

## The Bewildering World of Cryptocurrency

**Take-Away:** Cryptocurrency is a highly risky investment. Cryptocurrency that is part of the decedent's estate or trust poses many challenges to the fiduciary to consider before accepting any appointment.

**Disclosure:** I know virtually nothing about cryptocurrency. I do not invest in cryptocurrency. Frankly, when I think of cryptocurrency, I break out in hives. When I practiced law, I never had a client who admitted to owning any cryptocurrency, so I never had to worry about that asset as part of my client's estate. Consequently, the observations and suggestions that follow are only what I have discerned from reading several articles on how to deal with cryptocurrency in an estate plan and more particularly after its owner's death.

**Background:** When I Googled cryptocurrency, I was surprised to learn that 30% of adults (about 70 million people in the U.S.) own cryptocurrency at the beginning of 2026. Worldwide, it is estimated that 16 billion people own some form of cryptocurrency. Between 30 and 60 million cryptocurrency transactions occur each month. There are more than 76 million Blockchain.com wallets. Interesting statistics to be sure, but how does that relate to cryptocurrency in a decedent's estate? There are varying opinions about cryptocurrency.

**Rat Poison?** Public commentators have varying opinions about the merits of cryptocurrency as an investment. Those who advocate cryptocurrency and digital assets include Jeff Bezos, our beloved President as indicated by his Executive Orders and his World Liberty Financial which has sold hundreds of millions dollars in token sales in just the past year, and Suze Orman who guardedly says, "it's okay to own cryptocurrency, so long as you are okay with losing it." NBC's Jim Cramer's support for cryptocurrency is, at best, 'lukewarm.' Those who oppose any investment in cryptocurrency include Bill Gates, who thinks "it has no value," Dave Ramsey who describes it as "the closest thing to gambling, or a fad," and the Sage of Omaha, Warren Buffet, who bluntly described cryptocurrency as "rat poison squared." [I'll take Warren Buffet over Donald Trump any day of the week when it comes to investment advice.]

**IRS Regulation:** The IRS treats cryptocurrency as a digital asset; a virtual currency. [IRS Notice 2014-21.] In Revenue Procedure 2024-28 the IRS announced that it will require more formalized and standardized reporting of cryptocurrency. This includes the use of Form 1099-DA that requires the broker of cryptocurrency transactions to report almost all transactions regarding a digital asset. The individual owner of the currency must report his/her digital transactions on Form 8949 and also on Schedule D of Form 1040. Starting on January 1, 2026, crypto owners must track the cost basis for their digital asset, which brokers are now required to report. [IRS Notice 2024-57 lists transactions that do not require a filing until further guidance is issued, e.g., staking, wrapping, and unwrapping notional principal contracts. (I wish I could explain what these terms mean, but now I'm breaking out in hives again!)]

**Wallet-to-Wallet:** Starting this year, a crypto transaction must ascertain and report the cost basis used to determine capital gains or losses. Revenue Procedure 2024-28 takes determining gain, or loss, in crypto transactions to a new level of complexity, using a wallet-to-wallet method to determine gain, not the conventional method of subtracting the basis from the sales price received to determine the gain (or loss.) To calculate capital gains in a crypto transaction the owner must ascertain the cost basis of the precise crypto sold, not the normal way of calculation gains on transactions of certain type of crypto across all 'wallets.'

**Example:** Carl owns Bitcoin in three different 'wallets.' Wallet A owns 50 Bitcoin. Wallet B owns 40 Bitcoin. Wallet C owns 110 Bitcoin. Carl sells 30 Bitcoin. Under the customary rules, any gain was calculated on all transactions of a certain type of crypto, across all the owner's wallets. Now, with the current wallet-to-wallet method, cost basis is measured in all transactions of a certain type of crypto only within specific wallets. Carl must identify which wallet his sold Bitcoin derived, using a first-in, first-out method of accounting. Accordingly, Carl must identify the wallet, and the Bitcoin that he sold. Thus, following this wallet-to-wallet method, all units of unused basis must be allocated to specific wallets by the earlier of: (i) the first sale of crypto unit with unused basis; or (ii) the filing of an individual Form 1040. These are the rules that the crypto owner and broker now have to track, document, and report.

