

Probate Department Newsletter

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Upcoming CLE Presentations of Interest

July 29, 2021: Developing a Theory of the Case and Rules for Admitting and Excluding Evidence in Probate Court Trials -webinar presented by CLA

Aug 4, 2021: Revocable vs Irrevocable Trusts: Drafting, Administration, Top Uses - webinar presented by NBI

Aug 31, 2021: Tolling Legal Malpractice Statute of Limitations: The Uncertainty of “Continuous Representation” webinar presented by CLA

Sept 23-25, 2021: Annual Meeting of California State Bar

Nov 3, 2021: The Annual Meeting of the California Tax Bar and California Tax Policy

Nov 4-6, 2021: The 41st Annual Tax & Estate Planning Forum

Nov 19, 2021: 47th Annual Trust and Estate Conference presented by USC Gould School of Law

Jan 24-26, 2022: USC 2122 Tax Institute presented by USC Gould School of Law

Bequeathing Bitcoin: Crypto for the Cryptee*By Jeremy J. Ofseyer. ^{1**}

Cryptocurrencies originated in 2009 with the introduction of Bitcoin, and interest in these new digital assets has taken off. A recent survey showed 10% of the people in the United States now own some form of cryptocurrency.² This has created a new set of high-tech estate planning challenges. There are already numerous horror stories of cryptocurrency owners losing their private digital “keys” – or failing to make them accessible upon death to their heirs – causing great fortunes in digital wealth to be lost forever. This article analyzes the challenges cryptocurrency poses for estate planning, suggests best practices for cryptocurrency planning, and discusses some emerging solutions from the finance and technology industries.

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² Anna Byrne, *There Should Be Nothing Cryptic About Cryptocurrency in an Estate Plan*, FINANCIAL ADVISOR MAGAZINE, March 18, 2021, <https://www.fa-mag.com/news/there-should-be-nothing-cryptic-about-cryptocurrency-in-an-estate-plan-60977.html?print>.

What is Cryptocurrency? A cryptocurrency, such as Bitcoin, is a digital or virtual currency that is secured by cryptography, which makes it nearly impossible to counterfeit or double-spend.³ Many cryptocurrencies are decentralized networks based on “blockchain” technology -- a distributed ledger enforced by a disparate network of computers.⁴

Purchase of cryptocurrency involves a public and private “key”. The *public* key is visible to the whole decentralized computer network and is recorded with a unique identification that cannot be changed. The *private* key -- akin to a complex password and proves ownership of the cryptocurrency -- is stored in a digital “wallet” and is only accessible via the private key.

Storage: Hot and Cold A storage wallet is called “hot” when it is installed on a computer or mobile device and can be readily accessed online. A storage wallet is called “cold” when it holds keys offline, such as in a paper wallet on which keys are written, in a hardware wallet like a USB “thumb” drive, or in another offline device.⁵

Unlike funds on deposit in a bank account, the owner (or a fiduciary such as an executor or trustee) generally cannot contact some institution and request access to the funds if the private key is lost or stolen. Cryptocurrency exchange companies, such as Coinbase and Binance, do, however, offer digital “vault” (or “wallet”) services to hold a user’s private keys. Such “hosted” wallets provide easier access, but raise worries about hacking or other improper third-party access.⁶ “Cold” wallets, by contrast, are recommended as more secure from online threats, but are still vulnerable to risks of being corrupted, lost, hacked or stolen.⁷

The Estate Planning Challenge: Balancing Access and Security “The very features that make cryptocurrency attractive, such as privacy and decentralization, can also increase the risk that your client’s fiduciaries may lack access to crypto holdings if not properly documented.”⁸ This poses a great technical challenge to estate planning, which must strike a delicate balance between access and security. Plans that provide access too soon or without adequate safeguards pose an undue security risk that cryptocurrency may be misappropriated, before or after death. But if security measures go too far, excess obstacles to access may also cause effective total loss of the digital assets. More redundancy in storage of wallet information may be called for as cryptocurrency holdings increase in value,⁹ but this backup access necessarily introduces more points of potential vulnerability to security breaches.

