

# Tulsa Estate Planning Council

## New Kids on the Block(chain): Planning with Bitcoin & Other Cryptocurrencies\*

Monday, September 9, 2019

**Presented by:**

**Abigail Rosen Earthman**  
Winstead PC  
2728 N. Harwood Street  
Suite 500  
Dallas, TX 75201  
713-650-2639  
aearthman@winstead.com

\* Portions of these materials were initially prepared for the 53<sup>rd</sup> Annual Heckerling Institute on Estate Planning sponsored by the University of Miami School of Law. They are reprinted here with the permission of the Heckerling Institute and the University of Miami and the authors of the materials, Benetta Jenson, Austin Bramwell, Abigail Rosen Earthman, and Suzanne Walsh.

Please read important information at the end of the presentation.

winstead.com





## Agenda

- I. Introduction**
- II. Background
- III. Fiduciary Issues & Considerations
- IV. Advising Clients & Drafting Considerations
- V. Taxation & Reporting
- VI. Planning Strategies
- VII. Other Regulatory Issues
- VIII. Takeaways
- IX. Q&A

## Why Should We Care about Cryptocurrencies?

- **Total Number of Cryptocurrencies:** 2,405 (as of August 1, 2019)<sup>1</sup>
- **Total Market Cap:** Almost \$281 billion (as of August 1, 2019)<sup>1</sup>
- **Number of Users of Coinbase:** Over 30 million (as of August 1, 2019)<sup>2</sup> &  
**Number of Blockchain.com Wallets:** Over 40 million (as of August 1, 2019)<sup>3</sup>
  - Compared to Users of Traditional Investment Accounts:
    - TD Ameritrade: 11 million accounts (as of August 1, 2019)<sup>4</sup>
    - Charles Schwab: 11.6 million active brokerage accounts (as of December 31, 2018)<sup>5</sup>
- **Percentage of Individuals Between Ages 24-38 Who either had \$50,000 of Investable Assets or Earned \$100,000+/Year and Owned Cryptocurrency:** 25% (as of November 1, 2019)<sup>6</sup>
- **Number of Businesses that Accept Cryptocurrency:** Approx. 100 (as of September 13, 2018)<sup>7</sup>

1. <https://www.coinmarketcap.com> (last visited August 1, 2019).

2. <https://www.coinbase.com/about> (last visited August 1, 2019).

3. <https://www.blockchain.com/charts/> (last visited August 1, 2019).

4. <https://www.tdameritrade.com/about-us.page> (last visited August 1, 2019).

5. U.S. SEC Form 10-K The Charles Schwab Corporation, found at:

[https://content.schwab.com/web/retail/public/about-schwab/YE\\_2018\\_Form\\_10-K.pdf](https://content.schwab.com/web/retail/public/about-schwab/YE_2018_Form_10-K.pdf) (last visited August 1, 2019).

6. See Megan Henney, *More Rich Millennials Are Investing in Cryptocurrencies*, found at

<https://www.foxbusiness.com/personal-finance/more-rich-millennials-are-investing-in-cryptocurrencies-heres-why.amp> (November 1, 2018).

7. See Jonas, Chokun, *Who Accepts Bitcoins*, found at:

<https://www.99bitcoins.com/who-accepts-bitcoins-payment-companies-stores-take-bitcoins/> (last updated September 13, 2018).



## Agenda

- I. Introduction
- II. Background**
- III. Fiduciary Issues & Considerations
- IV. Advising Clients & Drafting Considerations
- V. Taxation & Reporting
- VI. Planning Strategies
- VII. Other Regulatory Issues
- VIII. Takeaways
- IX. Q&A

## What is Blockchain?

- **A blockchain provides the means to record and store distributed ledger transactions.**
  - **Blockchain is much more than Bitcoin**
1. Bitcoin is the first “use case” for blockchain technology.
    - Satoshi Nakamoto’s Bitcoin “whitepaper”
    - Genesis Block (first Bitcoin) was mined on January 3, 2009.
  2. Ethereum project, for example, has its own blockchain capable of very different actions.
    - Smart contracts
  3. Other blockchain use cases:
    - Trusts and estates
    - Elections
    - Health records