**Executive Orders:** In March of 2022, the Biden Administration issued Executive Order No. 14067 entitled "Ensuring Responsible Development of Digital Assets" which was an effort

to bring caution to investors of cryptocurrency (and other digital assets) through regulation and required transparency. This Order was in response to cryptocurrency marketers who were pushing to expand cryptocurrency investments to qualified plans, e.g., 401(k) plans. But then, the Biden Order was swiftly revoked as soon as Mr. Trump was sworn in as President and his family started their own cryptocurrency fund that was open to the public (and the Saudi Arabians.)

**Cryptocurrency is Classified as *Property*:** As has been covered in past missives, cryptocurrency is treated as *property*, such that any sale or exchange of cryptocurrency, including its conversion to dollars, constitutes a taxable event that can lead to the recognition of capital gains or losses. Classified as *property* means that if the owner of cryptocurrency holds onto it until his/her death, there *could* be a step-up in basis to its fair market value as of the date of death. [IRC 1014.] A gift of cryptocurrency results in carry-over basis to the donee. [IRC 1015.] However, for those who inherit cryptocurrency and want to claim a ‘step-up’ income tax basis of the crypto, the owner will have had to maintain complete records of acquisition dates, purchase prices, transaction dates, and any fees associated with cryptocurrency trades to document that ‘step-up’ in basis. The good news is that if cryptocurrency is held until death, there is a good chance that beneficiaries of the owner’s estate will avoid massive capital gains, assuming that the cryptocurrency appreciated in value during the owner’s lifetime. Then again, given crypto’s volatility, any gain might be washed out if crypto drops in value before the decedent’s death, a loss that the beneficiaries will be unable to claim.

**Estate Administration Challenges:** A fiduciary that is charged with administering an estate, or trust, that holds cryptocurrency will face numerous challenges.

**Secrecy:** The primary aspect of cryptocurrency is that by its nature it does not allow for conventional methods of recovery, and there is no central authority to go to once a ‘wallet’ is compromised or a ‘wallet’ key is lost. We’ve all read horror stories of how millions of dollars of crypto value were irretrievably lost due to crypto access codes being misplaced on the decedent’s death. [A 2018 Wall Street Journal article estimated that about 20% of all Bitcoin tokens had been lost and were no longer retrievable.] A fiduciary must have enough information to know how to go about retrieving cryptocurrency on the owner’s death.

**Technical Fluency:** Cryptocurrency requires technical fluency and understanding that many fiduciaries will lack. Mistakes can be costly if a fiduciary blunders in its efforts to immediately access a digital asset. Those ‘innocent’ missteps can lead to the forfeiture of the crypto and ultimately the fiduciary’s liability.

**Missing Records:** Incomplete or missing documents will create significant challenges for the fiduciary that is responsible for tax compliance and estate administration, including the need to file a federal estate tax return after the owner’s death where the fair market value of the cryptocurrency must be reported.

**Limited Access:** Because security is so important to holding cryptocurrency, a fiduciary will face challenges to obtain information regarding the decedent’s holdings. This entails accessing private keys, multi-signature wallets, recovery phrases, all of which have to be navigated by the fiduciary to gain access to, and control of, the digital property. How will this asset be identified, and access preserved during the period of administration? Access to a self-custody ‘wallet’ relies on cryptocurrency keys, usually a 12-24-word recovery phrase to restore the wallet. Without a recovery phrase or PIN, the fiduciary’s access to the digital property is almost impossible. Impatient beneficiaries will probably blame the fiduciary, not their decedent.

**Ownership:** Since the ownership of cryptocurrency is cloaked in blockchains, it is conceivable that disputes over its ownership will arise, particularly if the value of the digital asset is large enough to warrant a fight.

