

HOOK

LAW CENTER

Estate Planning for Digital Assets

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What is Cryptocurrency?



Digital currency used primarily for online payments, investment, or a store of value like gold or silver

- Does not exist in physical form
- All transactions performed with a computer



Bitcoin was **created in 2009** by a person or group using the pseudonym Satoshi Nakamoto, the name which appeared on the original 2008 Bitcoin white paper that first described the **blockchain system** that would serve as the backbone of the entire cryptocurrency market.



The **blockchain** is a **ledger that records cryptocurrency transactions** and keeps track of the cryptocurrency in circulation

- ① ~ 34 million U.S. adults own cryptocurrency
- ① 1/5 US adults have invested, traded, or used cryptocurrency
- ① Value of cryptocurrency market – Nov. 2021 \$3 Trillion ➡ June 2022 \$1 Trillion (Very Volatile)

What are Nonfungible Tokens (NFTs)?

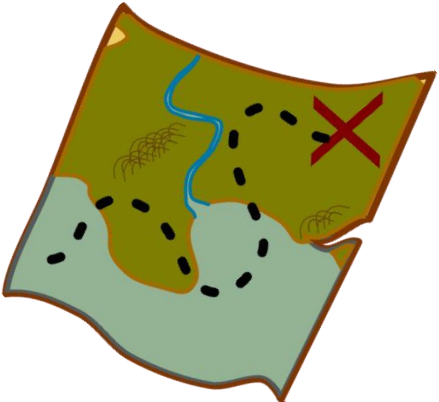
- ① NFT's may take the form of digital image files, audio files, or various characters or other assets in online game and metaverse experiences, with no actual link to any tangible asset.
- ① Other NFT's serve as digital certificates of authenticity or confirmation of ownership of real-world assets





Much like tearing up and entrusting three different people with pieces of a treasure map, there is a multisignature wallet framework for cryptoasset owners:

- Ⓞ Fragmenting and distributing private keys provides increased security during the owner's life and helps mitigate succession risk when the owner becomes incapacitated or dies



Managed through control of a combination of **“public keys”** and **“private keys”**

Ⓞ **Private keys** – generated from binary computer code that most commonly uses a series of human-readable words that, when entered into a compatible wallet device in a specific order, constructs and controls the private keys that can access the crypto assets on the blockchain. The human readable words constitute the **“seed phrase”** that control the private keys.

Control over the private keys equals direct control over the underlying assets

Using a blockchain - a decentralized ledger of all transactions across a peer-to-peer network. Using this technology, participants can confirm transactions without a need for a central clearing authority.

CONDENSED LEDGER.

DATE: from Feb. 1st to 28th, 1881, inclusive.

Brought forward.		DISTRIBUTION.		TOTALS.		BALANCE.	
DR.	CR.	DR.	CR.	DR.	CR.	DR.	CR.
664 72	182 00					664 72	182 00
		CASH.					
				Dr.	Cr.		
				\$ 65 00	\$190 00		
25 00	40 00	122 00	20 00	County Fund.....	20 00	40 00	122 00
20 00	10 00	27 00	0 00	Bridge Fund.....	20 00	40 00	20 00
21 00	20 00	22 00	4 00	County Jail.....	20 00	20 00	20 00
20 00	10 00	20 00		Building Fund.....	20 00	20 00	
20 00		20 00		General Fund.....	20 00	40 00	
		4 00		School Fund.....	4 00	4 00	
15 00		22 00	7 00	Refugees.....	22 00	22 00	
10 00	10 00			Tax Collector.....	2 00	10 00	10 00
10 00	10 00			Shoe Leases.....	7 00	20 00	20 00
20 00	20 00			Duplicates.....	558 72	558 72	
492 72	558 72	60 00		Shoe Leases.....	4 00	4 00	
4 00	4 00	20 00	20 00	School Fund.....	20 00	20 00	
		15 00	15 00	Refugees.....	15 00	15 00	
		4 00	0 00	County Fund.....	4 00	4 00	
		44 74		Township Fund.....	4 00	4 00	
				Treasurer's Fund.....	20 00	0 00	64 74
664 72	664 72	628 72	136 00	Carroll Account.....	65 00	1752 84	1752 84

AUDITORIAL DISTRIBUTION.

SHOW LICENSE. DR.		DUPLICATE. DR.	
To State Fund.....	1 00	To County Fund.....	200 00
To School Fund.....	1 00	To Bridge Fund.....	20 00
To Treasurer's Fund.....	94	To County Jail.....	20 00
		To Building Fund.....	20 00
		To General Fund.....	40 00
		To School Fund.....	4 00
		To Refugees.....	22 00
		To Tax Collector.....	10 00
		To Shoe Leases.....	20 00
SUNDRIES, DR.	60 00	To Duplicates.....	558 72
Refugees.....	24 00	To Shoe Leases.....	4 00
Tax Collector.....	1 00	To School Fund.....	20 00
Shoe Leases.....	20 00	To Refugees.....	15 00
		To County Fund.....	4 00
		To Township Fund.....	4 00
		To Treasurer's Fund.....	44 74

A. B. County Auditor.

How are Crypto assets Managed?