## What is Blockchain? (continued)

- **Defining Features of Blockchain**

1. Decentralized, peer-to-peer network
2. Transactions on blockchain are public
3. Immutable
4. Secure

- **Advantages of Blockchain**

1. Faster
2. Less costly
3. More secure



## Why Call It a Blockchain?

- **Pending transactions, once verified, are grouped into blocks of data. Blocks are linked sequentially by reference to the immediately preceding block, creating an unbreakable chain.**
- **Each block, once verified and incorporated into the ledger, is immutable.**
  - To reverse a transaction, one has to enter into a new transaction. No changes or erasures.
- **There is no running tally of one participant's transactions.**
  - Assets are traced, not asset owners.

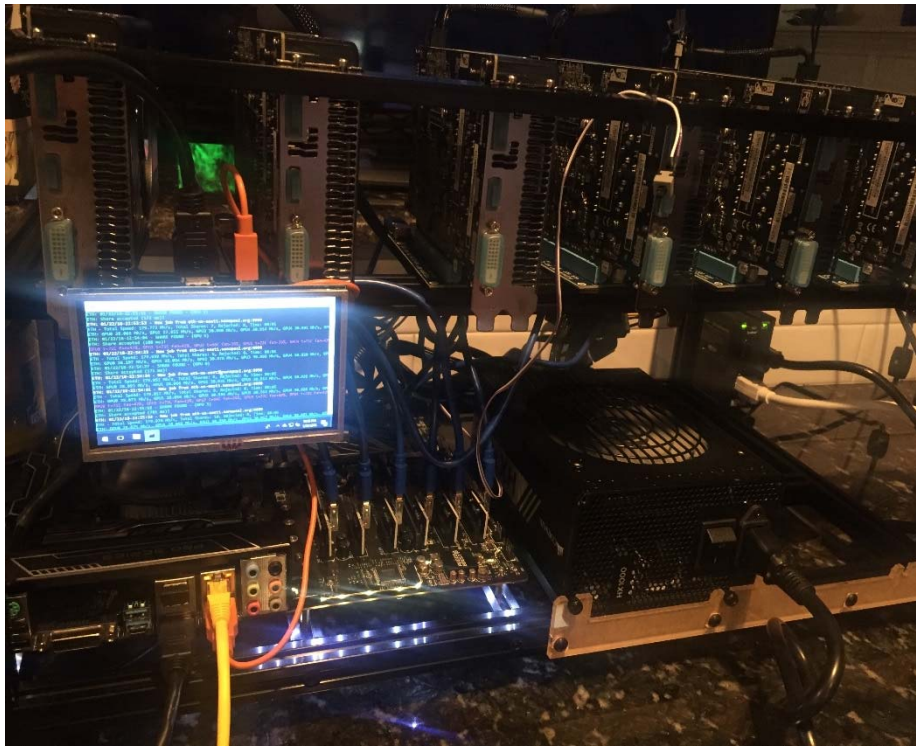
## What Are Cryptocurrencies?

- **Cryptocurrency Is Not Fiat Currency**
- **Different Currencies**
  1. Digital
  2. Virtual
  3. Crypto
- **Why Care about Cryptocurrencies?**
  1. Market value
  2. User base