**Valuations:** The value of cryptocurrency is inherently volatile. Date of death values may be more difficult to determine when compared to marketable securities. Preparing inventories that include cryptocurrency might be viewed by beneficiaries, or courts, as vague or misleading. With massive swings in value of a large cryptocurrency holding, more attention will have to be given by the fiduciary to the use of the alternate value rules of the Tax Code if an estate tax return has to be filed.

**Mistaken Efforts at Access:** In the effort to implement the recovery phrase or use of credential to gain access to the cryptocurrency, speculative access attempts by the

fiduciary will need to be avoided. Despite a fiduciary's general belief that it has free-rein to access the decedent's digital assets, repeated efforts to interact with, or technically access, the digital account by an inexperienced fiduciary could trigger damage to, or worse yet erase, key data.

**Forensic Experts:** These experts may have to be hired, at the estate's expense, to technically access the decedent's crypto. This could take time that will delay estate tax returns or estate distributions.

**Liquidation:** The fiduciary may be required to liquidate the cryptocurrency, converting it to cash. However, that liquidation must be through platforms that operate under a variety of regulatory regimes, especially if the crypto is centered offshore, often with varying degrees of oversight and transparency. If there is technical mismanagement, tax errors can occur. More to the point, exchange platforms must comply with anti-money laundering regulations, e.g., FinCEN. All of these regulations will force a fiduciary to conduct due diligence and incur additional legal fees to ensure that any liquidation platform follows U.S. laws.

**Escheat:** If a cryptocurrency 'wallet' remains unclaimed or unused, a state might initiate procedures to treat the 'wallet' as unclaimed property, despite it being inaccessible. Consequently, a fiduciary has to be mindful of escheatment timelines to avoid a deemed forfeiture of the crypto account.

**Planning:** The Revised Uniform Fiduciary Access to Digital Asset Act, adopted by Michigan in June of 2016 [MCL 700. 1001 et seq] allows a fiduciary to access certain digital assets, but only if the estate planning instruments clearly and expressly authorize that access.

**Express Powers:** Accordingly, the owner's Will or Trust needs to explicitly grant authority to the fiduciary to access and manage digital accounts, in order to reduce delays or avoid legal challenges. "My fiduciary may manage my digital assets" simply does not 'cut it' when it comes to managing, accessing, and liquidating cryptocurrency held in an estate or trust. [The American Bar Association has prepared sample language that can be used for

inclusion in estate planning documents to deal with cryptocurrency.

<https://tinyurl.com/bdc9e37c>, February 26, 2025.]

**Empowering Provisions:** It would be wise, as well, to grant this explicit authority to access, manage and liquidate cryptocurrency in Durable Powers of Attorney, Trust Certificates or Affidavits of Trust Existence and Authority as well as include these same provisions in the multiple pages that identify ordinary trust powers.

**Extraordinary Powers:** The powers given to the fiduciary should also authorize the fiduciary to engage professional assistance, including forensic recovery experts and crypto valuation experts.

**Hold or Sell:** The owner's Will or Trust should clearly direct the fiduciary if it should retain or convert the cryptocurrency after the owner's death or give the fiduciary the discretion to make this decision.

**Funding:** A crypto owner can have a trustee hold digital assets by retitling the crypto account in the name of the trust and then record the transfer of the digital asset. Or the crypto could be transferred to a single member LLC that appoints an independent manager, and the LLC units are then transferred to the owner's revocable trust, as an additional layer of protection to facilitate access to the crypto account.

**Conclusion:** I'm not naive enough to claim that cryptocurrency is a fad that will soon disappear. Crypto is no longer just a fringe asset. Rather, it must be recognized by estate planners and fiduciaries that crypto is a highly complicated asset that requires unique basis tracking, valuation, reporting, and liquidation requirements after the owner's death. The technical and sophistication will be required for any fiduciary to access and manage crypto and it presents many time consuming and expensive challenges simply to access the crypto account. In sum, crypto is not for the faint of heart, either for its owner, or the fiduciary that is charged with managing it after the owner's death. A fiduciary needs to think twice before serving if crypto is an asset that must be administered.

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