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SUCCESSION TO DIGITAL PROPERTY AND THE ROLE OF NOTARIES PUBLIC IN DIGITAL ASSET PROBATE

This article presents an analysis of the theoretical and practical challenges of inheriting property in digital form. The authors conclude that, in most cases, there are no justified reasons for non-inheritability of digital assets, pointing out that exceptions to the principle of inheritability of subjective rights need to be justified with convincing reasons. Special attention is devoted to the question of invalidity of terms in contracts for digital services which unjustly prohibit succession to contractual rights and duties. The authors also analyse the role of notaries public in the succession of digital property and the potential of the service of notaries public in improving the practice of planning and inheriting digital assets. The authors conclude that existing rules of succession law are adequate for the succession of digital rights and that there is no need for a reform of succession law or for special legislation.

Key words: *Digital property. – Succession. – Notary public. – Succession law. – Cryptocurrency.*

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1. INTRODUCTION

Technological development of the past several decades has drastically changed the way in which we communicate in everyday life, the way in which we work, and the way in which we keep our property. Digital assets – assets that exist in the form of digital data or as a right to a certain digital service – make up an increasingly significant part of estates, not only because numerous digital assets are becoming more valuable, but also because of the development of new types of digital assets and because traditional property interests are also often expressed in digital form. Consequently, the notion of digital property is discussed increasingly often as a set of rights with pecuniary value that exist only in the digital world (only in the form of digital data). Since this is a relatively new phenomenon and property in digital form was most often owned by young people, the question of succession to digital property was rarely raised. However, the time is now fully ripe to discuss and legally regulate this aspect of digital assets. At the same time, a drastic deviation from existing rules on property should not be expected, but rather their adaptation to new forms in which pecuniary values are expressed.

Contemporary civil law is founded on the principle of the inviolability of private property, market freedom and autonomy of will of subjects in civil law transactions. Therefore, it is easy to understand that civil law is biased towards inheritability and transferability of patrimonial rights. Civil law rights are transferable and inheritable as a matter of principle (Vodinelić 2012, 40–41). Non-inheritability and non-transferability are exceptions that must be justified by convincing reasons. However, in the world of digital assets, inheritability is often called into question – whether due to technical obstacles that stand in the way of heirs (such as lack of knowledge of access data), or due to attempts of digital services providers to limit the rights of users and to exclude all costs and risks associated with succession to these rights. The move from the analogue to the digital world endangers the system of succession because heirs are often unable to access and administer digital assets. It should also be kept in mind that, broadly speaking, there are two categories of digital assets depending upon whether there is an intermediary who allows the owner to use the digital asset or the owner directly administers the digital asset themselves. The first category encompasses all digital services and all digital assets that are enjoyed through an online platform or on the basis of an information system of the service provider. The second category encompasses digital data based on distributed ledger technology, which are controlled directly by the user without an intermediary. In the former case, the digital service provider may allow the heirs to access digital assets. In the latter case, the heirs may rely only on data that they received from the decedent.

Even if digital service providers attempt to limit the inheritability of the rights of their users, it is difficult to deny the interest of heirs to include those rights in the estate. The heirs have a justified interest in accessing digital assets of the decedent and especially their online accounts, which is of importance for administration of the estate. Heirs need the access in order to determine the value and composition of the estate, to acquire a complete picture of the legal relations of the decedent, to interpret the last will of the decedent and, in general, to be able to administer the estate (Kutscher 2015, 18–19). In addition, civil law is based on the principle of the inviolability of private property, which includes the right to dispose of property *inter vivos* and *mortis causa*. Rules that exclude the possibility of succession to digital assets, without good reason, should be viewed with great suspicion. It is necessary to carefully examine the justifiability and the legal validity of contractual terms that preclude heirs from accessing digital assets or limit their ability to succeed to digital rights.

This article contains an analysis of the notion of digital property and digital estate as well as reasons that speak in favour of or against the inheritability of rights to digital assets. The starting point is the idea that rights in the digital world may be incorporated in the existing system of civil law and succession. The authors advance the thesis that rights to digital assets are capable of being subject to succession and that exclusion from succession must be justified by convincing reasons.

2. THE NOTION OF DIGITAL PROPERTY

The development of digital technologies and their application in all spheres of life and work have resulted in a significant market value of digital data and rights of access to digital services. The term digital assets or digital property is used to denote such digital data and services with patrimonial value. These expressions do not have a precisely defined meaning, nor do they require it, because they are used to refer collectively to various kinds of digital objects. For example, digital property may refer to digital data stored on physical data carriers, rights to use accounts on various online platforms, digital content stored on cloud servers, intellectual property rights to digital content (photos, videos, announcements, etc.), rights to use internet domain names, rights to digital currencies and tokens, video games, accounts on dating websites... It is rightly pointed out in the literature that the notion of digital property or digital estate is of a descriptive nature and that it encompasses such varied relationships that no legal conclusions may be drawn from that notion and that legal questions arise only with regard to certain interests in digital assets (Budzikiewicz 2018, 559–562). Digital property is not a separate patrimonial unit in the sense of civil law because the rights that are included in that notion are of different content; they are not under a unitary legal regime and they are not a single organised whole with a defined legal function. The notion of a separate patrimonial unit implies an organised set of rights that are subjected to a unitary legal regime, with the aim of serving a given interest (Vodinelić 2012, 271–272). One of these separate patrimonial units is the estate, which is comprised of all inheritable rights and obligations of the decedent, for the purpose of allowing universal *mortis causa* succession (Vodinelić 2012, 276). Therefore, the notion of digital estate should be derived from the notion of digital property: it is necessary to determine which of the rights, from the broad concept of digital property, are capable of being subject to succession so that they are included in the estate, as a separate patrimonial unit that undergoes universal succession.

One cannot speak of inheritability of digital rights in general because it depends on the object, the legal basis and the aims of these rights. It is, therefore, useful to analyse various digital rights through a typology of digital assets, which is based on characteristics that are relevant for the civil law regime. Legal theorists have developed numerous such typologies, in accordance with issues they have examined (Klasiček 2023, 238–239). In the context of this article, a simple three-part typology may provide a starting point. In most cases, rights to digital assets and services may be deemed contractual rights. The use of accounts on various online platforms or mobile apps is based on a contract between the user and the service provider. Thus, the issue of inheritability of these rights is subject to the rules on inheritability of contractual rights and obligations. However, some digital assets are not based on contract, which raises the questions whether these assets are objects of property rights (*iura in re*) or sui generis rights that are neither contractual claims nor property rights. This question arises with regard to bitcoins, other digital currencies and digital tokens that are based on distributed ledger technology. Finally, the question of rights to individual digital data, regardless of the digital asset they comprise, is also raised due to their increasing economic significance.

2.1. Contractual Rights in Digital Assets

The biggest part of digital property is comprised of rights, which differ from property rights in that they are not connected to a physical object nor can they be applied directly without the use of a technical intermediary.

The existence of an intermediary is one of the fundamental characteristics of digital forms of property and it requires special regulation (Birnhack, Morse 2022, 5–7). We use our accounts on online platforms, email accounts, internet domain names, online payment accounts and other similar services on the basis of contracts with service providers, which act as technical intermediaries between us and 'our' accounts and data. The 'owner' of a Facebook account has nothing but a contractual right to use the Facebook platform on the basis of a contract concluded with the Meta company (Meta Platforms, Inc.). Similarly, the 'owner' of a national internet domain name has a time-limited right of use on the basis of a contract with one of the authorised registrars. Even if the registration of an internet domain name can be extended an unlimited number of times, the right to use an internet domain name is not unlimited in time and may not be used without the support of the internet service provider. The right to use an email address is regulated by a contract with an email service provider and cannot be separated from that relationship.

When speaking about access to online accounts, a distinction should be made between the right to access the account (formal access) and the factual ability to access the account (informal access). In most cases, an account may be accessed on the basis of certain access data (username and password), regardless of whether the person who accesses the account is formally entitled to use that account. Online services providers do not have the means nor the interest to control whether an account is accessed by the formal 'owner' or by another person who received the access data from them. However, since unauthorised access to an account may be deemed a breach of contract (Berlee 2017), it is important for the heirs to have their right to access the account formally recognised, regardless of their factual ability to gain access.

Accounts cannot be deemed movable things because they lack physical form, because they are not computer programmes but only sets of data that enable the use of certain computer programmes, and because they are inseparable from these computer programmes (Kutscher 2015, 22–25). Technically speaking, accounts are not separate entities but parts of larger digital systems. A user has the right to use a certain online platform and to store their data on servers, which are controlled by the service provider. Of course, even the servers, as physical things, do not necessarily have to be owned by the service provider, which means that ownership of technical infrastructure cannot be used as a criterion for determining digital data rights and rights to use a certain digital service. Most digital services, especially the services of large online platforms, such as social networks, are based on a complex web of contractual relations.