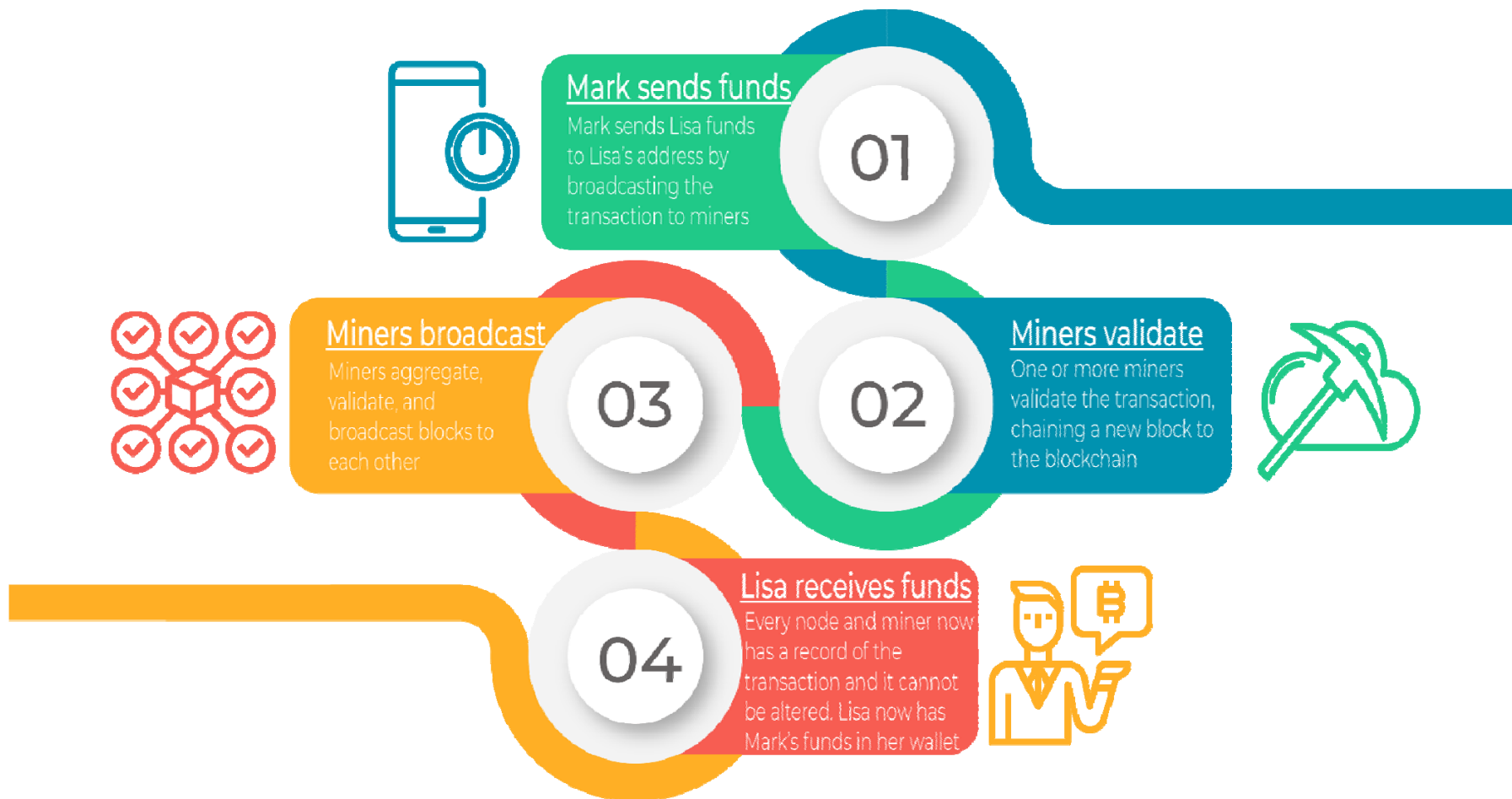
## How Do You Obtain Cryptocurrency?

- Purchase on exchange.
- Accept it for goods or services.
- Mine it.



Source: Abigail Rosen Earthman

## What Does a Transaction on a Blockchain Look Like?



Source: Winstead PC

[winstead.com](http://winstead.com)

**WINSTEAD**

## What Does a Transaction on a Blockchain Look Like? (continued)

### Sending Funds

- Verify both parties have an eligible cryptocurrency wallet.
- Share address through QR code or barcode.
  - Private and public keys



Source: [https://en.wikipedia.org/wiki/QR\\_code](https://en.wikipedia.org/wiki/QR_code)



### Mark sends funds

Mark sends Lisa funds to Lisa's address by broadcasting the transaction to miners

01

## What Does a Transaction on a Blockchain Look Like? (continued)

### Validating the Transaction

- Miners validate.
- Miners “hash” the transaction.
- Transactions are grouped together.
- New block is created and added to the Blockchain.

