

DIGITAL ASSETS: A CALL TO ACTION

Examining the risks and challenges posed by
digital assets to estate planning and administration



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ADVISING FAMILIES ACROSS GENERATIONS

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About STEP

STEP is the worldwide professional association for those advising families across generations. We promote best practice, professional integrity and education to our members. Our members help families plan for their futures: from drafting a will or advising family businesses, to helping international families and protecting vulnerable family members.



Centre for Commercial Law Studies

About the Cloud Legal Project at Queen Mary University of London

The Cloud Legal Project (CLP) undertakes research in complex areas of law and regulation related to the development and use of cloud computing services. The CLP was launched in 2009 by members of the Centre for Commercial Law Studies at Queen Mary University of London with generous financial support from Microsoft Corporation. Its current research covers a wide range of topics, including cloud contracts, data protection and privacy, taxation and the legal status of digital assets. To find out more, visit www.cloudlegal.ccls.qmul.ac.uk



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About IQ-EQ

IQ-EQ is a leading global investor services group with over 3,600 professionals across 24 jurisdictions. Within its Private Wealth and Family Office segment, its talented and highly qualified professionals have extensive experience of working with multi-generational families, their family offices and advisors to provide trust and fiduciary services to suit every stage of the family's wealth planning and management strategy.

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This report is based upon the best efforts of STEP to provide an accurate description based upon information supplied to it. Every effort has been made to ensure that the analysis is correct and that its sources are reliable, but its accuracy cannot be guaranteed, and no responsibility can be taken for any action taken based upon this information.

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EXECUTIVE SUMMARY

From social media and email accounts to cryptocurrency and photographs, digital assets are now an important part of people's lives. But what happens to these assets when someone dies or is incapacitated?

STEP and the Microsoft-funded Cloud Legal Project at Queen Mary University of London have collaborated on a joint research project into estate practitioner views on, and experiences with, digital assets. The aim is to understand the extent to which practitioners deal with digital assets; the risks and challenges posed by digital assets to estate planning and administration; and the measures practitioners are taking to assist clients with digital assets.

A survey sent to STEP members globally elicited more than 500 responses from a range of practitioners across the estate and wealth planning sectors. The results provide valuable insights into the experiences of practitioners and their clients.

KEY FINDINGS:

- 1 Digital assets have become a common part of modern estate planning and estate administration, with demand for advice expected to increase significantly in future.
- 2 Clients seek digital asset advice in relation to both estate planning and estate administration, with social media and email accounts topping the list of most-asked-about assets.
- 3 Clients frequently experience difficulties accessing digital assets on death or incapacity of a family member, causing distress and frustration.
- 4 Third-party service providers can present practical, procedural and legal obstacles to both estate planning and estate administration.
- 5 There is wide variation in policies, practices and tools for dealing with clients' digital assets, highlighting the need for more education for practitioners on best practices.
- 6 Law reform is needed to enable effective estate planning and estate administration for digital assets.

A CALL TO ACTION

Accessing digital assets after a loved one's death can pose a challenge. As digital assets become more prevalent and our lives become increasingly entwined with digital technologies, the need for effective solutions becomes ever more critical. These solutions require a joint response. Bodies such as STEP and its members need to engage with governments and service providers globally in order to produce industry solutions and best practices that will help families plan for their futures with certainty and clarity.

To address the challenges, STEP recommends a threefold approach based on education, collaboration and legislation.

Education

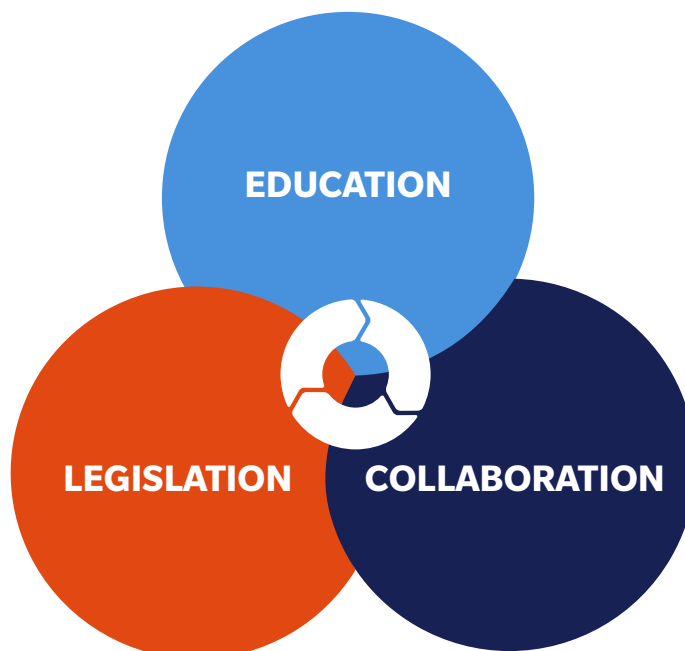
The wide variance in estate practitioners' policies and practices for dealing with digital assets demonstrates the need for the estate industry to work towards establishing, collating and sharing best practices for helping clients. There is also a need to raise public awareness of what constitutes a 'digital asset' and what happens on death or incapacity if you fail to make provision for these.

Collaboration

The estate industry needs to collaborate with cloud service providers to highlight the issues and find more effective solutions for accessing digital assets on death or incapacity. While there are some encouraging signs in relation to pre-planning, providers also need to establish clear procedures for estate administration. The estate industry can provide the legal and practical knowledge needed to inform technical solutions and ensure they work for families.

Legislation

Legal systems need to provide clear rules around property rights and rights of access by personal representatives. There are some encouraging signs, including the Law Commission of England and Wales' project in relation to digital assets in 2021, but there need to be wider efforts and greater cross-border collaboration in order to achieve consistent international standards. Specific legislation such as the *Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)* in the United States provides an example of how to approach this problem.



ABOUT THIS SURVEY

OBJECTIVES

This survey focused on digital assets as part of modern estate planning and estate administration. The COVID-19 pandemic accelerated the use of online services and members of STEP have increasingly become aware of digital assets as an aspect of their practices. This survey provides a benchmark of practitioner experiences assisting clients with digital assets. The survey addressed three issues:

- i. whether estate practitioners deal with digital assets in practice;
- ii. whether digital assets pose risks to estate planning and estate administration practices, particularly when the assets are managed or controlled by third-party service providers, such as cloud service providers; and
- iii. what measures estate practitioners are taking to assist clients with digital assets.

STEP looks forward to follow-on surveys and insights in the coming years, as estate practitioners navigate the opportunities and risks in relation to digital assets.

KEY TERMS

- **Digital asset:** any object that has monetary and/or sentimental value and exists only in electronic form, such as a digital photograph, an email account, an internet domain name, a video-game item, or a cryptocurrency like Bitcoin.
- **Estate planning:** the process of preparing a person's property and affairs during their lifetime, to ensure that their estate passes to the intended beneficiaries in a tax-efficient manner after their death. This includes drafting wills and letters of wishes, setting

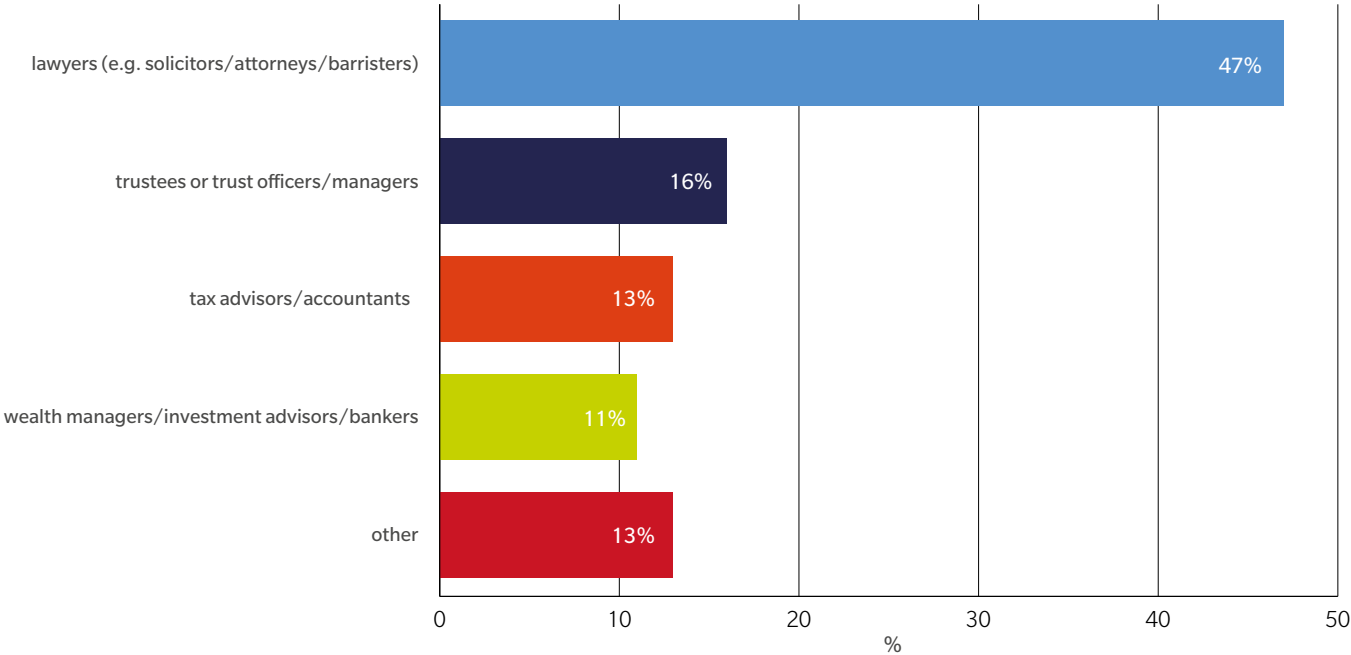
up trusts, and planning for incapacity and business succession.

- **Estate administration:** the process of dealing with a person's estate after their death, to ensure that their estate passes to their intended beneficiaries. This includes identifying and obtaining assets; inventorying and appraising assets; paying debts and estate taxes; and distributing any remaining assets to beneficiaries.
- **Cloud service:** a service in which a provider gives a customer access to a remote computing resource on-demand, for example by allowing the customer to store digital assets, such as digital files, on the provider's servers.
- **Pre-planning tools:** the options and choices offered by some online service providers for users to express their preferences in the case of incapacity or death, including to share access to their account with others. An example is Google's 'Inactive Account Manager', which lets the user set a period of inactivity from three to 18 months and designate a contact person. If Google detects that the account has been inactive for the chosen period, it will email the designated contact a download link to content stored on its servers.¹

RESPONDENTS

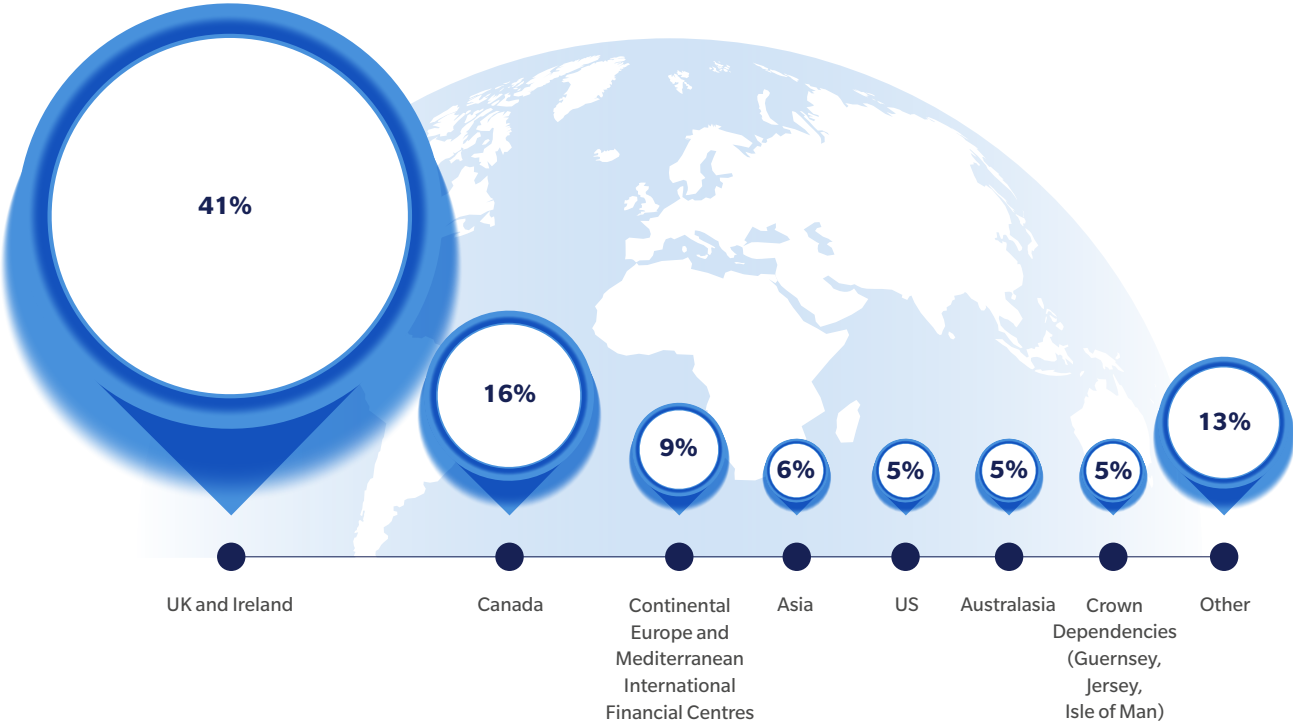
The survey had 507 total respondents. We want to thank all respondents for their time contributing to this first survey of its kind, not only in terms of the questions answered but also for the detailed written responses, which provide rich context based on practical experiences of estate practitioners.