Succession to digital rights is sometimes examined from the viewpoint of intellectual property rights, however, this area of law offers answers for only some of the questions that arise in connection with digital estates. Regardless of the fact that content on online platforms may be protected by intellectual property rights, this protection will be of little help to the heirs because IP rights do not guarantee the right to access an account and also because heirs often do not have knowledge of the contents of a decedent's account (Kutscher 2015, 37–39). IP rights are also of no help to the heirs with regard to digital assets that fall outside the scope of IP protection, such as virtual objects in online video games (Kutscher 2015, 40). Such virtual objects are part of the computer programme, which is subject to the IP rights of the programmer who made it. Therefore, succession to IP rights does not cover all of the rights that are necessary for the enjoyment of digital assets.

Given that the rights to use digital services are based on contracts between users and service providers, the issue of succession to these rights is determined by rules of succession to contractual rights and obligations. Civil law accepts the principle that contractual rights and obligations are transferred to the universal legal successors of the deceased contracting party, unless they are bound to the person of one or both contracting parties – either due to the nature and functions of a right or duty, or according to the intention of the contracting parties. However, digital service providers often exclude the possibility of transferring or succeeding to contractual rights, which raises the question of legal validity of such clauses. In a large number of contracts the possibility of transferring or succeeding to rights is completely excluded, but recently there is also a growing number of contracts which allow the user to designate a 'successor' within a certain digital service whose rights are usually more restricted in comparison to the rights that the user enjoyed on the basis of the contract (Vidić, Kovačević 2022, 430–433). There can be no doubt that contracting parties have the freedom to exclude inheritability of contractual rights and obligations, but that freedom is limited by general rules of contract law, which safeguard fairness of contractual transactions. The exclusion of inheritability of contractual rights cannot be legally valid if there is no legal interest to exclude succession and also if such a provision was forced on the party who finds itself in the weaker bargaining position. It should also be kept in mind that the presumption of inheritability of subjective rights serves not only private interests, but also the public interest in unimpeded transactions in patrimonial rights and preservation of continuity in legal relationships.

Exclusion of transferability and succession has become so dominant in the world of digital assets that the move from the analogue to the digital world is associated with a loss of freedom and autonomy. This may be illustrated by a simple example that is often encountered in the literature: if we buy a book, we are entitled to freely dispose of it – it becomes our property; if we buy a digital book, we have most likely bought only a limited licence to read it through the online platform with which we concluded the contract. The law started to react to such limitations of the freedom to dispose of digital assets. The practice of excluding the right to dispose of digital assets has been strongly criticised in legal theory and it is even being discussed under the notion of *digital feudalism* (Banta 2017, 1149–1156). This expression is not exaggerated because it clearly indicates the fundamental difference of rights in digital assets. When we say that a certain digital asset is 'ours' it often means something quite different from the meaning these words would have in the analogue world. In a large number of cases the 'owners' of digital assets only have the right to use digital services and cannot transfer that right to others.

The validity of contractual terms that exclude succession may be examined from the perspective of several different general rules. First of all, if a non-inheritability clause is part of general contract terms, the rules protecting formal and substantive fairness of general contract terms are applicable. If the party that accepted general contract terms was not adequately informed of their content, the general contract terms will not be considered as part of the contract.[1] However, regardless of this, a general contract terms clause is void if it is contrary to the purpose of the contract or to good business practice.[2] In addition to this rule of invalidity, which may be understood as an expression of the general provision on invalidity of contracts, the Law on Obligations authorises the court to refuse to apply any general contract terms clause that it finds to be unfair or excessively strict towards the other party.[3] The legislator thus established a stricter standard for fairness of clauses in general contract terms: they will have no legal effect if they drastically impair the contractual balance (frustrating the purpose of the contract or violating good business practice), as well as if they are unfair to a lesser degree.

The fact that social networks users offer their personal data and consent to its use as consideration for the right to use an account may speak against inheritability of rights relating to social media accounts. The creation of

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1 Law on Obligations – LO (Zakon o obligacionim odnosima), *Official Gazette of the SFRY* 29/78, 39/85, 45/89 – decision of the CCY and 57/89, *Official Gazette of the FRY* 31/93, *Official Gazette of SCG* 1/2003 – Constitutional Charter, and *Official Gazette of the RS* 18/2020, Art. 142 (3).

2 Law on Obligations, Art. 143 (1).

3 Law on Obligations, Art. 143 (2).

personalised advertising content would be made significantly more difficult if heirs were entitled to continue using the account of the decedent since the personal data of different persons would become mixed together, which could lead to the conclusion that the obligation of an account user is of a personal nature and that the right to use the account is therefore non-inheritable (Budzikiewicz 2018, 570–571). This argument loses its power with regard to digital service providers whose business model does not involve personalised advertising. In addition, a distinction should be made between individual contractual rights and the contractual relationship as a whole. Even if the right to use an account is bound to the person of the user and ends with their death, this does not mean that the whole contractual relationship also ends. The legal relationship that existed between the deceased user and the service provider is transferred to the heirs to the degree that is necessary to resolve that relationship – by deletion or transfer of the data that the user had entrusted to the service provider (Budzikiewicz 2018, 571–573). The complete exclusion of heirs from accessing an account may be argued for only with regard to online platforms that contain intimate data, such as dating sites, or when the user expressly stipulated so. The intention to exclude heirs from access to an account may be presumed when access to an account is biometrically protected – when access is obtained by fingerprint or facial scanning.

It is difficult to justify exclusion of the right to use a digital service when the service includes storage of users' data because the right of heirs to access and receive the data is necessary for achieving the purpose of the contract. A digital service contract that includes data storage would be significantly undermined if the obligation of safekeeping users' data would not extend to the obligation to provide that data to the heirs after the user's death. When heirs did not have any rights with regard to the data of deceased users, the data would simply be lost, even though such a result does not serve the interests of the service provider, the interests of heirs, or the legitimate expectations of the deceased user at the time when they concluded the contract. This line of reasoning may be decisive when deciding the validity of contractual non-inheritability terms – if heirs are, without good reasons, excluded from accessing and receiving the data of a deceased user, the digital service contract is frustrated and the non-inheritability clause may be deemed contrary to good business customs, unfair or excessively strict towards the user. By way of an example of unfair general terms of contract, the German Civil Code explicitly mentions terms that deviate from the fundamental principles of legislative solutions and terms that undermine the main obligations of contracting parties in a way that frustrates the purpose of the contract.[4] The freedom of contract is naturally limited by the purpose and meaning of the contract that has been concluded.

Finally, one should keep in mind that succession cannot be completely avoided – digital data will not automatically disappear when a user dies; the question then arises who will be authorised to access the data in the future and whether they will have the right to delete it. Clauses that prohibit succession to digital assets cannot completely prevent the transfer of data – or control over data – to another person. The death of an account user does not imply the extinction of their data and digital assets; it is only uncertain whether these assets belong to the estate or revert to full control of the owner of the online platform on which they are located (Banta 2017, 1131). In most cases there are no convincing reasons to deny the heirs access to digital data. Inheritability of accounts and account data meets the legitimate expectations of all interested subjects: the deceased user, their heirs, and the service provider.

2.2. Bitcoin and Similar Digital Tokens

Digital tokens are digital data that may be accessed and controlled only by persons who hold the necessary access data (private key). Digital tokens have pecuniary value as a means of exchange or as a digital representation of other patrimonial values. According to the definition in EU law, crypto-assets are comprised of digital data, which represent certain value or rights and which may be kept and transferred on the basis of distributed ledger technology (DLT) or similar technology.[5] Serbian law contains a similar definition of digital assets, which includes any 'digitally recorded value' that may be transferred digitally, apart from digital records of fiat currencies.[6] Serbian law makes a distinction between the notion of virtual currency, which is used to designate crypto currencies (decentralised fungible digital tokens), and the notion of digital token, which is used to refer to all other digital tokens that represent other patrimonial rights.[7] It is very important that the Law on Digital Property, in the definition of a digital token, explicitly acknowledges that patrimonial rights apply to digital tokens as immaterial

4 More on this *infra*.

5 Regulation (EU) 2023/1114 on markets in crypto-assets (MiCA), Art. 3 (1) (5).

6 Law on Digital Property (Zakon o digitalnoj imovini – ZDI), *Official Gazette of the RS*, 153/2020), Art. 2 (1) (1).

7 Law on Digital Property, Art. 2 (1) (2 and 3).

property.[8] Digital tokens are based on distributed ledger technology, which entails decentralised recording of transactions with digital tokens that prevents copying and falsifying digital tokens. Data relating to digital tokens is part of an autonomous and decentralised system in which the validity of transactions is checked automatically by way of computer algorithms (UK Jurisdiction Taskforce 2019, 10). Without going into excessive technical details, it can be said that digital tokens are similar to moveable things (e.g. cash) in that the 'owner' of a token has immediate control over their tokens. With access data, the owner may freely dispose of tokens and all other persons are prevented from interfering with transactions (the protection is even stronger than with moveable physical things). Transfers recorded in the common digital ledger are final and irrevocable, but the transferee may effect a return transfer if they have the necessary access data. The main difference, in comparison to other forms of digital assets, is that there is no intermediary, there is no service provider who enables the use of digital tokens – digital infrastructure is used directly, on the basis of access data. Intermediaries appear in the process of selling and buying digital currency (digital exchange offices), but they are not necessary for the transfer of digital tokens.