02

#### Miners validate

One or more miners validate the transaction, chaining a new block to the blockchain



Source: Abigail Rosen Earthman

## What Does a Transaction on a Blockchain Look Like? (continued)

### Broadcasting the Transaction

- Aggregate
- Validate
- Broadcast



#### Miners broadcast

Miners aggregate, validate, and broadcast blocks to each other

03

## What Does a Transaction on a Blockchain Look Like? (continued)

### Completing the Transaction

- Recorded on distributed ledger
- Cannot be altered or changed
- Transaction becomes public
- Assets are traced, not asset owners





## Agenda

- I. Introduction
- II. Background
- III. Fiduciary Issues & Considerations**
- IV. Advising Clients & Drafting Considerations
- V. Taxation & Reporting
- VI. Planning Strategies
- VII. Other Regulatory Issues
- VIII. Takeaways
- IX. Q&A

## Challenges to Fiduciary Access to Digital Assets, In General

- Passwords and encryption
- Federal and state privacy, computer fraud and data protection laws
- Terms of Service Agreements (“TOSA”)/privacy policies governing accounts



Source: <https://www.abposters.com/goldfish-jumping-out-of-the-water-f5767405>



## Computer Fraud and Abuse Acts Prohibit Hacking

- Each state , as well as Congress, has enacted a Computer Fraud and Abuse Act (“CFAA”) that criminalizes (or at least, creates civil liability for) the **unauthorized access** of computer hardware and devices, and the data stored thereon.
- For example, Connecticut criminalizes “unauthorized access” to a computer system, which occurs when “knowing that [a person] is not authorized to do so, he accesses or causes to be accessed any computer system without authorization.”
- If the cryptocurrency owner expressly authorized the fiduciary to access her computers, it is unlikely that such computer access violates the CFAA.
- Revised Uniform Fiduciary Access to Digital Assets Act (“UFADAA”) makes that clear.

## What about Password Sharing?

- The easiest way to provide for access to online accounts, and the digital assets held in them, during incapacity or after death is simply to share a password with a trusted friend or family member, which violates most TOSA's.



Source: <https://gizmodo.com/5870226/when-to-give-your-girlfriend-your-password>

## Password Sharing as TOSA and CFAA Violations

- Even if the fiduciary has the user's permission or passwords, the fiduciary may still be breaking the law. Access to a user's online account requires accessing the provider's or another vendor's computer, which requires *the service provider's* further authorization.
- If the provider's TOSA prohibits third parties from accessing the account, as many TOSAs do, when the fiduciary uses a shared password to access the account, he violates the TOSA and thereby exceeds his authorized access *to the service provider's system*. Technically, this violates the CFAA.
- Password sharing among family members and access by individual fiduciaries has not yet been and most likely will not be prosecuted as a CFAA violation.
- However, the CFAA and the cases interpreting it are neither consistent nor clear.
- *A password manager is a good workaround.*

## Revised UFADAA (2015)

- **May facilitate fiduciary access to virtual currency, but cannot guarantee it in all cases.**
- **Enactments (42):** Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, U.S. Virgin Islands, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming
- **2018 Introductions (5):** District of Columbia, New Hampshire, Oklahoma, Pennsylvania, Rhode Island

## **Cryptocurrency Is a “Digital Asset” under Revised UFADAA**

- “Digital assets” are defined as electronic records in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record. Revised UFADAA § 2.
- This is intended to give the fiduciary authority to access cryptocurrency if access is otherwise technologically feasible.



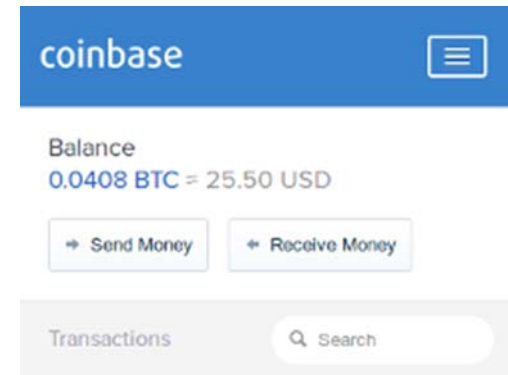
## Collecting Cryptocurrency under Revised UFADAA

- For any digital assets *held by a third-party service*, in general, fiduciaries must first provide a written request, a copy of the will, trust or power of attorney, and information linking the account to the customer.
- What about owners who store their private keys on devices or hard drives?
- Must the fiduciary search for wallet.dat or other wallet files before destroying hard drives and devices?
- Fiduciary always has to have the private key in order to access coins held offline.

