ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 29, 65; Ratiba 2013 *JJS* 35, 43.

²⁶⁹ Section 5 of *UFADAA*; Woodman 2017 *CJLT* 225-226.

²⁷⁰ Rajpal 2016 *Without Prejudice* 41; Will and Testament 2024 <https://www.willandtestament.co.za/what-happens-to-digital-assets-in-your-estate/>.

heirs facing potential civil or criminal liability (for example, for "hacking") if they attempt unauthorised access to digital accounts.²⁷¹

The result of this tension is that valuable or sentimental digital assets may remain locked in a state of "digital limbo", inaccessible to beneficiaries, while the executor struggles to satisfy statutory administrative obligations without clear legal authority.²⁷² It is submitted that the most effective legislative reform to prevent this "digital limbo" is the enactment of a dedicated Digital Assets Access Act, coupled with an explicit "executor exception" within the *POPIA* and the *PAIA*.²⁷³ Drawing upon *UADAFAA*, this statutory reform must enshrine the principle of "media neutrality," explicitly deeming the executor an "authorised user" who, by default, steps into the shoes of the deceased account holder.²⁷⁴ Furthermore, to definitively cure this administrative paralysis, the legislation must contain a statutory override that renders any standard-form Terms of Service (ToS) provision limiting fiduciary access void as against public policy, unless the user provided affirmative consent to that specific restriction separate from their general assent to the agreement.²⁷⁵ By granting default access and overriding restrictive contractual privity, the legislature can ensure that digital assets are administered with the same certainty and efficiency as traditional tangible property.

3.5 Conclusion

This chapter has demonstrated that the administration of digital assets is severely compromised by a complex interplay of restrictive private contracts and ill-adapted regulatory frameworks. The traditional proprietary paradigm, where an owner

²⁷¹ Will and Testament 2024 <https://www.willandtestament.co.za/what-happens-to-digital-assets-in-your-estate/>.

²⁷² Conner 2021 *EPCPLJ* 307-308; Sehati 2021 *Cardozo L Rev* 761; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>; AMAL 2024 <https://amal.co.za/digital-wills-and-the-legacy-of-digital-assets/>; FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; Boda, Beachen and Powell 2024 <https://www.lexology.com/library/detail.aspx?g=c10d2e18-0e9e-4d2a-98c8-169da39d8bef>.

²⁷³ Ratiba 2013 *JJS* 43; Sehati 2021 *Cardozo L Rev* 762-763.

²⁷⁴ Section 2 of *UADAFAA*; Woodman 2017 *CJLT* 193, 212.

²⁷⁵ Section 5 of the *UADAFAA*; Woodman 2017 *CJLT* 225-226; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 59, 65.

enjoys absolute powers of disposal, has been eroded by the "licensing model" prevalent in the digital economy.²⁷⁶ Consequently, the executor's common law duty to take assets into custody or control is frequently thwarted by EULA and ToS that classify digital content as non-transferable services rather than inheritable property.²⁷⁷ Based on the analysis in this chapter, it is concluded that this licensing model must be strictly regulated by legislation in the context of succession. Permitting unregulated reliance on boilerplate EULAs allows private service providers to unilaterally extinguish economic and sentimental value upon death, thereby bypassing South African succession law and undermining the constitutionally protected freedom of testation.²⁷⁸ Therefore, legislative reform is urgently required to introduce a "statutory override", similar to *UADAFAA*. Such regulation would render non-transferability and termination-on-death clauses unenforceable against a fiduciary unless the testator provided separate, affirmative consent to that specific restriction.²⁷⁹

Furthermore, the legal landscape presents a paradox where the fiduciary is legally obligated to take control of estate assets, yet faces potential criminal liability under anti-hacking statutes if they attempt to access accounts without explicit authorisation.²⁸⁰ This is exacerbated by the expansive discretion afforded to service providers, who often cite privacy legislation as justification for non-disclosure, prioritising the deceased's post-mortem privacy over the heir's proprietary interests.²⁸¹

The result is a "digital limbo" where assets of significant financial and sentimental value remain inaccessible, locked behind encryption and contractual privity.²⁸² The hierarchy of access established by *RUFADAA* in the United States attempts to

²⁷⁶ Erlank "Digital Property" (2021) 646; Woodman 2017 *CJLT* 205.

²⁷⁷ Perzanowski and Schultz *The End of Ownership* 2; Booyens *The impact of privacy policies and terms of service* 29.

²⁷⁸ Booyens *The impact of privacy policies and terms of service on freedom of testation* 59, 65; Ratiba 2013 *JJS* 43.

²⁷⁹ Section 5 of the *UADAFAA*; Woodman 2017 *CJLT* 225-226.

²⁸⁰ Sehati 2021 *Cardozo L Rev* 756-757; *Cybercrimes Act* 19 of 2020.

²⁸¹ Edwards and Harbinja 2013 *Cardozo Arts & Ent LJ* 102; *POPIA*.

²⁸² Ratiba 2013 *JJS* 35; Klein and Parthemer 2016 *Probate and Property Magazine* 5.

mitigate this by prioritising online tools and testamentary instructions over standard terms of service.²⁸³ However, without similar legislative intervention in South Africa, fiduciaries remain at the mercy of service providers.

Having established the contractual and common law impediments in this chapter, the next chapter will critically evaluate whether the existing South African legislative framework (specifically the *AEA*, the *Copyright Act* and *POPIA*) provides any adequate remedies for these challenges.

²⁸³ See Chapter 5 for a detailed discussion on the hierarchy of access established by *RUFADAA*.

CHAPTER 4 CRITICAL EVALUATION OF THE SOUTH AFRICAN LEGISLATIVE FRAMEWORK PERTAINING TO THE ADMINISTRATION OF DIGITAL ASSETS

4.1 Introduction

The administration of digital assets in South African deceased estates poses a profound challenge to the conventional legal framework, necessitating a critical evaluation of existing legislation, including the *AEA*, the *Copyright Act*, *PAIA* and *POPIA*. This analysis confirms that the statutory regime is marked by significant ambiguity, outdated provisions and crucial silence, compelling a reliance on judicial interpretation that, while developing, remains fragmented.

The primary objective of Chapter 4 is to critically evaluate the existing South African legislative framework to determine whether current statutes are sufficient to govern the management and distribution of digital assets. This involves identifying and analysing a profound "legislative lacuna" within the statutory regime, characterised by significant ambiguity, outdated provisions and crucial silence regarding digital wealth.

This chapter examines the provisions of the *AEA* together with other relevant legislative measures, including the *Copyright Act*, the *Copyright Amendment Bill* of 2017, *POPIA* and *PAIA*. It evaluates whether this legislative framework adequately regulates the administration and transfer of digital assets, and highlights areas where the law remains unclear, obsolete, or underdeveloped. The chapter also considers the extent to which South African courts have addressed these matters and extracts guiding principles from the available jurisprudence.

4.2 The legislative lacuna: absence of definition and classification

The fundamental insufficiency of the South African legislative framework stems from its lack of explicit engagement with the subject matter. The South African legislator has yet to attempt a classification of what constitutes a "digital asset", resulting in

the concept of a "digital estate" remaining largely undeveloped in law.²⁸⁴ This legislative silence creates ambiguity about whether online assets are included in terms such as "assets", "property" and/or "estate" in existing legislation.²⁸⁵ While it is acknowledged that the courts can, and have, utilised purposive interpretation to develop these concepts, most notably through the "always speaking" doctrine applied in the *Bester* case to classify cryptocurrency as property under the *Insolvency Act*, it is submitted that relying solely on judicial activism is fundamentally insufficient.²⁸⁶ Purposive interpretation may resolve isolated definitional disputes on a piecemeal basis, but it cannot comprehensively override restrictive, standard-form Terms of Service (ToS), nor can it establish the precise, uniform administrative procedures required by executors under the *AEA*. Therefore, this ambiguity cannot be resolved solely through judicial interpretation; the issue demands explicit legislative reform to prevent fragmented jurisprudence and to provide fiduciaries with the clear, legally enforceable authority needed to administer a digital estate effectively.²⁸⁷

4.2.1 *AEA*

As noted above, the *AEA* governs the administration process for deceased estates.²⁸⁸ Its potential application to digital assets hinges entirely on the interpretation of "property".²⁸⁹ Section 26 of the *AEA* imposes a peremptory duty on the executor to take into their custody or control all property, books and documents in the estate immediately after letters of executorship are granted.²⁹⁰ This statutory duty codifies the common law obligation of the executor to identify and preserve the assets of the deceased.²⁹¹ However, applying the traditional concept of "custody or control"

²⁸⁴ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 3.

²⁸⁵ Ratiba 2013 *JJS* 35.

²⁸⁶ *Bester* case para 49; Ratiba 2013 *JJS* 41-42.

²⁸⁷ Ratiba 2013 *JJS* 43; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 66.

²⁸⁸ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 45.

²⁸⁹ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 44.

²⁹⁰ Section 26 of *AEA*; Ratiba 2013 *JJS* 27.

²⁹¹ Ratiba 2013 *JJS* 27; *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 3 SA 295 (A) 304.

to digital assets requires a paradigm shift. In the digital realm, custody cannot denote physical apprehension; rather, it must be interpreted as possessing exclusive digital access and the technological ability to exclude others, primarily through holding private cryptographic keys or the administrative power to alter passwords.²⁹² As Erlank argues,²⁹³ control of digital property is inextricably linked to access rights and permissions. Therefore, where a digital asset is protected by encryption and the executor cannot physically or digitally obtain the private key, they are practically incapable of assuming *de facto* custody. As demonstrated in the *Bester* case, without the private key, the asset remains "in the wild" and beyond the executor's control.²⁹⁴ In such instances, while the executor retains *de jure* authority over the estate, the statutory duty under section 26 is fundamentally frustrated by technical impossibility, exposing the executor to potential liability if the assets are subsequently lost or hacked.²⁹⁵

In *Sackville-West v Nourse*,²⁹⁶ the court established that an executor must display the utmost good faith and the solicitude of a prudent man of business in the care of estate assets.

However, the application of section 26 to digital assets presents unique logistical challenges. Unlike tangible movables, which can be physically secured, or traditional incorporeal property (such as shares), which are evidenced by certificates or registers, digital assets often exist only as entries on a distributed ledger. As illustrated in the *Bester* case, where the *de facto* controllers of the scheme failed to keep proper records or demonstrate control over the Bitcoin, a crucial distinction must be drawn between legal authority and practical enforcement.²⁹⁷ It is submitted that the inability to obtain a private key does not mean the executor lacks the legal right (*de jure* control) to exercise authority over the asset; statutorily, the right to

²⁹² Erlank "Digital Property" (2021) 662-663.

²⁹³ Erlank "Digital Property" (2021) 662-663.

²⁹⁴ *Bester* case para 57; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>.

²⁹⁵ Section 26 of the *AEA*; Ratiba 2013 *JJS* 27.

²⁹⁶ 1925 AD 516 (hereafter the *Sackville-West* case).

²⁹⁷ *Bester* case para 57.

administer the property remains lawfully vested in the executor.²⁹⁸ Rather, it means the executor faces an absolute practical difficulty in enforcing that control, as they cannot assume de facto (factual) custody without the cryptographic key.²⁹⁹ A court order or letters of executorship cannot mathematically bypass blockchain encryption. Nevertheless, if an executor fails to proactively secure known private keys, effectively leaving the asset "in the wild" (unguarded) and susceptible to hacking or loss, they may still be held personally liable for negligence under the strict fiduciary standard of the "prudent person of business" established in the *Sackville-West* case.³⁰⁰

This study proposes the adoption of a "sealed digital asset memorandum". This protocol requires that the document must:

1. be referenced in the will but not physically attached to it;
2. contain the inventory of digital assets, usernames and location of hardware wallets or seed phrases;³⁰¹
3. be stored in a secure digital vault or with the attorney, separate from the will;³⁰² and
4. be updated regularly by the testator as an informal, administrative document, deliberately kept distinct from the formal will.

To address how this approach complies with the formal requirements for testamentary writings under the *Wills Act*, a crucial doctrinal distinction must be drawn. It is submitted that the sealed memorandum is purposefully not a "testamentary writing" because it does not dispose of property, nor does it

²⁹⁸ *Bester* case para 57.

²⁹⁹ Erlank "Digital Property" (2021) 662-663; *Bester* case para 57.

³⁰⁰ *Sackville-West* case para 534; Harms *et al* "Administration of Deceased Estates" para 440. See also in general Meyerowitz and Cilliers *Administration of Estates and Their Taxation* para 11.1.3.

³⁰¹ Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 69-70.