Respondents by profession



Q1: Which of the below best describes your role?, n=507

Respondents by location



Q2: In which region are you based?, n=500

SURVEY FINDINGS

1

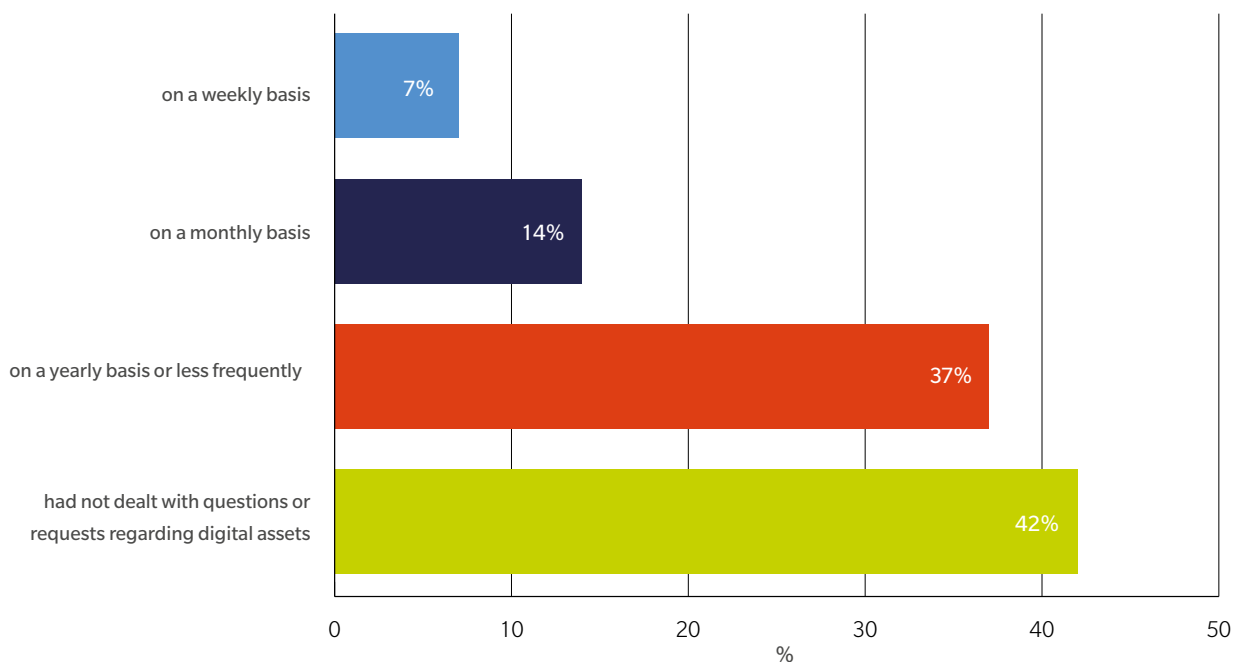
Digital assets have become a common part of modern estate planning and estate administration, with demand for advice expected to increase significantly.

What happens to your digital assets when you die? Legal disputes centred on this question have generated plenty of media attention² and academic interest,³ with contentious cases even reaching appellate courts in several jurisdictions.⁴ But how widespread are such issues? Our survey found that, far from being exceptional, questions around digital assets have in fact become a common part of modern estate practice.

Nearly 60% of respondents had dealt with questions from clients about digital assets. And the issue seems likely to grow in importance, as younger generations – whose lives are more entwined with digital technologies – start to consider estate planning or are confronted with estate administration. More than 90% of respondents thought that client demand for advice about digital assets would increase in future, with over 60% predicting a large increase.

ONE-FIFTH OF ESTATE PRACTITIONERS DEAL WITH DIGITAL ASSETS ON AT LEAST A MONTHLY BASIS.

Respondents dealt with client questions or requests regarding digital assets:



Q5: Have you dealt with any client questions or requests regarding digital assets and if so how frequently?, n=440

²See e.g. the coverage of the *Rachel Thompson v Apple* case, <https://www.thetimes.co.uk/article/widow-wins-long-battle-for-iphone-family-photos-h7mv9bw7t>

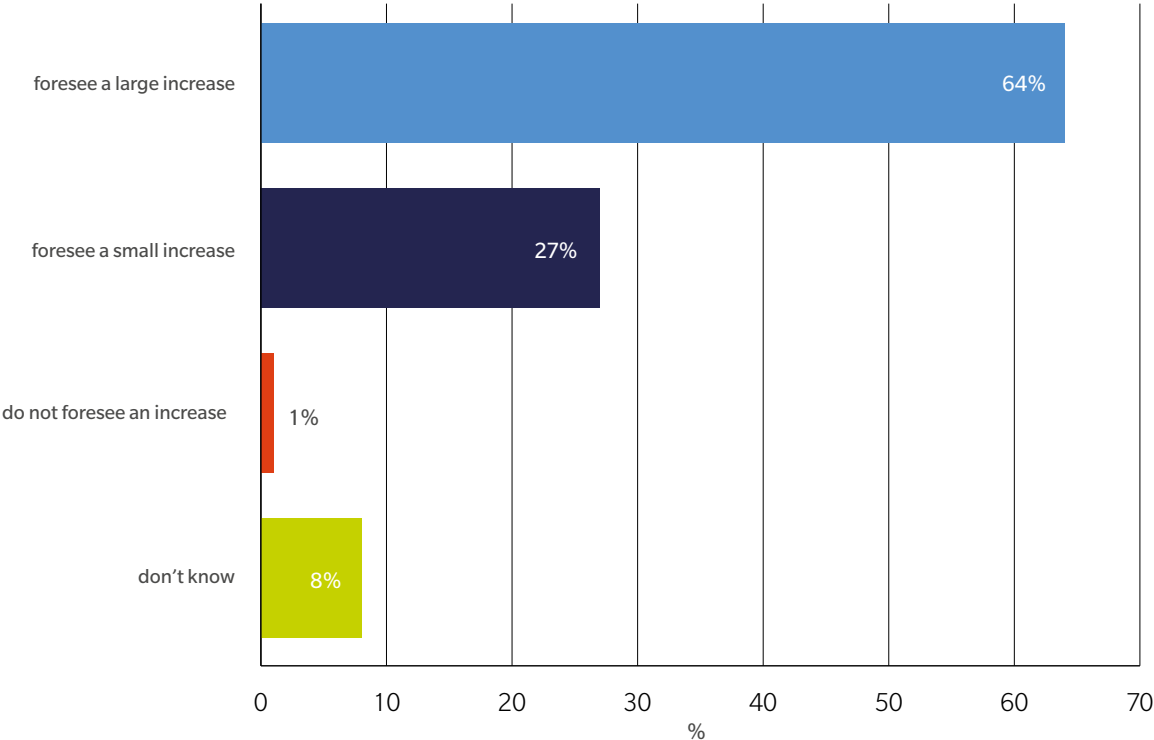
³See e.g. E. Harbinja, 'Post-mortem privacy 2.0: theory, law, and technology' [2017],

International Review of Law, Computers & Technology; A. Gilden, 'The Social Afterlife', [2020] *Harvard Journal of Law & Technology* 33:2.

⁴See e.g. in the US: *Ajemian v Yahoo*, 84 N.E.3d 766 (Mass. 2017); in Germany: BGH, Urteil vom 12. Juli 2018 - III ZR 183/17 juris.

OVER 90% OF ESTATE PRACTITIONERS PREDICT THAT CLIENT DEMAND FOR ADVICE ABOUT DIGITAL ASSETS WILL INCREASE.

Respondents thought the number of clients asking about digital assets will increase in future:



Q8: Do you think the number of clients asking about digital assets will increase in future?, n=436



Clients seek digital asset advice in relation to both estate planning and estate administration, with social media and email accounts topping the list of most-asked-about assets.

Of the 58% of practitioners that had received queries about digital assets, almost half had been asked for general estate planning advice and nearly a third had been asked about transferring digital assets after death. Conversations about data protection and privacy were also common during estate planning, as were requests to close accounts or prevent heirs from accessing digital assets.

Client queries were not limited to estate planning. Clients also asked for help with estate administration. Of the 58% that had received queries about digital assets, over a quarter had been asked about obtaining access to the digital assets of a deceased person during estate administration.

In terms of the type of assets, client queries most commonly concerned social media or email accounts, as well as cloud storage services containing files such as documents and photos. Clients also commonly asked about cryptocurrencies. Respondents highlighted questions around tax treatment of cryptocurrencies, suggesting this may be a growing area of client concern.

These findings suggest that, to help clients deal with digital assets, estate practitioners need to think about three issues:

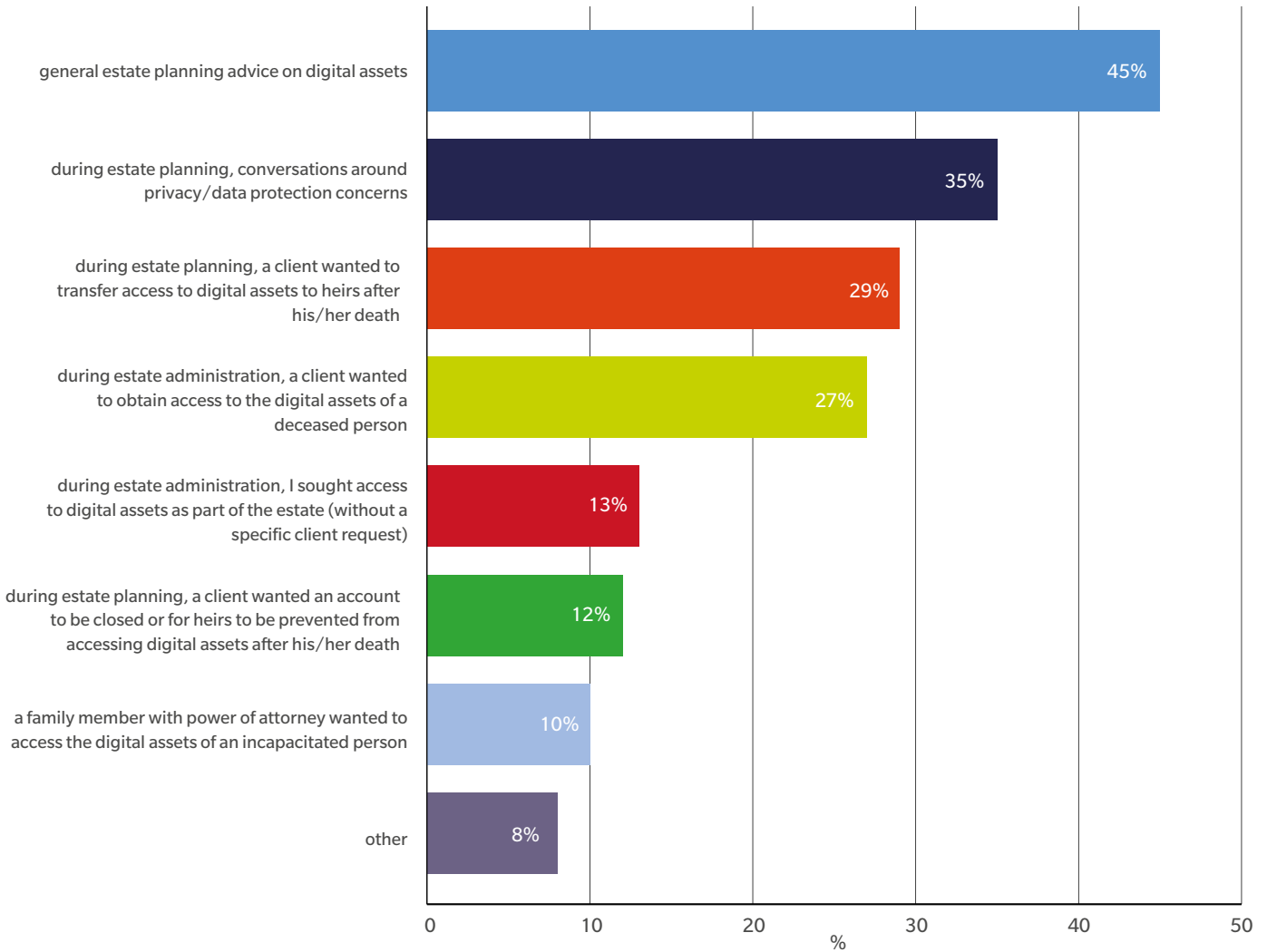
- First, what can clients do during estate planning to ensure that their digital assets pass to the intended beneficiaries?
- Second, what steps can clients take to obtain access to the digital assets of a deceased person during estate administration?
- Third, what is the impact on the above when digital assets are held by intermediaries on behalf of clients?