First of all, the famous bitcoin should be mentioned – but this category also includes all other digital currencies and digital tokens that are based on distributed ledger technology. In addition to digital currencies, which are fully fungible and divisible (same as fiat currencies), there are also non-fungible digital tokens, which are not fungible nor divisible, but are unique and represent an individually defined right of the owner of the token (e.g. ownership over a certain piece of art). Both types of digital tokens are based on the same technology and are significantly different to other forms of digital property. Digital tokens are specific because they most closely resemble the civil law notion of movable things. Even if they are not physical objects (which may also be called into question from a technological viewpoint – they consist of electrical energy as part of the physical world), digital tokens cannot be copied, they are controlled by an 'owner' and may be freely transferred and exchanged. Another characteristic of this type of digital asset is that they cannot be easily qualified within the existing categories of civil law, which is very important for their legal regulation – they are neither ownership rights in things, nor claims towards a person. 'Owners' of digital tokens have immediate digital control over the tokens and may use them and dispose of them without participation of an intermediary. This fact has influenced legislators to provide special laws, which recognise civil

8 Law on Digital Property, Art. 2 (1) (3).

law protection of digital tokens as a special kind of property. An example may be found in the English Law on Digital Property which recently entered into force and which wisely provides that property law protection cannot be denied to digital assets only because these assets are neither things in possession nor things in action.[9]

The fact that English law spearheads the acceptance of digital property comes as no surprise since common law allows much greater freedom to courts to apply general legal principles to new factual situations, compared to continental legal systems where new solutions must be incorporated into a codified legal system. In order to support the development of digital property and security of transactions in digital tokens, a group of distinguished English jurists has drafted a professional commentary which calls for acceptance of property rights in digital assets. They point out that crypto-assets conform to the definition of property rights that has been developed in court practice and that there is a practical need to provide crypto-assets with the same protection that is provided to property rights (UK Jurisdiction Taskforce 2019, 11–16). Similarly to other property rights, digital tokens are defined, they can be controlled, and they can be transferred from one subject to another, with the assumption that the owner of digital tokens is the person who legally acquired the private key that allows control over data stored in the digital ledger. The classification of property rights into two categories, physical objects (*choses in possession*) and non-physical rights that are enforced before courts (*choses in action*), which has been developed in court practice, does not prevent the adoption of new forms of property rights, regardless of whether that property can be physically possessed or enforced before courts or within an autonomous digital system (UK Jurisdiction Taskforce 2019, 18–21). This categorization was developed in order to make legal rules more transparent and its significance comes to the foreground when a right is bound to physical possession of a thing, such as a lien, but its significance is not in the prevention of legal protection of new forms of property rights.

9 English law, and common law legal systems in general, recognise a different division of legal rights than civil law systems. English law divides property into moveable and immovable property, and moveable property is further divided into moveable physical objects (*choses in possession*) and immaterial objects – various subjective rights which may be enforced only through court action (*choses in action*). However, for the purposes of this article, there is no need to delve into the details of English property law; it is sufficient to point out that both common law and civil law systems face the same problem – how to qualify rights in digital assets which cannot be understood either as a physical thing or as a claim.

Bitcoin is not too different from cash when it comes to unauthorised disposition. Just as possession is crucial for physical currency, registration in the digital ledger is crucial for bitcoins and other digital tokens. The registered person, provided that they hold the private key, may dispose of bitcoins in favour of another and this transfer cannot be prevented. Digital registration of bitcoins should be considered as a matter of fact, separate from the matter of legal right, just as possession is considered as a matter of fact, separate from the matter of ownership over a thing (Lehmann 2019, 118–120). Therefore, heirs may acquire the right to digital tokens independently of the private key and regardless of who has factual control over the digital tokens.

The distributed ledger shows who has the technical means and not who is authorised to dispose of certain crypto-assets (UK Jurisdiction Taskforce 2019, 30). The person who is registered as the owner in the digital ledger may not be the real owner. When a discrepancy arises between the factual and legal situations, there are numerous legal mechanisms to force the person in control of crypto-assets to transfer those assets to the person to whom that property legally belongs. In any event, factual digital control (possession of the private key) should not be confused with legal entitlement to crypto-assets. This is especially important for the issue of succession since succession is one of the situations in which it comes to a discrepancy between the digital ledger and legal rights. In other words, rights in crypto-assets may be transferred outside of the digital ledger, making it necessary to register crypto-assets in favour of the new owner.

Keeping all this in mind, it may be concluded that rights in crypto-assets pass to heirs as part of succession, but the question remains how the heirs will be able to use these rights. Heirs are entitled to acquire private keys and to demand registration of crypto-assets in their favour within the distributed ledger system. The fact that succession to crypto-assets is linked to technical difficulties cannot exclude the inheritability of rights in these assets, which are recognised by the legal system.

2.3. Digital Data

The issue of property rights in digital assets arises not only with regard to digital services or use of digital assets, such as crypto currencies, but also with regard to digital data as such, regardless of whether digital data can enjoy direct legal protection or be objects of absolute property rights – like ownership rights over physical moveable things. Different views of rights in digital data are found in the literature: some authors consider digital data as electrical impulses (physical objects), while others discuss the legal protection of digital files as organised sets of digital data. It is, however, certain that information in itself cannot be subject to ownership rights.

Some authors call for recognising absolute rights over digital files, as defined and transferrable sets of digital data, relying on the views of English courts about the characteristics of objects that enjoy absolute legal protection (Michels, Millard 2022). Namely, English legal theory starts from the assumption that property law protection may be enjoyed by interests which can be individualised, which can be recognised by third parties, which can be transferred from one person to another, and which are sufficiently stable. These characteristics of objects that enjoy property law protection have been developed in court practice and are clearly defined in the 1965 decision of the House of Lords in *National Provincial Bank v. Ainsworth*.[10] Digital data are different from data stored on physical data carriers in that there is a middle layer consisting of logical computer infrastructure between the right of ownership over the physical data carrier (such as a computer) and the intellectual property rights relating to their content (Michels, Millard 2022, 329–332). At this level digital data may fit the mentioned criteria exactly, which opens the path for their property law protection erga omnes (Michels, Millard 2022, 332–336). Of course, it should be noted that notions of property, real rights and the right of ownership have very different meaning in English law compared to in continental legal tradition, however, regardless of that, the practical arguments that have been voiced in favour of erga omnes protection of digital data have universal significance and should be taken into account when legal protection of digital data is examined within the framework of civil law.

In favour of erga omnes protection of digital data, it is stated that, through computer programmes and user interface, data may be recognised as individual units, may be controlled and protected against unauthorised access, and may even be transferred indirectly – by copying data and deleting the original data that remained with the transferor (Michels, Millard 2022, 332–336). Digital data are not mere ideas or information that cannot be separated from the subject who perceives them; they can be isolated as specific individual entities that are subject to control and disposal, which means that they can exist as independent objects of legal protection, independently of the owner to whom they belong or of the contractual relationship to which they are bound.

[10] House of Lords, National Provincial Bank v. Ainsworth [1965] A.C. 1175.

In addition to this, in practice there is a need for erga omnes protection of digital data in order to protect the 'owners' of data, in the event of insolvency of the person who 'holds' the data on their servers, as well as in the event of unauthorised copying of data (Michels, Millard 2022, 344–347). However, when a contractual relationship exists between the parties, courts are inclined to resolve issues relating to data access by interpreting the contract. For instance, when a company offering database services refused to allow access to a database of subscribers to a magazine publisher with whom it had a contract, the court decided that there is an implied contractual duty to hand over a copy of the database after the contract had ended (Michels, Millard 2022, 344–345). It is easy to understand that courts are inclined to resolve issues of access to digital data on the basis of flexible rules of contract law, avoiding the complex issue of the legal protection of data as such.

Recognising rights that would refer directly to digital files does not seem like a measure that would simplify relations with regard to digital assets, especially because the individualisation of digital files is not perfect. The unlimited possibility of copying and using digital data also undermines their protection as independent legal objects.

Some authors point out that recognising rights in digital data is justified when data can be individualised (so that the principle of the transparency of property rights is preserved) and they propose an examination of the certainty of digital data, which would encompass their nature, the subjects to which they relate, and their purpose (van Erp 2017, 12–16). According to this idea, digital data would enjoy sui generis absolute legal protection similar to the right of ownership. The 'owner' of digital data would be entitled to request access and transfer of control over 'their' data. As an illustration of this approach, a clause of the Luxembourg Commercial Code is mentioned, which allows for '*reivindicatio*' of incorporeal movable things that have been entrusted to an insolvency debtor (van Erp 2017, 18–21).[11] However, this is not a right of ownership over digital data, since the contents of the right of ownership and other rights in rem is appropriate for physical objects capable of being in possession.