³⁰² Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 74-75.

nominate an executor.³⁰³ Instead, it functions merely as a confidential administrative guide that provides the technical means (such as passwords and seed phrases) to execute a bequest that has already been lawfully established in the formally executed, public will.³⁰⁴ Because it lacks a dispositive effect, the memorandum is exempt from the strict execution and amendment formalities of section 2(1)(a) and (b) of the *Wills Act*. Consequently, it is also exempt from the public disclosure requirements of the *AEA*, allowing the access credentials to remain secure and out of the public record.³⁰⁵

4.2.2 Ambiguity in the definition of "property"

The ambiguity in the definition of "property" in the *AEA* remains a primary hurdle. As mentioned above, while the *AEA* provides a broad definition, including "any contingent interest in property", it fails to explicitly reference digital assets.³⁰⁶ In light of the theoretical groundwork established in Chapter 2,³⁰⁷ it is submitted that this definition is sufficiently wide to encompass online assets by conventional construction. However, the absence of an explicit legislative classification leaves the executor in a position of uncertainty when attempting to report "all property known" as required by section 9 of the *AEA*.³⁰⁸ Academically, it is arguable that if property is construed in a conventional and broad sense, online assets could be included and encompassed in this definition.³⁰⁹ However, it is submitted that relying on theoretical or academic construction is practically insufficient for the purposes of estate administration. While the existing definition of property in the *AEA* may be theoretically broad enough, it urgently requires legislative amendment. This

³⁰³ Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 25.

³⁰⁴ Snapshots 2024 *Digital Estate Planning Guide* 6; Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 25.

³⁰⁵ Simon D Law 2023 <https://simondlaw.com>; Conner 2011 *EPCPLJ* 320.

³⁰⁶ Section 1(1) of the *AEA*; Ratiba 2013 *JJS* 41-43; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 45; It is interesting to note that the definition of "property" in terms of the *Estate Duty Act* 45 of 1955 is very broad: "Property" means any right in or to property, movable or immovable, corporeal or incorporeal.

³⁰⁷ See paras 2.1 and 2.4.1.

³⁰⁸ Section 9 of the *AEA*.

³⁰⁹ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 45; Ratiba 2013 *JJS* 41-43.

statutory vagueness permits service providers to exploit the ambiguity and deny fiduciary access on the grounds that digital assets are not explicitly enumerated in the Act. Therefore, to prevent this interpretive gap and to remove the burden of piecemeal "judicial activism" from the courts, the legislature must amend the *AEA* to explicitly define and include "digital assets", thereby granting fiduciaries undisputed statutory authority.³¹⁰

4.2.3 *Reliance on judicial activism*

In the absence of a definition that refers to specific types of online assets, the matter of proper construction is currently left in the hands of the courts and the inevitable "advent of judicial activism", tasked with inclusively interpreting the term "asset".³¹¹ However, it would be inaccurate to describe this process as "judicial activism". Rather, it is more accurately characterised as the necessary judicial interpretation and development of the law. As demonstrated in the *Bester* case, courts must employ purposive interpretation (specifically the "always speaking" doctrine) to inclusively interpret the term "asset" and accommodate technological advancements.³¹²

The crucial question arises as to whether the mere introduction of a statutory definition of digital assets would resolve this uncertainty. It is submitted that while a statutory definition would cure the theoretical ambiguity of whether digital wealth constitutes inheritable property, it is fundamentally insufficient on its own. Defining an asset does not automatically dismantle the practical barriers to obtaining it.³¹³

The *AEA* further complicates matters by obliging the executor to report "all property known",³¹⁴ yet provides no guidance on assets that are owned locally but may be

³¹⁰ Ratiba 2013 *JJS* 41-43.

³¹¹ Ratiba 2013 *JJS* 41-43; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 45.

³¹² *Bester* case paras 46 and 49; Ratiba 2013 *JJS* 42-43.

³¹³ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 47, 65; Ratiba 2013 *JJS* 42-43.

³¹⁴ Section 9(1) of the *AEA*; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 45.

hosted by foreign service providers.³¹⁵ Foreign custodians routinely rely on restrictive Terms of Service (ToS) and privacy laws to deny fiduciaries access to these accounts, regardless of how South African law classifies the asset. Therefore, a statutory definition must be accompanied by additional, dedicated access legislation. To resolve this administrative paralysis, South Africa requires a statutory framework (akin to *UADAFAA*) that explicitly regulates executor access, mandates media neutrality, and legally compels foreign service providers to cooperate with local fiduciaries.³¹⁶

4.2.4 *The Copyright Act 98 of 1978 and related reforms*

The *Copyright Act* is relevant because certain digital assets, such as e-mails, digital art, blogs and creative media, are protected intellectual property.³¹⁷

The *Copyright Act* provides for the protection of various forms of intellectual expression, including literary and artistic works, as long as they meet the prescribed statutory requirements.³¹⁸ Since copyright vests in the author, it can be inherited by their heirs.³¹⁹ Digital assets, like e-mails, can be seen as original, materialised works protected by copyright.³²⁰ Digital assets, such as e-mails, can be seen as materialised works capable of copyright protection, provided they meet the requisite statutory standard of originality. It must be noted that not all e-mails will automatically qualify; originality implies the application of independent skill and judgment by the author.³²¹ However, it is submitted that a high degree of creativity is not required.

³¹⁵ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 45-46.

³¹⁶ Section 5 of the *UADAFAA*; Woodman 2017 *CJLT* 225-226; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 66.

³¹⁷ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 44; Booyens *Freedom of Testation and Digital Assets* 14; Will and Testament 2024 <https://www.willandtestament.co.za/what-happens-to-digital-assets-in-your-estate>.

³¹⁸ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 44; Booyens *Freedom of Testation and Digital Assets* 14; Will and Testament 2024 <https://www.willandtestament.co.za/what-happens-to-digital-assets-in-your-estate>.

³¹⁹ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 44; Booyens *Freedom of Testation and Digital Assets* 14.

³²⁰ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 44; Booyens *Freedom of Testation and Digital Assets* 14.

³²¹ Woodman 2017 *CJLT* 203; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 26.

Therefore, while automated or purely generic messages may fall short of this threshold, even relatively quotidian or banal e-mails can satisfy the originality requirement and be protected as original literary works, analogous to traditional private letters.³²²

Despite potential inheritance rights, the existing *Copyright Act* (1978) is widely critiqued as outdated and failing to keep pace with the digital era and modern technological developments.³²³

Crucially, the *Copyright Act*, while addressing ownership of the intellectual property inherent in the content, does not overcome the practical barrier of access.³²⁴ Access remains controlled by service providers through ToS agreements.³²⁵ The *Copyright Amendment Bill* seeks to address these issues by aligning copyright with the digital era, introducing improved exceptions and limitations, and protecting authors' economic interests.³²⁶ However, to answer whether copyright law should be amended to provide executors with a statutory right of access, it is submitted that it should not. The primary legislative purpose of copyright law is to govern the existence, ownership, and economic exploitation of intellectual works, not to regulate the procedural mechanisms of deceased estates.³²⁷ Conflating these two distinct areas of law in order to bypass privacy policies would be doctrinally inappropriate. Instead, the barrier of fiduciary access must be addressed strictly through estate administration legislation. As scholars correctly argue, it is within the framework of succession law (whether through an amended *AEA* or the enactment of a dedicated Digital Assets Access Act) that the legislature must explicitly empower

³²² Woodman 2017 *CJLT* 203.

³²³ Minister of Trade and Industry *Memorandum on the objectives of the Copyright Amendment Bill* B 13B of 2017 37; Riby-Smith 2017 *JILP* 216-217.

³²⁴ Booyens *Freedom of Testation and Digital Assets* 14; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 45-46.

³²⁵ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 45-46.

³²⁶ Minister of Trade and Industry *Memorandum on the objectives of the Copyright Amendment Bill* B 13B of 2017 37.

³²⁷ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 44-45.

executors to override restrictive ToS agreements and compel service providers to grant access.³²⁸

4.2.5 Privacy legislation: POPIA and PAIA

The administration of digital assets is severely hampered by South Africa's privacy and access legislation, primarily due to the unresolved question of post-mortem privacy.

4.2.5.1 POPIA

POPIA is a crucial, yet inadequate, statute in this context. It mandates the proper handling and safeguarding of "personal information",³²⁹ but poses the following problems for the executor:

- *Silence on deceased persons: POPIA* protects "personal information relating to an identifiable, living natural person or juristic person".³³⁰ Critically, as previously indicated, *POPIA* does not explicitly extend this protection to a deceased person.³³¹ This creates a "critical anomaly" because, notwithstanding the definition, privacy laws are generally understood to continue applying after death.³³² For instance, sections 34 and 63 of *PAIA* expressly prohibit the unreasonable disclosure of personal information about a "deceased individual".³³³ Furthermore, the Supreme Court of Appeal in *Ex Parte: BoE Trust* case established that the constitutional right to dignity extends beyond death; a principle which scholars such as Rajpal and Chu³³⁴

³²⁸ Ratiba 2013 *JJS* 41-43; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 45.

³²⁹ Will and Testament 2024 <https://www.willandtestament.co.za/what-happens-to-digital-assets-in-your-estate>.

³³⁰ Booyens *Freedom of Testation and Digital Assets* 15-16.

³³¹ FNB 2025 <https://novuspressbulletin.co.za/blog/don-t-leave-your-digital-assets-out-of-your-estate-plan>; Will and Testament 2024 <https://www.willandtestament.co.za/what-happens-to-digital-assets-in-your-estate/>.

³³² FNB 2025 <https://novuspressbulletin.co.za/blog/don-t-leave-your-digital-assets-out-of-your-estate-plan>; Will and Testament 2024 <https://www.willandtestament.co.za/what-happens-to-digital-assets-in-your-estate/>.

³³³ Sections 34 and 63 of *PAPIA* ; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 15-16, 49.

³³⁴ *Ex Parte: BoE Trust* case; Rajpal 2016 *Without Prejudice* 42; Chu 2015 *NJTIP* 272.

argue forms the jurisprudential basis for post-mortem privacy. Regarding whether *POPIA* should be amended to explicitly address this, it is submitted that while *POPIA* should ideally be updated to formally recognise post-mortem privacy and cure this anomaly, such an amendment cannot occur in isolation. A blanket extension of privacy rights in *POPIA* would severely obstruct fiduciaries. Therefore, the practical mechanics of executor access must be comprehensively regulated by separate, dedicated estate legislation (such as a Digital Assets Access Act). Concurrently, *POPIA* and *PAIA* must be amended to include an explicit "executor exception" to ensure fiduciaries can lawfully bypass these privacy protections to fulfil their statutory mandate without facing civil or criminal liability.³³⁵

- *Executor vulnerability*: Executors must comply with *POPIA* when handling digital information.³³⁶ Compliance is made treacherous because *POPIA*'s security measures for personal information can expose the estate to penalties.³³⁷ For instance, the loss or leakage of private keys (which are unique identifiers linked to an identifiable person) can trigger mandatory breach reporting and potential fines under *POPIA*.³³⁸ As mentioned above, executors also face the risk of civil or criminal liability (for example, for "hacking") if they attempt to access accounts without explicit legal authority or documented consent.³³⁹ It is submitted that the enactment of a statutory digital asset access regime would definitively resolve this risk. By explicitly deeming the executor an "authorised user" of the deceased's digital property, such legislation creates a crucial statutory safe harbour.³⁴⁰ This explicit, codified authority provides the requisite lawful consent, thereby shielding fiduciaries from civil claims and criminal prosecution for "unauthorised

³³⁵ Woodman 2017 *CJLT* 215; Sehati 2021 *Cardozo L Rev* 750; Ratiba 2013 *JJS* 43.

³³⁶ Will and Testament 2024 <https://www.willandtestament.co.za/what-happens-to-digital-assets-in-your-estate>.

³³⁷ FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; FNB 2025 <https://novuspressbulletin.co.za/blog/don-t-leave-your-digital-assets-out-of-your-estate-plan>.

³³⁸ MPA 2025 <https://meyerattorneys.co.za/2025/09/02/crypto-estate-planning/>.

³³⁹ FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; FNB 2025 <https://novuspressbulletin.co.za/blog/don-t-leave-your-digital-assets-out-of-your-estate-plan>.

³⁴⁰ Walker 2017 *Real Prop Tr & Est LJ* 66; See Chapter 5 for more detailed discussion.

access" under anti-hacking statutes, such as the *Cybercrimes Act*, provided they act within the scope of their administrative duties.³⁴¹

4.2.5.2 PAIA

While *PAIA* provides a framework for access to records held by public and private bodies,³⁴² it often reinforces the privacy barrier in estate administration. *PAIA* allows for the refusal of access to a record if its disclosure would result in the "unreasonable disclosure of personal information about a third party, including a deceased individual".³⁴³ This provision directly enables the custodian to deny an executor access to sensitive digital information, exacerbating the conflict between the executor's statutory duty to take assets in the estate into custody or control and the right to post-mortem privacy. To resolve this administrative impasse, it is submitted that *PAIA* urgently requires an amendment to create an explicit "executor exception".³⁴⁴ Without such a statutory carve-out, *PAIA* serves as an impenetrable shield for custodians, fundamentally frustrating the executor's peremptory duties under the *AEA*. An explicit exception, modelled on the "media neutrality" principle found in the *UADAFAA*, would legally empower executors to bypass these privacy restrictions to the extent reasonably necessary for estate administration.³⁴⁵ As will be comprehensively argued in Chapter 6, such a targeted amendment to *PAIA* is a vital component of the dual-track legislative reform required to cure South Africa's digital limbo.³⁴⁶

4.3 Judicial engagement and inferences from case law

In the absence of comprehensive legislation, South African courts have begun to engage with the challenges presented by the digital era, allowing specific legal principles to be inferred, particularly regarding crypto assets and testamentary

³⁴¹ Walker 2017 *Real Prop Tr & Est* LJ66.