How Is Cryptocurrency Taxed in the United States?

Generally, the IRS taxes cryptocurrency like **property and investments, not currency.**

This means all transactions, from selling coins to using cryptos for purchases, are subject to the same tax treatment as other capital gains and losses.



In 2014, the IRS issued [Notice 2014-21, 2014-16 I.R.B. 938](#), explaining that virtual currency is treated as property for Federal income tax purposes and providing examples of how longstanding tax principles applicable to transactions involving property apply to virtual currency. The IRS additionally provided guidance in Frequently Ask Questions on Virtual Currency Transactions - <https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions> The 46 FAQ include information on record keeping, determination of basis, taxation of hard forks and air drops.

The 2021 Form 1040 asked whether at any time during 2021 whether the taxpayer received, sold, exchanged, or otherwise disposed of any financial interest in any virtual currency.

As property, cryptocurrency would be subject to gift, estate and generation skipping taxation.

Benefits & Problems of Cryptocurrency

Problems with cryptocurrency:

Unlike money, crypto still has to persuade people other than enthusiasts to use it. It has to persuade governments to leave it alone (i.e. lightly regulate it).

Very high price volatility.

Use in criminal activities.

And one of the most cited drawbacks is crypto's environmental impact; the "mining" infrastructure for some of the most popular cryptocurrencies is estimated to consume more electricity than many countries."

Benefits of cryptocurrency:

Transaction speed

Accessibility

Privacy

Diversification

24/7 trading

Blockchain technology is inherently secure

Why is Estate Planning for Crypto assets Needed?

- ① **Our clients own and will likely in the future own Crypto assets with significant value. We have a duty to provide advice.**
- ① **No paper trail re: crypto asset ownership**
 - ① Just records of transactions on the blockchain
 - ① Only identifying characteristics of the transactions are wallet addresses and amounts
- ① **Without identifying the crypto asset and how to access it in the estate plan, nobody will know it exists**
- ① **Other estate planning considerations:**
 - ① Fiduciary access and fiduciary duties
 - ① Trust Funding

Stored Communications Act

Fiduciary Access to Digital Assets

An internet service provider (ISP) may not disclose to the government any records concerning an account holder or the content of any electronic communications in the absence of an applicable exception, such as consent by the account holder, search warrant or subpoena.

Prohibits unauthorized access to an electronic communication service.

Establishes limits on the ISP's ability to voluntarily disclose the content of communications – can voluntarily disclose the content of communications, but only if an exception applies

Exception for fiduciaries – permits, but does not require, a provider to disclose communication content if the provider has the consent of the originator, an addressee of the communication, or the subscriber

Some providers refuse to give executors access to the content of decedent's email accounts without a court order stating that the executor has the user's consent

Federal Computer Fraud and Abuse Act

Criminalizes two kinds of computer trespass: accessing a computer without authorization and access that exceeds authorized access

Even though a fiduciary is authorized by the account holder or state law to use a computer, the fiduciary is not necessarily exempt from CFAA prosecution

Accessing a computer's hard drive is technically different from accessing the account holder's digital accounts or assets, which are stored on the provider's server, not the user's

If the fiduciary is violating the account provider's Terms of Service Agreement by accessing the account holder's digital accounts or assets online, the fiduciary may be violating the CFAA

Agents for incapacitated persons, guardians, and executors should review income tax returns to discover evidence of cryptocurrency.

Fiduciary Access to Digital Assets (cont'd)

Fiduciary Access to Digital Assets (cont'd)

Revised Uniform Fiduciary Access to Digital Assets Act



- Ⓞ Gives fiduciaries limited, but much needed, access to digital assets

- Ⓞ Virginia Code Section 64.2-118:
 - Ⓞ If an online tool is **used** to direct the custodian to disclose digital assets to a designated recipient, such a direction overrides a contrary direction by the user in a will, trust or power of attorney

 - Ⓞ If an online tool is **not used** or provided by the custodian, the user may allow or prohibit disclosure of digital assets to a fiduciary in a will, trust or power of attorney

 - Ⓞ A user's direction in either case will override a contrary provision in a terms of service agreement

 - Ⓞ A USER MUST PROVIDE DIRECTION

Fiduciary Duties

Uniform Prudent Investor Act – Trustees must comply with the act unless excused in the trust (Virginia Code § 64.2-781)

Prudent Investor Rule – a trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust; the trustee shall exercise reasonable care, skill and caution

“management” includes the duty to monitor trust investments

Duty to diversify – unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying



At the present time, most trustees most professional fiduciaries will refuse to hold cryptocurrency without express authorization, limitation of liability, use of a directed trustee arrangement, and/or beneficiary consent.