If there are no rights in digital data, there can be no succession to digital data; they are transferred only as part of succession to other rights that comprise the estate. Data contained on physical data carriers are inherited through succession to ownership rights on the data carriers. Heirs are entitled to access all data that the decedent kept on physical data carriers that

[11] Luxembourg Code de commerce, Art. 567 (2).

belonged to them at the moment of their death. This situation is no different from the case of other objects containing the decedent's data. Data kept on physical data carriers that did not belong to the decedent are inherited through succession to contractual rights and obligations from the contract, based on which the physical data carriers have been used. Succession to crypto currencies and other digital tokens cannot be resolved through the right of ownership or through contractual rights. Crypto currencies, as well as other digital assets that are based on distributed ledger technology, enjoy protection as complex units of public and private data that allow transactions within a certain system, while the data that forms the crypto currencies is not itself an object of legal protection (UK Jurisdiction Taskforce 2019, 16–17). Therefore, there is no succession to the data itself, but to the digital entities that comprise the digital data.

3. DIGITAL ESTATE

Succession is mandatory universal succession of heirs to the rights and obligations of the decedent. With the aim of protecting legal certainty and legal continuity, succession is always universal acquisition of all inheritable rights and obligations that belonged to the decedent at the moment of his death. Succession resolves the legal uncertainty which arises when a legal subject ceases to exist and guarantees the survival of private property (Đurđević 2022, 25–27). The principle of universal succession prevents the possibility of any inheritable right or obligation remaining without a legal subject (Đurđević 2022, 35–36). Universal succession is established in the first Article of the Law on Succession which provides that 'the estate comprises all rights that are suitable for succession and that belonged to the decedent at the moment of death'.[12] The law does not discriminate between the rights belonging to the estate: neither according to their value (the estate also includes physical objects without any market value, such as family photographs), nor according to the type of right (for instance, whether a right is classified as a right to dispose, a claim, or a legal power), nor according to whether a right relates to physical objects. Suitability for succession is not dependent on the form in which a certain right is expressed (Vidić, Kovačević 2022, 427). The only factor that decides on the composition of the estate is inheritability. Non-inheritability may be determined by law or by the will of the contracting parties, but it may also

[12] Law on Succession (Закон о наслеђивању – ЗОН, *Службени гласник РС*, бр. 46/95, 101/2003 – одлука УСРС и 6/2015) Art. 1 (2), translated by author.

arise out of the nature of the right itself. Rights which are bound to their owner by their purpose cannot be part of succession. In the domain of the law of obligations, such a strong personal connection exists in cases in which a claim would lose its purpose if it were transferred to another subject or in which a debt would lose its purpose if it were transferred to a new debtor (Đurđević 2022, 51–52). According to the wording of the Serbian Law on Obligations, an obligation is extinguished due to death of one party only if it was incurred with regard to personal characteristics of the debtor or the creditor.[13] Personal obligations are obligations that arise in connection with the personal characteristics of the debtor or creditor, such as the specialist knowledge or art of the debtor, or a relationship of trust that exists between the creditor and the debtor (Karanikić Mirić 2024, 128–129). One should also keep in mind that each right or obligation from a certain legal relationship should be regarded individually. Thus, Karanikić Mirić gives the example of the personal obligation of a novelist to write a book, which ceases to exist if the novelist dies before the book is finished, and compares it to the obligation of the novelist to hand over the finished manuscript, which is not personal and which may be performed by the novelist's heirs. Such individual examination of the personal nature of rights and obligations is of great importance in complex legal relationships. It should also be mentioned that the extinction of one right or obligation, due to the death of its subject, does not automatically entail the extinction of the entire contract if it contains other rights and obligations that are suitable for succession; therefore, careful examination of the applicability of non-inheritability to the entire contract or only to certain rights and obligations arising out of it is required (Karanikić Mirić 2024, 890–891).

Irrespective of the nature of the right or obligation, inheritability may be excluded by the will of the contracting parties, but this can be expected only when they have important practical reasons and when this does not disturb the balance of their interests and contractual positions. Frivolous and unjustified exclusion of inheritability, even if it is based on the freedom of contract, may be disputed as a legally invalid departure from the basic principles of civil law.[14] Contractual provisions that exclude inheritability of contractual rights and obligations are certainly allowed based on the freedom of contract, but they are subject to general rules on contract validity.

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13 ZOO, Art. 359.

14 This has already been mentioned in the part dealing with contractual rights in digital assets, *supra*.

The issue of the validity of the contractual exclusion of inheritability may be especially important when the exclusion is provided in the general terms of contract.

The idea that an estate includes digital assets has already been accepted in German legal theory and court practice because it is in line with the principle that an estate encompasses all the rights of the decedent, which serves justice and preservation of legal continuity (Pockrandt 2020, 23). However, since digital assets are comprised of various different legal relationships, it is impossible to give one answer to the question whether these relationships are strictly personal – inheritability must be analysed with regard to every type of relationship separately (Budzikiewicz 2018, 566–567). The expression 'digital assets' is used to refer to various digital rights with monetary value, but it does not have a technical meaning: some forms of digital assets are subject to rules of contract law, some are not; some rights consist in claims, while others allow for direct control over digital data; digital assets are sometimes contained on physical data carriers that are owned by the same person who 'owns' the data. All these situations require separate appraisal and different legal reasoning.

A subjective right is non-inheritable by its nature – if the change of the entitled person would lead to a change in the substance of the right. Only if there is a very close connection between a person and a certain right, can the right be considered tied to that person. The analysis of legal relationships in social media accounts, email accounts, domain names, and similar digital assets leads to the conclusion that these relationships do not contain rights or obligations that have a close personal connection: users of accounts are not under a duty to prove their identity prior to the contract conclusion, service providers do not control the real identity of their users, information is transferred between accounts and not between individuals, and accounts are often used under a pseudonym (Pockrandt 2020, 25–29). In this sense, succession to an account does not alter anything with regard to the nature of the rights and the relationship between the account user and the service provider.

When speaking of social media accounts and similar digital services, the 2018 decision of the German Federal Court should be mentioned because it offers convincing and influential arguments in favour of inheritability of the right to access a social media account.[15] The Federal Court decided that the parents of a deceased Facebook user have the right to access data in

[15] BGH III ZR 183/17, Verdict dated 12 July 2018, *https://openjur.de/u/2110135.html*, last visited April 20, 2026.

her account as her heirs, even if Facebook only provided the possibility to change the account of a deceased user into a so-called ‘memorial account’ (the account would remain visible, but heirs would be barred from accessing it or downloading the data of the deceased user). In support of its decision, the Federal Court gave the following significant arguments: the right to use a Facebook account is not strictly personal; the exclusion of inheritability in the general contract terms must be transparent and it would not be valid if it departs from the fundamental principle of universal succession or undermines the main duty of the service provider to keep the user’s data; that rules on personal data protection, secrecy of correspondence and protection of personality rights cannot prevent succession and the right of heirs to access personal data.

The right of heirs to access the accounts of the decedent cannot be denied with reference to the duty of secrecy because digital service providers have no statutory duty of secrecy and because the relationship between the account user and the service provider is not based on personal trust to the same degree as relationships that include a duty of secrecy, such as relationships with doctors, lawyers or notaries public (Budzikiewicz 2018, 574–575). On the other hand, it should be presumed that the decedent wanted their heirs to have access to their data because they had the possibility of deleting data that they wanted to keep secret.

Inheritability of digital assets may also be examined from the perspective of posthumous protection of personality rights. As a rule, digital assets contain personal communication and other content that express the decedent’s personality rights (photographs, videos, personal posts, notes etc.). A digital estate may be intertwined with various personal content. The question arises whether this personal content prevents or limits the possibility of succession to digital assets. There are several compelling reasons why protection of personality rights cannot prevent succession to a digital estate. First of all, it would be technically unfeasible to separate personal and non-personal content. Providers of digital services are not authorised, nor would they have the capacity, to sort data of a deceased user according to their content. Apart from this, it would not be logical to protect the personality of the decedent by granting access to their personal data to a third person (the service provider) rather than to their heirs (Pockrandt 2020, 32–34). Non-inheritability of personal data would lead to a so-called ‘infection’ of the entire user account – if an account contains even one piece of personal information, this would be enough to conclude that the entire account is non-inheritable (Pockrandt 2020, 34–35).

Even putting aside the technical issues, within the system of civil law there are no substantive reasons to deny the inheritability of digital assets that contain personal data. Succession to property that contains personal information is nothing new. In the world of analogue assets, heirs unquestionably acquire all the rights to physical things that belonged to the decedent, whether these objects contain personal information or not. Heirs thus acquire the decedent's diaries, letters, notes, photographs, and similar objects with personal data. The same is true of physical digital data carriers (hard drives, CDs, USB memory sticks, etc.). This solution guarantees continuity in property relationships and ensures that objects containing personal data are not left without an owner (Pockrandt 2020, 36). This solution is also appropriate for digital assets. A clear distinction should be kept between succession to property – whether analogue or digital – and posthumous protection of personality rights. The persons who are entitled to protect the personality of the decedent may react if their posthumous personality rights are violated – if heirs, for instance, make unauthorised use of the decedent's account in their name or if they refuse to delete personal data contrary to the wishes of the decedent – but the persons entitled to protect the personality of the decedent are not entitled to dispose of decedent's property (Pockrandt, 41–42). Succession and posthumous protection of personality rights remain two separate spheres of civil law even when they are connected and intertwined. The protection of the posthumous personality rights is entrusted to the 'next of kin', regardless of whether they are the heirs of the person whose personality rights they are protecting. In short, posthumous protection of personality rights does not have the significance that would prevent succession; it serves as a correction in the event that feelings of piety towards the decedent are injured (Budzikiewicz 2018, 576), regardless of whether by the heirs or by third parties. Digital data deserve a lesser degree of protection because users of digital means of communication must be aware of the heightened risk of access by unauthorised persons and often willingly share their content with the public or publish their personal and intimate views under a pseudonym (Pockrandt 2020, 38). In any event, digital communication deserves no additional protection of secrecy, compared to communication in analogue form.