## **Searching a Decedent's Computer Files under Revised UFADAA**

- Sections 15(d) and (e) of Revised UFADAA confirm that a fiduciary is an authorized user of the decedent, protected person, principal or settlor's property under applicable CFAAs, and confirm that a fiduciary with authority over devices can access digital assets and files on it, and is an authorized user.

## Locating Cryptocurrency



Jul 9, 2014  
You sent bitcoin to an external account  
**PENDING** **-0.001 BTC**

---

Jul 9, 2014  
You received bitcoin from an external account  
**COMPLETE** **+0.0418 BTC**

Source: <https://www.amazon.com/Trezor-bitcoin-wallet-white/dp/B00P5HU80A>





## **Companies Are Wary**

- Wallet/exchange companies are understandably concerned with fraud and theft.
- Coinbase has posted procedures, requiring a death certificate, last will, probate certificate, government-issued photo identification for the fiduciary, and a letter of instruction.
- No commercial service, as of yet, has created online tools (which are akin to beneficiary designations).



## Practical Considerations

- Traditional assets are often held by a third party, who can be compelled by court order to turn the asset over to the fiduciary.
- With cryptocurrency, there may be no trusted intermediary with access to the private key that controls the tokens.
- When the private key is lost, the cryptocurrency it controls cannot become unclaimed property as we understand it, because the state has no ability to control or transfer it.



## **Practical Considerations (continued)**

- **If the user's private key is lost, so is the cryptocurrency accessed with that key.**
- Probate by computer (the modern version of probate by truck) may be a problem.
- Risk of loss of coins held in wallets is great, if fiduciaries do not know to look for them.
- Corporate fiduciaries may be unwilling to accept trusteeships for living settlors who own cryptocurrency because of the fiduciaries' inability to monitor it.
- Delayed access to cryptocurrency may cause loss in estate or trust value.



## **Titling Options for Cryptocurrency Accounts**

- Does titling a cryptocurrency account or wallet as a custodial, transfer on death (“TOD”), payable on death (“POD”), survivorship or other joint account “work”? Yes, but only if the custodian and a governing or enabling statute (if any) allow it.
- Without statutory authority, wallet companies are unlikely to allow TOD, POD, beneficiary or joint accounts.

## Uniform Transfer on Death Security Registration Act (“UTODSRA”) Accounts

- Uniform Transfer on Death Security Registration Act (1998) (“UTODSRA”) is enacted in all states except Texas and Louisiana, **applies to securities**, defined as “a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, and a security account.”
- That definition is derived from Uniform Commercial Code § 8-102 and includes shares of mutual funds and other investment companies.

## **UTODSRA Accounts (continued)**

- UTODSRA permits beneficiary registration of securities if any state with which any of the parties to a registration “has contact” has enacted the Act. This could be the company, the transfer agent, or the owner.
- In enacting states, registration in beneficiary form may be shown by the words “transfer on death,” the abbreviation “TOD,” or by the words “pay on death” or the abbreviation “POD,” after the name of the registered owner and before the name of a beneficiary.

## POD, Joint “Bank” Accounts

- Normally, payable on death and survivorship joint bank accounts are described in the state banking laws, which will not only specify ownership at death, but will also clarify that the accounts are not testamentary transfers subject to the statute of wills.



Source: <https://www.t3.com/features/what-is-bitcoin-and-how-do-i-get-rich-from-it>

## POD, Joint “Bank” Accounts (continued)

- **POD: Hawaii Revised Statutes § 412:10-308. Payable-on-death accounts.**  
Notwithstanding any other provision of law, a credit union may establish share and deposit accounts payable to one or more persons during their lifetimes and on the death of all of them to one or more payable-on-death payees. Any transfer to a payable-on-death payee is effective by reason of the account contract and shall not be considered to be a testamentary transfer.
- **JOINT: Connecticut General Statute § 36a-290. Joint deposit and share accounts. (a)**  
When a deposit account has been established at any bank... in the names of two or more natural persons and under such terms as to be paid to any one of them, or to the survivor or survivors of them, such account is deemed a joint account, and any part or all of the balance of such account...may be paid to any of such persons during the lifetime of all of them or to the survivor or any of the survivors of such persons after the death of one or more of them.



