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### Cryptocurrency in Estate Planning

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# Cryptocurrency in Estate Planning

August 31, 2021

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Indiana Continuing Legal Education Forum (ICLEF)

230 East Ohio Street, Suite 300

Indianapolis, Indiana 46204

Ph: 317-637-9102 // Fax: 317-633-8780 // email: [iclef@iclef.org](mailto:iclef@iclef.org)

URL: <https://iclef.org>



# **CRYPTOCURRENCY IN ESTATE PLANNING**

August 31, 2021

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# **CRYPTOCURRENCY IN ESTATE PLANNING**



## **Agenda**

- 12:00 P.M. Login Time Open  
**12:10 P.M. Welcome & Introduction**  
12:15 P.M. Program begins  
**1:15 P.M. Program adjourns**

## **Faculty**

**Mr. Jason C. White, JD, CPWA**  
Dickmann Reason Bogigian & White  
17 North Pennsylvania Street  
Greenfield, IN 46140  
ph: (317) 462-1401  
e-mail: [jason@drbwlaw.com](mailto:jason@drbwlaw.com)

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**Jason C. White**

Dickmann Reason Bogigian & White, Greenfield



*Jason White* has been an investment advisor for fifteen years and has helped hundreds of people plan for and achieve their goals for growing, protecting and transferring their wealth. He spent the first part of his career at Edward Jones and Merrill Lynch, and in March of 2009 joined the Trust & Investment Management department of Greenfield Banking Company. He has trained and mentored over 50 financial advisors as they have started their careers. He graduated from the Indiana University School of Law in 1999 and was admitted to the state bar in 2000. He has a B.S. from Indiana University where he graduated with distinction. In 2011, he obtained the prestigious Certified Private Wealth Advisor designation, which will help him further his specialty in estate planning, elder law and wealth management. He is one of only 10 advisors in Indiana to have achieved this rigorous credential. He is active in the community, serving on the board (and past Chairman) of the Hancock Regional Hospital Foundation, and is a past president of the Set A Good Example Foundation. He volunteers weekly at Harris Elementary school helping third graders improve their reading skills. He also volunteers his time delivering Meals on Wheels and officiating and coaching boys and girls youth sports leagues. He lives in Greenfield with his wife Tiffany and their three kids, Tyler, Josie and Andrew and their dogs Flashy and Jingle.

# How should estate planning attorneys go about addressing cryptocurrency in estate plans?

By: Jason White, JD, Certified Private Wealth Advisor and Accredited Asset Management Specialist  
Dickmann Reason Bogigian & White, 17 N. Pennsylvania St., Greenfield, Indiana 46140  
Phone: (317) 462-1401  
Email: [jason@drbwlaw.com](mailto:jason@drbwlaw.com)  
[www.drbwlaw.com](http://www.drbwlaw.com)

## I. UNDERSTANDING CRYPTOCURRENCY

*What is cryptocurrency?* A digital currency that uses blockchain technology to create a decentralized, immutable, public ledger.

*What does that mean?* It's an electronic asset that can also be used as a currency for the purchase of other assets.

There are over 1000 different versions of cryptocurrency.

10% of the U.S. population owns some form of cryptocurrency and the number is growing steadily.

It is anonymous.

It exists outside of government regulation, so no government is responsible for regulating it or protecting individuals from being scammed or hacked.

Cryptocurrency does not pay dividends, and unlike bonds or certificates of deposit, cryptocurrency does not accrue interest either. Rather, cryptocurrency increases (or decreases) in value like real estate. The market capitalization for all cryptocurrencies as of the date of this article is approximately 2 trillion dollars, which is more than double the size of the market on January 1 this year.

## II. CHALLENGES PRESENTED BY CRYPTOCURRENCY IN ESTATE PLANNING AND ADMINISTRATION

### A. Volatility

- Potential liability of fiduciary if price declines significantly.
- Liability of trustee for holding cryptocurrency and the Prudent Investor Rule (IC 30-4-3.5-2)

### B. Access

- Stefan Thomas and the \$220 million lost password
- Unlike traditional investments, there are no traditional ownership or beneficiary designations on cryptocurrency accounts.