OF THOSE PRACTITIONERS WHOSE CLIENTS HAD ASKED ABOUT DIGITAL ASSETS, CLOSE TO A THIRD HAD BEEN ASKED ABOUT TRANSFERRING DIGITAL ASSETS TO HEIRS AFTER DEATH.

A SIMILAR NUMBER HAD BEEN ASKED ABOUT OBTAINING ACCESS TO THE DIGITAL ASSETS OF A DECEASED PERSON.

We asked the **58% of respondents** who had received questions from clients about digital assets, what those questions were.

Respondents who had dealt with relevant questions stated:



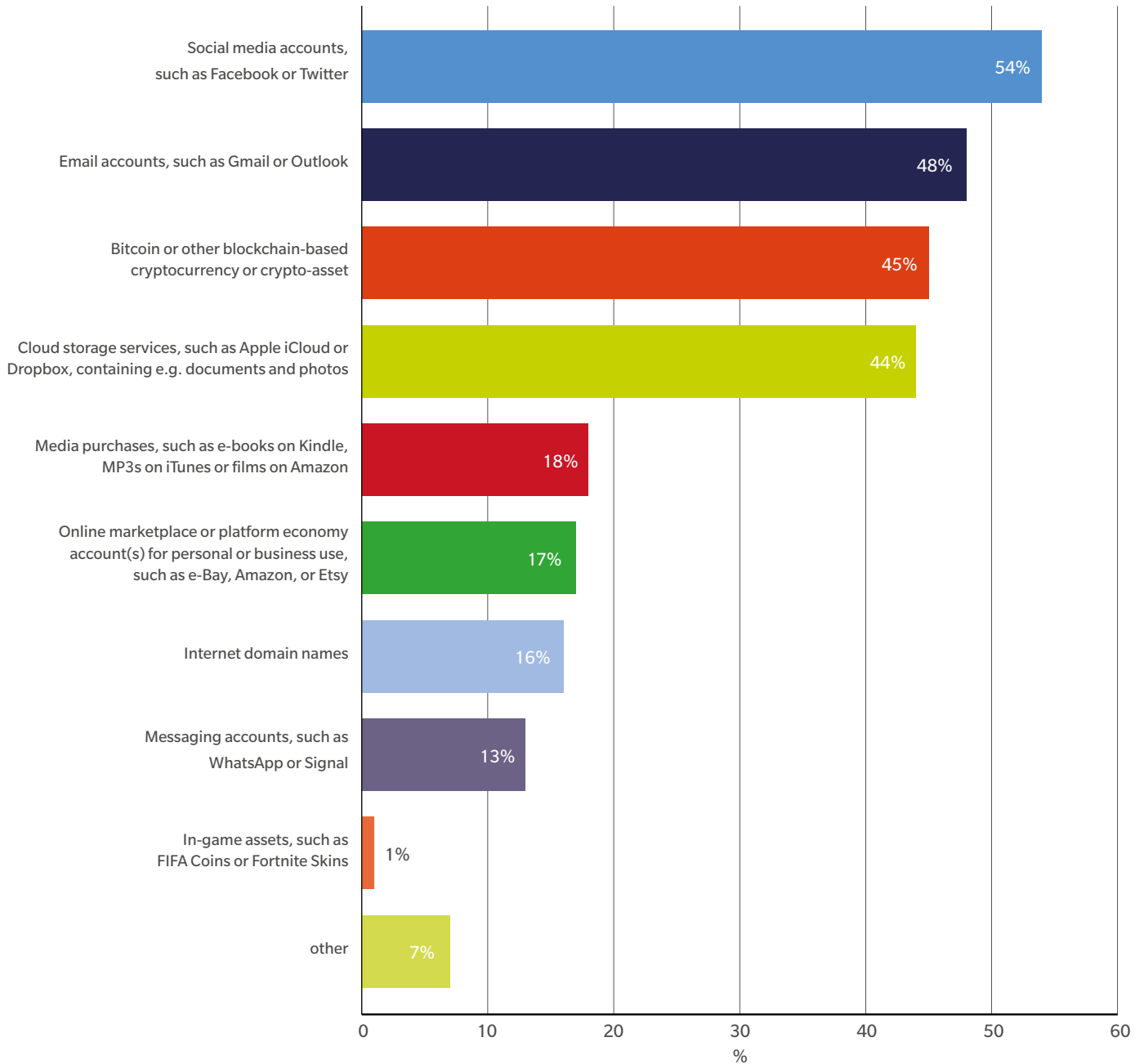
Q6: Which of these characterises your clients' questions?, n = 253, respondents could select multiple options

Of the 'other' responses, key themes were tax implications of digital assets, including cryptocurrencies; general questions about digital assets; and other questions about cryptocurrencies.

CLIENTS MOST COMMONLY ASKED ABOUT SOCIAL MEDIA, EMAIL, CRYPTOCURRENCIES, AND CLOUD STORAGE.

We asked the **58% of respondents** who had received questions from clients about digital assets, what those digital assets were.

Respondents who had dealt with relevant questions stated:



Q7: In your experience, which digital assets do clients ask about?, n=239, respondents could select multiple options

The 'other' responses included online bank accounts, customer loyalty points and access to physical devices such as smart phones or computers.

3

Clients frequently experience difficulties accessing digital assets on death or incapacity of a family member, causing distress and frustration.

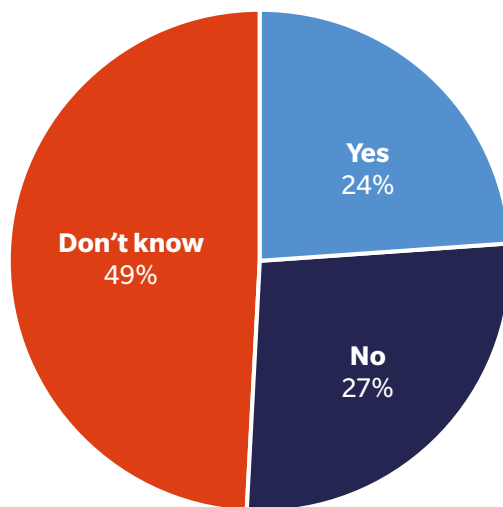
Our survey indicates that clients frequently experience difficulties when trying to obtain access to the digital assets of a deceased or incapacitated person. Nearly a quarter of respondents stated that their clients had faced such difficulties. We asked these respondents to describe the impact on clients, with 79 respondents providing qualitative feedback. The most common theme was the distress and frustration experienced by clients (raised by around one in four responses).

Many respondents mentioned a lack of cooperation from service providers such as Apple, Facebook, and Google (close to one in five responses). Taken together, these findings suggest that clients attach great emotional value to digital assets, including pictures and messages stored on social media, email, and cloud storage services. Yet the providers of such services can frustrate estate administration.

Further, a small number of respondents mentioned difficulties obtaining technical control over cryptocurrencies, including the use or retrieval of so-called 'private keys'. Finally, the responses also indicate that the risks to estate administration are not limited to accessing digital assets. In some cases, an inability to access an online service, such as an email account, can make it more difficult to obtain relevant information about the rest of the estate, including more traditional assets such as online bank accounts.

A QUARTER OF ESTATE PRACTITIONERS REPORTED THAT CLIENTS HAD EXPERIENCED DIFFICULTIES ACCESSING OR TRANSFERRING DIGITAL ASSETS ON DEATH OR INCAPACITY.

Respondents who stated that clients had experienced difficulties accessing or transferring digital assets on death or incapacity of a family member:



Q9: Have any of your clients or their families experienced difficulties in relation to accessing or transferring digital assets on the death or incapacity of a family member?, n=434

When asked what difficulties clients or their families had encountered, respondents mentioned:

Distress, frustration, and other emotional burdens

(18 respondents)

‘Significant distress at not being able to access photos’

‘A deceased's client's family were very distressed when her WhatsApp account was closed after several months of inactivity – they got a message to their family WhatsApp group which said “X has left the group” and as their grief was still very raw, they found that deeply upsetting.’

‘Adds to emotional burden post death of a loved one and the facilities are not yet in place to deal with these matters. Those that are in place are insufficient.’

Uncooperative service providers

(14 respondents)

‘The wide range of different requests from providers i.e. asking for too much information that is not necessary’

‘The greatest difficulty is often trying to get through to a relevant legacy team member within huge organisations such as Facebook and to demonstrate adequate authority to operate an account and secure a desired outcome.’

Difficulty in accessing email and devices to obtain information about the estate

(6 respondents)

‘Many clients are now going paperless. Without access to email notifications or digital devices, almost impossible to discover and collect all assets for clients who did not maintain list or keep paper records (statements).’

Q10: What were the difficulties your clients or their families experienced in relation to accessing or transferring digital assets on the death or incapacity of a family member and impact of these on the client/their family?, selected responses organised by theme, n=79

Other themes mentioned in response to the above question, along with the number of respondents and selected quotes, can be found on page 33 in Annex 2: Practitioner Responses.

4

Third-party service providers can present practical, procedural and legal obstacles to both estate planning and administration.

Estate practitioners will be familiar with the various assets and associated property rights that make up a traditional estate. This typically includes physical assets such as land and buildings, as well as vehicles and valuable tangible personal belongings, like jewellery. It also includes intangible assets, often in the form of legal rights against companies, such as a bank account, an investment fund, a pension, or a life insurance policy. These companies have experience dealing with estate issues, and estate practitioners have established practices for working with them to plan and administer estates. However, consumers increasingly access such intangible assets through smartphone apps or web portals, often using digital access accounts linked to email addresses and/or mobile phone numbers. This can pose new challenges for how to inventory such assets during estate planning, how to provide compliant access for the fiduciary during incapacity administration and how to deal with providers during estate administration.

Digital assets, such as photographs posted on social media or data files stored in the cloud, are often managed or controlled by different third-party service providers, including technology companies and providers of cloud services. These companies are new intermediaries and are often key to managing digital assets. Our survey shows that cloud providers can present obstacles to both estate planning and administration. More than half of respondents stated that there was not a straightforward process for accessing digital assets stored in the cloud in their jurisdiction.

We asked respondents what obstacles they faced in dealing with digital assets stored in the cloud. Respondents identified a range of issues, including practical, legal and planning problems:

- The most-cited obstacle was practical: most digital assets are subject to security measures that restrict access, such as password protection.
- The second-most cited obstacle was legal, namely a lack of clarity around property rights in digital assets.
- The third-most-cited obstacle was a lack of proper estate planning by the deceased.

Further, half of respondents also pointed to uncooperative cloud providers as an obstacle, with just over 40% pointing to restrictive standard contracts and terms of service. Over 85% of respondents agreed that cloud providers should provide better solutions for managing access to digital assets stored in the cloud after death or incapacity. According to a December 2018 study, 85% of standard contracts for consumer cloud services did not explicitly address what happens to customer accounts or data stored in the cloud when the customer passes away. The terms of the remaining contracts differed: some appeared to exclude post-mortem access by heirs entirely, while others permitted such access under certain conditions, such as when the customer had left clear instructions. Further, all 35 contracts prohibited user password sharing and close to 90% of the standard contracts prohibited user assignment of rights under the contract.⁵

Finally, half of respondents noted privacy and data protection concerns as an obstacle. This points to the possible tensions between a deceased person's privacy interests and the interests of heirs in accessing digital assets. This issue isn't unique to digital assets, but may be more prominent given the sheer amount of digital files and emails people store. What's more, such digital assets are often held by an intermediary, such as a cloud storage or email provider, who may focus on maintaining the confidentiality of data with which customers have entrusted it. This tension has been the subject of much academic debate.⁶

⁵J.D. Michels, C. Millard and S. Joshi, 'Beyond the Clouds, Part 1: What Cloud Contracts Say About Who Owns and Can Access Your Content', (2019) Queen Mary School of Law Legal Studies Research Paper No. 315/2019 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3386609#

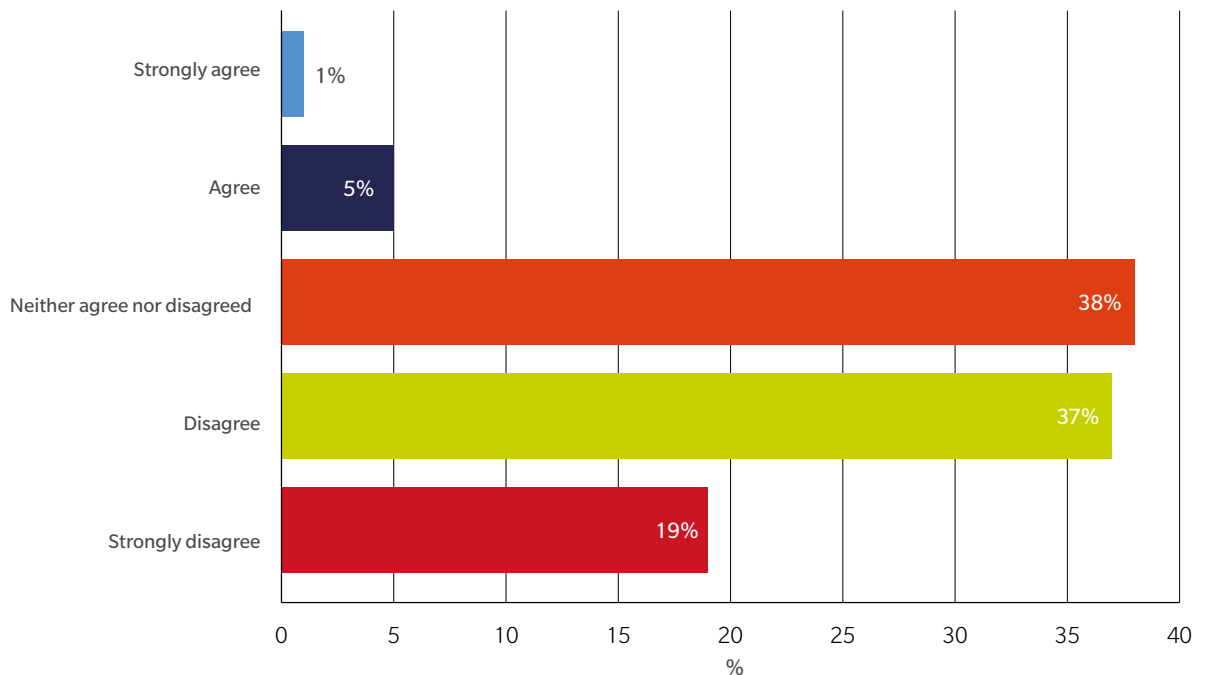
⁶See e.g. L. Edwards and E. Harbinja, 'Protecting post-mortem privacy: reconsidering the privacy interests of the deceased in a digital world', [2013] *Cardozo Arts and Entertainment Law Journal*, 32:1; T. Morse and M. Birnhack, 'The posthumous privacy paradox: Privacy preferences and behavior regarding digital remains', [2020] *New Media & Society*.

