

# Virtual Money Adds New Twist to Estate Planning

By Diane Tom

The house, cottage, furniture and investments are covered. Jewelry, art and bank accounts are also accounted for in your estate plan. But what about the bitcoin?

Over the last few years, digital assets ranging from entertainment libraries to social media accounts have been driving change in the supposedly staid world of estate planning. We regularly help clients answer questions about succession planning and how digital assets should be managed in the event of incapacity, or death. Working on the front lines of this relatively new frontier, we appreciate there is no widely understood or accepted consensus on how executors should approach managing digital assets. There are few laws in this area. Traditional documents such as powers of attorney and Wills may not always work well when dealing with digital assets.

Now virtual currencies such as bitcoin are adding another twist to the estate planning equation. This is about money. As virtual currencies grow more popular, so do the funds tied up in unregulated peer-to-peer currency systems<sup>1</sup> where no central banks or financial institutions are involved.<sup>2</sup> Used either as a means of exchange or as property, there is nothing traditionally “tangible” about bitcoin.<sup>3</sup> As the adjacent *A Bit About Bitcoin* explains, the only evidence of owning this virtual currency are transactions, one’s public key (analogous to an ID number), and a private key (similar to a password).<sup>4</sup>

How are virtual currencies affecting estate planning? This is even newer territory. Most countries have not turned their minds to succession planning involving digital currency assets like bitcoin. The United States Law Library of Congress, for instance, surveyed over 40 countries for their bitcoin positions. The responses focused primarily on considering bitcoin’s acceptance as legal tender, taxation and consumer protection.<sup>5</sup>

Over the last couple of years, the Canada Revenue Agency categorized bitcoin as foreign property.<sup>6</sup> This is consistent with the guidance provided by the United States where, for example, the New York Department of Finance also landed on a property classification for bitcoin.<sup>7</sup>

These types of decisions may lead to more clarity about any taxation consequences and reporting responsibilities that may flow from bitcoin transactions. As importantly, they may also provide more certainty and direction about an executor’s duty to manage such assets.

## WHAT’S AN EXECUTOR TO DO?

In itemizing property for an estate, executors used to count on physical items such as a person’s belongings, mail and input from family, friends and financial institutions. The virtual, anonymous nature of bitcoin may mean your executor is unable to access and distribute this asset. In today’s world, if the private key is lost or forgotten, the bitcoin is not lost, but will remain forever inaccessible in the electronic wallet.<sup>8</sup> In addition, right now there is no authority that can give bitcoin access to an executor.<sup>9</sup>

This challenge is similar to other digital assets such as external hard drive accounts, social media accounts and photo-, video- and music-sharing services. Providers may have policies on how to deal with an accountholder’s death, but may not allow third parties, such as executors, to access an individual’s account.<sup>10</sup> We see a Catch 22 arise quite frequently where not only may an executor not have any authority to deal with the digital asset, but the provider or custodian of the digital assets may likewise have no authority to deal with an executor and disclose information about the account.<sup>11</sup> The result: Once a user passes away, there is an authority vacuum.

In our experience, new digital businesses are not being intentionally difficult. Instead, given their emphasis on innovation, they focus more on improving the functional aspects of their service(s) than on developing supporting policies and procedures to manage such account issues.

To avoid leaving your executor in a quandary and assets orphaned, we encourage clients to develop a sound digital succession plan that begins with a comprehensive inventory of assets and passwords. Follow this up by examining what each digital asset provider requires to transition authority to an executor and, ultimately, your beneficiaries.

With such foundation information in place, you can provide written direction on issues such as how any digital assets that generate income are to be allocated, whether you want

1. “Bitcoin,” The Free Dictionary, <http://encyclopedia2.thefreedictionary.com/>

2. “Bitcoin,” Investopedia, [www.investopedia.com](http://www.investopedia.com)

3. Ibid.

4. “Bitcoin,” Wikipedia, January 27, 2016, <https://simple.wikipedia.org/wiki/Bitcoin>

5. Kenda Shaheen, “Regulation of Bitcoin Around the World,” Dentons, May 22, 2014, [www.canadiantaxlitigation.com](http://www.canadiantaxlitigation.com)

