

PART II

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**SERIES: ESTATE PLANNING WITH DIGITAL ASSETS**

**UNDERSTANDING DIGITAL ASSETS IN THE  
CONTEXT OF ESTATE PLANNING**

*By Vanessa L. Maczko and Beth A. Scharpf*

Estate planning attorneys spend a great deal of time advising clients on both lifetime gifting and estate planning for after death. In the first part of this two-part series (click [here](#) to read), we outlined terminology and concepts that estate planners must address with their clients to facilitate the ownership and transition of digital assets as part of their estate plan. In this second part of our series, we will explore how to incorporate digital assets into an estate plan and ways to structure lifetime gifting of digital assets.

**ESTATE PLANS WITH DIGITAL ASSETS**

**Flow of Digital Assets.** Investors of digital assets must consider how they want their digital assets to pass at death. In most circumstances, estate planning documents must be explicit as to the disposition of digital assets. Relying on common form language can be problematic, as described below.

Without additional specifications in an estate plan, “valuable” digital assets, such as bitcoins or NFTs, will pass as part of the decedent’s residuary estate. For many clients, this means into trusts created for the decedent’s spouse or children. Said another way, the continuing trusts for the decedent’s heirs will hold equity in the digital investments. But, as we discussed in part one, what good is the equity if you do not have the access to the digital investments? Thus, the corollary question is how do the tangible storage items that provide access to the digital assets pass? Very likely, the estate plan provides that tangible personal property passes to the decedent’s spouse or children and likely free of trust. Thus, under the best set of circumstances, you have digital asset storage passing to the decedent’s spouse while digital asset equity in the investment portfolio passes to a trust for such spouse. This is still problematic. In a worst set of circumstances, you have digital asset storage passing to the decedent’s children from a prior marriage while digital asset equity passes to a trust for the decedent’s second spouse. This is obviously extremely problematic.

Such a client’s testamentary documents need to provide for a consistent disposition of both the digital asset investments as well as the tangible storage devices associated therewith. Perhaps the documents specify that storage associated with a digital asset flows as part of the residuary estate. Or perhaps the document designates a specific bequest of the digital asset portfolio together with the digital asset storage.

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## UNDERSTANDING DIGITAL ASSETS IN THE CONTEXT OF ESTATE PLANNING

**Naming a Digital Fiduciary and Granting Access.** Thought must be given to the fiduciary selected to manage the digital assets. Generally speaking, a fiduciary should be someone trusted, responsible and thoughtful. When the asset is unique, like a digital asset, the fiduciary should have knowledge with respect to investing, managing and storing the asset. For some clients, there is not one individual who has all of these attributes. A client's spouse may be someone who is trusted wholeheartedly but who lacks the knowledge and expertise to manage the digital assets. In this scenario, the client may wish to appoint what is referred to as a **"digital fiduciary"** – someone tasked only with managing the digital assets. A digital fiduciary can be appointed as an attorney-in-fact under a Power of Attorney in the case of incapacity, as an Executor under a Will in the case of death and as a Trustee of a continuing trust for administration after death.

The trust or Will that governs the disposition of the digital asset should refer to the state's fiduciary access statute. For instance, in Connecticut, that is the **Connecticut Revised Uniform Fiduciary Access to Digital Assets Act**. Incorporating such a statute into the document will help with granting the fiduciary access to the digital asset. Beyond this, you want to ensure that your digital fiduciary knows where to find your list of digital assets and login information. For more on this topic, please check out **Part I** of this series which analyzes storage options.

As a digital fiduciary, do not be surprised if there are no account statements to reference. You may need to rely on the investor's emails regarding cryptocurrency trades as well as the investor's income tax returns from prior years since taxpayers must report virtual currency transactions each year.

**Prudent Investor Rules.** Now enacted by statute in every state, the prudent investor rule, is a focal point of trust and estate investment law. The rule directs a trustee to implement an overall investment strategy having risk and return objectives reasonably suited to the trust. In other words, the fiduciary is required to invest as a prudent or reasonable person would. Given the highly volatile nature of digital assets, it is pretty safe to say that they are not prudent investments. As such, clients should consider including waivers of the prudent investor standard in their estate planning documents.

**HOW TO STRUCTURE A LIFETIME GIFT OF DIGITAL ASSETS**

**Directed Trusts.** Since we are in a time of historically high gift tax exemptions, clients may wish to use their digital asset portfolio for lifetime gifting. An advantage with gifting digital assets during life is that the client may retain control over the digital portfolio even after transfer. To accomplish this, the client can use a type of trust known as a **"directed trust"** to hold their digital assets. In Delaware and Connecticut, for example, a trust can have an **"investment trustee"** or **"investment trust director"** who exclusively handles responsibility for investments. The investment trustee or trust director would be the fiduciary responsible for investing in, managing and storing the digital assets. And in many cases, the client can serve as the investment trust director.

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## UNDERSTANDING DIGITAL ASSETS IN THE CONTEXT OF ESTATE PLANNING

*This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.*

**LLCs.** Another option for separating investment control from other fiduciary responsibilities is to use a limited liability company as a wrapper around digital investments. A client can transfer the digital asset to the LLC and, subject to certain limitations, retain control over the management of the digital assets by serving as the LLC's manager. Administration of the digital asset can be seamless since control and decision-making remains with the client. If the client serves as the LLC's initial manager, he or she can name an appropriate successor manager for the LLC. But as with the selection of a digital fiduciary, it is important to select a successor manager that is capable of managing the digital assets and understands the implications of digital assets.

Using an LLC wrapper around digital assets has additional benefits, including:

1. An LLC can facilitate the transfers of the digital assets. Rather than sharing access to the digital asset with the donee (or donees), the client can transfer or assign the membership interests in the LLC to the donee (or donees) without disclosing any sensitive information such as passcodes or having to register the transfer on any blockchain.
2. By transferring membership interests in an LLC, discounts may apply to reduce the value of the transfer. This provides a sizable savings to a client's gifting exemption.

**Example.** Client owns cryptocurrency valued at \$10,000,000 held in a manager-managed LLC. Client wishes to transfer a 10% interest in the LLC to a trust for the client's spouse and kids. The fair market value of such a transfer would be less than \$1,000,000 (or 10% of \$10,000,000) due to the availability of valuation discounts. Since the transfer is of an LLC minority interest, it lacks control and lacks marketability, especially in the case of an LLC invested in a highly volatile, difficult to access asset. Discounts can range anywhere from 15-40% and are determined by a qualified appraiser. Using a 30% discount for this scenario, the client can transfer a 10% interest and only use up \$700,000 of his or her lifetime gifting exemption.

3. An LLC can provide asset protection. In most states, a properly formed and administered LLC can protect a member's personal assets from an LLC's liabilities. Additionally, in certain jurisdictions, the LLC's assets can be protected from the member's personal liabilities. In these situations, a member's creditor would stand as an assignee rather than an actual member. The creditor would have no vote or control and would simply have to wait for a distribution to be made, if ever.

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It is crucial to address the flow of digital assets and ensure consistent disposition of both the investments and associated storage devices. In **Part I** of this series, digital assets, like cryptocurrencies and NFTs, and their various storage devices, like hot and cold wallets, were described in detail. The strategies outlined above should assist with effectively incorporating digital assets in an estate plan and making informed decisions about the ultimate disposition and administration of digital assets.

Please contact a Wiggin and Dana attorney if you have questions about the information shared in this article, or to discuss other aspects of digital asset estate planning. We would be happy to speak with you and advise you on this ever-evolving and technical subject.