EU personal data protection law also does not prevent succession to digital property. The rules of the General Data Protection Regulation do not apply to personal data of deceased persons, as explicitly stated in the preamble.[16] The decision on the need for legal regulation of the use of

[16] Preamble 27, General Data Protection Regulation, available at: *https://eur-lex.europa.eu/eli/reg/2016/679/oj*, last visited April 20, 2026.

personal data of deceased persons has been left to the member states. In German law the view has been accepted that protection of personal data applies only to persons who are alive because the protection is based on constitutional rules on the protection of personality rights, which cease to exist upon the death of the subject (Budzikiewicz 2018, 578–579, 581–582). The purpose of personal data protection does not imply the need to limit or exclude the possibility of succession to property that contains personal data. Protection of personal data aims to protect the individual from abuse of their personal data for commercial purposes and to provide informational freedom, as an expression of the general right to free personal development. None of these goals are relevant in the context of succession because there is no risk of commercial abuse of personal data and because the right to free personal development ceases with death (Pockrandt 2020, 65–66). Individuals should be protected against unauthorised use of their personal data and against unauthorised access to personal data by third parties, but that protection is superfluous when data is accessed by the heirs of the data subject. Heirs cannot be considered unauthorised third parties. One should also keep in mind that every person has to contemplate their mortality and keep in mind that after their death their personal data will be accessed by their heirs, so that privacy can be protected by deleting or protecting data.

Inheritability of email accounts and social media accounts may also be denied, with reference to the secrecy of correspondence. Regardless of the complex discussion on whether rules on secrecy of correspondence apply to providers of internet communication services, it should be kept in mind that heirs of a user account are not unauthorised third parties, but that they gain access to the contents of communication as the user's universal legal successors that succeed to their civil law position (Budzikiewicz 2018, 585). According to the Serbian Law on Postal Services, secrecy of letters and other forms of communication is violated if the operator discloses their content to an unauthorised person.[17] Even if this statute does not apply to online communication, it is clear that the purpose of protecting the secrecy of communication is to keep the content of communication away from unauthorised third parties. The Law on Electronic Communications regulates the issue of secrecy of electronic communication only insofar as to limit data secrecy on grounds of public policy.[18] In any event, the starting point should be that heirs are not unauthorised third parties and that they are

[17] Law on Postal Services (Zakon o poštanskim uslugama), *Official Gazette of the RS*, 19/2025. Art. 16.

[18] See Law on Electronic Communications (Zakon o elektronskim komunikacijama), *Official Gazette of the RS*, 44/2010, 60/2013 – CC decision, 62/2014, 95/2018 – other law, 35/2023 – other law, Arts. 126–130a.

entitled to access the content of the digital communication of the decedent, unless circumstances exist that undoubtedly show that the decedent had the intention of excluding their heirs from access to certain communication. However, the fact that an account may be accessed only with the access data (e.g., user name and password) cannot be understood, on its own, as an expression of the decedent's intention to deny their heirs access and they will have the right to demand access from the service provider. The right of heirs to access the contents of digital communication is excluded only if the decedent clearly expressed such an intention, whether online or offline, or when it is evident that a digital account is connected to the intimate sphere of the decedent (dating sites, adult sites).

Keeping in mind all the arguments for and against the inheritability of digital assets, it is easy to arrive at the conclusion that there should be a presumption that rights to digital assets are inheritable, that they are transferred to the heirs as part of universal succession, and that the only non-inheritable rights are those that are clearly connected with the personality of their holder, either by their nature or by clear and justified intention of the contracting parties. Therefore, the inheritability of digital assets should not be doubted as a matter of principle; the question of inheritability may be raised only with regard to particular rights or contracts, in accordance with their content and the intention of the contracting parties. The notion of the estate, as a collection of inheritable rights and obligations that belonged to the decedent at the moment of death, has never been limited to physical things nor did it exclude objects without market value or things that contain the decedent's personal information. Even today, in the domain of civil law relationships, heirs may be considered continuators of the decedent's personality and they acquire the entire civil law position in which the decedent found themself at the moment of death.

4. CONTRACTUAL EXCLUSION OF INHERITABILITY

In a large number of contracts for digital services, the service providers attempt to limit or fully exclude the transfer of rights of a deceased user to their heirs. This is usually achieved by general contract terms because contracts for digital services are concluded in great numbers, without the possibility of negotiating their content. Because of this, when analysing the validity of non-inheritability clauses, the rules on general terms of contract should be kept in mind, since they usually set strict requirements of transparency and substantive fairness. It should also be kept in mind that digital services are provided across national borders, on a global scale, which sometimes makes it difficult to determine the law that is applicable to the issue of validity of general contract terms. That problem is made somewhat easier by the rule that contracting parties are free to choose the applicable law, but it should not be overlooked that digital services contracts are consumer contracts, which means that consumer protection law rules may also be of significance.

4.1. Applicable Law

Given that the seats of many digital service providers are in different countries, the validity of non-inheritability contractual clauses depends firstly on the applicable law. The freedom of contract includes the freedom to choose the applicable law so that the contracting parties are entitled to choose the law that will apply to their contractual relationship.

At the level of the European Union, conflict of laws rules for substantive contract law are determined by the Rome I Regulation. According to the rules of this Regulation, the validity of contractual clauses is determined according to the law that has been chosen by the contracting parties.[19] However, one should keep in mind that the choice of applicable law is limited in consumer contracts. The choice of law cannot deprive a consumer of the protection that they enjoy according to cogent rules of the state in which they have their habitual residence, which means that the applicable law will be the law that is more favourable for the consumer: the law chosen by the contracting parties or the law of the consumer's habitual residence.[20]

The limited choice of law in consumer contracts applies only to contracts that are deemed consumer contracts. If an account on an online platform is used for commercial and private purposes, the qualification of the contract will depend on the balance of these two aspects; in the event of doubt, the consumer nature of the contract should be presumed, in order to save the protective purpose of the rule (Kutscher 2015, 78–79). Contracts for use of an online platform for professional networking, such as LinkedIn, cannot be deemed consumer contracts, which means that the contracting parties are completely free to choose the applicable law.

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[19] Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I), Art. 10 in connection with Art. 3.

[20] Rome I Regulation, Art. 6 (2).

4.2. Exclusion of Inheritability in General Terms of Contract

Clauses that exclude the possibility of succession to rights from digital services contracts are often found in digital service provider general contract terms. Compared to other contractual provisions, general contract terms are subject to stricter fairness control. According to the rules of the Serbian Law on Obligations, general contract terms that are contrary to the purpose of the contract or good business practices are null and void.[21] In addition to this, a court may decline to apply the general contract terms that are unfair or unjustifiably strict towards the party that accepted these terms; clauses based on which a party loses their contractual rights are given as an example of unfair terms.[22] These rules may be crucial when determining the validity of clauses through which digital services providers limit the possibility of succession to contractual rights and exclude heirs from access to the decedent's account. First of all, it can be said that such clauses are contrary to the purpose of the contract because in the case of social media and similar accounts, it is a fundamental duty of the service provider to provide unhindered access to the given platform and the data stored on it. Second of all, non-inheritability clauses may be deemed unjust even if they do not lead directly to loss of contractual rights, because they lead to the loss of rights in a broader sense: the rights of the user will not be transferred to their heirs, so the user loses the right to dispose of their assets *mortis causa*. Non-inheritability clauses could be justifiable only if it is possible to show that in a particular case the service provider has legitimate reason to exclude succession.

The German Civil Code provides rules on the invalidity of the general contract terms that are very similar to the rules of the Serbian Law on Obligations. According to the norm of § 307, clauses that, contrary to the principle of good faith, place a contracting party in an unjustifiably unfavourable position (*unangemessen benachteiligen*) are null and void. Clauses that deviate from the fundamental principles of statutory norms and clauses that limit fundamental rights, arising from the nature of the contract, to such a degree as to endanger the purpose of the contract are listed as unfair clauses.[23] Non-inheritability clauses are undoubtedly allowed and their validity cannot be questioned merely because they deviate from the principle of universal succession, but a distinction needs to be made between clauses that completely exclude the possibility of heirs accessing

[21] Law on Obligations, Art. 143 (1).

[22] Law on Obligations, Art. 143 (2).