³⁴² Department of Human Settlements of the Republic of South Africa *PAIA Manual* 3 and 8.

³⁴³ Booyens *Freedom of Testation and Digital Assets* 15-16.

³⁴⁴ Sehati *Cardozo L Rev* 762-763; Ratiba 2013 *JJS* 43.

³⁴⁵ Section 2 of the *UADAFAA*; Woodman 2017 *CJLT* 215

³⁴⁶ See Chapter 6, specifically paragraph 6.3.4, for a detailed discussion on the proposed "media neutrality" legislative amendment to *PAIA*.

intent in electronic documents.³⁴⁷ However, to address whether the judiciary alone can adequately resolve these issues, it is submitted that it fundamentally cannot. While the courts are capable of providing piecemeal, post-mortem relief, such as utilising purposive interpretation to classify digital wealth or condoning formally defective electronic wills on a case-by-case basis, they lack the institutional mandate to proactively regulate the digital estate. The judiciary cannot draft comprehensive administrative procedures, nor can it universally override the restrictive, standard-form Terms of Service (ToS) agreements enforced by foreign service providers.³⁴⁸ Consequently, while judicial interpretation provides vital interim guidance, explicit legislative intervention remains an absolute necessity to grant fiduciaries the uniform, legally enforceable authority required to administer digital assets effectively.

4.3.1 Classification of crypto assets as property

Section 2 of the *Insolvency Act* defines "property" broadly to include movable or immovable property and contingent interests. Similarly, section 1 of the *AEA* defines "property" as "any contingent interest in property".³⁴⁹ While the *AEA* lacks the specific inclusion of "movable or immovable" found in the *Insolvency Act*, the inclusion of "contingent interests" suggests a legislative intent to cast the net widely to encompass all proprietary rights held by the deceased.

The interpretation of "property" in the *AEA* must be evaluated in light of contemporary judicial engagement. As established in the primary analysis of the *Bester* case (see paragraph 2.4.2 above), the court utilised the "always speaking" doctrine to classify crypto assets as movable property.³⁵⁰ However, it is submitted that this doctrine cannot be applied indiscriminately to recognise all digital assets as property. A critical distinction must be drawn between quasi-proprietary digital

³⁴⁷ *Bester* case para 46; *Van der Merwe v Master* ZAWCHC 117; *Perumal v Janse van Rensburg* ZAKZPHC 66.

³⁴⁸ Ratiba 2013 *JJS* 41-43; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 65-66.

³⁴⁹ Section 1 of the *AEA*; *Bester* case para 41.

³⁵⁰ *Bester* case para 41.

assets and pure service licences.³⁵¹ While the "always speaking" doctrine logically extends to assets where users exercise exclusive control (such as digital wallets), it cannot transform personal contractual rights into property rights. Digital assets governed by restrictive EULAs, such as purchased e-books, constitute merely non-transferable lifetime licences.³⁵² Lacking true proprietary ownership, these licensed assets cannot be legally classified as inheritable property under the Administration of Estates Act (AEA), regardless of purposive judicial interpretation.³⁵³

It is submitted that the Master of the High Court should adopt this same reasoning when interpreting the definition of "property" in section 1 of the *AEA* to avoid the "absurd result" identified by the court.³⁵⁴ The court relied on the "always speaking" doctrine of interpretation, citing *Malcolm v Premier, Western Cape Government*,³⁵⁵ to hold that courts must interpret legislation in light of technological developments to determine if new situations fit within the statutory language.³⁵⁶ Applying this doctrine, the court classified cryptocurrency as "intangible, fungible, divisible and movable".³⁵⁷

It is submitted that the Master of the High Court should view the *Bester* judgment not merely as a precedent for insolvency, but as persuasive authority for the interpretation of "property" under the *AEA*. The court in the *Bester* case reasoned that excluding cryptocurrency from the definition of property would lead to the "absurd result" that an insolvent's digital wealth would remain untouchable by creditors.³⁵⁸ It would lead to an equally absurd result if the very same asset were classified as "property" when an individual is sequestrated but ceased to be "property" when that individual dies solvent. It is submitted that such an interpretation highlights a glaring doctrinal inconsistency in South African law. It

³⁵¹ Erlank "Digital Property" (2021) 646.

³⁵² Booyens *The impact of privacy policies and terms of service on a user's testamentary freedom* 29, 53; Woodman 2017 *CJLT* 205-206.

³⁵³ Booyens *The impact of privacy policies and terms of service on a user's testamentary freedom* 29, 53; Woodman 2017 *CJLT* 205-206.

³⁵⁴ *Bester* case para 49.

³⁵⁵ [2014] 2 All SA 251 (SCA).

³⁵⁶ *Bester* case para 49.

³⁵⁷ *Bester* case para 46.

³⁵⁸ *Bester* case para 49.

precipitates a severe legal anomaly wherein the creditors of an insolvent estate are afforded far greater statutory protection and access to digital wealth than the rightful heirs of a solvent deceased estate.³⁵⁹ Such a bifurcated approach to the definition of property is logically untenable; if a crypto asset satisfies the requirements of an intangible movable thing for the purposes of settling debts under the *Insolvency Act*, it must logically retain that exact proprietary status for the purposes of distribution under the *AEA*.³⁶⁰

Therefore, applying the classification of digital assets as "intangible movable property" in the *Bester* judgment to the *AEA*, aligns with the common law understanding that property includes incorporeal assets that are of use and value.³⁶¹ Consequently, while it may be argued practically that the Master of the High Court could rely on the *Bester* judgment as persuasive authority to accept crypto assets in the L&D account, it must be conceded that the Master ultimately lacks the broad statutory discretion to do so definitively. The Master is an administrative functionary (a creature of statute) and does not possess the inherent judicial power to unilaterally expand the statutory definition of "property" within the *AEA* to cure legislative anomalies.³⁶² Therefore, relying solely on administrative discretion or piecemeal judicial interpretations is legally tenuous. To ensure absolute legal certainty and to empower the Master and executors unequivocally, explicit legislative reform is strictly required to amend the *AEA*.³⁶³

4.4 Conclusion: insufficiency and the call for reform

The overall assessment dictates that the current South African legislative framework is woefully insufficient to govern the complex management and distribution of digital

³⁵⁹ Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 48-49; *Bester* case para 49.

³⁶⁰ Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 48-49.

³⁶¹ Erlank 2015 *PER/PELJ* 1766; Muller *et al Silberberg and Schoeman* 19.

³⁶² Harms *et al* "Administration of Deceased Estates" para 440; Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 48-49. See in general Meyerowitz and Cilliers *Administration of Estates and Their Taxation* para 1.3.

³⁶³ Ratiba 2013 *JJS* 41-43; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 45.

assets. The *AEA* is ambiguous regarding property classification, and statutes like *POPIA* are silent on post-mortem privacy, creating legal gaps that restrict fiduciary action.³⁶⁴ Furthermore, the legal framework fails to effectively counter the unilateral power exercised by service providers through restrictive ToS and EULA, which often dictate non-transferability, overriding testamentary wishes, especially for licensed content such as e-books or digital music.³⁶⁵ Moreover, the prevailing view is that, in the absence of a clear legislative framework governing digital assets and obliging service providers to give effect to testamentary intentions (enforceable in local courts) the transferability of digital assets in South Africa will remain highly problematic.³⁶⁶ Consequently, legislative codification, potentially drawing on comparative models like the USA's *RUFADAA* and Canada's *UADAFAA*, is urgently recommended. To address what constitutes the single most urgent legislative reform, it is submitted that South Africa requires the enactment of dedicated access legislation, such as a specific Digital Assets Access Act. While amending the definition of "property" in the *AEA* is necessary, it is entirely futile if fiduciaries cannot practically reach the assets. Therefore, the paramount legislative priority must be to grant executors explicit, statutory authority—rooted in the principle of media neutrality—that legally compels foreign and local service providers to grant access, thereby overriding restrictive privacy laws and private contractual barriers.³⁶⁷

³⁶⁴ FNB 2025 <https://novuspressbulletin.co.za/blog/don-t-leave-your-digital-assets-out-of-your-estate-plan>; Will and Testament 2024 <https://www.willandtestament.co.za/what-happens-to-digital-assets-in-your-estate/>.

³⁶⁵ FNB 2025 <https://novuspressbulletin.co.za/blog/don-t-leave-your-digital-assets-out-of-your-estate-plan>.

³⁶⁶ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 49 and 65; Ratiba 2013 *JJS* 43; FNB 2025 <https://novuspressbulletin.co.za/blog/don-t-leave-your-digital-assets-out-of-your-estate-plan>.

³⁶⁷ Ratiba 2013 *JJS* 43; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 66.

CHAPTER 5 COMPARATIVE ANALYSIS FROM SELECTED JURISDICTIONS

5.1 Introduction

The administration of digital assets in South African deceased estates remains fundamentally hampered by a profound legislative lacuna, compelling legal academics and practitioners to seek guidance from international jurisdictions that have proactively developed statutory frameworks.³⁶⁸ In addressing the specific shortcomings that justify this comparative analysis, three primary doctrinal gaps in South African law must be highlighted: the definitional ambiguity of "property" within the *AEA*; the unresolved tension between the executor's statutory duties and post-mortem privacy under *POPIA* and *PAIA*; and the complete absence of a statutory mechanism to override restrictive Terms of Service (ToS) imposed by global service providers.³⁶⁹

While this comparative analysis evaluates the United States' *RUFADAA*, the primary focus is directed toward the Canadian *UFADAA* as the most viable template for domestic reform. The criteria used to determine the superiority of the Canadian model for South Africa are twofold: administrative efficiency and doctrinal compatibility. The chapter examines how *RUFADAA* attempts to balance privacy rights with executor duties through a complex, tiered hierarchy that frequently necessitates court orders, a requirement that would prove administratively disastrous for South Africa's already overburdened High Courts and Master's Offices.³⁷⁰ This is contrasted with the bolder Canadian principle of "media neutrality". Under the ULCC model, a digital record is treated legally identical to a paper record, allowing the fiduciary to "step into the shoes" of the account holder by default.³⁷¹ This analysis aims to demonstrate that the Canadian approach provides a more

³⁶⁸ Ratiba 2013 *JJS* 43.

³⁶⁹ Booyens *The impact of privacy policies and terms of service on user's freedom of testation* 44-47; Sehati 2021 *Cardozo L Rev* 750.

³⁷⁰ Sheridan 2020 *Ohio St Tech LJ* 382; Sehati 2021 *Cardozo L Rev* 768-769.

³⁷¹ Woodman 2017 *CJLT* 193-194.

efficient mechanism for South Africa, as it aligns seamlessly with the executor's existing common law representative capacity and statutory duties under section 26 of the *AEA*.³⁷²

5.2 The American model: RUFADAA

RUFADAA, approved by the Uniform Law Commission (ULC) in 2015, represents a significant attempt to address the unique challenges that digital assets pose to traditional estate law.³⁷³ Its purpose is dual: first, to extend the legal authority of fiduciaries (such as personal representatives, trustees and agents)³⁷⁴ to manage digital assets in the same manner as tangible assets; and second, to grant custodians (service providers) legal authority to cooperate with fiduciaries while upholding the user's reasonable expectation of privacy.³⁷⁵ In critically evaluating whether *RUFADAA* primarily protects fiduciary authority or user privacy, it is submitted that the Act is fundamentally privacy-centric.³⁷⁶ While it ostensibly purports to balance these competing interests, its practical application places an unjustifiably heavy reliance on post-mortem privacy, which often overshadows the fiduciary's responsibility to properly and efficiently administer the estate.³⁷⁷ By establishing a default rule of non-disclosure for the content of electronic communications in the absence of explicit consent, *RUFADAA* effectively shifts the balance of power away from personal representatives and into the hands of corporate custodians.³⁷⁸ It is precisely this overwhelming deference to privacy and custodian discretion that creates the severe administrative hurdles critiqued later in this chapter.³⁷⁹

³⁷² Section 26 of the *AEA*; Introduction to *UADAFAA*.

³⁷³ Trust and Will unknown <https://trustandwill.com/learn/what-is-RUFADAA>; Prefatory note to *RUFADAA*.

³⁷⁴ Within South African law, this would include executors of estates, and all referrals to fiduciaries in this chapter would include executors if *RUFADAA* were to apply in South Africa. S2 of *RUFADAA* defines a fiduciary as an original, additional, or successor personal representative, [conservator], agent, or trustee.