Entrusting the Keys Entrusting the private crypto-keys to a confidante or fiduciary may be the simplest “do it yourself” post-death transfer plan. But such sharing is generally unduly risky, because it facilitates

³ Jake Frankenfield, INVESTOPEDIA, <https://www.investopedia.com/terms/c/cryptocurrency.asp> (updated 05/21/2021).

⁴ *Id.*; see also Joseph W. Guzzetta, *How Bitcoin Works: a Technological Description of Blockchain-Based Cryptocurrencies for Non-Technical Lawyers*, 59 ORANGE COUNTY LAW. 34 (October 2017).

⁵ Amy L. McEvoy, *Tips of the Trade: How to Help Clients Avoid Taking Cryptocurrency to the Crypt*, 24 CAL. TRUSTS & ESTATES Q. No. 2 (2018), p. 5-6.

⁶ *Id.* at 6.

⁷ *Id.*

⁸ Byrne, *supra* note 2.

⁹ McEvoy, *supra* note 5, at 6.

theft -- which will be far harder to discover and rectify than garden-variety theft. Fear of such risks is a major deterrent to any planning, which often results by default in no succession plan and loss of the assets at death.

The best solutions provide a roadmap for how to access the crypto-keys upon the owner's death, without presently divulging them or providing other unauthorized, earlier access. One such simple option is to write down the private key and store it in a safe but accessible place, such as a bank safety deposit box.

Will and Trust Provisions If cryptocurrency owners do not share their private keys while they are alive, their estate planning documents need to expressly identify the existence and location of cryptocurrency, and provide partial (but not complete) instructions on how to access them. Absent such information, a deceased owner's successors may not know to look for -- or how to access -- those assets.

This information needs to include sufficient technical guidance (or directions for getting it) to enable successors to reconstruct the complex technical know-how the deceased owner needed to access their cryptocurrency. The actual keys should in any event never be fully stated in an estate planning instrument -- especially in a Will that will become a public document.

The estate planning documents need specific language authorizing the fiduciary to access, retain, and manage the cryptocurrency, depending on the plan.¹⁰ If a trust instrument requires ongoing trust administration and cryptocurrency retention, the trustee should be released and indemnified from any contrary duty to diversify (or otherwise invest) under the applicable prudent investor act. If, however, the estate plan envisions selling cryptocurrency or prompt estate distribution and termination, the fiduciary needs prompt access and authority to sell. The great volatility in cryptocurrency value can make it a "hot potato" for fiduciaries, exposing them to potential liability if a digital asset crashes during estate administration.¹¹

¹⁰ In 2016 California enacted the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADA"). Probate Code sections 870-884. It mainly addresses various types of digital accounts (e.g., email, social media, financial, and file storage), but broadly defines "digital asset" as "an electronic record in which an individual has a right or interest." Probate Code section 871(h). Under RUFADA, *digital asset* "does not include an underlying asset or liability, unless the asset or liability is itself an electronic record." *Id.* (emphasis added). This apparently includes cryptocurrency as an asset. Nearly all of RUFADA's provisions, however, address "disclosure" of the existence or "content" of digital accounts or "termination" of such accounts, without expressly addressing distribution, transfer or possession of cryptocurrency (or the like). See Probate Code sections 872-881. Probate Code section 880(e)(1) is a key apparent exception, which provides that "a fiduciary with authority over the tangible, personal property of a decedent or settlor ... has the right to access the property and any digital asset stored in it." That section adds: "Nothing in this subdivision requires a custodian to share passwords or decrypt protected devices." Probate Code section 880(e)(1). No reported California case law has yet interpreted or applied RUFADA. Insofar as it applies to cryptocurrency, however, it only applies to relations between digital account "custodians" and their "users". See Probate Code section 871(a) ("account"), (f) ("custodian"), and (v) ("user").