[23] § 307 BGB.

an account and its content and clauses that allow access by the heirs, but prevent them from using an account for their own purposes (Budzikiewicz 2018, 589–590). Only the first type of clauses can be considered as unfair clauses because there is no doubt that access to an account and its data is a fundamental right contained in the contract for use of the digital account.

General contract terms must be just, but also transparent. If the party that accepted the general terms did not have the possibility to learn their content in a reasonable way, it will be considered that these terms have not become part of the contract, i.e. that no consensus has been reached with regard to these terms. The Serbian Law on Obligations explicitly states that general contract terms bind a contracting party only if they were aware of them or if they could have known of their content at the time of the contract conclusion.[24] This provision should be interpreted in connection with the rule in the same article, which states that general contract terms must be published according to business customs.[25] If a digital service provider did not publish its general contract terms so that they are clear, known and available to a service user, it can be claimed that they never became part of the contract. Similar reasoning was adopted in the decision of the German Federal Court dealing with the question whether inheritability of a Facebook account was excluded by the rules that were laid out on a separate online help page, to which the general terms of the user agreement did not even refer. According to the view of the court, stating rules on non-inheritability in this manner is not sufficient for their inclusion in the user agreement.[26]

Therefore, exclusion of inheritability in the general contract terms is legally valid only if general terms have been made clear and available to the user at the moment of the contract conclusion and only if the service provider sets an exclusion of inheritability that is adequate to the purpose of the contract and justified by its legitimate business interests. As we have seen, a service provider may prohibit heirs from using an account in the name of the decedent, but it cannot completely exclude them from access to an account and prevent them from obtaining data stored on the servers. General contract terms cannot be used as a means to circumvent the legitimate expectations of the contracting parties and to endanger the position of the party with a weaker negotiation position. General contract

[24] Law on Obligations, Art. 142 (3).

[25] Law on Obligations, Art. 142 (2).

[26] BGH III ZR 183/17, Verdict dated 12 July 2018, *https://openjur.de/u/2110135.html*, last visited April 20, 2026.

terms also cannot be used with the aim of unjustified deviation from the fundamental principles of civil law, such as the principle of the transferability and inheritability of subjective rights.

5. THE ROLE OF NOTARIES PUBLIC IN SUCCESSION TO DIGITAL ASSETS

Succession to digital assets raises theoretical, as well as practical dilemmas and difficulties. Unlike other forms of property, digital assets can easily remain unknown or unavailable to the heirs. The heirs must first have a way of finding out about the decedent's digital rights and then they need the access data. Most digital services are used through an account that can be accessed with a user name and a password, or by using some other method of authentication. Heirs often cannot find this information without the help of the decedent or the digital services provider. In a global questionnaire for professionals in the field of succession, a quarter of all participants mentioned problems in accessing and transferring digital assets (Michels, Hartung, Millard 2021, 13–14). The following major problems were listed: technical barriers to access (passwords and other access data), unclear rules on the rights to digital assets, ineffective estate planning, and unwillingness of service providers to allow and facilitate the transfer of digital assets to heirs (Michels, Hartung, Millard 2021, 15–19). An additional problem can arise when there are several heirs who cannot agree about the administration of a digital account or digital data. In order to solve these problems, it is necessary to develop awareness of the legal significance of digital assets, through the education of users of digital services and professionals in the field of succession. In this context, a very important role belongs to notaries public because they are under the duty to provide preventive legal protection in juridical acts for succession planning, as well as in probate proceedings. Notaries public may significantly contribute to the development of the legal awareness of the importance of planning digital succession and help with organising transfer of digital rights.

One of the main goals of the institution of notaries public is to achieve the cautionary function of form in civil law by instructing parties of the legal significance of juridical acts they undertake (Đurđević 2014, 30–32, 79–81). When drafting notarial deeds and authenticating private juridical acts, notaries public are under a duty to inform the parties of the legal consequences and legal risks of the act that they are undertaking, as well as to determine the real intention of the parties and their legal capacity. Notaries public do not have a duty to advise parties with regard to the economic effects of juridical acts, nor may they advise parties in contracts in a way that brings their impartiality into question (Đurđević 2014, 87). However, notaries public are not limited to instructing parties only about the typical legal consequences of a juridical act, without entering into the details of each party's particular situation; quite to the contrary, they should examine the intention of the parties and determine the aims that they want to achieve in their particular case. In this sense, when drafting wills, notaries public are authorised to inform testators of the importance of precisely defining rights belonging to the estate (including related to digital assets), as well as of the possibility of providing a special regime for digital assets. The fact that civil law only recently started dealing with the issues related to digital assets does not prevent notaries public from informing testators of the importance of stating a clear testamentary intent also with regard to those assets. The legislator has expressly provided the duty of notaries public to warn testators of the rules related to forced shares,[27] but this does not limit the notaries public's duty, because the purpose of this statutory rule is to underline the duty of information with regard to the most important limit to testamentary freedom, but not to free notaries public from the duty of informing parties of the other important legal consequences of making a will.

In addition to the duty of information, which takes centre stage when planning succession, notaries public also play an important role in the probate procedure when the estate is discussed. In order to alleviate the workload of the courts and provide preventive legal protection, the legislator has provided original competence of notaries public for conducting certain actions in probate procedures and the possibility of delegating whole probate procedures to notaries public (Đurđević 2022, 282–285). Notaries public have the original competence for compiling a document containing basic information on the decedent, the heirs and the estate[28] and for making an inventory and evaluation of the estate.[29] In both cases notaries public have the duty to investigate the existence and composition of an estate. Having in mind the growing importance of digital assets, notaries public should also examine whether a decedent had significant digital assets. The legislator has provided that the object of an inventory are all the assets that were in the decedent's possession at the moment of death, assets that belonged to the decedent but were in possession of another, as well as claims and debts of the

[27] Law on Non-contentious Procedure (Zakon o vanparničnom postupku), *Official Gazette of the SRS* 25/82 and 48/88, *Official Gazette of the RS* 46/95 – other law, 18/2005 – other law, 85/2012, 45/2013 – other law, 55/2014, 6/2015, 106/2015 – other law, and 14/2022, Art. 183 (5).

[28] Law on Non-contentious Procedure, Art. 92 (2).

[29] Law on Non-contentious Procedure, Art. 96.

decedent.[30] Even though this provision is formulated with physical property in mind – which can be in possession – it does not prevent taking inventory of digital assets because digital assets can be deemed claims (when based on contract) or property that belonged to the decedent, but was in possession of another (e.g. data on another's server).

The first step in which notaries public may help with succession to digital property is connected to succession planning. Even though the legal regime of digital assets is still not clearly defined in most cases, holders of digital assets may alleviate problems related to succession by making use of traditional institutions for succession planning, such as a will. The clearly expressed intention of the decedent may be of decisive importance in cases in which digital services providers deny inheritability of digital assets or data on the grounds of privacy or presumed intention of the decedent. When a will is made in notarial form, the notary public should, within their duty of information, warn the testator that their estate also includes their digital assets and that it is desirable that they regulate their succession by a will. The notary public should also warn the testator of the importance of informing potential heirs of the existence of digital assets and of keeping access data in a way that allows the heirs to acquire those data in the event of the testator's death. The notary public could also help the testator by informing them of the possibility of providing special rules for digital assets, by disposing of those assets in the form of a legacy and by appointing an executor who would supervise the fulfilment of that legacy.

Notaries public are independent legal professionals who enjoy public trust and who, among other things, are authorised to take deposits. Holders of digital assets may provide their heirs with access to their digital assets by depositing access data with a notary public. There is no doubt that access data may be deposited with a notary public in paper form, i.e. in a sealed or open envelope, however, according to a broader understanding of statutory norms on the objects of deposit, they may also be deposited on a physical data carrier, such as a hard drive, memory card or USB flash drive.[31] Notarial deposit is practical for keeping access data because it guarantees a high degree of security, secrecy of access data, and that they will be handed over to an authorised person. A depositor may make a deposit in favour of their potential heirs, without making the handing over of the object of deposit conditional on a decision in probate procedure identifying heirs. A depositor

[30] Law on Non-contentious Procedure, Art. 97.

[31] See the Law on Notaries Public (Zakon o javnom beležništvu, *Official Gazette of the RS* 31/2011, 85/2012, 19/2013, 55/2014 – other law, 93/2014 – other law, 121/2014, 6/2015, 106/2015 and 94/2024), Art. 165.

may simply make a deposit in favour of their potential heirs, naming them individually, regardless of their legal position as heirs, in order to allow them to access the digital assets even before the probate procedure is completed. It is of great importance for the heirs to acquire access to digital assets as soon as possible in order to be able to make a decision on accepting the estate or administer the digital assets. The importance of depositing access data would be greatly diminished if the heirs could only obtain access on the basis of a final probate decision in which they are recognised as heirs. In order to allow heirs to learn of the deposit of access data, information about the deposit should be included in the will or another reliable means of informing heirs of the deposit of access data.