## UTMA and 529 Accounts

- UTMA defines “custodial property” as any interest in property transferred to a custodian under the Act, so any type of property is covered. UTMA § 1(6).
- IRC § 529 requires that contributions be made in “cash” and the qualified tuition program be established and maintained by the state.



Source: <https://www.thisismoney.co.uk/money/saving/article-2210095/The-great-piggy-bank-robbery-parents-raid-kids-savings.html>



## Agenda

- I. Introduction
- II. Background
- III. Fiduciary Issues & Considerations
- IV. Advising Clients & Drafting Considerations**
- V. Taxation & Reporting
- VI. Planning Strategies
- VII. Other Regulatory Issues
- VIII. Takeaways
- IX. Q&A



## **Advising Clients & Drafting Considerations**

- **Client Questionnaire**
  - Include specific reference to cryptocurrency and how it can be accessed
- **Education of Client and Client's Family**
- **Drafting Considerations**
  - Directed trusts
  - Authority to retain
  - Access provisions

## Advising Clients & Drafting Considerations (continued)

- **Drafting Considerations**

- Sample language (provided by Austin Bramwell & Milbank, Tweed, Hadley & McCloy LLP)
  - To make sure that cryptocurrency wallets are not included in a bequest of tangible personal property (here, via a revocable trust):

All furniture, furnishings, rugs, pictures, books, silver, plate, linen, china, glassware, objects of art, wearing apparel, jewelry, automobiles, boats and their accessories, and all other tangible personal property (excluding cash, bullion, *cryptocurrency wallets of any kind, including any cryptocurrency paper wallets, hardware wallets, desktop wallets, or mobile telephone wallets*, and any tangible personal property used primarily in any trade or business at the Grantor's death) which is held as part of the trust estate (whether directly or indirectly through an entity in which the trust estate has an interest), together with any insurance policies covering the same (the "Grantor's tangible personal property"), shall be transferred, conveyed and paid over to \_\_\_\_\_.

## Advising Clients & Drafting Considerations (continued)

- **Drafting Considerations**

- Sample language (provided by Austin Bramwell & Milbank, Tweed, Hadley & McCloy LLP)

- In the powers provisions, add cryptocurrency powers to the digital assets provision:

- In addition to, and not by way of limitation of, the powers conferred by law upon fiduciaries, the Trustee is expressly granted with respect to each of the trust estates herein created, including any accumulated income thereof, the powers hereinafter enumerated, all of such powers so conferred or granted to be exercised by the Trustee as the Trustee may deem advisable in the exercise of sole and absolute discretion . . .

- To access, handle, distribute and dispose of digital assets; to access, use and take control of digital devices, including but not limited to desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smart phones, *cryptocurrency wallets of any kind, including cryptocurrency paper wallets, hardware wallets, desktop wallets, or mobile telephone wallets*, and any similar digital device; to access, modify, delete, control, copy, transfer and otherwise deal with digital assets, including but not limited to e-mails, documents, images, audio, video, software licenses, domain registrations, *cryptocurrency private keys*, and similar digital files, regardless of the ownership of the physical device upon which the digital asset is stored; to access, modify, delete, control, copy, transfer and otherwise deal with digital accounts, including but not limited to e-mail accounts, social network accounts, social media accounts, file sharing accounts, financial management accounts, *cryptocurrency exchange accounts*, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, and other online accounts.