Taken together, these findings suggest that overcoming such obstacles requires a multi-pronged approach:

1. **The estate industry needs to collaborate with cloud providers** to find more effective solutions for post-mortem access. There are some encouraging signs, as Apple announced a ‘digital legacy’ tool for its iCloud service in June 2021.⁷ Nonetheless, while such pre-planning tools may help estate planning, providers also need to establish clear procedures for estate administration.
2. **Legal systems should provide greater clarity.** Again, there are some encouraging signs, as the Law Commission of England and Wales commenced a project looking at property rights in digital assets in 2021.⁸ The European Law Institute is working on a project specifically dealing with post-mortem access to digital assets, with a report expected in 2021.⁹ The United Nations Institute for the Unification of Private Law (UNIDROIT) is working on guidance on digital assets and private law, for adoption in 2022.¹⁰
3. **Estate practitioners need to raise awareness** and help clients with estate planning for digital assets.

ONLY 6% OF ESTATE PRACTITIONERS AGREED THAT THERE WAS A STRAIGHTFORWARD PROCESS FOR ACCESSING DIGITAL ASSETS STORED IN THE CLOUD.

Respondents who agreed that ‘In my jurisdiction, there is a straightforward process for obtaining access to digital assets stored in the cloud after a clients death’:



Q11: Do you agree with this statement? ‘In my jurisdiction, there is a straightforward process for obtaining access to digital assets stored in the cloud after a client’s death.’ n=426

⁷A. Neely, ‘Digital Legacy streamlines procedures for data access after death’, 1- June 2021, <https://appleinsider.com/articles/21/06/10/icloud-digital-legacy-streamlines-procedures-for-data-access-after-death>

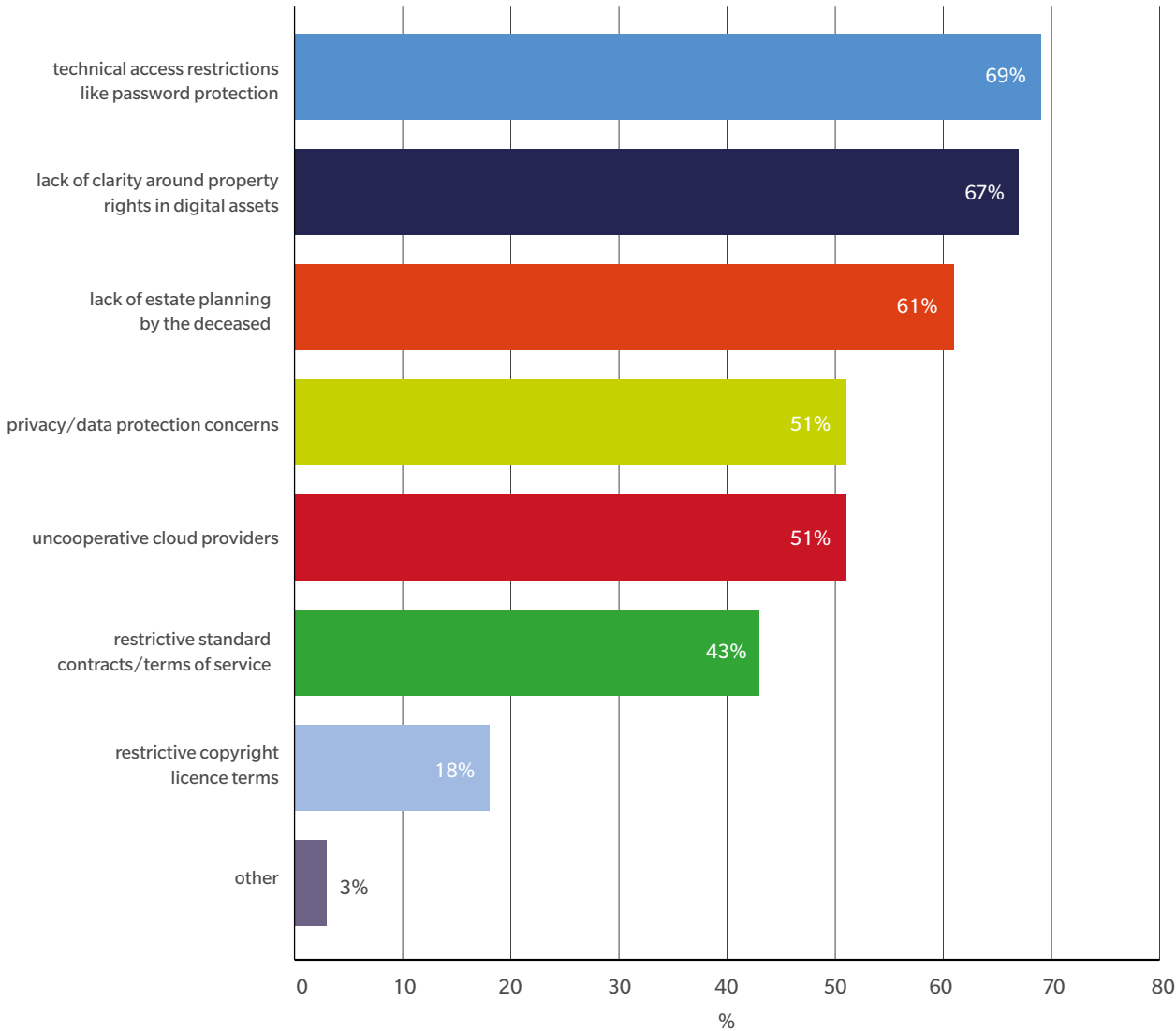
⁸Law Commission of England and Wales, ‘Digital Assets: Call for Evidence’, July 2021, <https://www.lawcom.gov.uk/project/digital-assets/>

⁹European Law Institute, ‘Access to Digital Assets’, <https://www.europeanlawinstitute.eu/projects-publications/current-projects-upcoming-projects-and-other-activities/current-projects/access-to-digital-assets/>

¹⁰UNIDROIT, ‘Study LXXXII – Digital Assets and Private Law Project’, <https://www.unidroit.org/work-in-progress/digital-assets-and-private-law>

THE MOST-CITED OBSTACLES TO ACCESSING DIGITAL ASSETS STORED IN THE CLOUD INCLUDED TECHNICAL RESTRICTIONS; LACK OF CLARITY AROUND PROPERTY RIGHTS; AND LACK OF ESTATE PLANNING.

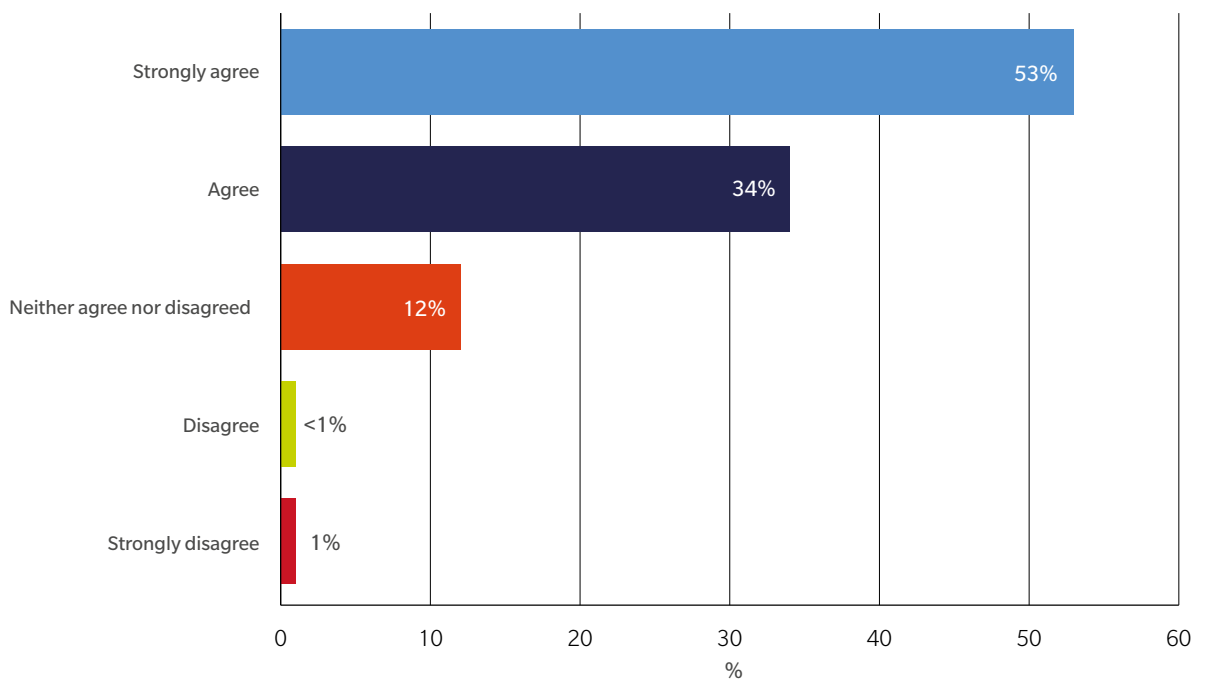
Respondents who disagreed that there was a straightforward process for accessing digital assets stored in the cloud, considered the primary obstacles to obtaining such access to be:



Q12: What do you see as the primary obstacles to obtaining access to digital assets stored in the cloud?, n=239, respondents could select multiple options

OVER 85% OF ESTATE PRACTITIONERS STATED THAT CLOUD PROVIDERS SHOULD PROVIDE BETTER SOLUTIONS FOR MANAGING ACCESS TO DIGITAL ASSETS STORED IN THE CLOUD AFTER DEATH OR INCAPACITY.