Trust Funding

Send virtual currency to the trustee's online wallet account

Transfer private key to a secure physical device, transfer the device to the trustee and document the transfer

Use a hardware wallet instead of an online wallet account and assign it to the trust's name

To ensure completed gift to an irrevocable trust – transferor should contractually agree that he/she has not retained a physical copy of or memorized the key

Fund an LLC with crypto currency and transfer the LLC interest to trust

What Planners Should Do

Ask

- Ask clients if they own cryptocurrency!
- Put it on your questionnaires



Educate

Educate clients who do:

- Without giving access to the private key, there is no one who can be compelled by court order to turn the asset over to the fiduciary
- Cryptocurrency cannot become unclaimed property

Review

Review estate planning documents:

- Fiduciary authorized to retain crypto & exonerated by the EP docs for doing so?
- Client's crypto specifically listed in the Will or Trust?
- Tangible personal property dispositions should specifically exclude "cryptocurrency wallets of any kind, including any cryptocurrency paper wallets, hardware wallets, desktop wallets, or mobile telephone wallets" to avoid unintentional bequests
- Memorandum explaining the step-by-step process for accessing and using crypto?

Sample Will/Trust Language

I leave all my cryptocurrency investments, crypto-coins, tokens, any other form of digital assets, or anything found in or on my cryptocurrency wallets to _____.

My cryptocurrency might be stored on digital wallets, cold wallets, online exchanges, or a combination of wallets and exchanges. The following items or devices might contain a cryptocurrency wallet: _____, _____, and _____. These items should not be distributed to any person until such time as the cryptocurrency, digital assets, or any information related to the access of my cryptocurrency is transferred to [beneficiary named above].

Sample Will/Trust Language (cont'd)



I have created a separate writing from this will that explains how to access my cryptocurrency wallets, and online cryptocurrency accounts. This document needs to be kept private as it contains the passwords, PINs, and private keys needed to access my cryptocurrency. This document my cryptocurrency wallets, and online cryptocurrency accounts. This document needs to be kept private as it contains the passwords, PINs, and private keys needed to access my cryptocurrency. This document will be stored with my other estate planning documents or [insert specified location(s)]. I intend to provide my executor/trustee full authorization to access the contents of any communication under the Stored Communications Act (currently codified as 18 U.S.C. §§ 2701 et. seq.) and such executor/trustee shall be an authorized user for purposes of applicable computer fraud and unauthorized computer access laws.will be stored with my other estate planning documents or [insert specified location(s)]. I intend to provide my executor/trustee full authorization to access the contents of any communication under the Stored Communications Act (currently codified as 18 U.S.C. §§ 2701 et. seq.) and such executor/trustee shall be an authorized user for purposes of applicable computer fraud and unauthorized computer access laws.

Sample POA Language



To handle on my behalf any of my “cryptocurrency,” defined for purposes of this durable power of attorney as digital assets that are exchanged electronically and based on a decentralized network or exchange, with such exchanges not requiring a reliable intermediary and managed using distributed ledger [blockchain] technology. I give my attorney-in-fact the power to accept or pay on my behalf any cryptocurrency, digital asset currency, funds, or other value that substitutes for currency from one person to another person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means. The above term “other value that substitutes for currency” encompasses situations in which the transmission does not involve the payment or receipt of cryptocurrency, but does include, yet is not limited to, my private and public keys, blockchain and ledger information, bitcoins, bitcoin addresses, and any other cryptocurrency user or account data or information related to such transactions or to any convertible currency related thereto on my behalf.

Sample Trust Language



The Trustee may take any action with respect to any Digital Assets, Digital Accounts, and Digital Devices held as part of any trust hereunder (whether by explicit transfer or by general assignment), or which are, or were, owned or lawfully used by me in connection with any asset held as part of any such trust, as the Trustee shall deem necessary or appropriate, and as shall be permitted under applicable law. This authority shall include, but shall not be limited to, (a) the authority to access or control any Digital Device, including any computer, camera, telephone, or data storage device owned or lawfully used by me, (b) the authority to manage, control, delete, or terminate any e-mail, telephone, bank, brokerage, investment, insurance, social networking, internet service provider, retail vendor, utility or other account which is, or was owned or lawfully used by me, and (c) the authority to change a username and password used by me to gain access to such accounts and information. I expressly authorize the disclosure to the Trustee of (a) a full catalogue of my Digital Assets and Digital Accounts, including a full catalogue of electronic communications sent or received by me, and (b) all content of electronic communication sent or received by me.

Sample Trust Language (cont'd)



This authority is intended to give my “lawful consent” for the Trustee to take the actions described in this paragraph, to the fullest extent allowable under the Electronic Communications Privacy Act, as amended, the Computer Fraud and Abuse Act of 1986 as amended, the Gramm-Leach-Bliley Act, as amended, and any other Federal, state, or international laws that may require such consent or authorization.

“Digital Assets” shall include any electronic record in which I have a right or interest, including any asset or liability which is itself an electronic record, regardless of the ownership of the device or accounted used to create such electronic record.

A “Digital Device” is an electronic device that can create, generate, send, share, communicate, receive, store, display, or process information.

“Digital Accounts” shall include all arrangements under which a custodian carries, maintains, processes, receives or stores a Digital Asset or provides goods or services in which I have an interest, or which I am lawfully entitled to use, regardless of the ownership of any device on which the Digital Account is accessed or stored.

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