³⁷⁵ Trust and Will unknown <https://trustandwill.com/learn/what-is-RUFADAA>; Prefatory note *RUFADAA*; Klein and Parthemer 2016 *Probate and Property Magazine* 1-7.

³⁷⁶ Sehati 2021 *Cardozo L Rev* 768-769; Sheridan 2020 *Ohio St Tech LJ* 382.

³⁷⁷ Sehati 2021 *Cardozo L Rev* 749-750.

³⁷⁸ Sehati 2021 *Cardozo L Rev* 755.

³⁷⁹ Woodman 2017 *CJLT* 193; Wickenden 2018 *STEP* 18.

5.2.1 Definition and scope

RUFADAA defines a "digital asset" as "an electronic record in which an individual has a right or interest".³⁸⁰ This targeted definition focuses on the digital medium itself to clarify the executor's remit over the decedent's electronic communications and records.³⁸¹ The *RUFADAA* focuses primarily on facilitating access for estate administration purposes, not necessarily vesting proprietary ownership in the fiduciary or heir.³⁸² Critically, a fiduciary under *RUFADAA* cannot take any action that the original user could not have legally taken.³⁸³

In addressing whether this definition is sufficiently broad for the South African context, it is submitted that it is fundamentally too restrictive. By confining a "digital asset" merely to an "electronic record," the *RUFADAA* definition fails to adequately capture the substantive proprietary nature of complex assets such as cryptocurrency or licensed digital content. South Africa requires a broader, functionally categorised definition that aligns with the *Bester case*, explicitly recognising these assets as "intangible movable property" to ensure their seamless integration into the *AEA*.³⁸⁴

Furthermore, regarding whether the limitation on a fiduciary's actions restricts the recovery of assets, the answer is unequivocally affirmative. Because *RUFADAA* inextricably ties the fiduciary's authority to the legal capacity and express instructions of the user, an executor administering an intestate estate, or an estate where the testator failed to provide specific digital consent, is severely incapacitated.³⁸⁵ Without explicit prior consent to access the actual content of electronic communications, the executor is legally blocked from retrieving critical information (such as password reset links or financial correspondence) necessary to

³⁸⁰ Sehati 2021 *Cardozo L Rev* 749.

³⁸¹ Trust and Will unknown <https://trustandwill.com/learn/what-is-RUFADAA>.

³⁸² Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 54-55; Booyens *Freedom of Testation and Digital Assets* 16-19; *Introduction of Uniform Access to Digital Assets by Fiduciaries Act* 2016 (hereinafter UAFADAA).

³⁸³ Booyens *Freedom of Testation and Digital Assets* 16-19; *Introduction to UAFADAA*.

³⁸⁴ Ratiba 2013 *JJS* 41-43; Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 48-49.

³⁸⁵ Sehati 2021 *Cardozo L Rev* 750; Sheridan 2020 *Ohio St Tech LJ* 382.

identify and recover the estate's underlying digital wealth, ultimately resulting in the permanent loss of estate value.³⁸⁶

5.2.2 *The three-tier hierarchy for access*

To navigate the tension between user privacy and fiduciary necessity, *RUFADAA* establishes a rigid three-tier hierarchy for access.³⁸⁷

- a. *Online tool precedence:* If a service provider offers an online tool (for example, Facebook's Legacy Contact or Google's Inactive Account Manager), the user's instructions made through this tool take absolute precedence over all other directions, including those contained within a legally executed will or trust.³⁸⁸ This mechanism validates technical solutions already employed by major service providers.³⁸⁹ Online tool precedence: If a service provider offers an online tool (for example, Facebook's Legacy Contact or Google's Inactive Account Manager), the user's instructions made through this tool take absolute precedence over all other directions, including those contained within a legally executed will or trust. This mechanism validates technical solutions already employed by major service providers. Online tool precedence: If a service provider offers an online tool (for example, Facebook's Legacy Contact or Google's Inactive Account Manager), the user's instructions made through this tool take absolute precedence over all other directions, including those contained within a legally executed will or trust. This mechanism validates technical solutions already employed by major service providers.³⁹⁰

³⁸⁶ Sehati 2021 *Cardozo L Rev* 750.

³⁸⁷ Prefatory note to *RUFADAA*; s 4 of *RUFADAA*; Sehati 2021 *Cardozo L Rev* 759.

³⁸⁸ Sehati 2021 *Cardozo L Rev* 749; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>; Klein and Parthemer 2016 *Probate and Property Magazine* 5; Banta 2020 *BLR* 575.

³⁸⁹ Sheridan 2020 *Ohio St Tech LJ* 369-370; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>; Sehati 2021 *Cardozo L Rev* 759.

³⁹⁰ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 58; Banta 2020 *BLR* 575.

- b. *Testamentary documents*: If the user did not utilise an online tool, directions specified in a will, trust, power of attorney or other written record govern access.³⁹¹ Notably, *RUFADAA* respects this expression of testamentary intent even if the document does not meet traditional will formalities, by including "other record", defined broadly to include information stored in an electronic or other medium.³⁹² In addressing whether such an approach would be compatible with South African law, it must be stated that it is fundamentally incompatible. South African succession law is anchored in the strict execution formalities of section 2(1) of the *Wills Act*.³⁹³ While South African law does possess a "testamentary rescue" mechanism under section 2(3) of the *Wills Act*, which allows for the condonation of formally defective documents, including electronic records, as demonstrated in *Macdonald v The Master* and *Van der Merwe v The Master*,³⁹⁴ this is by no means an automatic process. An informal "other record" cannot simply be accepted by the Master of the High Court or an executor to govern access; its validity is entirely contingent upon a discretionary, costly, and time-consuming High Court application to prove the deceased's *animus testandi*.³⁹⁵ Therefore, *RUFADAA*'s approach of granting automatic legal effect to informal electronic records completely circumvents the rigorous judicial oversight required by South African law for formally defective testamentary writings.
- c. *ToS and default rules*: In the absence of any specific direction by the user via an online tool or legal document, the custodian's existing ToS applies.³⁹⁶ If the ToS is silent, *RUFADAA*'s default provisions apply.³⁹⁷

³⁹¹ Klein and Parthemer 2016 *Probate and Property Magazine* 1-7; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>.

³⁹² Banta 2020 *BLR* 572-573.

³⁹³ Section 2(1) of the *Wills Act* 7 of 1953.

³⁹⁴ Section 2(3) of the *Wills Act* 7 of 1953; *Macdonald v The Master* 2002 5 SA 64 (O); *Van der Merwe v The Master* 2010 6 SA 544 (SCA).

³⁹⁵ Faber and Ratotobala 2025 *JJS* 18

³⁹⁶ Sehati 2021 *Cardozo L Rev* 759; Sheridan 2020 *Ohio St Tech LJ* 369-370.

³⁹⁷ Sheridan 2020 *Ohio St Tech LJ* 369-370.

5.2.3 *Balancing privacy and fiduciary duty (content v catalogue)*

- a. A central feature of *RUFADAA* is its approach to balancing the fiduciary's duty to manage the estate with the deceased user's right to post-mortem privacy.³⁹⁸ This balance is achieved by distinguishing between the content of communications and the catalogue thereof.³⁹⁹ In evaluating whether this distinction would be practical or workable in the South African context, it is submitted that it would be highly impractical and administratively paralyzing. The American framework essentially forces fiduciaries into a convoluted, two-step "scavenger hunt"; an executor must first review the catalogue of metadata to find suspicious indicators or clues of hidden assets (such as monthly correspondence from a financial institution), and only then can they petition the court to access the actual content of those communications.⁴⁰⁰ Given that the South African Master's Offices and High Courts are already severely overburdened, mandating this litigation-reliant, piecemeal process would inflict inordinate delays and exorbitant costs on the estate.⁴⁰¹ Consequently, the strict content/catalogue distinction severely undermines the executor's statutory duty to expeditiously identify and marshal assets, rendering it an unworkable model for South African reform.⁴⁰²
- b. *Content (high protection)*: This refers to the substance of electronic communications (for example, the body of an e-mail). Access to content is restricted unless the deceased user provided explicit, express consent in a will or online tool.⁴⁰³ The fiduciary requires explicit, express consent from the deceased user, provided either through an online tool or a legal record.⁴⁰⁴ This creates an "opt-in" structure for accessing personal communication

³⁹⁸ Prefatory note to *RUFADAA*; s 4 of *RUFADAA*; Sehati 2021 *Cardozo L Rev* 759.

³⁹⁹ Klein and Parthemer 2016 *Probate and Property Magazine* 1-7.

⁴⁰⁰ Sehati 2021 *Cardozo L Rev* 770; Sheridan 2020 *Ohio St Tech LJ* 385.

⁴⁰¹ Sehati 2021 *Cardozo L Rev* 768-769.

⁴⁰² Ratiba 2013 *JJS* 41-43; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 45.

⁴⁰³ Sehati 2021 *Cardozo L Rev* 755-757.

⁴⁰⁴ Klein and Parthemer 2016 *Probate and Property Magazine* 1-7.

content.⁴⁰⁵ Content (high protection): This refers to the substance of electronic communications (for example, the body of an e-mail). Access to content is restricted unless the deceased user provided explicit, express consent in a will or online tool. The fiduciary requires explicit, express consent from the deceased user, provided either through an online tool or a legal record. This creates an "opt-in" structure for accessing personal communication content.⁴⁰⁶ Content (high protection): This refers to the substance of electronic communications (for example, the body of an e-mail). Access to content is restricted unless the deceased user provided explicit, express consent in a will or online tool. The fiduciary requires explicit, express consent from the deceased user, provided either through an online tool or a legal record. This creates an "opt-in" structure for accessing personal communication content.⁴⁰⁷

- c. *Catalogue (default disclosure)*: Fiduciaries are granted a default rule of disclosure regarding the catalogue of electronic communications.⁴⁰⁸ The catalogue consists of metadata, sender and recipient electronic addresses, and the time and date of communication, but not the substance of the message.⁴⁰⁹ This catalogue access is intended to assist fiduciaries in discovering the existence of accounts, which is crucial for taking assets into custody or control.⁴¹⁰

5.2.4 *Lingering impediments and custodian power*

Despite its structural improvements, *RUFADAA* still faces criticism, primarily regarding the continued power of custodians:⁴¹¹

⁴⁰⁵ Klein and Parthemer 2016 *Probate and Property Magazine* 1-7.

⁴⁰⁶ Sehati 2021 *Cardozo L Rev* 750.

⁴⁰⁷ Sehati 2021 *Cardozo L Rev* 750; Sheridan 2020 *Ohio St Tech LJ* 382.

⁴⁰⁸ Sehati 2021 *Cardozo L Rev* 755; s 4 of *RUFADAA*.

⁴⁰⁹ Klein and Parthemer 2016 *Probate and Property Magazine* 1-7; Sehati 2021 *Cardozo L Rev* 750-753.

⁴¹⁰ Sehati 2021 *Cardozo L Rev* 755-757.

⁴¹¹ Sheridan 2020 *Ohio St Tech LJ* 377-378.

- a. *Discretion to require court orders: RUFADAA* grants custodians complete discretion to insist that a fiduciary obtain a court order before disclosing any information, even regarding non-protected assets.⁴¹² This discretion is troubling because disclosure of non-protected assets is supposedly mandatory under *RUFADAA*.⁴¹³ This practice effectively transforms court orders into a de facto requirement, shifting the legal and administrative burden onto the deceased's estate and leading to delays and costs.⁴¹⁴ In elaborating on the practical consequences, it must be emphasised that this discretionary requirement creates a profound "chilling effect", particularly in the administration of smaller estates.⁴¹⁵ By forcing fiduciaries to initiate costly and time-consuming High Court litigation merely to obtain basic account information, the legal fees and administrative delays can quickly eclipse the financial value of the digital assets being sought. Consequently, executors are frequently compelled to abandon the recovery of these assets entirely, resulting in an unjustifiable economic loss to the heirs.⁴¹⁶
- b. *Ambiguity of fiduciary powers: RUFADAA* requires the custodian to "disclose" information but lacks clear language explicitly granting the fiduciary comprehensive "access" or "control" over the digital property, creating ambiguity about the scope of fiduciary authority.⁴¹⁷ In addressing whether legislation should explicitly grant fiduciaries control over digital assets rather than a mere right to disclosure, the answer is unequivocally affirmative. Under South African law, section 26 of the *AEA* imposes a peremptory duty on the executor to take all estate property into their "custody and control".⁴¹⁸ A statutory framework that merely grants a right to "disclosure" reduces the executor to a passive recipient of information, leaving them entirely powerless to actively manage, transfer, or liquidate the underlying digital

⁴¹² Sheridan 2020 *Ohio St Tech LJ* 381-385.

⁴¹³ Sheridan 2020 *Ohio St Tech LJ* -385.

⁴¹⁴ Sheridan 2020 *Ohio St Tech LJ* 381-385.

⁴¹⁵ Sheridan 2020 *Ohio St Tech LJ* 385.