Depositing access data would not be of much use if it is necessary to periodically change access data and also if the terms of a digital service contract exclude the possibility of sharing access data. In the first case, depositing is practically unfeasible, while in the second case it may be considered as a breach of contract for the digital service, which could entitle the service provider to block access to a decedent's account. Depositing access data is of greatest practical importance with regard to digital currencies and tokens based on DLT technology because these assets may be controlled directly based on access data, unless their administration has been entrusted to another.[32] Lastly, it should be stressed that access data should never be stated in a will because the contents of a will must be published to all interested persons; access data should remain known only to those persons to whom the decedent wanted to give access.

The potential role of notaries public as depositaries of digital data has already been recognised in Dutch law, where the Dutch association of notaries public proposed the creation of a digital vault for safekeeping data (Berlee 2017). Such a solution should be considered in the Serbian legal system as well. The existence of a central digital vault, administered by the Serbian Chamber of Notaries Public, could create more legal certainty in succession to digital assets, provided that adequate technical measures against unauthorised access to stored data are employed. Similar services are already available on the private market, but they are not characterised by public trust and legal guarantees that are inherent to the profession of notaries public.

32 Although the participation of an intermediary is not necessary in the case of digital assets based on DLT technology, the law provides for the possibility of entrusting such assets to persons professionally engaged in the safekeeping and management of such assets. See ZDI Art. 3 (1)(4).

Notaries public also play an important role in probate proceedings. They are authorised to collect all information that is of importance for making a decision on succession, to take an inventory of an estate and to evaluate it, as well as to conduct probate procedures as delegates of the courts. By exercising these duties, notaries public can develop legal practices and rules on succession to digital assets. Investigation of the contents of an estate should not remain limited to traditional forms of property. Notaries public are under a duty to take into account all significant digital assets of the decedent, especially email accounts, social media accounts, online payment accounts, digital currencies and tokens, domain names, etc. There are no statutory limits to take all this property into account in the probate proceedings. Namely, the Serbian Law on Succession recognises a very broad definition of an estate – an estate is comprised of all 'rights which are suitable for succession that belonged to the decedent at the moment of death'.[33] Therefore, all civil law rights that are not tied to the person of their holder make up an estate. From the perspective of the law of succession, the issue with digital assets is not their incorporeal nature, but the uncertainty with regard to their legal regulation. The main question is whether the decedent even had a right to a digital asset that can be transferred to their heirs. However, with regard to most digital assets of practical importance, there is no longer any doubt that they are objects of legally protected interests. Whether these rights are contractual or sui generis rights of direct control is not of importance for succession.

Notaries public are not required to investigate contractual exclusions of inheritability with regard to accounts on various online platforms. For the purposes of probate proceedings, as a non-contentious procedure that is aimed at preventive legal protection, it is sufficient to list all accounts that belonged to the decedent at the moment of death and to state that the rights to use these accounts have been transferred to the heirs, in accordance with contractual provisions. A probate decision must contain information about the decedent, the heirs, immovable property, and moveable property with reference to the inventory of the estate.[34] The purpose of a probate decision is to enable heirs to prove their position as the decedent's successors, which serves the need for preventive legal protection. A probate decision is not a final court decision on the composition of an estate because disputes about the composition of an estate must be decided in a regular civil procedure. Therefore, in a probate decision it is sufficient to enumerate all accounts on online platforms that belonged to the decedent at the moment of death;

33 Law on Succession, Art. 1 (2), translated by author.

34 Law on Non-contentious Procedure, Art. 122.

heirs will be able to prove their status of successors of the user account and all potential disputes regarding the inheritability of rights to an account will be settled in contentious civil procedure.

When conducting probate proceedings as a delegate of the court, a notary public is entitled to request of any person to disclose information that is relevant to the proceedings.[35] According to the procedural statutes, a court or notary public may demand a document (or data) when a third party has a statutory duty to hand over certain information or documents. The problem lies, however, in the fact that digital service providers do not have a statutory duty to hand over data to users' heirs. The rules on protection of personal data, which, among other things, grant the right to access personal data, apply only to the person whose personal data is being used and not to their heirs. Therefore, if access to a decedent's account is necessary for reaching a probate decision (e.g. email account or an account containing online means of payment), the request for granting access to the account may be made only by the heirs and not by the notary public, as the holder of a public office.

When taking inventory and evaluating an estate, notaries public are faced with the challenge of assessing the value of digital assets. Adequate valuation of digital assets may be of crucial importance for the protection of the interests of the forced heirs and the decedent's creditors. In Serbian succession law, the value of forced shares is determined on the basis of the so-called calculated value of an estate – the net value of the estate increased by the value of all gifts made by the decedent in their last year of life, as well as all gifts made at any time to persons from the circle of their intestate heirs.[36] In addition to this, the liability of the heirs for the decedent's debts is limited to the value of the assets they inherited.[37] The liability of the heirs is limited *ipso iure* to the value of the estate at the moment of decedent's death; heirs cannot limit their liability to the assets belonging to the estate and changes in the value of the assets are not taken into account. According to this strict rule, the heirs bear the risk of a decrease in the value of the inherited assets after the decedent's death (Đurđević 2016, 178–180). On the other hand, the creditors cannot make use of a subsequent increase in the value of inherited assets; they can benefit from an increase in value of inherited property only if they have submitted a successful request for separation of the estate from

35 Law on Civil Procedure, Art. 242, on the basis of the Law on Non-contentious Procedure, Art. 30, (2).

36 Law on Succession, Art. 48.

37 Law on Succession, Arts. 222 and 224.

the property of the heirs (*separatio bonorum*).[38] Keeping in mind the very large and frequent fluctuations in the value of crypto-assets, these rules may create significant problems and lead to unfair results. In any event, the position of the forced heirs and the decedent's creditors is directly tied to the value of the estate and they bear the risk of uncertainty with regard to the market value of digital assets. Therefore, notaries public should be aware of the great importance of the valuation of the estate and request expert help whenever they deem it necessary.[39] Determining the value of digital assets does not pose great difficulties with regard to crypto currencies and similar assets that have a market value – in that case, a notary public should simply refer to the value of a certain crypto-asset on a given date. However, with regard to other rights, such as internet domain names or accounts on certain online platforms, the public notary will have to request expert appraisal.

In order to effectively fulfil their duties in the probate proceedings, notaries public must have adequate access to the decedent's digital data. Serbian law still has no special rules on access to digital data of deceased persons, but such rules could alleviate the technical problems that notaries public face and provide more legal certainty in succession to digital assets. The right to access to a decedent's data should be regulated for the purposes of conducting probate proceedings, separately from the rules that regulate succession to rights in digital assets. For example, in US law access to digital assets of a decedent is regulated by the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), which has been enacted in nearly all states (with the exception of Louisiana). This law provides very detailed and flexible rules that aim to achieve a balance between the interests of the decedent, the heirs, and the digital service providers.[40] First, this statute provides that digital assets may be accessed only based on the decedent's consent, which is determined in two ways in strict hierarchy: primary importance is given to online mechanisms for appointing persons who are authorised to access digital assets, and secondary importance is given to the intention of the decedent that has been expressed in a will or in other written document.[41]

38 Law on Succession, Arts. 225–227.

39 Law on Non-contentious Procedure, Art. 99 (1), provides the possibility of engaging expert witnesses when making an inventory and evaluation of the estate.

40 A service provider or a person who 'holds' digital assets is referred to as the custodian, while the person who administers the estate is referred to as a fiduciary. In American law, as well as other common law jurisdictions, heirs do not acquire the estate directly from the decedent, it must first pass to a decedent's personal representative or trustee, who is under a duty to administer the estate, settle the decedent's debts, and distribute the remaining assets among the heirs.

41 RUFADAA, Section 4.

If a decedent made no statement of the right of heirs to access their digital data, the rules of the general terms of contract for digital services will apply.[42] This statute also regulates in great detail the way that a service provider may grant access to digital data and gives it the right to charge a reasonable administrative tax for the additional costs associated with granting access.[43] A service provider is free to choose whether it will give heirs full access to an account or only to the data which they require, and also whether it will allow online access or only data in paper form. It is also made clear in the statute that a service provider is not under the duty to sort the decedent's data in order to allow heirs to obtain access only to those data that they need, if sorting data would be a significant burden for the service provider. In such cases, the service provider may request a court order for access to all data, data from a certain time period, denying access entirely, or allowing access to all data. It is important to state that it is explicitly stipulated that a service provider is not under any duty to grant heirs access to data that the deceased user has deleted, even if it is technically possible to restore them. Deletion of data is considered as a clear expression of the intention to make them unavailable to the heirs.

Apart from these rules, the RUFADAA specifically regulates the issue of access to the electronic communication of a decedent. The contents of electronic communication may be accessed only based on the consent of the decedent, which has been expressed online or in a written document, or based on a court decision when access to the content of digital communication is necessary for administering the estate.[44] The statute, however, also provides the possibility of allowing heirs to access a 'catalogue of electronic communication', which implies meta-data about communication (time of communication, addressees, etc.), in order to learn the facts that are significant for estate administration (e.g. that the decedent had an account with a certain bank). To access these data, it is sufficient that the decedent has not explicitly prohibited access, but a service provider may request a court decision that access to these data is necessary for administering the estate.[45]

These rules reflect a successful balance between the interests of the decedent and their right to privacy, the interests of the service provider not to be overburdened with requests by heirs or exposed to liability for

[42] RUFADAA, Section 5.