¹¹ Ted Knutson, *Estate Planning for Crypto and Other Digital Assets: What You Need to Know*, FORBES, August 14, 2108, <https://www.forbes.com/sites/tedknutson/2018/08/14/estate-planning-for-crypto-and-other-digital-assets-what-you-need-to-know/?sh=16bc19672f51>.

Institutional custodians have developed protocols for handling decedent's cryptocurrency. Coinbase, for instance, does so in a manner akin to other institutions holding financial assets, requiring submission of Letters Testamentary or Letters of Administration or an Affidavit for Collection or Small Estate Affidavit.¹² Institutional custodians have also developed trust accounts for cryptocurrency. Coinbase in particular "supports accounts in the name of a trust" through some of its business platform accounts.¹³

Separate Instruction Memorandum (or "Crypto-Treasure Map") In addition to including partial identifying information in the owner's Will or Trust document, the owner should keep a separate memorandum, with more detailed information about their digital wallets, passwords, and private keys. Because this is a separate document, the owner can update it from time to time, as needed, without the formalities required to change a Will or Trust document. This memorandum should be stored in a secure location or with a trusted individual.

"Possession is 9/10 of the Law" This old common law adage, though perhaps always overstated, still largely captures the practical legal situation of personal property ownership rights that are not established by some formal or official document of title. For such items, it is difficult for someone, with an adverse claim to the person in possession, to prove and enforce their claim. This seems quite so for cryptocurrency,¹⁴ especially given it is generally anonymous, intangible, and often has no third-party custodian.

Some experts have gone as far as to say: "But with assets like bitcoin, a court order is meaningless. Not because these assets are outside the legal system, as some say, but because there is no one to order. Without access to private keys, no one can comply. It's matter of technology, not will."¹⁵ This seems to be a point of pride for cryptocurrency enthusiasts, who have popularized such expressions as "not my keys, not my coin" and "be your own bank."¹⁶

Where there is an institutional custodian, the situation is akin to when a bank or brokerage firm holds cash or other financial assets. Such a firm is in a position to stop a transfer, freeze an account, or obey a court order concerning account assets. These are valuable remedies for an aggrieved beneficiary, compared to a situation where assets of a deceased owner have already been transferred, and the aggrieved person must try to "claw" property back from the transferee.

Is Testator or Trustor Intent the Rest of the Law? Although lost keys may well mean irretrievably lost cryptocurrency, cases of misappropriated or improperly transferred cryptocurrency are new variations on old estate challenges presented by familiar personal property items, and the familiar remedies may apply. When a corrupt heir steals grandpa's cash, gold bars, or Picasso, before or after he died, and falsely

¹² See Coinbase Help, <https://help.coinbase.com/en/coinbase/managing-my-account/other/how-do-i-gain-access-to-a-deceased-family-members-coinbase-account>.

¹³ *Id.* at <https://help.coinbase.com/en/coinbase/getting-started/other/can-i-create-a-coinbase-account-in-the-name-of-a-trus>.

¹⁴ McEvoy, *supra* note 5, at 5.

¹⁵ Pamela Morgan, *Inheriting Bitcoin: Design Your Plan in 7 Steps*, June 6, 2016, <https://medium.com/decentralize-today/inheriting-bitcoin-design-your-plan-in-7-steps-b805ae487691>.

¹⁶ Robert Hackett, *Bitcoin investors, rest in peace: Digital bank adds crypto estate planning*, FORTUNE, April 23, 2021, <https://fortune.com/2021/04/23/bitcoin-investing-crypto-investors-estate-planning-anchorage-coin-trust/>.

alleges an inter vivos gift, an aggrieved beneficiary under his estate plan may have legal recourse against the thief or a negligent fiduciary. Similarly, when a financial firm affects a non-probate transfer, per a deceased client's apparent instructions, an aggrieved claimant may still be able to contest and undo the transfer through litigation alleging they are the intended beneficiary under the decedent's Will or Trust.¹⁷

Familiar precautions to protect the decedent's intended beneficiaries, for various types of personal property, including cryptocurrency, will still include careful inventorying and securing of assets, documenting a chain of custody of valuable items, and estate planning instruments and other records that accurately and thoroughly memorialize the decedent's intended disposition.