⁴¹⁶ Sehati 2021 *Cardozo L Rev* 768-769; Sheridan 2020 *Ohio St Tech LJ* 385.

⁴¹⁷ Sheridan 2020 *Ohio St Tech LJ* 378-379.

⁴¹⁸ Section 26 of the *AEA*; Ratiba 2013 *JJS* 27.

wealth. Therefore, to ensure effective estate administration and alignment with existing common law duties, reform legislation must explicitly vest fiduciaries with comprehensive control over digital assets.⁴¹⁹

5.3 Comparative analysis: Commonwealth jurisdictions

Examining alternative responses from Commonwealth nations offers valuable contrasting models for South Africa, particularly concerning the media neutrality principle.

5.3.1 The Canadian model (ULCC Uniform Act)

UADAFAA, adopted in 2016, offers a distinct approach compared to *RUFADAA*'s privacy-centric model.⁴²⁰ *UADAFAA* offers a distinct model built on the principle of "media neutrality"⁴²¹, which involves the following:

- *Default access and media neutrality: UADAFAA* favours default fiduciary⁴²² access to digital assets and, hence, media neutrality.⁴²³ It affirms that the standard powers of fiduciaries also apply to digital assets, with the executor assuming the rights and responsibilities of the account holder.⁴²⁴ It operates on the premise that a fiduciary should have the same power to manage digital assets as they do tangible assets, essentially "stepping into the shoes" of the account holder.⁴²⁵ This model creates a default rule of access for fiduciaries, making it easier to administer estates without requiring express prior consent for every asset, aligning closely with the executor's duty to take custody of property under South African law.⁴²⁶ Default access and media neutrality:

⁴¹⁹ Woodman 2017 *CJLT* 193-194; Ratiba 2013 *JJS* 43.

⁴²⁰ Woodman 2017 *CJLT* 193.

⁴²¹ Woodman 2017 *CJLT* 225.

⁴²² Section 1 of *UADAFAA* defines a "fiduciary" as, in relation to an account holder, a personal representative for a deceased account holder, a guardian appointed for an account holder, an attorney appointed for an account holder who is the donor of the power of attorney, or a trustee appointed to hold in trust a digital asset or other property of an account holder.

⁴²³ Woodman 2017 *CJLT* 194, 212-213 and 226.

⁴²⁴ Introduction to *UADAFAA*; Varvis 2024 <https://ablawg.ca/2024/08/07/in-support-of-a-new-alberta-act-for-fiduciary-access-to-digital-assets/>.

⁴²⁵ Woodman 2017 *CJLT* 225.

⁴²⁶ Introduction to *UADAFAA*; ss 2-10 of *UADAFAA*; s 26 of *AEA*.

UADAFAA favours default fiduciary access to digital assets and, hence, media neutrality. It affirms that the standard powers of fiduciaries also apply to digital assets, with the executor assuming the rights and responsibilities of the account holder. It operates on the premise that a fiduciary should have the same power to manage digital assets as they do tangible assets, essentially "stepping into the shoes" of the account holder. This model creates a default rule of access for fiduciaries, making it easier to administer estates without requiring express prior consent for every asset, aligning closely with the executor's duty to take custody of property under South African law.⁴²⁷ Default access and media neutrality: UADAFAA favours default fiduciary access to digital assets and, hence, media neutrality. It affirms that the standard powers of fiduciaries also apply to digital assets, with the executor assuming the rights and responsibilities of the account holder. It operates on the premise that a fiduciary should have the same power to manage digital assets as they do tangible assets, essentially "stepping into the shoes" of the account holder. This model creates a default rule of access for fiduciaries, making it easier to administer estates without requiring express prior consent for every asset, aligning closely with the executor's duty to take custody of property under South African law.⁴²⁸ Default access and media neutrality: UADAFAA favours default fiduciary access to digital assets and, hence, media neutrality. It affirms that the standard powers of fiduciaries also apply to digital assets, with the executor assuming the rights and responsibilities of the account holder. It operates on the premise that a fiduciary should have the same power to manage digital assets as they do tangible assets, essentially "stepping into the shoes" of the account holder. This model creates a default rule of access for fiduciaries, making it easier to administer estates without requiring express prior consent for every asset,

⁴²⁷ *Clarkson NO v Gelb* 1981 1 SA 288 (W) 293; Harms *et al* "Administration of Deceased Estates" para 440.

⁴²⁸ Section 26 of the *AEA*; Ratiba 2013 *JJS* 27.

aligning closely with the executor's duty to take custody of property under South African law.⁴²⁹

- *Privacy stance:* Unlike *RUFADAA*, *UADAFAA* generally does not treat fiduciary access as a "disclosure" of personal information that impacts privacy legislation, thereby simplifying the access mechanism.⁴³⁰ The fiduciary is considered an "authorised user" of the digital asset.⁴³¹
- *Contractual override:* *UADAFAA* stipulates that any clause in a service agreement restricting fiduciary access in violation of *UADAFAA* is unenforceable, unless the account holder has given explicit consent through a separate affirmative action, distinct from their agreement to other terms.⁴³² This aims to prevent boilerplate ToS provisions from overriding local succession law.⁴³³ In addressing whether South African law would be willing to override private contractual terms in this manner, it is submitted that such legislation would be both legally justified and constitutionally sound. While South African law respects the principle of freedom of contract, it is not absolute; courts will not enforce contractual provisions that are *contra bonos mores* (against public policy).⁴³⁴ Standard-form ToS and End User Licence Agreements (EULAs) are overwhelmingly contracts of adhesion where the user exercises no genuine bargaining power.⁴³⁵ Allowing these unilateral agreements to extinguish digital assets upon death effectively disinherits beneficiaries, undermining the constitutionally anchored principle of freedom of testation and resulting in an arbitrary deprivation of property under Section 25 of the Constitution.⁴³⁶ Therefore, a statutory mechanism that overrides

⁴²⁹ Woodman 2017 *CJLT* 193-194; Introduction to *UADAFAA*.

⁴³⁰ Section 5 of *UADAFAA*; Wickenden 2018 *STEP* 12.

⁴³¹ Section 5 of *UADAFAA*.

⁴³² Section 5 of *UADAFAA*; Woodman 2017 *CJLT* 225-226.

⁴³³ Varvis 2024 <https://ablawg.ca/2024/08/07/in-support-of-a-new-alberta-act-for-fiduciary-access-to-digital-assets/>.

⁴³⁴ Jamneck "Freedom of Testation" 137; Jordaan 2026 <https://www.moneyweb.co.za/financial-advisor-views/beyond-free-will-the-legal-limits-of-your-freedom-of-testation/>.

⁴³⁵ Perzanowski and Schultz *The End of Ownership* 2; Booyens *The impact of privacy policies and terms of service on user's freedom of testation* 29.

⁴³⁶ Du Toit 2022 *JCLS* 385-386; Woodman 2017 *CJLT* 205-206.

these restrictive, non-negotiable clauses, unless separately and explicitly consented to, would likely withstand constitutional and contractual challenges, as it actively defends public policy and succession rights against the unilateral overreach of global service providers.⁴³⁷

5.3.2 Critical evaluation: privacy versus efficiency in the South African context

While the American *RUFADAA* model provides a sophisticated three-tier hierarchy for access, it is fundamentally privacy-centric, often requiring a court order to access the content of electronic communications.⁴³⁸ In the South African context, where the Master's Office and High Courts are already overburdened, requiring a court order for every e-mail account would be administratively disastrous. To illustrate the severe administrative and financial burden this creates, one need only look to practical examples in foreign jurisdictions, such as the widely reported case of Peggy Bush, a widow who was unreasonably commanded by Apple to obtain a High Court order merely to retrieve her deceased husband's tablet password.⁴³⁹ Such discretionary requirements inflict inordinate delays and costs, creating a chilling effect that often forces fiduciaries of smaller estates to forfeit viable administration efforts entirely

In contrast with *UADAFAA*'s principle of "media neutrality",⁴⁴⁰ *RUFADAA* presumes that if a fiduciary has the authority to read paper files in a filing cabinet, they should have the same authority to read digital files on a server. Woodman⁴⁴¹ notes that the Canadian model essentially confirms "that the fiduciary 'steps into the shoes' of the account holder".⁴⁴² This concept is not foreign to South African law; it is perfectly analogous to the established common law principle whereby an executor acts in a representative capacity, effectively stepping into the shoes of the deceased to

⁴³⁷ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 53; Ratiba 2013 *JJS* 35.

⁴³⁸ Sheridan 2020 *Ohio St Tech LJ* 382.

⁴³⁹ Sehati 2021 *Cardozo L Rev* 768-769

⁴⁴⁰ Woodman 2017 *CJLT* 212.

⁴⁴¹ Woodman 2017 *CJLT* 193.

⁴⁴² Woodman 2017 *CJLT* 193.

assume control over the totality of their rights and obligations.⁴⁴³ This study, therefore, recommends that South Africa adopt the Canadian approach of default access, as it aligns better with the executor's existing common law powers to take custody of property under Section 26 of the *AEA*.

5.4 Lessons for South African law reform

The comparative outline provides critical lessons for addressing the systemic failures within the current South African legal framework, where the *AEA* is ambiguous,⁴⁴⁴ and privacy legislation (*POPIA* and *PAIA*) creates tension with executor duties.⁴⁴⁵

As Ratiba⁴⁴⁶ advocates, South Africa requires dedicated legislation in this regard, either through amendments to existing laws or the creation of a new, sole statute. In addressing whether this should be achieved through piecemeal amendments to existing laws or the creation of a new statute, it is submitted that South Africa urgently requires the enactment of a dedicated, standalone Digital Assets Access Act. A singular, comprehensive statute would provide absolute legal certainty and avoid the fragmentation of fiduciary duties across disparate acts.⁴⁴⁷ Such legislation must explicitly expand on the executor's access rights, outlining procedures and obliging service providers to preserve and disclose assets necessary for estate administration.⁴⁴⁸

The South African legislature must provide a clear definition and classify which digital assets constitute property, particularly noting the judicial precedent set by the *Bester* case, which affirmed crypto assets as property for insolvency purposes.⁴⁴⁹

⁴⁴³ *Clarkson NO v Gelb* 1981 1 SA 288 (W) 293; Silberstein and Davies 2015 <https://www.massbar.org/publications/ejournal/ejournal-article/lawyers-journal-2015-february/defining-owning-and-accessing-digital-asset>

⁴⁴⁴ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 45.

⁴⁴⁵ Sehati 2021 *Cardozo L Rev* 750.

⁴⁴⁶ Ratiba 2013 *JJS* 43.

⁴⁴⁷ Ratiba 2013 *JJS* 43.

⁴⁴⁸ Ratiba 2013 *JJS* 43.

⁴⁴⁹ *Bester* case para 47; MPA 2025 <https://meyerattorneys.co.za/2025/09/02/crypto-estate-planning/>.

This classification is the necessary prerequisite for the assignment of clear inheritable rights.⁴⁵⁰

South Africa must implement a clear hierarchy, similar to *RUFADAA*, to navigate the conflict between the executor's duty and post-mortem privacy, which is protected under *PAIA*.

The *RUFADAA* three-tiered system offers a practical solution by prioritising user-defined access instructions (via online tools or wills) over boilerplate ToS.⁴⁵¹ This would restore control over the disposition of digital assets back to the individual.⁴⁵² However, regarding whether the South African legal system could implement such a hierarchy without further administrative complexity, extreme caution is required. The American model's reliance on court orders for content access would be administratively disastrous for South Africa's already overburdened High Courts and Master's Offices.⁴⁵³

Consideration should be given to the *UADAFAA* approach of default access and media neutrality for assets required for administration, as this is arguably more efficient and aligns the treatment of digital records with that of traditional paper records.⁴⁵⁴

The new legislation must address EULAs and ToS directly.⁴⁵⁵ Following the Canadian model, South African legislation could declare provisions limiting fiduciary access to be void unless the user provides affirmative consent separate from the general assent to the ToS.⁴⁵⁶ This would mitigate the current situation in which service providers unilaterally dictate ownership and transferability. Finally, concerning whether South Africa possesses the jurisdictional authority to regulate international

⁴⁵⁰ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 47.

⁴⁵¹ Booyens *Freedom of Testation and Digital Assets* 20; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 54-56.

⁴⁵² Sehati 2021 *Cardozo L Rev* 763.

⁴⁵³ Sehati 2021 *Cardozo L Rev* 768-769; Sheridan 2020 *Ohio St Tech LJ* 382.

⁴⁵⁴ Section 5 of *UADAFAA*.

⁴⁵⁵ Ratiba 2013 *JJS* 43.

⁴⁵⁶ Section 5 of *UADAFAA*; Woodman 2017 *CJLT* 225-226.

service providers whose servers reside abroad, the judiciary has already provided a solution. As demonstrated in *Foize Africa (Pty) Ltd v Foize Beheer BV*,⁴⁵⁷ South African courts have firmly established that foreign choice-of-law or jurisdictional clauses cannot automatically oust the jurisdiction of local courts. Consequently, domestic legislation can effectively compel foreign tech companies to comply with South African succession law when administering the estates of South African domiciliaries.

