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TECHNOLOGY

With the rise of cryptocurrency, estate lawyers caution that it shouldn't be treated like any other asset

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 As the cryptocurrency craze spreads, the mainstream public is investing in bitcoin and other digital currencies. With dollar signs in their eyes, they might not think about what happens to their cryptocurrency when they die.

Cryptocurrency, such as bitcoin or Ethereum's ether, could vanish into thin air unless estate-planning lawyers spur their crypto-loving clients to make inheritance plans. But there are traps for estate-planning attorneys to watch for in order to ensure that heirs will have access to a client's cryptocurrency after death, while making sure the client won't be giving up the keys to the castle prematurely.

"This is a whole new area for estate-planning lawyers," says Pamela Morgan, an attorney and author who founded Empowered Law and trains lawyers about cryptocurrency and blockchain technology. "It's an opportunity to grow your client base—to attract new people who never thought about this before."

A full immersion into cryptocurrency is a good first step for other estate-planning lawyers wishing to break into the space.

"If you don't actually understand the technology and how it works, you make assumptions about access," says Morgan, who focuses one Empowered Law workshop on crypto-estate planning and is writing a crypto-inheritance guidebook geared toward lawyers. "Often the assumptions are wrong and will lead to loss."

PLANNING IS THE KEY

The first step in creating a crypto-estate plan is figuring out whether clients even own cryptocurrency. Colorado estate-planning lawyer Matthew McClintock says his client intake forms now have a new category for crypto-assets. In one way, cryptocurrency is just another class of assets, but on another level, it's unlike any asset that came before it.

"Possession equals control equals ownership. If someone gets the client's private keys, they have unlimited access to the client's crypto. This makes succession planning very challenging," McClintock says.

When a person buys bitcoin, it's associated with cryptographic public and private keys. The public key, visible to all, identifies that specific bitcoin and all of its transactions on the blockchain—a public ledger that records transactions on a network of decentralized computers across the world. The private key is the owner's secret and proves ownership and authorizes transfers. The private key must remain secret until the owner dies, or else anyone could steal the cryptocurrency.

Morgan explains that unlike a bank, which must follow a probate court's order to turn over a decedent's account to an heir, with crypto-assets there is often no trusted third party who is subject to a court order. The inheritance plan must spell out for heirs how to access the cryptocurrency.

She says there are several methods for an owner to hold cryptocurrency—including online exchanges, software wallets and hardware wallets—and an estate plan needs something slightly different for each method. If held on an exchange such as Coinbase or Kraken, an heir can use the normal probate process to access the accounts.

For software wallets, the inheritance plan must say which program the client used, the device it's installed on, the type of cryptocurrency in the wallet, and the place an heir can find the seed phrase—a security feature that allows a user to recover lost cryptocurrency. As for hardware wallets, including Ledger or Trezor, the estate plan must spell out where to find those USB-like devices and their seed phrases.

Morgan says it's a good practice to keep hardware wallets and seed phrases in a safe deposit box because they're secured during the client's life, and an heir can go through the normal probate process to access the box after the client's death.

Although succession planning is a large part of what estate-planning attorneys handle, they also help their clients manage their assets during their lives. Legally avoiding taxation is often high on clients' to-do lists, and it's no different with cryptocurrency.

“They’re usually very highly appreciated, so capital gains tax issues—and for many, estate-tax issues—have to be addressed with the strategy phase,” says McClintock of Colorado-based Evergreen Legacy Planning.

Indeed, many of Toronto attorney Aaron Grinhaus’ cryptocurrency clients come to him through referrals from accountants. Some of these clients ask Grinhaus, the managing partner of Grinhaus Law Firm, about creating a corporation to hold their crypto-assets in order to gain tax benefits and make it easier to pass the assets to beneficiaries.

“With crypto, the governments are still trying to figure out how to tax it and in what way,” he explains, noting that trading one cryptocurrency for another may trigger a tax consequence. “You have to anticipate how it’s treated for estate-planning purposes: whether it’s capital gains or current income.”

Because the law is unsettled and yet changes rapidly, some lawyers may shy away from representing cryptocurrency clients. Not Grinhaus, who says the niche practice area brings in business for his firm.

“Crypto clients are a different brand of client than everyone else. A lot of them are younger—we have a lot of multimillionaire clients under 25,” he says, revealing that he ditches his suit in favor of jeans and a T-shirt to meet with these newly wealthy clients.

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