## Agenda

- I. Introduction
- II. Background
- III. Fiduciary Issues & Considerations
- IV. Advising Clients & Drafting Considerations
- V. Taxation & Reporting**
- VI. Planning Strategies
- VII. Other Regulatory Issues
- VIII. Takeaways
- IX. Q&A

## Cryptocurrency and Tax

### General Principles

- Cryptocurrency is a novel form of property
- Blockchain technology creates a novel way of transacting
- But that doesn't mean new law is required

### Practitioners Need:

- Familiarity with common issues
- Ability to spot planning opportunities and advise on implementation

### Topic Is as Vast as Tax Law Itself

- Tax consequences to issuers of initial coin offerings
- Outbound anti-deferral rules
- Cryptocurrency traders

## Notice 2014-21 – Only IRS Guidance To Date

- **Cryptocurrency Is Property**
  1. Not currency
  2. No *de minimis* exception
- **Receipt of Cryptocurrency for Goods or Services Is Gross Income**
  1. Basis = FMV on date of receipt
  2. Cryptocurrency received from mining is gross income on date of receipt
- **Exchange of Cryptocurrency for Cash or Other Property Causes Gain or Loss**
  - Gain or loss may be capital if cryptocurrency was a capital asset



## Valuing Cryptocurrency for Tax Purposes

- **When FMV of Cryptocurrency Needed**

1. Receipt of cryptocurrency in exchange for goods or services
2. Determination of amount realized if cryptocurrency received in a sale or exchange of other property
3. Reportable transfer for gift or estate tax purposes
4. Determination of basis of cryptocurrency acquired from a decedent (and sometimes by gift)
5. Charitable gift of cryptocurrency

- **How to Determine FMV**

1. Notice 2014-21 - FMV is based on exchange rates
2. Conversion into dollars at exchange rates must be made in a “reasonable manner” and “consistently applied”
3. Which exchanges’ prices may be used?
4. May indexes be used?
5. Is average high/low of daily prices “reasonable”?
6. Different methods for different cryptocurrencies?
7. Publicly traded securities exception to requirement of appraisal for charitable deduction substantiation purposes?

- **What Is the Property Acquired from a Decedent at Death?**

## Tracking Basis

- **Challenges in Tracking Basis**

1. The same cryptocurrency may be acquired at different times and at different prices
2. Similar to corporate stock acquired at different times and at different prices
3. Tracking different lots is possible in principle, but difficult in practice

- **Basis Tracking Methods**

1. Treas. Reg. § 1.1012-1(c) provides that first-in-first-out (FIFO) is the default for stock
2. May a taxpayer adopt a similar, consistently applied convention?

## Losses

- **Losses from Sale or Exchange**
  1. Notice 2014-21 confirms that a loss may be realized upon sale or exchange of cryptocurrency
  2. Loss is ordinary or capital depending on whether cryptocurrency was a capital asset
  3. Could loss ever be a non-deductible personal loss?
  4. Wash sale losses
- **Theft Losses**
  - **What if Private Key Goes Missing or Becomes Inaccessible?**
    1. Casualty loss deduction?
    2. Non-casualty loss deduction?

## Is Cryptocurrency Tangible?

- **If I Can't Fathom It Conceptually, It's not Tangible (Right?)**
- **Distributed Ledger Is Intangible**
- **What Is It that a Cryptocurrency Investor Owns?**
  1. The FBI "seized" \$18 Million of cryptocurrency possessed by Ross Ulbright
  2. Cryptocurrency owners must be careful not to "lose" their private keys
  3. The safest way to own cryptocurrency is in "cold storage"
- **What Is the Legal Relationship of Coinbase and Its Customers?**
- **Implicit IRS Position on Tangibility**
  1. Notice 2014-21 - Miners' realize gross income as cryptocurrency is received
  2. IRC § 263A - Uniform capitalization rules
- **Does It Matter?**
  1. Situs of cryptocurrency for U.S. gift and estate tax purposes
  2. Charitable gifts of cryptocurrency
  3. Intervening use rule for charitable remainder trusts
  4. Non-depreciable tangible property GRITs
  5. State source income rules
  6. State sales taxes

## Gift Completion Issues

- **Ways to Make a Gift of Cryptocurrency**

1. Physical delivery of a wallet
2. Initiation of a transaction on blockchain
3. Transfer to a Coinbase account or other cryptocurrency exchange account

- **Physically Delivering a Wallet: Is the Gift Complete?**

1. Mere possibility that the donor could retain a copy of the private key
2. What if the donor does retain a copy?
  - Incomplete gift?
  - Transfer with retained interest?
  - Gift subject to a valuation discount?
  - Open transaction?