5.5 Conclusion

In conclusion, the *RUFADAA* model, despite its reliance on custodian discretion and tendency to favour privacy over unfettered access, provides South African policy-makers with a proven structure for balancing competing digital interests. However, the bolder approach of the *UADAFAA*, which asserts the fiduciary's authority as an authorised user and seeks to overcome restrictive contracts through legal fiat, may offer a more decisive legislative template for an emerging market struggling with the extraterritorial imposition of foreign service provider ToS.⁴⁵⁸ In determining which single feature of the comparative legislation is most valuable for South African law reform, it is submitted that the Canadian principle of "media neutrality", and its consequent statutory override of restrictive Terms of Service, must take absolute precedence.⁴⁵⁹ The ability to statutorily compel service providers to grant default access, thereby treating a digital record precisely like a physical document, is the only mechanism that practically empowers South African executors to bypass restrictive private contracts and effortlessly "step into the shoes" of the deceased.⁴⁶⁰ South Africa's regulatory future in this domain hinges on its ability to synthesise these international lessons into a comprehensive domestic statute that provides executors with the clear, legally enforceable access mechanisms currently lacking.

⁴⁵⁷ 2013 3 SA 91 (SCA) para 21.

⁴⁵⁸ Varvis 2024 <https://ablawg.ca/2024/08/07/in-support-of-a-new-alberta-act-for-fiduciary-access-to-digital-assets/>; Wickenden 2018 *STEP* 18.

⁴⁵⁹ Section 5 of *UADAFAA*; Woodman 2017 *CJLT* 225-226.

⁴⁶⁰ Woodman 2017 *CJLT* 193.

CHAPTER 6 CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

The complexities inherent in the digital transformation of wealth demand a comprehensive and immediate statutory response within the South African legal sphere. This concluding chapter provides a distillation of the research findings, confirming the systemic inadequacy of the current legal framework, and culminates in concrete proposals for legislative and policy reform necessary to secure the digital legacy of South African citizens. The primary research question of this study was: How can South African estate law be reformed to incorporate selected digital assets into estate planning and the administration of a deceased estate? To address this question, this study pursued two main objectives: first, to critically analyse the current South African legal position regarding the inclusion of digital assets in deceased estates; and second, to propose law reform drawing on international best practices.⁴⁶¹ By evaluating the systemic friction between traditional estate administration principles and the digital medium, this study identified that the single most urgent deficiency within the current legal framework is the profound "legislative lacuna"; specifically, the absence of a statutory definition for digital assets and the critical lack of explicit, legally enforceable mechanisms for fiduciary access.⁴⁶² This chapter demonstrates how the research objectives set out in Chapter 1 have been met and provides a definitive answer to this core research question.

6.2 Summary of core findings

The analysis across preceding chapters reveals a clear disparity between the realities of modern property ownership and the capacity of South African estate administration to govern it effectively. The research question was addressed by attaining the following secondary objectives.

⁴⁶¹ See para 1.3.2.1 above.

⁴⁶² Ratiba 2013 *JJS* 41-43; Booyens *The impact of privacy policies and terms of service on the user's freedom of testation* 44-45.

6.2.1 Legislative and doctrinal deficiencies

The first objective was to categorise and define digital assets to evaluate their relevance in deceased estates. The cornerstone of estate administration, the *AEA*, is structurally ambiguous. Specifically, the greatest uncertainty stems from section 1, which broadly defines "property" as "any contingent interest in property" but remains entirely silent on digital assets, thereby severely complicating the executor's peremptory duties under section 9 (to inventory all known property) and section 26 (to take custody or control thereof).⁴⁶³ Similarly, while the *Copyright Act*⁴⁶⁴ provides protection for intellectual property, its efficacy is negated by prevalent digital licensing models (EULAs and ToS), which typically impose non-transferable, lifetime licences, rendering many digital content acquisitions (such as e-books and digital music) incapable of devolution upon death, thereby circumventing the principle of freedom of testation.⁴⁶⁵ In addressing whether all licensed digital assets should become inheritable property, a critical doctrinal distinction must be drawn. It is submitted that pure service licences (such as streaming subscriptions) legitimately terminate upon death; however, quasi-proprietary assets (such as purchased e-libraries) must be legally recognised as inheritable property to prevent the arbitrary destruction of the estate's economic value.⁴⁶⁶

Furthermore, the legal landscape in South Africa is characterised by a critical lack of dedicated legislation governing fiduciary/executor access.⁴⁶⁷ This void forces executors to navigate restrictive contractual terms imposed by global service providers.⁴⁶⁸ While regulating international service providers poses practical jurisdictional challenges, South African courts (as demonstrated in *Foize Africa (Pty) Ltd v Foize Beheer BV*) have firmly established that foreign choice-of-law or

⁴⁶³ Sections 1, 9 and 26 of the *AEA*; Ratiba 2013 *JJS* 41-43.

⁴⁶⁴ 98 of 1978.

⁴⁶⁵ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 46. See para 3.2.1.

⁴⁶⁶ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 29, 53.

⁴⁶⁷ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 44-47.

⁴⁶⁸ Sheridan 2020 *Ohio St Tech LJ* 366.

jurisdictional clauses cannot automatically oust the jurisdiction of South African courts.⁴⁶⁹ Therefore, domestic legislation could effectively compel compliance by declaring restrictive clauses void against South African public policy. The tension is acutely felt in the conflict between the executor's statutory duty to take assets into custody and the principles of post-mortem privacy implicated by the *PAIA*. It must be clarified that *PAIA* does not absolutely enshrine a constitutional right to post-mortem privacy; rather, sections 34 and 63 simply permit a custodian to refuse access to records if disclosure would result in the "unreasonable disclosure" of a deceased individual's personal information.⁴⁷⁰

6.2.2 Judicial evolution and practical challenges

A further objective was to assess the recognition of digital assets as "property" in South African law. Despite the legislative silence, South African jurisprudence has begun to adapt. The judicial acknowledgement of crypto assets (like Bitcoin) as property for insolvency purposes, established in the *Bester*⁴⁷¹ case, sets a significant precedent for classifying financially valuable digital assets.⁴⁷² This supports the finding that digital assets satisfy the *Pandectist* requirements of a "thing" (*saak*), as they are of value to a legal subject and susceptible to human control.⁴⁷³

However, in addressing whether judicial interpretation alone could eventually resolve this classification, it is submitted that legislative intervention remains strictly essential. Judicial development is inherently piecemeal; while the *Bester* judgment is a watershed moment, its context is limited to insolvency, and courts cannot unilaterally amend the *AEA* to universally empower executors.⁴⁷⁴ Furthermore, it must be clarified that not all categories of digital assets satisfy the traditional *Pandectist* definition of a "thing". While quasi-proprietary assets like

⁴⁶⁹ *Foize Africa (Pty) Ltd v Foize Beheer BV* 2013 3 SA 91 (SCA) para 21.

⁴⁷⁰ Sections 34 and 63 of *PAIA*; Booyens *The impact of privacy policies and terms of service on the user's freedom of testation* 15-16.

⁴⁷¹ *Bester* case para 50.

⁴⁷² Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 43-49. See para 2.42 and 4.3.1.

⁴⁷³ Geyer 2023 *PSLR* 152. See paragraph 2.1.

⁴⁷⁴ Ratiba 2013 *JJS* 41-43; Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 48-49.

cryptocurrencies possess the requisite value and susceptibility to human control, pure service licences (such as purchased e-books or streaming accounts) constitute mere personal contractual rights that extinguish upon death, entirely lacking true proprietary status.⁴⁷⁵

Furthermore, judicial flexibility in handling electronic documents, exemplified by the *Van der Merwe*⁴⁷⁶ case, indicates a path toward recognising electronic expressions of testamentary intent.⁴⁷⁷ However, this judicial evolution has not translated into comprehensive statutory mechanisms for access or transfer.

Practically, the challenges for the executor remain formidable: the risk of neglecting crypto holdings due to hidden keys,⁴⁷⁸ the difficulty of valuing volatile assets for estate duty purposes,⁴⁷⁹ and the potential legal jeopardy faced when attempting to circumvent security measures or foreign anti-hacking legislation.⁴⁸⁰ Regarding the proposition of imposing a statutory duty on individuals to disclose digital asset information during estate planning, it is submitted that such an obligation would be legally and practically fraught, risking severe security breaches if sensitive cryptographic credentials become public. Instead, disclosure must remain a matter of proactive personal responsibility, best facilitated through confidential mechanisms such as the "sealed digital asset memorandum".⁴⁸¹ Ultimately, to resolve the severe legal jeopardy fiduciaries face under the *Cybercrimes Act*, the introduction of explicit statutory authorisation is absolutely critical. Enacting a dedicated Digital Assets Access Act (drawing on the Canadian *UADAFAA* model) that

⁴⁷⁵ Erlank "Digital Property" (2021) 646; Booyens *The impact of privacy policies and terms of service on the user's freedom of testation* 29, 53.

⁴⁷⁶ MPA 2025 <https://meyerattorneys.co.za/2025/09/02/crypto-estate-planning/>.

⁴⁷⁷ Engelsman 2024 <https://engelsman.co.za/beyond-the-physical-addressing-digital-assets-in-your-will/>.

⁴⁷⁸ SD Law 2023 <https://www.sdlaw.co.za/articles/cryptocurrency-and-your-will/>, Old Mutual Wealth 2025 <https://www.dailymaverick.co.za/article/2025-11-20-safeguarding-digital-wealth-crypto-as-a-component-of-uhnw-estate-planning/>.

⁴⁷⁹ SD Law 2023 <https://www.sdlaw.co.za/articles/cryptocurrency-and-your-will/>; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>.

⁴⁸⁰ Sheridan 2020 *Ohio St Tech LJ* 366; Sylvester *An overview of the regulation and management of cryptocurrency in South African inter vivos and testamentary trusts* 64-65.

⁴⁸¹ Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 25; Snapshots 2024 *Digital Estate Planning Guide* 6.

deems the executor an "authorised user" would definitively shield fiduciaries from criminal liability and override the restrictive privacy barriers of *POPIA* and *PAIA*, thereby transforming the administration process into a legally certain mechanism.⁴⁸²

6.2.3 International best practice

The final objective was to identify reform mechanisms through a comparative analysis. Comparative analysis reveals functional legislative solutions. *RUFADAA* provides a model for balancing fiduciary access against post-mortem privacy through a clear three-tiered hierarchy.⁴⁸³ It prioritises user-defined instructions (via online tools or testamentary documents) and differentiates access rights based on the nature of the information (restricting access to communication content but allowing access to the catalogue or metadata).⁴⁸⁴ Conversely, *UFADAA* presents a simpler, media-neutral approach, asserting the fiduciary's right to default access and aiming to render conflicting contractual restrictions unenforceable, which may be a more efficient model for South Africa.⁴⁸⁵ In determining the single most essential feature of the comparative legislation for South African reform, it is submitted that the Canadian principle of "media neutrality", and its resulting statutory override of standard-form Terms of Service (ToS), is paramount.⁴⁸⁶ The ability to statutorily compel foreign service providers to grant default access, thereby treating a digital file on a server exactly the same as a physical document in a filing cabinet, is the only mechanism that can practically empower South African executors to bypass restrictive private contracts and effortlessly "step into the shoes" of the deceased.⁴⁸⁷

⁴⁸² Section 5 of *UADAFAA*; Woodman 2017 *CJLT* 193, 215.

⁴⁸³ Booyens *Freedom of Testation and Digital Assets* 19-20. See paragraph 5.2.2.

⁴⁸⁴ Sheridan 2020 *Ohio St Tech LJ* 364-365.

⁴⁸⁵ Woodman 2017 *CJLT* 202. See para 5.3.1.

⁴⁸⁶ Section 5 of *UADAFAA*; Woodman 2017 *CJLT* 225-226.

⁴⁸⁷ Woodman 2017 *CJLT* 193.

6.3 Concrete legal reforms and policy recommendations

In light of the finding that digital assets constitute "property" for the purposes of the *Insolvency Act*,⁴⁸⁸ and by extension the *AEA*, it is untenable for the current administrative vacuum to continue. The following recommendations are derived from the theoretical and comparative analysis presented in Chapters 2 through 5.

6.3.1 Immediate intervention: the Chief Master's directive

As established in the introductory motivation of this study,⁴⁸⁹ assets in a deceased estate are traditionally valued based on their fair market value as at the date of the deceased's death.⁴⁹⁰ As stated previously, the executor is legally obliged to take control of all property and create a detailed account (the L&D account) of all administrative steps.⁴⁹¹

As established in the analysis of the *Bester* case,⁴⁹² the Western Cape High Court has already provided the judicial catalyst for classifying crypto assets as "intangible movable property".⁴⁹³ To ensure consistency between the collection of taxes by SARS and the distribution of the residue to heirs, the Chief Master should issue a directive mandating that crypto assets be classified as movable property for the purposes of the L&D account.