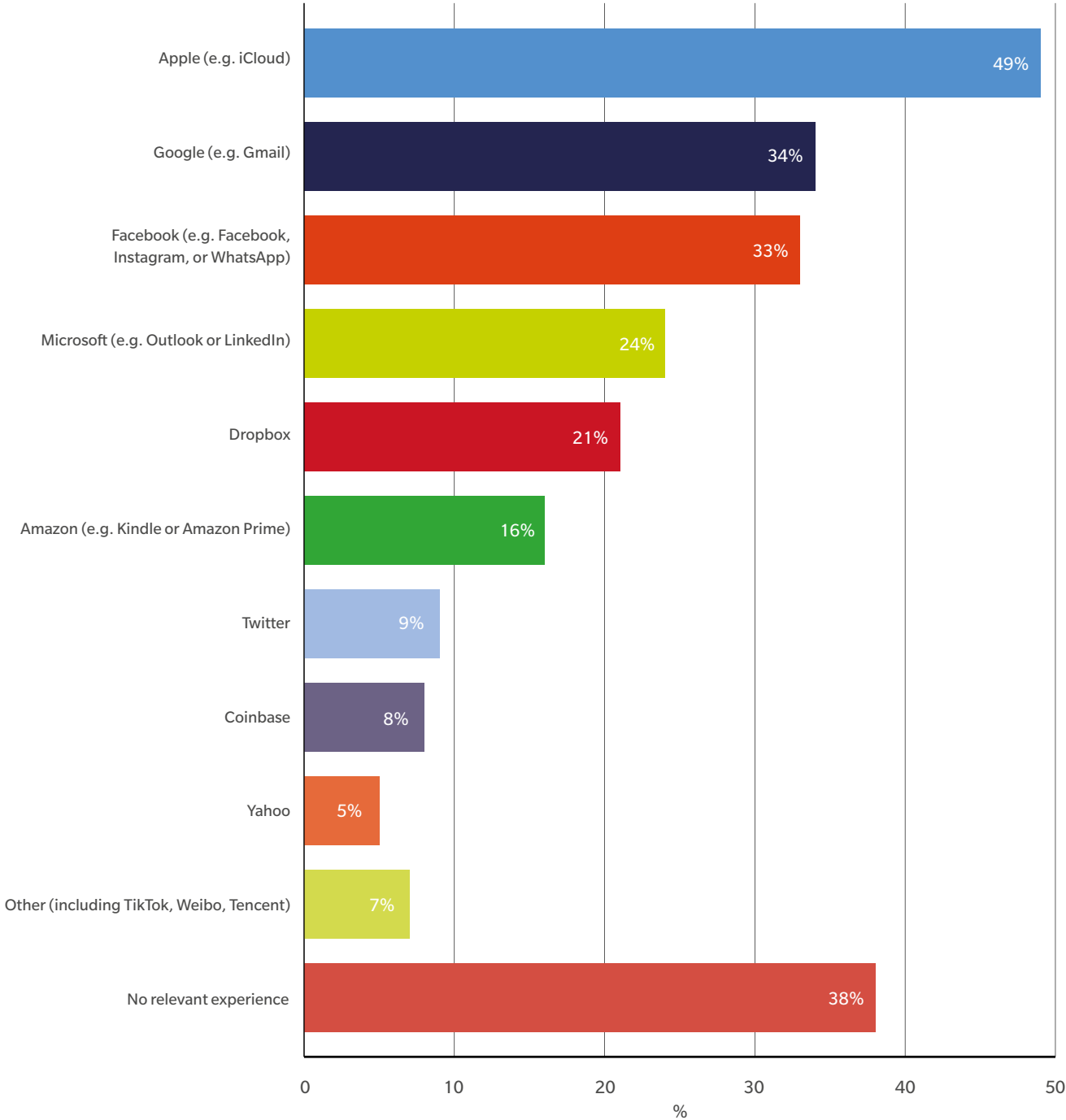
Respondents who agreed that 'Cloud providers should provide better solutions for managing access to digital assets stored in the cloud after death or in the event of incapacity.'



Q13: Do you agree with this statement? 'Cloud providers should provide better solutions for managing access to digital assets stored in the cloud after death or in the event of incapacity.'; n=422

THE FIVE PROVIDERS MOST MENTIONED BY CLIENTS REGARDING DIGITAL ASSETS STORED IN THE CLOUD WERE APPLE, GOOGLE, FACEBOOK, MICROSOFT AND DROPBOX.

Respondents stated that clients who asked about digital assets stored in the cloud mentioned the following providers:



Q14: In your experience, when clients ask about digital assets 'stored in the cloud', which cloud providers do clients mention?, n= 427, respondents could select multiple options

5

There is wide variation in policies, practices and tools for dealing with clients' digital assets, highlighting the need for more education for practitioners on best practice.

Our survey indicates that many estate practitioners are only beginning to engage with this new and exciting digital frontier. Almost half of respondents had not undertaken any specific preparations or put in place organisational policies to help clients with digital assets in the estate context. Around a third had not heard of the pre-planning tools that some cloud providers make available. Indeed, when it came to their own digital assets, less than 20% of respondents had used pre-planning tools themselves.

These findings suggest that estate practitioners would benefit from information, education and training to better assist clients with digital assets – many practitioners themselves identify this need. We include links to some relevant resources at the end of this report.

How can estate practitioners help clients plan for their digital assets? We asked respondents what they would advise clients to do. Respondents' views differed on the various options.

1. Most respondents would advise clients to express their preferences regarding their digital assets in a written document, such as a will or letter of wishes (over 70%).
2. Around half would advise clients to use pre-planning tools, where available (just under 50%).
3. Less than half would advise clients to share passwords to ensure that heirs can access digital assets (around 40%).

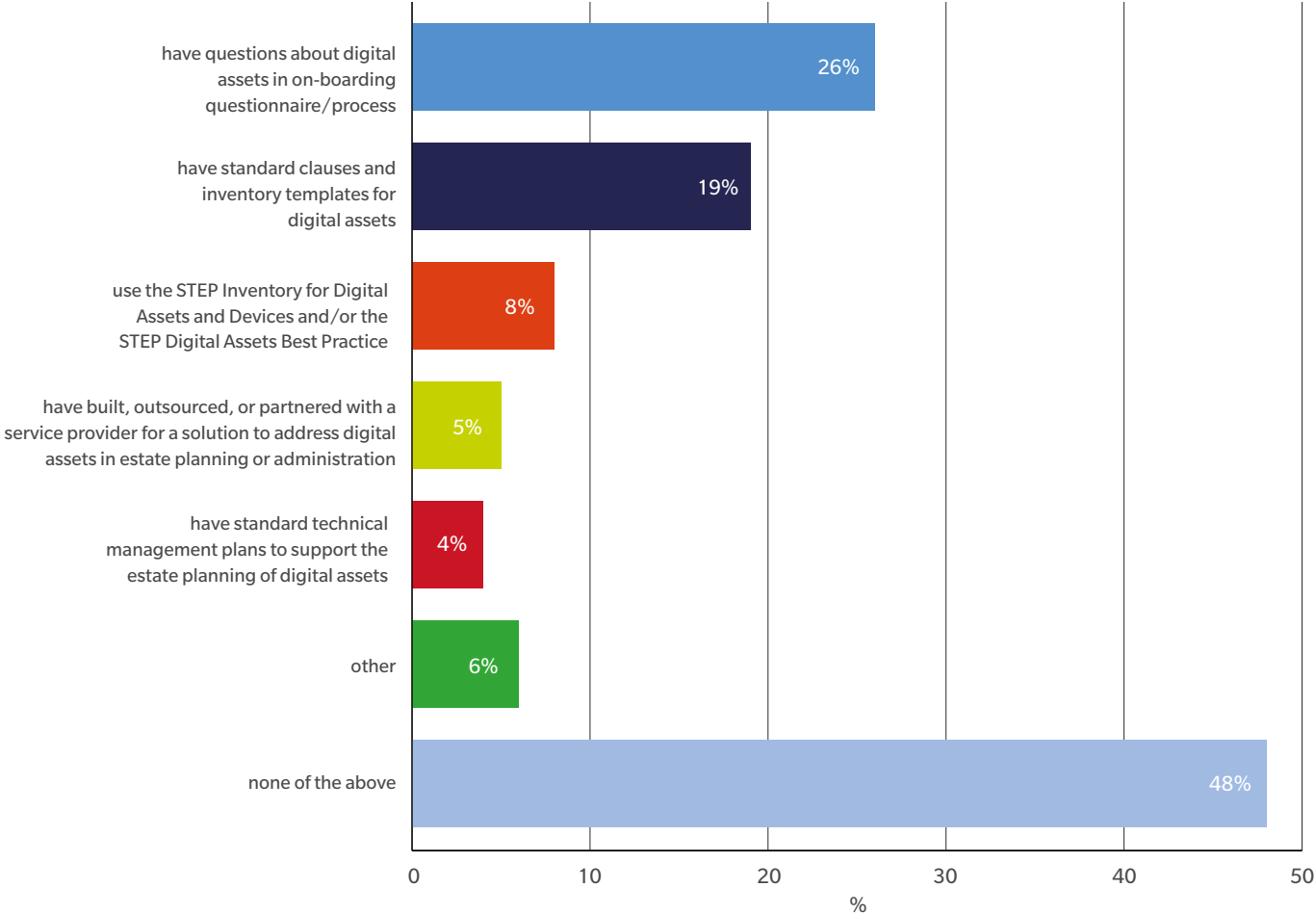
We also asked respondents to describe their concerns in relation to the above options. 58 respondents provided qualitative feedback, setting out the below concerns.

- **Wills:** respondents mentioned concerns that a will would become a public document, so it should not include confidential information about digital assets (such as passwords). Respondents also highlighted legal uncertainty: whether a will proves effective might depend on (i) whether the client has a property right in the relevant digital asset; and (ii) the terms and conditions of a relevant service provider.
- **Pre-planning tools:** respondents highlighted security concerns with the existing options and noted that instructions may become outdated.
- **Password sharing:** respondents mentioned concerns that such sharing could lead heirs to commit a criminal offence of unauthorised access. Further, it might breach a service provider's terms and conditions; and may prove ineffective, for instance if passwords change or two-factor authentication is required.

These findings suggest that the estate industry should work towards establishing, collating and sharing best practices for helping clients with digital assets, both in estate planning and in estate administration. Since this will require multi-disciplinary expertise, the industry may benefit from collaborating with academics and other practitioners in the fields of law, technology and tax.

CLOSE TO HALF OF ESTATE PRACTITIONERS HAD NOT PREPARED TO ASSIST CLIENTS WITH DIGITAL ASSETS.

Respondents had taken the following preparations to assist clients with digital assets:

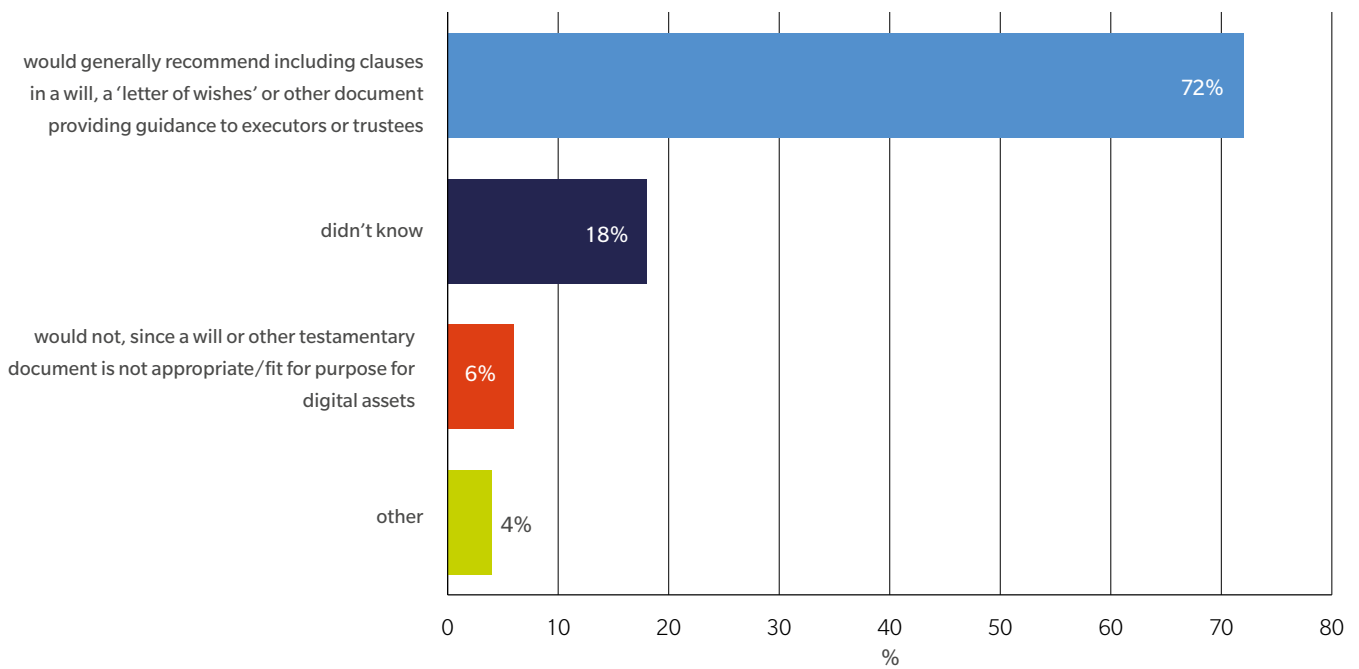


Q4: Thinking of your own practice, have you taken any of these preparations to assist clients with digital assets?, n=451, respondents could select multiple options

Of the 'other' responses, preparations mentioned included part of standard client discussions/ education; toolkits, checklists, workbooks or asset inventories for clients; and standard clauses in wills, powers of attorney or letters of wishes.

MOST ESTATE PRACTITIONERS WOULD ADVISE CLIENTS TO EXPRESS THEIR PREFERENCES REGARDING THEIR DIGITAL ASSETS IN A WRITTEN DOCUMENT.

Respondents who would advise clients to express their preferences regarding their digital assets in a will or other testamentary document:



Q15: Would you advise the client to express their preferences regarding their digital assets in a will or other testamentary document?, n=417

Respondents who stated that including preferences regarding digital assets in a will was not appropriate, gave the below reasons:

Confidentiality concerns, since a will becomes a public document

(9 respondents)

‘Client would need to disclose confidential information e.g. keys to cryptocurrencies to allow seamless access to the digital assets. Such significant compromises to the confidentiality are often unacceptable to clients’

‘A will becomes a public document at probate. A family may prefer to retain privacy of the sensitive information in passwords and access codes in order to continue to use them on their own personal records for sentimental reasons, or the details may reveal personal details of a living person.’

Legal uncertainty around digital assets means a will may not be enforceable under local law

(5 respondents)

‘It depends, but many digital assets are not part of the estate and including them in a will can give a false impression of how enforceable the testator’s wishes are in relation to digital assets’

‘It will depend on the law where the provider is located as well as the actual rights conferred to the deceased, very often people only acquire a licence and not eternal rights.’