[43] RUFADAA, Section 6.

[44] RUFADAA, Section 7.

[45] RUFADAA, Section 8.

unauthorised disclosure of information, and the interests of the heirs or trustees in probate proceedings to learn all facts that are relevant for succession. It is especially important that this statute facilitates access to a 'catalogue of electronic communication' because this solves the problem of unknown digital assets: in most cases, heirs will be able to draw conclusions about the composition of the estate and about digital assets based on these meta-data. The second important solution of this statute is the flexibility in the way that heirs are granted access to digital data. Digital service providers are given great freedom to grant access to data in a way that most suits their needs and business interests, and they are explicitly given the right to an administrative charge for the cost of providing access. The RUFADAA rules remove the arguments that digital service providers could use to avoid the duty of granting data access to heirs, while, at the same time, recognising the new forms of succession planning that have developed in the digital world, which are specific to digital assets.

Statutory rules such as these do not change substantive rules of succession, nor do they resolve the dilemmas regarding legal rights to digital assets, but they are of great practical importance in probate proceedings. Their primary purpose is to regulate technical issues related to the conditions and means of accessing the digital assets and electronic communication of a decedent. Keeping that in mind, these rules are clearly not specific to American law or common law legal systems in general, but can also be adopted in civil law legal systems. Mindful of the importance of digital assets and the difficulties faced by heirs trying to access them, the RUFADAA rules may be recommended as adequate for other legal systems. Of course, regardless of particular solutions, it is clear that a need exists for specific regulation of the right to access digital property, independently of subjective rights and the system of succession.

6. THE IMPORTANCE OF WILLS TO THE SUCCESSION TO DIGITAL ASSETS

Freedom of testation allows everyone to make detailed plans for their digital assets after their death. A testator is free not only to name heirs, but also to leave legacies (bequests) of individual rights. In this way, a testator may create a special legal regime for digital assets and limit access to their digital data. In a system of mandatory universal succession, a testator cannot prevent their digital assets from transferring to their heirs, but they can limit the heirs' access and their rights to those assets. A testator may leave their digital assets to a certain person as a legacy and appoint an executor who will take care of the fulfilment of the legacy. In that case, heirs do not have the right to administer or dispose of rights from the estate before the executor fulfils their duty and secrecy of digital data can be protected by a password that is available only to the legatee (Pockrandt 2020, 43–44). When digital data are stored on physical data carriers owned by the testator, there are no limits to disposing of digital assets. Likewise, there are no issues with regard to digital currencies and tokens because their holder can directly dispose of them using the access data. However, when it comes to rights based on contract, the issue of their inheritability will arise. In many cases, transferability and inheritability of rights are excluded by contractual provisions, so service providers can simply block access, provided that contractual provisions are legally valid.

Even if rarely used in contemporary Serbian legal practice, a will executor can have very important rights with regard to an estate and may significantly contribute to the efficient application of the testamentary dispositions. Their role is especially important when an estate is comprised of rights that require professional management, such as shares in commercial companies or rights in digital assets. The rights and obligations of the executor are determined by the intention of the testator, but the Law on Succession provides for very broad competence of the executor: their duties include safeguarding the estate, administering the estate, payment of the decedent's debts and legacies, and generally taking care that the last will of the decedent is applied effectively.[46] As long as an executor is in place, the right of heirs to administer and dispose of the estate is limited (Đurđević 2022, 288–289). The estate belongs to the heirs, but the executor has priority in administering and disposing of the estate in accordance with the provisions of the will. An executor may be appointed only for one part of the estate or for taking care of a certain legacy (Đurđević 2022, 289), which means that their role can be limited to solving problems that arise in connection with digital assets. In this sense, the need for including a clause on the digital executor into wills is already being discussed in Dutch law (Berlee 2017). Such a solution would significantly facilitate administration of digital estates and prevent potential disputes between heirs.

When digital assets are left as a legacy to one of the intestate or testamentary heirs, the testator has the right to decide whether those assets will be included into the heir's share of the estate (*collatio bonorum*). This issue can be very important because of the unstable value of some digital assets, such as cryptocurrencies, but also because of the difficulty of evaluating digital rights. According to dispositive rules of the Serbian Law

[46] Law on Succession, Art. 173 (1).

on Succession, gifts and legacies made to intestate heirs are included in their shares of the estate.[47] The law does not provide a rule for testamentary heirs, which means that gifts and legacies will be included in their shares of the estate only if the testator orders this explicitly (Đurđević 2022, 346). A testator may protect their heir from the risk of the evaluation of digital assets by excluding rules on *collatio bonorum*. Heirs will thus be certain of the division of other property because the value of the digital assets will not influence the distribution of the estate. The issue of evaluation, however, cannot be avoided if issues relating to the forced shares or liability of the heirs are raised; in both cases it is necessary to determine the value of the estate, including digital assets. The impossibility of determining the value of this property inevitably hurts the interests of the forced heirs and the decedent's creditors.

When digital assets are disposed of based on a will, it is useful to clearly and precisely define digital rights, but it should also be kept in mind that a will is not an adequate means for protecting access data because of their secrecy and the need to periodically change them, therefore, access data must be kept outside the will (Juhász 2024, 560–561). Access data may be kept in a separate document or in digital form on a physical data carrier or an online platform for storing data. A testator can refer in their will to the document wherein access data is contained, which does not mean that the document will become part of the will if it does not fulfil the requirements of testamentary form (Đurđević 2022, 151), so that it will not be necessary to publish the content of that document in the probate proceedings.

7. CONCLUSION

Inheritance, as universal succession to rights and obligations of the decedent, includes all rights that are suitable for succession and belonged to the decedent at the moment of death, regardless of the type and form of the legal rights. Only rights that are, by their nature, tied to their holder are excluded from the estate, as are rights that are non-inheritable by statute or contractual agreement. Consequently, it should be presumed that all rights to digital assets are inheritable. Uncertainties in the succession to digital assets do not arise from rules of succession – which are defined broadly and liberally – but from insufficient legal regulation of rights in digital assets. In short, it is indisputable that rights to digital assets can be part of succession,

[47] Law on Succession, Arts. 66–68.

but it is unclear whether there are any rights in digital assets in the first place. This is especially problematic with digital assets, which cannot be deemed as things or claims, such as crypto assets based on DLT technology. Nevertheless, in contemporary law there is a clear tendency towards accepting civil law rights in these assets and their succession should not be called into question.

A special issue related to digital succession concerns contractual provisions that exclude the possibility of succession to rights and obligations from contracts for digital services. Such provisions are very common in today's world because they suit the business interests of digital services providers. However, the issue of fairness and validity of such clauses should be raised. Legal theory accepts the view that non-inheritability of digital assets is an exception that should be interpreted narrowly and that privacy, personal data and secrecy of correspondence cannot prevent succession. Furthermore, general contract terms that exclude the possibility of succession may be deemed unfair clauses without legal effect. This is especially the case when heirs are completely barred from accessing and removing the decedent's data. Complete exclusion of the right of heirs to access the decedent's data may be justified only on the basis of the explicit or presumed intention of the decedent.

Notaries public, as impartial legal professionals, may contribute significantly to the development of rules on succession to digital assets and to legal certainty in particular cases. First of all, notaries public are under a duty of helping parties in succession planning, which includes the duty to inform them of the importance of digital assets and the need for clear regulation of the fate of those assets by will or contract. Notaries public should question parties about their digital assets and present to them the legal mechanisms for disposing of that property. This duty arises from the principle of information of parties and the position of notaries public as independent and impartial legal professionals. In addition, notaries public are required to take digital assets into account when conducting probate proceedings and particular actions in probate procedures, especially when taking inventory and evaluating the estate. Rights to digital assets should not remain outside the inventory because they form part of the estate and may have significant monetary value, which directly influences the interests of heirs, the forced heirs, and the decedent's creditors.

Finally, one of the main conclusions of this article should be emphasised: new forms of property interests do not require a fundamental reform of the rules of succession. Succession to digital assets is already regulated by flexible and well-known rules of succession law and all issues pertaining to digital succession may be resolved by adequate interpretation and careful application of these rules. This task is entrusted to the Serbian courts, notaries public, solicitors and legal theorists who will increasingly often have to devote their attention to the issue of civil law protection of digital assets. However, there is no need for legislative intervention because an attempt to provide special rules for digital succession could undermine the unity and coherency of the rules that regulate succession in general and also unfairly limit legal recognition and protection of new forms of property. On the other hand, a legislative intervention would not remove the technical issues that arise from the fact that some assets exist only as sets of digital data. Therefore, succession to digital assets should be approached based on well-established rules of succession law, which, for a good reason, do not provide special rules for every particular type of property, but attempt to cast the net of succession as widely as possible, in order to protect the justified interests of the heirs and the decedent's creditors.

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