In addressing whether the Chief Master currently possesses sufficient statutory authority to issue such a directive, a critical distinction must be drawn between administrative regulation and substantive law. It must be conceded that the Chief Master cannot unilaterally amend the substantive definition of "property" within the *AEA* to cure the legislative lacuna. However, as an administrative functionary, the Chief Master possesses the inherent authority to issue practice directives that standardise reporting, valuation, and accounting procedures across all Master's

⁴⁸⁸ See para 4.3.1 of this study.

⁴⁸⁹ See para 1.1.2.

⁴⁹⁰ Section 5 of the *Estate Duty Act* and s 9HA(1) of the *Income Tax Act* 58 of 1962. See para 2.5.3.

⁴⁹¹ Section 26 of the *AEA*.

⁴⁹² See the discussion in para 2.4.2 above.

⁴⁹³ *Bester* case para 49.

Offices.⁴⁹⁴ Therefore, while explicit legislative amendment remains the ultimate requirement for absolute legal certainty, a Chief Master's directive serves as a crucial, legally permissible administrative interim measure.⁴⁹⁵

The directive should mandate the following:

- *Inventory requirements:* Pursuant to section 27 of the *AEA*, executors must list crypto assets under a distinct heading, verifying existence via a public wallet address while maintaining the security of the private key.⁴⁹⁶
- *Valuation standard:* *Given the extreme volatility of cryptocurrency values, additional and highly specific valuation guidelines are strictly necessary to ensure consistency across estates.*⁴⁹⁷ Consistent with the volatility concerns addressed in paragraph 2.5.3 above, the L&D account must reflect the fair market value at the date of death for estate duty purposes.⁴⁹⁸ However, if the asset is realised (sold) during administration, the actual proceeds must be reflected to calculate capital gains tax (CGT).⁴⁹⁹ To achieve this necessary consistency, the Master's directive should mandate the use of time-stamped "proof of funds" snapshots from reputable exchanges as sufficient evidence of the exact date-of-death value, analogous to a traditional bank certificate.⁵⁰⁰

⁴⁹⁴ Harms *et al* "Administration of Deceased Estates" para 440.

⁴⁹⁵ Ratiba 2013 *JJS* 41-43.

⁴⁹⁶ Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 44-45. See in general Meyerowitz and Cilliers *Administration of Estates and Their Taxation* paras 5.32.

⁴⁹⁷ Maureen *et al* 2025 *Aurelia: Jurnal Penelitian dan Pengabdian Masyarakat Indonesia* 943.

⁴⁹⁸ Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 59 and 72-73.

⁴⁹⁹ MPA 2025 <https://meyerattorneys.co.za/2025/09/02/crypto-estate-planning/>; Brooks 2025 <https://coinledger.io/guides/crypto-tax-south-africa>.

⁵⁰⁰ Roman *The regulations on crypto assets and the impact on the South African insolvency regime* 38.

6.3.2 Estate planning practice: the "digital executor" clause

A critical finding of this study is that South African law does not recognise a "digital executor" as a distinct statutory office separate from the executor of the estate.⁵⁰¹ The Master appoints one executor who bears total liability.

To circumvent the risk of a technologically illiterate executor failing to identify or secure digital assets, legal practitioners must adopt a specific drafting convention. It is recommended that wills include a "digital fiduciary power" clause,⁵⁰² which explicitly authorises the executor to engage forensic technologists as an administration expense, thereby facilitating the discovery of assets without exposing the executor to criminal liability under the *Cybercrimes Act*.⁵⁰³

The proposed wording for the digital agency clause for will drafters could be: "I authorise my Executor to engage the services of a digital assets specialist or forensic technologist to access, decrypt, archive or delete my digital accounts. The reasonable costs of such services shall be deemed an administration expense of my estate. My Executor shall not be personally liable for any loss of digital assets resulting from encryption measures I have enacted, provided they have acted with reasonable care."

In addressing whether it would be preferable to introduce a statutory "digital executor" or expand the powers of the existing executor, it is submitted that the latter is the only legally and practically sound approach. Establishing a separate statutory office would bifurcate the administration process, inevitably leading to administrative delays, increased costs, and jurisdictional conflicts between co-executors. Under South African law, a deceased estate is an aggregate of assets and liabilities; the appointed executor alone is vested with the power to deal with

⁵⁰¹ Roman 2025 *The regulations on crypto assets and the impact on the South African insolvency regime* 25; See ss 2(1)-(2), 3 and 7 of the *Cybercrimes Act* on how "accessing" a deceased person's digital assets without clear and lawful authority could technically constitute a criminal offence.

⁵⁰² See para 2.5 for an explanation on the risks of a technologically illiterate executor and para 3 on the risk of assets entering a "digital limbo".

⁵⁰³ MPA 2025 <https://meyerattorneys.co.za/2025/09/02/crypto-estate-planning/>; Rivellini 2024 <https://www.jpfirm.com/news-resources/digital-assets-in-estate-planning-navigating-the-new-frontier-of-wealth-transfer/>.

this totality of rights and obligations.⁵⁰⁴ Therefore, rather than creating a novel office, the existing executor must simply be granted expanded, explicit statutory powers to manage digital assets, mirroring the framework of the *UADAFAA*.⁵⁰⁵ Furthermore, while the proposed "digital fiduciary power" clause currently serves as a vital drafting recommendation to bridge the existing legislative lacuna, it is submitted that this authority must eventually be incorporated into formal legislation. Codifying this power within a dedicated Digital Assets Access Act would provide a uniform safety net, ensuring that all fiduciaries are empowered and shielded from cybercrime liability, even in intestate estates or where a testator lacked the foresight to include such specific clauses.⁵⁰⁶ Furthermore, while the proposed "digital fiduciary power" clause currently serves as a vital drafting recommendation to bridge the existing legislative lacuna, it is submitted that this authority must eventually be incorporated into formal legislation. Codifying this power within a dedicated Digital Assets Access Act would provide a uniform safety net, ensuring that all fiduciaries are empowered and shielded from cybercrime liability, even in intestate estates or where a testator lacked the foresight to include such specific clauses.

6.3.3 *The "sealed memorandum" protocol*

This dissertation has highlighted the security risk inherent in the *Wills Act*: once a will is lodged with the Master, it becomes a public document.⁵⁰⁷ Therefore, recording passwords, seed phrases, or private keys within the will itself invites theft and creates a security vulnerability that could deplete the estate before the executor is even appointed.

In addressing whether the use of a sealed memorandum would be legally enforceable if it were not executed with the formalities required for testamentary

⁵⁰⁴ *Clarkson NO v Gelb* 1981 1 SA 288 (W) 293; Harms *et al* "Administration of Deceased Estates" para 440.

⁵⁰⁵ Section 2 of *UADAFAA*; Woodman 2017 *CJLT* 193. (Note: Woodman confirms that under the Canadian model, the existing fiduciary simply "steps into the shoes" of the account holder without needing a new category of executor).

⁵⁰⁶ Ratiba 2013 *JJS* 43; Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 59.

⁵⁰⁷ Conner 2011 *EPCPLJ* 320. See para 2.5.1.

writings, a careful doctrinal distinction must be drawn. Under South African law, the doctrine of incorporation by reference is strictly rejected; an informally executed document cannot be incorporated into a valid will to dispose of property.⁵⁰⁸ Therefore, if a sealed memorandum attempts to nominate beneficiaries or distribute digital assets, it constitutes a "testamentary writing" under the test established in *Ex parte Estate Davies* and would be entirely unenforceable without full compliance with the Wills Act.⁵⁰⁹ However, to ensure its practical enforceability and legality, it is submitted that the proposed memorandum must be drafted strictly as a confidential administrative guide or inventory. By ensuring the memorandum merely provides the technical access credentials (the "keys") to facilitate a bequest already lawfully disposed of in the formal, public will, it falls outside the definition of a testamentary writing.⁵¹⁰

6.3.4 Legislative reform: the media neutrality amendment

The most effective long-term solution to the administrative hurdles identified in Chapter 4 is legislative amendment. The necessity of these reforms is best illustrated by revisiting the hypothetical scenario of Ms Themba, introduced in Chapter 1.⁵¹¹

Finally, regarding the conflict between fiduciary access and privacy laws (*POPIA* and *PAIA*), South Africa should look to the *UADAFAA* rather than the *RUFADAA* model. The American model requires court orders for content access, which would overwhelm the South African High Courts.⁵¹² In addressing why the media neutrality principle is fundamentally more suitable for South Africa than the American privacy-focused approach, two primary factors must be considered. First, from a practical perspective, the South African High Courts and the Master's Office are already severely overburdened; imposing a *RUFADAA*-style requirement to obtain a court order merely to access routine electronic communications would be administratively

⁵⁰⁸ *Burnett NO v Kohlberg* 1984 2 SA 137 (E) 143; Du Toit 2014 *APLJ* 63.

⁵⁰⁹ *Ex parte Estate Davies* 1957 3 SA 471 (N); *Oosthuizen v Die Weesheer* 1974 2 SA 434 (O).

⁵¹⁰ See Meyerowitz and Cilliers *Administration of Estates and Their Taxation* paras 5.32-5.33.

⁵¹¹ See para 1.1.2.

⁵¹² Sehati 2021 *Cardozo L Rev* 768-769.

disastrous.⁵¹³ Second, from a doctrinal perspective, the Canadian principle of media neutrality perfectly aligns with the executor's existing duties under South African law. By presuming that a fiduciary who has the authority to read physical paper files in a filing cabinet should possess the identical authority to read digital files on a server, the *UADAFAA* model allows the executor to effortlessly "step into the shoes" of the account holder.⁵¹⁴ This default access seamlessly supports the executor's common law and statutory mandate to take custody and control of estate property in terms of section 26 of the *AEA*, rendering it a far more functional legislative template for South Africa than a restrictive, privacy-centric approach.⁵¹⁵

It is recommended that *PAIA* be amended to include an "executor exception". This would mirror the "media neutrality" principle found in *UADAFAA*.⁵¹⁶ This amendment would align digital assets with paper assets, allowing an executor to demand bank statements from a cloud server just as they would demand paper statements from a bank branch,⁵¹⁷ thereby solving the "digital limbo" identified in Chapter 3. This would compel service providers to grant access to accounts required for the proper liquidation and distribution of the estate, overriding restrictive ToS agreements.⁵¹⁸

As stated in Chapter 5, while the American *RUFADAA* model provides a sophisticated three-tier hierarchy for access, it is fundamentally privacy-centric, often requiring a court order to access the content of electronic communications.⁵¹⁹ In the South African context, where the Master's Office and High Courts are already overburdened, requiring a court order for every e-mail account would be administratively disastrous.

By contrast, *UADAFAA* adopts a principle of "media neutrality".⁵²⁰ It presumes that if a fiduciary has the authority to read paper files in a filing cabinet, they should

⁵¹³ Sehati 2021 *Cardozo L Rev* 768-769.

⁵¹⁴ Woodman 2017 *CJLT* 193.

⁵¹⁵ Section 26 of the *AEA*; Woodman 2017 *CJLT* 193.

⁵¹⁶ Section 2 of *UADAFAA*.

⁵¹⁷ Sehati 2021 *Cardozo L Rev* 762-763.

⁵¹⁸ See para 3.2.1.

⁵¹⁹ Sheridan 2020 *Ohio St Tech LJ* 382.

⁵²⁰ Woodman 2017 *CJLT* 212.

have the same authority to read digital files on a server. As mentioned above, the Canadian model essentially confirms that the fiduciary "steps into the shoes" of the account holder.⁵²¹ This study therefore recommends that South Africa adopts the Canadian approach of default access, as it aligns better with the executor's existing common law powers to take custody of property under Section 26 of the *AEA*.

6.4 Application of findings to the hypothetical scenario of "Ms Themba"

The necessity of these reforms is best illustrated by revisiting the hypothetical scenario of Ms Themba introduced in Chapter 1. Under the current legal framework, Ms Themba's estate faced partial intestacy, significant financial loss, and the destruction of her intellectual legacy due to the rigid application of the *AEA*, contractual restrictions in ToS, and the privacy barriers of *POPIA* and *PAIA*.

It must be emphasised that this scenario accurately reflects the systemic, practical challenges currently encountered by fiduciaries, rather than being a mere theoretical demonstration.⁵²² Executors are routinely confronted with the reality of inaccessible accounts and uncooperative service providers, leading to the permanent loss of valuable digital property. In addressing whether the law should place greater responsibility on individual estate planning or pursue legislative reform, it is submitted that legislative reform is paramount. While proactive estate planning is vital, the law cannot rely on it as the sole remedy. Placing the burden entirely on individual testators is fundamentally flawed, particularly given that the vast majority of South Africans currently die intestate or without updated wills.⁵²³ Furthermore, even when a testator meticulously plans for their digital assets, private contractual restrictions (such as non-transferable lifetime licences for e-books) often override testamentary intent. Therefore, comprehensive legislative reform is strictly necessary to serve as a statutory safety net; it must empower executors and protect

⁵²¹ Woodman 2017 *CJLT* 193.