Dynamic nature of digital assets, including accounts and passwords

(3 respondents)

“fluidity” of such assets much more common perhaps than ‘tangible’ assets or standard bank accounts, etc.’

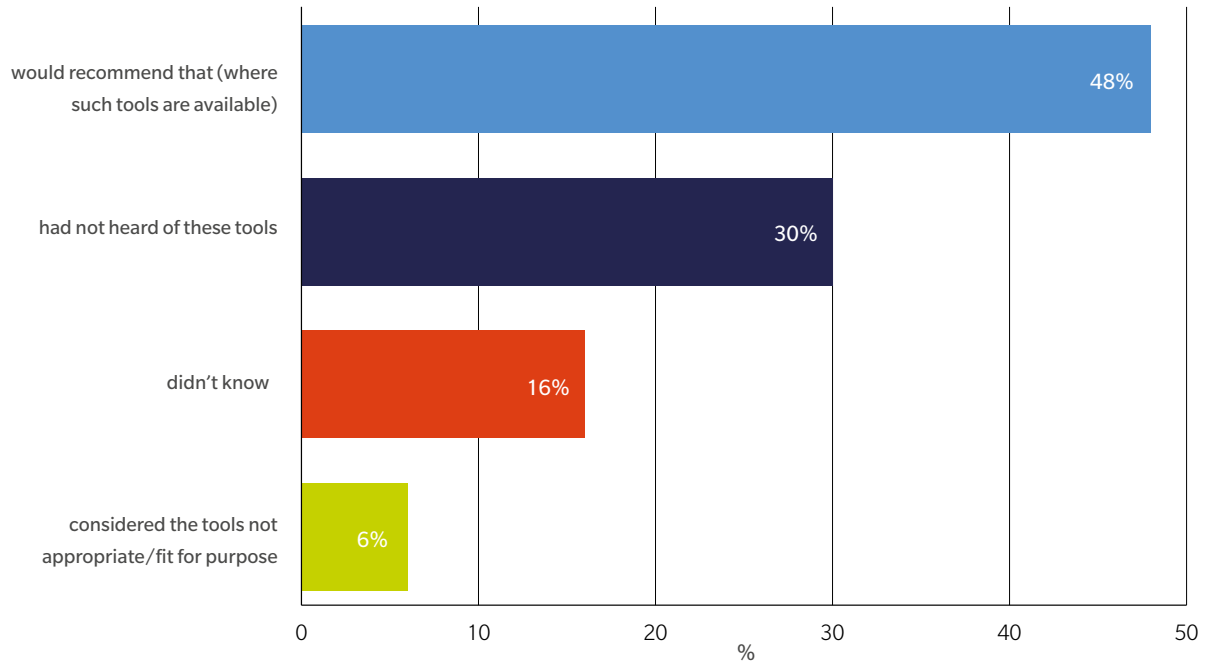
‘It can show a very general intention but passwords and accounts change so frequently that there is no satisfactory solution to ensure ease of access.’

Q15: Please explain why [a will] is not appropriate or fit for purpose for digital assets, selected responses organised by theme, n=26

Other themes mentioned in response to the above question, along with the number of respondents and selected quotes, can be found on page 34 in Annex 2: Practitioner Responses.

JUST UNDER HALF OF ESTATE PRACTITIONERS WOULD ADVISE CLIENTS TO USE A CLOUD PROVIDER'S PRE-PLANNING TOOLS, WHERE AVAILABLE.

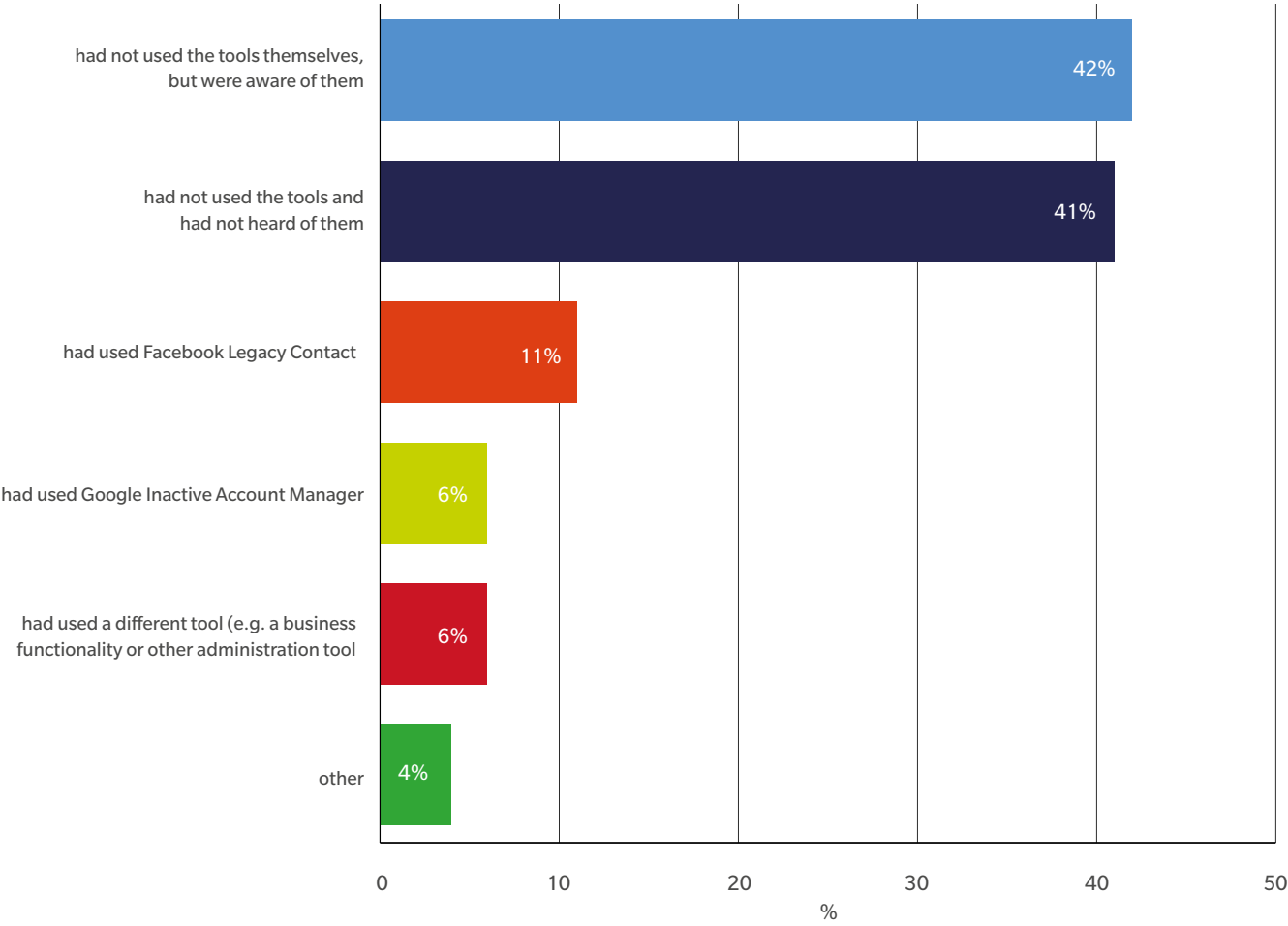
Respondents who would advise clients to use pre-planning tools that some cloud providers make available for others to access accounts:



Q17: Would you advise the clients to use the pre-planning tools that some cloud providers make available for others to access accounts, such as Google's Inactive Account Manager?, n=417

OVER 80% OF ESTATE PRACTITIONERS HAD NOT USED A CLOUD PROVIDER’S PRE-PLANNING TOOLS THEMSELVES ON THEIR PERSONAL ACCOUNTS, WHILE OVER 40% HAD NOT EVEN HEARD OF THEM.

Respondents who had set up pre-planning tools that some cloud providers make available for others to access accounts after death:

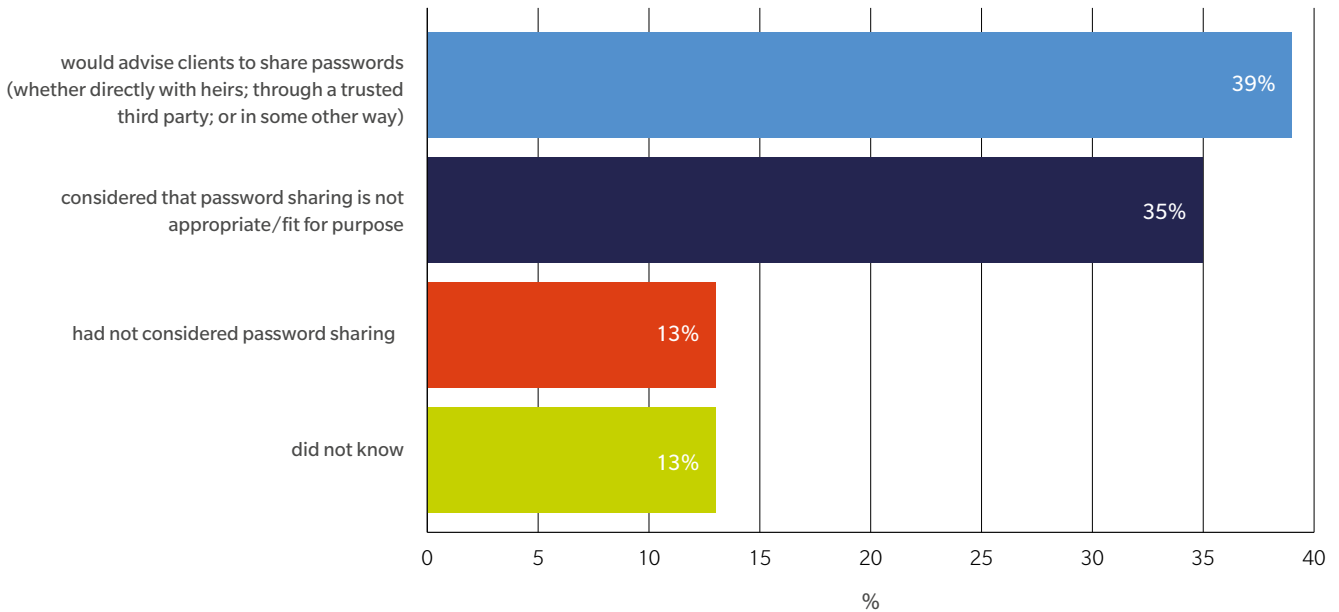


Q3: For your personal accounts, have you set up any of the tools that service providers make available for others to access your accounts after your death, such as Google Inactive Account Manager or Facebook Legacy Contact?, n=484, respondents could select multiple options

The ‘other’ tools respondents had used included password managers (such as 1Password, Dashlane, Easeneet, LastPass); digital safe or vault services (such as Legacy Vault, OneSafe) and self-created options: ‘developed by our Tech Department’ and ‘We partnered with engineers and created our own called cloud lockers’.

AROUND 40% OF ESTATE PRACTITIONERS WOULD ADVISE CLIENTS TO SHARE PASSWORDS TO ENSURE THAT HEIRS CAN ACCESS DIGITAL ASSETS.

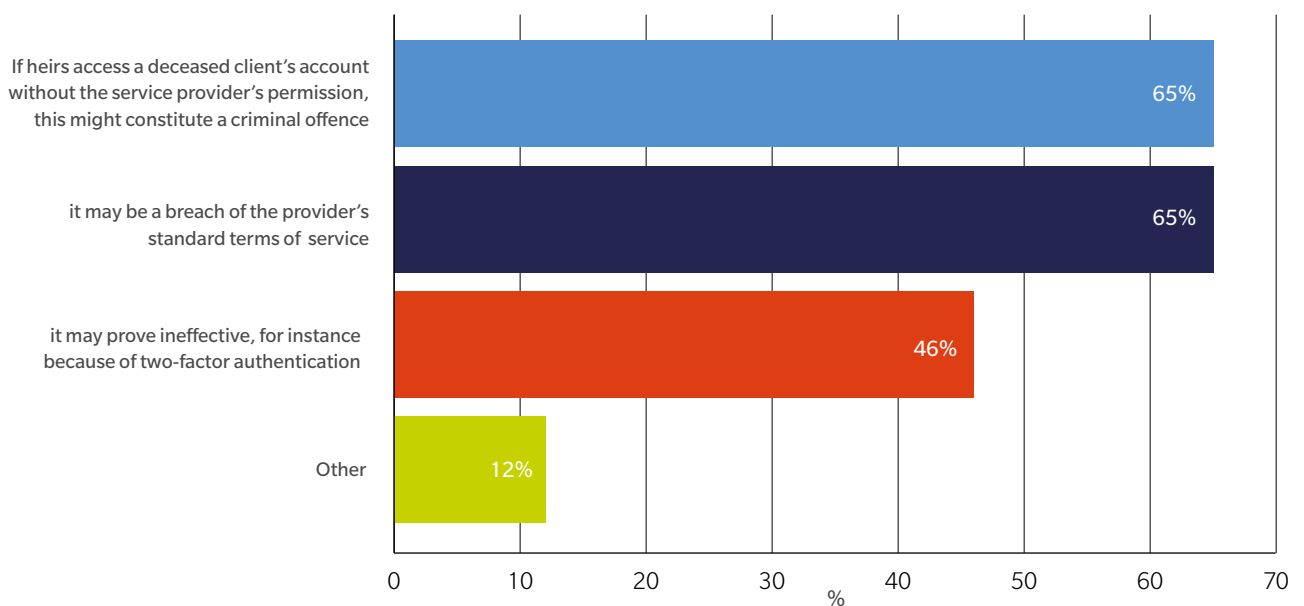
Respondents who would advise clients to share their passwords, as a way of ensuring that heirs can access digital assets after the client's death:



Q19: Would you advise the client to share their passwords, as a way of ensuring that heirs can access digital assets after the client's death?, n=418

CONCERNS AROUND PASSWORD SHARING INCLUDED CRIMINAL LIABILITY, BREACH OF CONTRACT AND INEFFECTIVENESS.