- Lack of paper statements to identify if and where cryptocurrency exists. Since not as common as bank accounts, family/fiduciary may not know decedent owned it.
- However, it is easier for fiduciary to access because no documentation required; just username/password or digital key.
- The only way to access it is with the password or “private key.” Without the private key, you have no access, and without access, you have no cryptocurrency, and all the value is lost.
- Cryptocurrencies can be purchased on exchanges such as Coinbase and held there. Exchanges like Coinbase provide easy access to the owner but are not as secure as “wallets.”
- “Cold Storage”, or a “Cold Wallet” storage refers to offline storage devices such as a USB drive, computer, phone or tablet that are not connected to the internet.
- “Hot wallets” are online or desktop apps that allow you to store keys and passwords to access cryptocurrencies.

#### C. Taxation

- The IRS treats cryptocurrency as property, not as a currency. General tax principles applicable to property transactions apply to virtual currency, and as such, cryptocurrency transactions have tax consequences that may result in tax liability in the form of capital gains or losses. The foregoing though is subject to change under proposed legislation by the Biden Administration.
- Gifts of cryptocurrency are treated as gifts of property, in which the donee receives the donor’s cost basis in the property. At the death of the “owner” cryptocurrencies receive a step-up in basis like other property assets. The carryover and step-up rules governing these assets should be factored into decisions about what to do with the cryptocurrencies in a clients’ estate plan.
- To reduce tax liability, some clients may be interested in making gifts of cryptocurrency. By donating appreciated cryptocurrency to qualified charities, the taxpayer can receive a charitable deduction on his/her income taxes for the value of the gift and avoid paying capital gains taxes on the appreciation.
- Some best practices for gifting cryptocurrency include 1) obtaining an appraisal to establish the fair market value of the cryptocurrency being gifted and 2)executing a separate memorandum that includes details of the gift, such as the date of the transfer, the donor’s basis in the gift, and the fair market value of the gift at the time of the transfer. Since blockchain transactions are anonymous, the memo should state that the donor has given up control and dominion over the donee’s cryptocurrency address to confirm that the gift is complete. If the gift is being made to a charitable organization, the memo should state that the gift meets the tax requirements to record that it qualifies for an income tax charitable deduction.
- Because the IRS treats cryptocurrency as property rather than currency, it will most likely require an appraisal for estate tax purposes. Notice 2014-21

provides that the fair market value of cryptocurrency is based on the exchange rates at the relevant date for appraisal purposes.

### III. ESTATE ADMINISTRATION WHEN CRYPTOCURRENCY IS INVOLVED

#### A. Advantages

- Cryptocurrency has at least one procedural advantage over other financial assets in estate administration. Unlike a traditional bank or broker, which typically requires executors to produce an original death certificate and letters testamentary in order to take control of accounts in the deceased owner's estate, cryptocurrency merely requires the fiduciary to have the decedent's passcode to access and transfer the account for estate administration purposes. The fiduciary then would hold the complex, multi-character passcode needed to access, invest and distribute the estate's cryptocurrency assets to the beneficiaries as needed and as permitted by the relevant estate planning document.

#### B. Problems that may arise

- Because cryptocurrency offers ease of administration, there are fewer checks on a fiduciary who is handling a cryptocurrency account. Individuals who own cryptocurrency or have a trust that holds cryptocurrency should be exceptionally cautious when selecting an executor or trustee because the fiduciary could use the passcode to access and manage the cryptocurrency account, unlike a traditional bank account, which provides more oversight. In addition, should the fiduciary make a transfer of cryptocurrency that is not authorized by the relevant estate planning document, the transfer could be traced but would be nearly impossible to recover.
- Remember, *cryptocurrency is considered personal property, rather than currency*, for purposes of estate planning and administration. If the private key for the client's cryptocurrency is held in an online wallet, then it is considered 'intangible' personal property, much like accounts receivable, copyrights or patents. However, if the private key is held in some type of offline storage device, such as a USB drive, then it may be considered tangible personal property, like clothing or furniture.
- *Why does it matter whether cryptocurrency is considered personal property?* Standard language in Wills and Living Trusts might designate certain personal property for specific persons—for example, your jewelry should be given to your daughter. It is also common to have catchall language that gives all of your personal property to a specific person. That language may include your cryptocurrency (because it is considered personal property), even if you only meant to include your household furnishings. Although IRS Notice 2014-21 provides that cryptocurrency is "property" for tax purposes, it is silent on the nature of that property. As a result, until these issues have been more fully settled, it is important to carve out this exception when disposing of tangible personal property through an estate planning document.