⁵²² FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Fiduciary-20240130/>; Conner 2011 *EPCPLJ* 307-308.

⁵²³ Agathos BlueStar 2023 <https://www.sanlamadvice.co.za/bluestar/agathos/blogs/are-we-ready-for-electronic-wills>.

estates uniformly, even in instances where individual planning was inadequate or entirely absent.⁵²⁴

However, were the legislative and practical recommendations of section 6.3 of Chapter 6 implemented, the administration of her estate would proceed as follows:

a. *The non-custodial Bitcoin wallet*

The practical utility of the proposed reforms is best illustrated by revisiting the hypothetical scenario of Ms Themba (introduced in paragraph 1.1.2 above). Had the proposed "sealed digital asset memorandum" and "media neutrality" amendments been in effect, the administration would have been resolved as follows:

Under the proposed policy of a "sealed digital asset memorandum",⁵²⁵ Ms Themba would have recorded her private key or seed phrase in a separate, encrypted document referenced in her will but stored securely with her attorney or a digital custodian. This document is categorised as an administrative guide rather than a dispositive testamentary writing, thereby exempting it from the public disclosure requirements of the *AEA*.⁵²⁶ This mechanism protects the security of the asset (avoiding the public nature of the will) while ensuring the executor possesses the necessary "key" to access and transfer the funds.⁵²⁷ Furthermore, the executor is empowered via the "digital fiduciary power" clause,⁵²⁸ to hire a forensic technologist as an administration cost to assist in the secure transfer of the R500 000 in Bitcoin to Mr Sean Kolisi, avoiding the "digital limbo" identified in Chapter 3.⁵²⁹

⁵²⁴ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 59, 65 and 68; Ratiba 2013 *JJS* 43.

⁵²⁵ See para 6.3.3.

⁵²⁶ See para 6.3.3.

⁵²⁷ SD Law 2023 <https://www.sdlaw.co.za/articles/cryptocurrency-and-your-will/>; MPA 2025 <https://meyerattorneys.co.za/2025/09/02/crypto-estate-planning/>.

⁵²⁸ See para 6.3.2.

⁵²⁹ MPA 2025 <https://meyerattorneys.co.za/2025/09/02/crypto-estate-planning/>.

It can be argued that the memorandum is not a "testamentary writing" because it does not dispose of property or nominate an executor; instead, it provides the technical means to execute a bequest already established in the public will. It should be framed as a confidential inventory held in a fiduciary capacity by a legal practitioner, analogous to how an executor handles private bank account details or access keys during the stage of "accessing and taking control" of assets.

b. *The university cloud storage and thesis drafts*

Current position: Currently, the university and cloud service provider would likely refuse the executor access to Ms Themba's accounts, citing the *POPIA* and the *PAIA* regarding the privacy of a third party (the deceased).⁵³⁰ Without a court order, which is costly and time-consuming, the intellectual property (her thesis) and evidence of the university's debt to her would remain locked away.

Reformed position: Under the proposed *PAIA Amendment* (section 6.3.4) South Africa would adopt the "media neutrality" principle found in the *UADAFAA*.⁵³¹ The amendment would explicitly deem the executor an "authorised user" for the purpose of estate administration. This statutory authorisation would override the service provider's privacy policy, compelling them to grant the executor access to the catalogue and content of her files immediately upon production of the letters of executorship, thereby preserving her intellectual legacy.⁵³²

c. *The licensed e-book collection*

Current position: Currently, the EULA governing Ms Themba's digital library stipulates that the licence is non-transferable and terminates upon death. Consequently, the bequest to her sibling, Mr Xane Themba, fails, and the

⁵³⁰ Booyens *Freedom of Testation and Digital Assets* 15-16

⁵³¹ Section 5 of *UADAFAA*.

⁵³² Woodman 2017 *CJLT* 215.

asset is extinguished.⁵³³ In addressing whether legislation should override such contractual clauses or whether consumers should remain bound by them, it is submitted that legislative intervention is absolutely essential. EULAs and ToS agreements are overwhelmingly standard-form contracts of adhesion where the consumer exercises no genuine bargaining power.⁵³⁴ Allowing these private agreements to unilaterally extinguish assets upon death fundamentally undermines the constitutionally protected principle of freedom of testation and results in the arbitrary destruction of economic value.⁵³⁵ Therefore, consumers should not be strictly bound by these concealed, non-negotiable restrictions post-mortem.⁵³⁶

Reformed position: Consequently, the proposed legislation (section 6.3.4) would declare that any clause in a consumer ToS that restricts a fiduciary's access to, or control over, a digital asset is void as against public policy unless the user affirmatively agreed to that specific restriction separate from the general terms.⁵³⁷ This reform would treat the digital library as property capable of transmission, allowing the executor to transfer the account credentials to the heir, thereby upholding Ms Themba's freedom of testation and preserving the value of the estate's assets.

By shifting the legal framework from one of obstruction to one of facilitation, the proposed reforms ensure that digital assets are treated with the same efficacy as physical assets, preventing the "digital limbo" that currently threatens modern estates.

⁵³³ Woodman 2017 *CJLT* 205-206.

⁵³⁴ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 29; Perzanowski and Schultz *The End of Ownership* 2-6.

⁵³⁵ Woodman 2017 *CJLT* 205; Ratiba 2013 *JJS* 35.

⁵³⁶ Section 5 of *UADAFAA*; Woodman 2017 *CJLT* 225-226.

⁵³⁷ Section 5 and s 6 of *UADAFAA*.

6.5 Areas for further research and professional awareness

The nascent state of digital asset law necessitates continued academic scrutiny and professional adaptation in South Africa.⁵³⁸

6.5.1 Further research

The nascent state of digital asset law necessitates continued academic scrutiny and professional adaptation in South Africa. It is submitted that the following areas require the most urgent further academic research:

- a. Implementation of fiduciary access: Research is needed to develop the precise statutory language required to grant executors control (beyond mere disclosure) over digital assets, drawing on clearer models such as the Delaware version of *RUFADAA*.⁵³⁹
- b. Harmonising the *Wills Act* and *ECTA*: Further academic work must explore the possibility of creating a synergy between the *Wills Act* 7 of 1953 and the *Electronic Communications and Transactions Act* 25 of 2002 (ECTA) to legally recognise electronic wills. This research must address formalities through digital signatures and Public Key Infrastructure (PKI) technology, drawing lessons from Australian law and the proposed act-based model.⁵⁴⁰
- c. Third Category Property: Continued engagement with international academic developments, such as the UK Law Commission's concept of a "Third Category" of personal property for crypto assets, will be essential to

⁵³⁸ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 68.

⁵³⁹ Sheridan 2020 *Ohio St Tech LJ* 381-383

⁵⁴⁰ Faber and Ratotobala 2025 *JJS* 18, 44-45; Mahlaela and Monyamane 2024 *PER* 1-20; Banta 2020 *BLR* 551. (Note: Mahlaela and Monyamane argue that South Africa's *Wills Act* is becoming outdated in the face of 4IR technologies due to its exclusion from the ECTA and propose amending both statutes.)

accurately reflect the unique proprietary nature of Distributed Ledger Technology (DLT)-based assets in South African law.⁵⁴¹

6.5.2 Advocating awareness

A concerted effort is required to raise both public and professional awareness regarding digital estate planning.⁵⁴² This requires both professional development and public education.

- *Professional development:* Legal practitioners, particularly estate planners and executors, require continuous professional development to master the technical and legal complexities surrounding crypto assets and online platforms.⁵⁴³ Furthermore, it is submitted that professional bodies, such as the Legal Practice Council and the Fiduciary Institute of Southern Africa must urgently develop and implement formal practice guidelines for digital estate planning. Relying solely on voluntary professional development is practically insufficient. Without formal, standardised guidelines, practitioners are left to navigate the digital estate landscape without a uniform ethical or practical compass. This lack of standardisation significantly increases their exposure to claims of professional negligence when handling volatile, encrypted, or cross-border digital assets. The establishment of formal practice directives would establish a necessary baseline of competency and ensure the uniform protection of clients' digital legacies.⁵⁴⁴

⁵⁴¹ Maureen *et al* 2025 *Aurelia: Jurnal Penelitian dan Pengabdian Masyarakat Indonesia* 945; Callaway and Osborne 2022 <https://www.fladgate.com/insights/classifying-digital-assets-as-property-does-the-law-have-it-right>.

⁵⁴² P&C 2025 <https://focusedlaw.com/8-common-mistakes-to-avoid-in-digital-estate-planning/>; Dobra *Riding the Digital Wave: an executor's Fiduciary Duty towards Digital Assets* 20-21.

⁵⁴³ BVR 2023 <https://www.bvrbusinessrescue.co.za/cryptocurrencies-and-death-a-south-african-legal-perspective/>; Old Mutual Wealth 2025 <https://www.dailymaverick.co.za/article/2025-11-20-safeguarding-digital-wealth-crypto-as-a-component-of-uhnw-estate-planning/>; FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Will-Testament-20241130-b/?blog=investments&category=Wills%20and%20legacy%20planning&articleName=Will-Testament-20241130-b>.

⁵⁴⁴ Dobra *Riding the digital wave: an executor's fiduciary duty toward digital assets* 20-21; Szwajdler 2023 *IJLIT* 160-161.

- *Public education:* The legal community must actively advocate for public awareness, emphasising that digital assets are an integral part of one's legacy and that reliance on verbal instructions alone is legally insufficient.⁵⁴⁵ Tools such as Google's Inactive Account Manager and digital vaults should be promoted as essential components of modern estate planning.⁵⁴⁶

Ultimately, the goal of South African law reform must be to ensure that digital assets are administered with the same certainty, efficiency and respect for the testator's intention that the law currently affords to traditional, physical property. Without a clear, dedicated legislative framework to regulate access and compel custodian cooperation, the inheritability and administration of digital assets in South Africa will inevitably remain problematic.⁵⁴⁷

6.6 Concluding remarks

In conclusion, this research has provided a definitive answer to the core research question: how South African estate law can be successfully reformed to incorporate digital assets into estate planning and deceased estate administration.⁵⁴⁸ To summarise the findings of this study in a single premise: the most critical reform required to ensure that digital assets can be properly administered in South African estates is the enactment of dedicated, media-neutral access legislation that explicitly empowers fiduciaries to override restrictive terms of service and privacy barriers.⁵⁴⁹ By proposing a dual-track reform strategy, this study identifies a clear pathway to bridge the critical "legislative lacuna" identified within the current statutory framework.⁵⁵⁰ The first track involves immediate administrative intervention through

⁵⁴⁵ P&C 2025 <https://focusedlaw.com/8-common-mistakes-to-avoid-in-digital-estate-planning>. Szwajdler 2023 *JLIT* 160-161.

⁵⁴⁶ FNB 2024 <https://www.fnb.co.za/blog/investments/articles/Will-Testament-20241130-b/?blog=investments&category=Wills%20and%20legacy%20planning&articleName=Will-Testament-20241130-b>; Christo Mulder Attorneys 2024 <https://mulderattorneys.co.za/2024/04/02/estate-planning-preparing-for-the-digital-afterlife-2/>.

⁵⁴⁷ Booyens *The impact of privacy policies and terms of service on a user's freedom of testation* 59, 65 and 68.

⁵⁴⁸ See para 1.2.

⁵⁴⁹ Ratiba 2013 *JJS* 43; Woodman 2017 *CJLT* 193, 225-226.

⁵⁵⁰ See para 4.2.

a Chief Master's directive to standardise the identification, valuation and reporting of digital assets in the L&D account.⁵⁵¹ This ensures that the Master's Office acts as a catalyst for reform by applying the precedent established in the *Bester* case, classifying digital wealth as "intangible movable property" to avoid the legal anomaly where creditors are currently afforded greater protection than heirs.⁵⁵²

The second track necessitates long-term legislative amendment, specifically the adoption of a "media neutrality" principle within *POPIA*. By deeming the executor an "authorised user" who "steps into the shoes" of the account holder by default, the law can effectively overcome the "digital limbo" currently caused by restrictive EULA's and the misapplication of post-mortem privacy protections.⁵⁵³ Furthermore, the integration of practical planning mechanisms, such as the "sealed digital asset memorandum" and the "digital fiduciary power" clause, provides a secure and legally robust method for testators to facilitate access without compromising the public nature of the will. This holistic approach ensures that freedom of testation (a cornerstone of South African succession law) is respected regardless of the medium in which an asset resides. Ultimately, these reforms will transform the administration process into a more certain mechanism, ensuring that the digital legacy of South African citizens is preserved and distributed according to their final wishes in an increasingly paperless world.

⁵⁵¹ See para 6.3.1.

⁵⁵² See para 4.3.1

⁵⁵³ See paras 2.42 and 3.5.

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