6. Brenna Nitkin, “CRA: Bitcoins may be Specified Foreign Property,” Dentons, July 22, 2015, [www.canadiantaxlitigation.com](http://www.canadiantaxlitigation.com)

7. “Tax Department Policy on Transactions Using Convertible Currency,” New York State Department of Taxation and Finance, Taxation Guidance Division, December 5, 2014, <https://www.tax.ny.gov/>

8. Matthew Sparkes, “The £625m lost forever—the phenomenon of disappearing Bitcoins,” The Telegraph, January 23, 2015, [www.telegraph.co.uk](http://www.telegraph.co.uk)

9. Jeff Vandrew Jr., “Estate Planning & Bitcoin: Steps to Take Now,” Vandrew LLC, [www.vandrew.com](http://www.vandrew.com)

10. Suzanne Brown Walsh, Benjamin Orzeske & Turney P. Berry, “You Can’t Always Get What You Want,” Trusts & Estates, November 2015,

[http://www.murthalaw.com/files/trustsandestates.com\\_ufadaa\\_article\\_sbvw\\_11.15.pdf](http://www.murthalaw.com/files/trustsandestates.com_ufadaa_article_sbvw_11.15.pdf)

11. “Revised Uniform Fiduciary Access to Digital Assets Act,” National Conference of Commissioners on Uniform State Laws, 2015, [www.uniformlaws.org](http://www.uniformlaws.org)

accounts to continue, or be closed, and how, when, and on behalf of whom to redeem points or distribute funds. Check for any technically-oriented digital estate planning options. For example, bitcoin provides the option to copy your electronic wallet<sup>12</sup> or use an electronic escrow system.<sup>13</sup>

Just as you take time to choose your executor, consider appointing a separate or a digitally focused co-executor—a tech-savvy person who would be comfortable managing your technological, electronic and digital assets. We believe it is prudent to share the details of your digital estate plan with your digital executor in more precise terms and perhaps earlier than you would a traditional plan. With that person in place, choose a secure way to store your sensitive account, login and password information, whether it is through an online or physical storage device. Bitcoin users, for example, may wish to store private key information in separate wallet software or apps dedicated to managing this type of information.

Given the rising use of digital assets, we believe processes and conventional standards will eventually emerge on dealing with the succession of such property. However, we know the financial and sentimental value of digital assets is currently often underestimated. That is why we have made questions about digital assets an integral part of our estate planning process. That way, we can help you begin to transition those assets in the manner you desire. We help answer “What about the bitcoin?” now, before the asset is “locked” or “lost” forever.



12. Matthew Pfau, “A Bitcoin Primer,” Lawyers Plus, April 29, 2014, [www.lawyers-plus.com](http://www.lawyers-plus.com)

13. Guilio Prisco, “Bitrated Unveils Reputation System and Multisig Escrow,” Bitcoin Magazine, February 23, 2015, [bitcoinmagazine.com](http://bitcoinmagazine.com)

## A BIT ABOUT BITCOIN

Bitcoin is one of many decentralized virtual currencies in the marketplace today. Bitcoin transactions are publicly sent to and from electronic wallets, meaning everyone on the network can see a transaction and the transaction history can be traced back to when the bitcoin was generated.<sup>14</sup> With no middle institution such as a bank, transactions involve exchanging encrypted, anonymous codes,<sup>15</sup> which can also occur without any link to a real world identity.<sup>16</sup> Users are not required to use their real name; rather, each user is linked to a bitcoin address consisting of a public and private key. All users can view the balance associated with an ID number. The password equivalent is needed to initiate transactions.<sup>17</sup>

The potential magnitude of virtual currencies has been compared to email’s dramatic transformation of the way we communicate. With that in mind, we believe it is important to highlight some of the key estate planning risks and opportunities associated with today’s virtual currencies. While you may not own bitcoin, you may be surprised to learn of family members who do. We believe it is a worthwhile conversation to have in very many ways.

14. “How do Bitcoin Transactions Work?,” CoinDesk, March 2015, <http://www.coindesk.com>

15. “Bitcoin,” WhatIs, June 2013, [www.whatIs.com](http://www.whatIs.com)

16. “Bitcoin,” Wikipedia, January 27, 2016, <https://simple.wikipedia.org/wiki/Bitcoin>

17. Ibid.