Emerging Non-probate Cryptocurrency Transfer Solutions Tech and finance firms are rushing to enter the cryptocurrency market, and may now or soon offer "pay-on-death", "transfer-on-death" or other beneficiary designation arrangements. Coinbase, however, does not yet offer direct beneficiary designation or the like on its accounts.¹⁸ But new "digital inheritance software" promises to automate the process.¹⁹ TrustVerse, a digital finance company, offers its "Pluto Digital Wealth Management Solution," which it calls a "blockchain platform innovated to provide stability to users and their beneficiaries with proper inheritance services" that "enables you to design your own personal inheritance and legacy planning." They explain: "In case of a sudden death of the predecessor, the beneficiary(s) will need to submit the individual's certificate of death to withdraw his/her digital assets. In the case of multiple beneficiaries, the approval of the death certificate's validity by all the beneficiaries is necessary."²⁰

New solutions include a so-called "dead man's switch." Last Will, introduced in 2019 by software developer Karol Trzeszczkowski, is an open source, smart contract program for bequeathing Bitcoin Cash (BCH, a Bitcoin spinoff).²¹ It implements a "dead man's switch" with a six-month trigger. If the Last Will agreement is not refreshed by the user during that period, the BCH becomes available to the inheritor. SafeHaven, a company that builds financial and asset management technology on the blockchain, offers various "Inheriti" digital inheritance solutions for cryptocurrency.²² These include online designation of beneficiaries and "dead man switches" that active the distribution plan if the account owner does not login to the site or respond to an email within a certain amount of time.²³ Mutual consent of all beneficiaries can be required to activate the plan. The use of such a "dead man switch" is obviously fraught with risk if owners neglect to refresh their "live" status or if a malicious beneficiary learns of the arrangement and can "activate" the switch by foul play.

Anchorage Digital Bank NA and Two Ocean Trust LLC have partnered to offer a "COIN Trust", short for Crypto Optimized Irrevocable Non-grantor Trust, which they claim "is the first of its kind digital asset estate planning solution that brings together the benefits of an established trust and estate planning

¹⁷ See Matthew R. Owen, *Contested Nonprobate Transfers: When the Estate Plan Trumps*, 26 CAL. TRUSTS & ESTATES Q. No. 3, pp. 31-38 (2020).

¹⁸ *Id.*

¹⁹ Kai Sedgwick, *How to Bequeath Your Digital Assets to Your Descendants*, August 19, 2019, <https://news.bitcoin.com/how-to-bequeath-your-digital-assets-to-your-descendants/>.

²⁰ See TrustVerse.io, <https://www.trustverse.io/pluto>.

²¹ See Coinwire.com, <https://www.coinwire.com/last-will-platform-offers-bch-inheritance-solution>.

²² See SafeHaven.io, <https://safehaven.io>.

²³ See Inheriti.com, <https://docs.inheriti.com/2a%20Walkthrough/>.

structure with one of the most advanced and secure digital asset custody platforms.”²⁴ They tout use of biometrics-based security technology, claiming: “From a security perspective, Anchorage Custody has been engineered specifically to avoid key person risk, as well as any other single point of failure common to custodial models that rely on physical safekeeping and key redundancy as proxies for security.”²⁵

These and other new solutions promise to offer various options for balancing security and access in digital asset estate planning.

* The views and opinions expressed in this article are those of the author only.

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²⁴ See Hackett, note 16, *supra*; Anchorage Digital, *Case Study: Estate Planning in Crypto — COIN Trust Brings Generational Wealth Management From Two Ocean Trust to Anchorage Digital Clients*, April 23, 2021, <https://medium.com/anchorage/case-study-estate-planning-in-crypto-coin-trust-brings-generational-wealth-management-from-two-86efac553599>.

²⁵ *Id.*