## Security Risk Discounts

- **Suppose Father Makes Simultaneous Gifts of the Same Private Key to Daughter and Son**
  1. Valuation discount?
  2. Aggregation of value? See Rev. Rul. 93-12.



## Agenda

- I. Introduction
- II. Background
- III. Fiduciary Issues & Considerations
- IV. Advising Clients & Drafting Considerations
- V. Taxation & Reporting
- VI. Planning Strategies**
- VII. Other Regulatory Issues
- VIII. Takeaways
- IX. Q&A

## GRATs & GRITs

- **With GRATs, Volatility Is the Taxpayer's Friend**
- **GRAT Best Practices**
  1. Contemporaneous memorandum
  2. Independent trustee
  3. Locking in successful GRATs
  4. Getting volatile assets out of unsuccessful GRATs
- **Non-Depreciable Tangible Personal Property GRIT**
  1. IRC § 2702 general rule
  2. Exception for non-depreciable tangible property
  3. Valuation challenges



## Charitable Giving

- **Substantiation**

- For gifts of \$250 or more, donor must obtain a contemporaneous written acknowledgment from the charity to substantiate the charitable deduction for the donation.

- **Valuation**

- If a charitable income tax deduction of more than \$5,000 is claimed for a contribution of property, a qualified appraisal is needed.
- Determination of fair market value (“FMV”) – what methodology should be used?
  1. Notice 2014-21 - FMV is based on exchange rates.
  2. Conversion into dollars at exchange rates must be made in a “reasonable manner” and “consistently applied.”
  3. Which exchanges’ prices may be used?
  4. May indices be used?
  5. Is average high/low of daily prices “reasonable”?
  6. Different methods for different cryptocurrencies?
  7. Publicly traded securities exception to requirement of appraisal for charitable deduction substantiation purposes?

- **Volatility**

- Charity will want to convert cryptocurrency into dollars quickly.



## Agenda

- I. Introduction
- II. Background
- III. Fiduciary Issues & Considerations
- IV. Advising Clients & Drafting Considerations
- V. Taxation & Reporting
- VI. Planning Strategies
- VII. Other Regulatory Issues**
- VIII. Takeaways
- IX. Q&A

## Other Regulatory Issues

- **Securities and Exchange Commission (“SEC”) – Is Cryptocurrency a “Security?”**

- SEC public statements & cases
- Facts & circumstances
- *Howey*: Used to identify an investment contract, which is a security for SEC purposes.

“[A] contract, transaction or scheme whereby a person (1) invests his/her money in (2) a common enterprise and is led to (3) expect profits (4) solely from the efforts of the promoter or a third party, ... it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.”

- **Commodity Futures Trading Commission (“CFTC”) – Is Cryptocurrency a “Commodity?”**

- CFTC public statements & cases
- Facts & circumstances



## Agenda

- I. Introduction
- II. Background
- III. Fiduciary Issues & Considerations
- IV. Advising Clients & Drafting Considerations
- V. Taxation & Reporting
- VI. Planning Strategies
- VII. Other Regulatory Issues
- VIII. Takeaways**
- IX. Q&A

## Takeaways

- **Communicate**
  - Advisors should ask clients whether they own cryptocurrency.
  - Clients should notify executor/trustee of the existence of cryptocurrency and how to access.
- **Educate**
  - Advisors should educate clients and their officeholders (e.g., executors, trustees) on how to identify/locate cryptocurrency.
- **Keep Detailed Records**
  - Date of acquisition
  - Track basis
  - Inventory of all holdings
  - How to access
- **Security & Custody – Cold vs. Hot Storage**



## Agenda

- I. Introduction**
- II. Background
- III. Fiduciary Issues & Considerations
- IV. Advising Clients & Drafting Considerations
- V. Taxation & Reporting
- VI. Planning Strategies
- VII. Other Regulatory Issues
- VIII. Takeaways
- IX. Q&A**