#### **IV. ESTATE PLANNING FOR CLIENTS WHO OWN CRYPTOCURRENCY**

- As an initial step in the estate planning process, clients should document their ownership of cryptocurrencies as part of their net worth statement and provide a document to their chosen fiduciary about how to access those assets after their death or disability. The simple step of keeping an asset inventory and documenting where passwords can be found on an exchange or a “wallet,” can help ensure that crypto-assets are not lost at the death of the original owner.
- 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. You should address cryptocurrency and all digital assets with your clients to ensure that they minimize the risks of loss and maximize the opportunities for these assets to be distributed according to your client’s wishes after death.
  - The estate plan documents should outline how the cryptocurrencies are to be distributed at death and provide the named fiduciary with authority and the powers to own cryptocurrencies in the estate. The plan should also authorize fiduciaries to provide passwords to the beneficiaries who are to inherit the crypto-assets when the assets are “distributed.”
  - Include language that permits fiduciaries to access, retain and manage the cryptocurrency without extraneous liability; include language that allows fiduciary to access other digital assets such as, laptops and cellphones, which may have information about the decedent’s digital assets.
  - There is no legal document in the world that can provide access to cryptocurrency when the key is lost. This is a tricky line to walk, since anyone with your key can access your crypto at any time. You might write a memorandum and keep it with your estate planning documents; leave your information on a cold storage drive in a location your successor fiduciaries will be able to find; or use a password manager and leave instructions about how to access that manager.
  - Individuals with private keys need to write down those keys and store in a secure, but accessible location (or multiple locations).
  - As with all client passwords, advisors should never keep the passwords to any digital assets, but instead be familiar with password storage options available to clients and ensure that their clients have a documented process whereby named fiduciaries can access the accounts.
  - Given the complexity involved with cryptocurrencies, it’s important to discuss with the client whether a special trustee should be selected to manage just the crypto-assets. As with all trustee selections, clients should select a trustee they trust since the passwords and encryption codes are extremely sensitive. Include language that relieves trustee of liability for not diversifying or for holding the digital currency at all.
  - Clients should also contemplate who will have the authority to deal with the cryptocurrency during disability, and ensure that any power of attorney executed have the proper provisions for this type of asset and have the information to access the crypto accounts.

- As attorneys who know that cryptocurrencies present unique challenges, we must be asking our clients whether they own any as part of our in-take or questionnaire process. Clients will not necessarily have thought about or know of the issues that their death, incapacity or lost access in general will have, and they will be very thankful that we have brought those issues to their attention and have a plan to address them.
- Unlike most other assets than do not need to be specifically identified in client's estate plan documents, cryptocurrencies do need to be to ensure that they are known by those who will have to located and access them.

V. **SUMMARY OF BEST PRACTICE RECOMMENDATIONS:**

- list cryptocurrency in the Will or Living Trust documents
- maintain list of cost basis of all purchases of cryptocurrency
- include information about client's digital wallets in their Will or Living Trust
- create a memorandum to their Will or Living Trust with passwords and PINs, and
- include a step-by-step guide to explain how their beneficiaries can access their cryptocurrency.

VI. **MISCELLANEOUS CONCEPTS**

- Irrevocable family trust could be used if estate taxes are a potential issue and the cryptocurrency holder believes there is going to be significant appreciation of the asset.
- Using a GRAT to hold cryptocurrency
- Digital estate plans and digital executors. A digital executor is the person entrusted to carry out your wishes for your digital assets. This person will have access to all your online accounts and be in charge of handling how they are distributed or destroyed.
- The Revised Uniform Fiduciary Access to Digital Assets Act