Respondents who were concerned that password sharing was inappropriate or not fit for purpose, described their concerns as:



Q20: Which of the below best describes your concerns around password sharing?, n=151, respondents could select multiple options

6

Law reform is needed to enable effective estate planning and estate administration for digital assets.

We asked respondents for their views on what needs to change in the future, to ensure effective estate planning and estate administration for digital assets. More than 220 respondents provided qualitative feedback. The most common theme in their responses was the need for legal reform (raised by 69 respondents). This includes clear rules around property rights and rights of access by personal representatives.

For example, in the US, most US states and the US Virgin Islands have implemented laws addressing access to email, social media accounts or other electronically stored assets upon a person's incapacity or death.¹¹ In particular, 46 US states have adopted either the Uniform Law Commission's *Uniform Fiduciary Access to Digital Assets Act* (UFADAA) (2014) or the revised version of the act, known as RUFADAA (2015).¹² Washington DC has also adopted a *Uniform Fiduciary Access to Digital Assets Act*.¹³ Canada also has relevant model legislation: the Uniform Law Conference of Canada *Uniform Access to Digital Assets By Fiduciary Act* (2016).¹⁴ Saskatchewan was the first province to enact legislation based on this model law, which came into force in 2020.¹⁵ These laws provide an example of how specific legislation can address the problem – and the need to balance the user's expressed preferences, the provider's terms of service, and the privacy of any third parties. With the Law Commission of England and Wales, the European Law Institute, and UNIDROIT all working on projects around digital assets, now is the time to ensure appropriate legislative change and cross-border coordination.

Other popular responses included the need to raise awareness among clients and to provide information, education, and training for estate practitioners. Given the wide range of issues that can arise in relation to digital assets, such training would need to be tailored to different practice areas and professions, including succession law, trusts, technology advice and tax. Respondents also suggested that the estate industry should collaborate with service providers and help develop better technical management solutions.

Taken together, these measures could help improve estate planning and administration for the 21st century. Estate practitioners would then be in better position to help clients ensure their digital assets pass to the intended beneficiaries in an efficient manner after their death.

JUST UNDER HALF OF ESTATE PRACTITIONERS EITHER DIDN'T KNOW WHETHER DIGITAL ASSETS QUALIFIED AS PROPERTY IN THEIR JURISDICTION OR STATED THAT THE LAW WAS UNCLEAR.

¹¹US National Conference of State Legislatures, 'Access to Digital Assets of Decedents', www.ncsl.org/research/telecommunications-and-information-technology/access-to-digital-assets-of-decedents.aspx

¹²Uniform Law Commission, *Fiduciary Access to Digital Assets Act, Revised* <https://www.uniformlaws.org/committees/community-home?CommunityKey=f723%207fc4-74c2-4728-81c6-b39a91ecd9%2022>

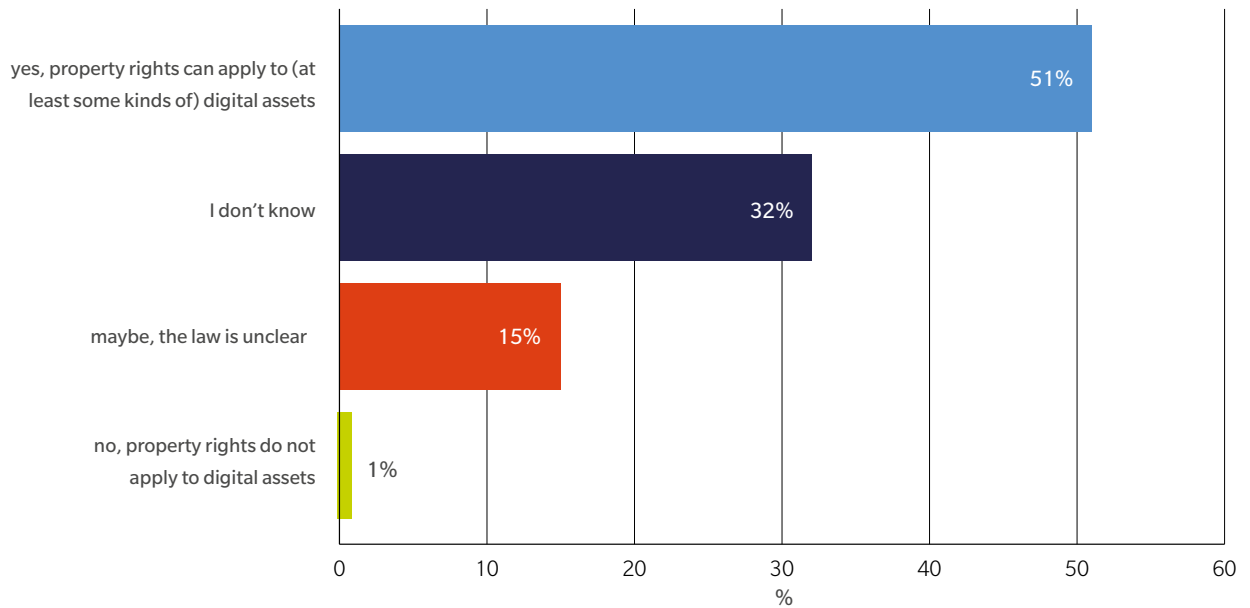
¹³DC Code 21-2501 et seq. Code of the District of Columbia, Chapter 25 *Uniform*

Fiduciary Access to Digital Assets Act, <https://code.dccouncil.us/dc/council/code/titles/21/chapters/25/>

¹⁴Uniform Law Conference of Canada, *Uniform Access to Digital Assets By Fiduciary Act* (2016), https://www.ulcc.ca/images/stories/2016_pdf_en/2016ulcc0006.pdf

¹⁵Law Society of Saskatchewan, 'Legislative Update' (2020), <https://www.lawsociety.sk.ca/uncategorized/legislative-update-12/>

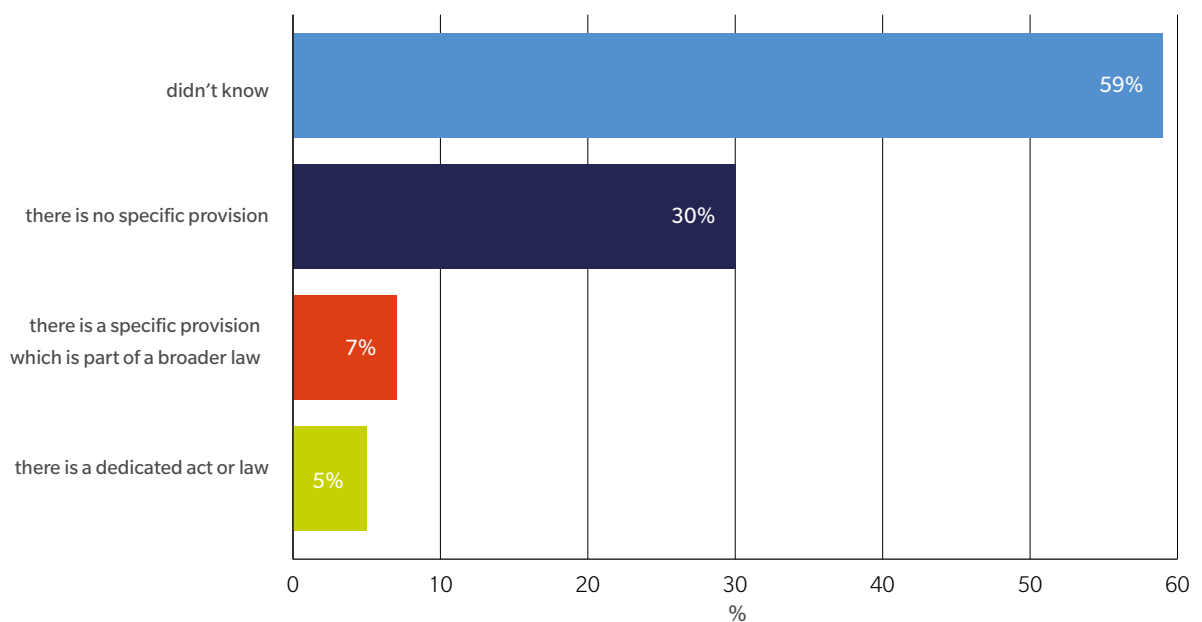
Respondents who stated that digital assets qualify as objects of property in their jurisdiction:



Q22: Can digital assets qualify as objects of property in your jurisdiction? (For example, can you legally own a Bitcoin or a domain name?), n=409

AROUND 60% OF ESTATE PRACTITIONERS DIDN'T KNOW WHETHER THEIR JURISDICTION HAD A SPECIFIC LEGAL PROVISION GOVERNING ACCESS TO DIGITAL ASSETS STORED IN THE CLOUD.

Respondents who stated that their jurisdiction had a specific legal provision governing access by fiduciaries or personal representatives to digital assets stored in the cloud:



Q23: Does your jurisdiction have a specific legal provision governing access by fiduciaries or personal representatives to digital assets stored in the cloud?, n=408

GOING FORWARD, ESTATE PRACTITIONERS PROPOSED LAW REFORMS, BETTER EDUCATION FOR BOTH CLIENTS AND PRACTITIONERS, AND MORE COLLABORATION WITH SERVICE PROVIDERS.

When asked what should change in their jurisdiction to assist clients in planning for their digital assets, respondents stated:

Law reform

(69 respondents)

‘Specific legislation identifying digital assets as property or intangible assets able to be accessed/dealt with on incapacity or death. This will also require the terms of the contracts to recognise this legislation.’

‘There need to be clear laws that allow executors to access a deceased’s digital assets regardless of where the company that holds the assets is located.’

Raise awareness among clients

(47 respondents)

‘There needs to be a lot more education of the public with regard to digital assets. Many people do not understand that their rights depend on the agreement they have with the digital provider; others do not consider the need to include digital assets amongst their list of assets.’

Education and training for estate practitioners

(31 respondents)

‘We do live in the digital world and all fiduciaries should have digital asset skills. But they don’t and therefore ignore the digital activity associated with the decedent and their estate. One way to get this accelerated is to have a ‘Technical CLE’ credit requirement for each bar.’

Collaboration with service providers to find better solutions

(22 respondents)

‘Perhaps the industry standard should be to require service providers to ask for named beneficiaries as they do in the case of retirement plans such as the IRA.’

Q24: What do you think needs changing and/or implementing in your jurisdiction to assist your clients in planning for their digital assets?, n=228

Other themes mentioned in response to the above question, along with the number of respondents and selected quotes, can be found on page 36 in Annex 2: Practitioner Responses.

ABOUT THE AUTHORS

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Sharon Hartung, Captain (Ret'd), PEng, TEP, is a Professional Engineer and the Founder of Your Digital Undertaker®. As a technologist, Sharon's focus is on the technical management aspects of digital assets in estate planning. Sharon is a committee member of the STEP Digital Assets Special Interest Group. Sharon is the author of *Your Digital Undertaker: Exploring Death in the Digital Age in Canada* (2019), and *Digital Executor®: Unraveling the New Path for Estate Planning* (2021).

Christopher Millard is Professor of Privacy and Information Law at the Centre for Commercial Law Studies, Queen Mary University of London, and is Senior Counsel to the law firm Bristows. He has some 40 years of experience in technology law in academia and legal practice and is a Fellow (and past Chair) of the Society for Computers and Law. He has led the Cloud Legal Project since it was established in 2009 and has been Joint Director of the Microsoft Cloud Computing Research Centre since it was launched in 2014. His most recent book is the 2nd edition of *Cloud Computing Law*, Oxford University Press (2021).

STEP would like to thank its sponsor IQ-EQ for its support.

USEFUL RESOURCES

STEP Digital Assets Guide for the Public

www.step.org/system/files/media/files/2020-01/Digital_Assets_PUBLIC_GUIDE.pdf

STEP Digital Assets and Digital Devices Inventory

www.step.org/system/files/media/files/2020-10/step-digital-assets-inventory-v2.pdf

Christopher Millard, 'Cloud Computing Law', 2nd edn, Oxford University Press (2021)

<https://global.oup.com/academic/product/cloud-computing-law-9780198716679?cc=gb&lang=en>

Sharon Hartung, 'Digital Executor®: Unraveling the New Path for Estate Planning', 2021

www.amazon.co.uk/Digital-Executor%C2%AE-Unraveling-Estate-Planning/dp/1039113362

Leigh Sagar, 'The Digital Estate', Sweet & Maxwell (2018)

www.sweetandmaxwell.co.uk/Product/Data-Protection/Digital-Estate-The/Hardback/30805675

David Fox and Sarah Green, 'Cryptocurrencies in Public and Private Law', Oxford University Press (2019)

<https://global.oup.com/academic/product/cryptocurrencies-in-public-and-private-law-9780198826385?cc=us&lang=en&>

Practitioners interested in this area can join STEP's Digital Assets Special Interest Group to keep up to date with developments and gain access to further resources, including best practice guides:

www.step.org/special-interest-groups/digital-assets-global-special-interest-group

ANNEX 1: METHODOLOGY

Survey questions were prepared by members of the Cloud Legal Project at Queen Mary University of London and of STEP. We chose topics for questions based on a review of the available literature and case law, as well as on STEP members' professional experiences and discussions at previous STEP events. A link to the survey questionnaire was sent to the entire membership of STEP by direct email.

The survey opened on 5 May 2021 and closed on 26 May 2021. The survey was conducted using a computer-assisted web-based interviewing system called 'ClickTools', operated by STEP. The survey was completed by 507 respondents.¹⁶ Since participation in the survey was entirely voluntary, we cannot rule out some degree of selection bias resulting from self-selection. For example, it may be that estate practitioners who have experience with digital assets were more likely to respond to a survey about digital assets. Nonetheless, given the high number of responses, we are confident the results are largely representative of estate practitioners' experiences.

Survey questions are presented alongside the survey results. There were three types of questions: (i) close-ended questions where respondents could select one response; (ii) close-ended questions where respondents could select multiple responses; and (iii) open-ended questions, where respondents could fill in text in a free-text box. Where appropriate, close-ended questions included an 'Other' answer option, for respondents to provide open-ended comments not covered by the answers provided in the questionnaire.

Some of the questions were conditional; these were only asked of respondents who answered a previous question in a certain way. For example, if a respondent answered they had dealt with digital assets, they would then be asked subsequent questions, such as what those digital assets were. (If a respondent answered they had not dealt with digital assets, they would not be asked the subsequent question.) As a result, the respondent numbers differed per question – respondent numbers are provided alongside the results above.

The findings we present above are based both on responses to close-ended questions and on responses to open-ended questions. In the case of the close-ended questions, we analysed responses using Clicktools and Excel. For open-ended responses, we categorised responses thematically, using an inductive coding style to identify relevant themes. We analysed and reported on the prevalence of themes among responses, and provided illustrative direct quotations.

All participants provided informed consent. Respondents were asked not to share any confidential or sensitive data, including about clients, in their responses. Respondents did not receive any reward or compensation for participating. We received ethical approval to conduct this research from the Queen Mary Ethics of Research Committee (QMERC).

ANNEX 2: PRACTITIONER RESPONSES

When asked what difficulties clients or their families had encountered, respondents mentioned:

Distress, frustration, and other emotional burdens – 18 respondents

‘Significant distress at not being able to access photos.’

‘A deceased’s client’s family were very distressed when her WhatsApp account was closed after several months of inactivity – they got a message to their family WhatsApp group which said “X has left the group” and as their grief was still very raw, they found that deeply upsetting.’

‘Adds to emotional burden post death of a loved one and the facilities are not yet in place to deal with these matters. Those that are in place are insufficient.’

Uncooperative service providers – 14 respondents

‘The greatest difficulty is often trying to get through to a relevant legacy team member within huge organisations such as Facebook and to demonstrate adequate authority to operate an account and secure a desired outcome.’

‘The wide range of different requests from providers i.e. asking for too much information that is not necessary.’

‘Cost of having to get a court order for iCloud for Apple-based access. Very frustrating as they were unable to say whether anything was stored so you could go to the cost of getting a specific order and then finding that there is nothing backed up.’

‘Google and Facebook refusing to comply with requests by personal representatives.’

‘Custodians (airlines, passport office, banks, social media) put up roadblocks and still handle every request by assigning a person to handle the request. This is time consuming, expensive and cruel to the family and very frustrating to the fiduciary.’

Difficulty in accessing email and devices to obtain information about the estate – 6 respondents

‘Difficulty in accessing email accounts which may contain data regarding financial assets and which is no longer provided in paper format.’

‘Difficulty collecting details of financial assets and property records that were stored digitally.’

‘Many clients are now going paperless. Without access to email notifications or digital devices, [it’s] almost impossible to discover and collect all assets for clients who did not maintain list or keep paper records (statements).’

Difficulty obtaining control over cryptocurrency – 3 respondents

‘Difficulty in accessing the keys to the cryptocurrencies, and uncertainties about the succession planning relating to such currencies.’

Difficulty accessing an online bank account – 3 respondents

‘The client was unable to obtain access to their spouse’s bank account on incapacity (a stroke), which made for an incredibly stressful situation in which they were unable to pay their personal tax liability and other capital expenses. They were unable to locate or recover passwords and with the majority of bank statements, utility bills and household information now stored electronically, it made the situation even worse when they were already dealing with the emotional impact of their partner having a stroke.’

Jurisdictional issues – 2 respondents

‘The conflict of laws and cross-border/jurisdictional issues, i.e. will a social media enterprise recognise a Canadian probate without the trustee applying for a local Californian Court order? If the answer is no, does it even make sense (monetary or time wise) for the trustee to apply such local court order, just for the purpose of closing down a social media account?’

When asked to specify where clients should express preferences regarding digital assets, respondents stated:**A will – 5 respondents**

‘Will plus annex: if will has specific clause for digital assets, makes access easier. But not practical to update will with complete list every time it changes. Separate annex/list referenced in will can help.’

‘Some assets may be governed by will, others will be governed by terms of service, others may not be capable of being passed on at all.’

A letter of wishes / instructions – 4 respondents

‘Letter of wishes – document sitting outside will unless there is some monetary value such as Bitcoin, etc’

‘In a will or letter of wishes depending on the type of asset.’

Need for technical management – 3 respondents

‘Asset dependent. Blockchain assets require duplicate planning in both will and physical security. Multi-signature wallets are an essential component.’

‘Permit access by the executors in the will but I always advise that if clients want to ensure someone can access their accounts to have access IDs and passwords written down for use by executor without involvement of platform.’

Appoint a digital executor – 1 respondent

‘I advise that a digital executor should be appointed to manage a deceased person’s digital affairs. A letter of wishes can be stored alongside a will for the digital executor to action in the event of death.’

Enduring power of attorney – 1 respondent

‘In an Enduring Power of Attorney to give the authority to their attorneys to deal with the digital assets providers’

Respondents who stated that including preferences regarding digital assets in a will was not appropriate, gave the below reasons:**Confidentiality concerns, since a will becomes a public document – 9 respondents**

‘A will becomes a public document at probate. A family may prefer to retain privacy of the sensitive information in passwords and access codes in order to continue to use them on their own personal records for sentimental reasons, or the details may reveal personal details of a living person.’

‘Client would need to disclose confidential information, e.g. keys to cryptocurrencies to allow seamless access to the digital assets. Such significant compromises to the confidentiality are often unacceptable to clients.’

Legal uncertainty around digital assets means a will may not be enforceable under local law – 5 respondents

‘It depends, but many digital assets are not part of the estate and including them in a will can give a false impression of how enforceable the testator’s wishes are in relation to digital assets.’

‘It will depend on the law where the provider is located as well as the actual rights conferred to the deceased, very often people only acquire a licence and not eternal rights.’

Dynamic nature of digital assets, including accounts and passwords – 3 respondents

‘It can show a very general intention but passwords and accounts change so frequently that there is no satisfactory solution to ensure ease of access.’

‘“Fluidity” of such assets much more common perhaps than “tangible” assets or standard bank accounts, etc.’

No need; already covered – 1 respondent

‘Usually falls under residue so no separate clause needed (unless specific wishes).’

Not appropriate – 1 respondent

‘If the wishes are not relevant to succession then a will is not the place. Just as it is not the place to list or comment upon non-digital assets where this is not relevant to dispositive provisions. It is better to use a separate memorandum of wishes that can be updated and qualified without a new will having to be executed. In a similar fashion to expressions of very detailed funeral wishes, wishes with regard to personal chattels, management and distribution instructions for discretionary trusts or other matters which are more questions of principles and general direction which are not dispositive.’

When asked about their concerns regarding the providers’ pre-planning tools, respondents stated:

Distrust of major cloud providers – 4 respondents

‘It’s a gimmick and another way for these companies to control your data.’

‘Yet another area for a big corporation to have access to things they shouldn’t.’

Security concerns – 3 respondents

‘Not comprehensive or secure enough. We built cloud lockers [for clients] which unless properly accessed, the documents are in shards and not reassembled.’

Instructions may become outdated – 2 respondents

‘When they are set up, the user believes that the named person will (a) be around and (b) be willing and able to perform the task. This is simply not the case if these are set up when a person is in the 40s.’

‘Snap shot at that time. Clients concern over security. Clients not bothering to keep the tools updated.’

Not appropriate for all asset types – 1 respondent

‘Not designed to handle digital assets such as cryptocurrencies.’

When asked what should change in their jurisdiction to assist clients in planning for their digital assets, respondents stated:

Law reform – 69 respondents

‘Specific legislation identifying digital assets as property or intangible assets able to be accessed/dealt with on incapacity or death. This will also require the terms of the contracts to recognise this legislation.’

‘A review of the *Computer Misuse Act 1990* to permit PRs of a deceased person to access their accounts’

‘There need to be clear laws that allow executors to access a deceased’s digital assets regardless of where the company that holds the assets is located.’

‘Legislation similar to RUFADA[A] should provide users with a guaranteed right to choose whether or not their legal representatives should be able to access digital assets after death; they should be able to choose this on a service-by-service basis.’

‘Section 4C of RUFADAA currently states that in the case that the TOSA conflict with the digital assets online tool or the will/DPOA, that the online tool/will/DPOA supercede, but it needs to be clearer that when an executor is acting on behalf of the testator, that the executor can log in using the testator’s credentials.’

‘Adhering to access like with any other asset holder. for example, Grant of representation allows access to normal assets and digital assets – photos, albums, etc. should be the same.’

Raise awareness among clients – 47 respondents

‘There needs to be a lot more education of the public with regard to digital assets. Many people do not understand that their rights depend on the agreement they have with the digital provider; others do not consider the need to include digital assets amongst their list of assets.’

‘There is a lot of misconceptions around what digital assets actually entail and the property rights attached to these. Most customers think digital assets are only about crypto/virtual currencies and Bitcoins so think it’s not relevant to them if they don’t own any.’

Education and training for estate practitioners – 31 respondents

‘Better and more specific training for lawyers, accountants and others who may be in a fiduciary position for individuals.’

‘We do live in the digital world and all fiduciaries should have digital asset skills. But they don’t and therefore ignore the digital activity associated with the decedent and their estate. One way to get this accelerated is to have a “Technical CLE” credit requirement for each bar.’

‘Part of issue is probably that the advisor community – particularly (excuse the generalisation) at more senior end – has a smaller digital footprint than the youngest generation of advisors, who has not known a world without internet, smartphones and social media. Or, actually, the more senior generation don’t appreciate the extent of the digital footprint that they (and everyone else) has. [...] (P.S. I count myself – age 41 – as senior for these purposes because I didn’t get a smartphone until my 30s. And some of my partners were practising in the 1970s and 80s before computers were introduced into the office environment. By contrast, my trainee solicitor will have had a smartphone for as long as she can remember.)’

Collaboration with service providers to find better solutions – 22 respondents

‘Complete clarity for users of these services when they sign up to help them appreciate the access others may require in the event of incapacity or death. [...] Paid-for services can be quickly closed

down and data erased when the payments are missed which means that it is difficult for executors/attorneys to safeguard the information stored'

'Greater clarity and plain language in service agreements with providers. It is very difficult to find this in terms of service.'

'Each company should also provide planning solutions similar to the Facebook legacy contact or the Gmail account shutdown.'

'Perhaps the industry standard should be to require service providers to ask for named beneficiaries as they do in the case of retirement plans such as the IRA.'

'The problem is the service providers. Even if local jurisdiction implements proper tools, the service providers do not recognise the documents/legality of trustee/executor; even with a local court order. They always refer to their own jurisdiction and require court order there. Need worldwide agreements to allow access to assets or to force service providers to comply with local jurisdiction of the estate/trust.'

Clarity on property rights in digital assets – 9 respondents

'Clarity on what digital assets can be possessed and passed on death and those that cannot.'

Technical management solutions –7 respondents

'Development in how to securely store and share passwords is needed as there is currently no universally appropriate solution.'

Better cooperation across jurisdictions –3 respondents

'Better jurisdictional cooperation between British Columbia and the US federal and state-level jurisdictions on digital assets, e.g. mutual recognition of the court-issued documents between Canadian and US jurisdictions, perhaps at least on a regulatory perspective, if the legislative changes are slow to implement.'

'I'm not sure how much local changes would assist. How much does something like the Delaware code assist executors if the end-user license agreement is governed by the laws of a different jurisdiction?'



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