

Cryptocurrency, death and divorce. How it works

As cryptocurrency is a relatively new kid on the block, so to speak, the full legal ramifications of what happens to it in the event of a death or divorce are still being explored.



Stephan Haynes of Gillan and Veldhuizen

Although it has been around since 2009, the South African Revenue Services (Sars) only as recently as April 2018 released a statement in which it noted its interpretation of cryptocurrency as an “asset of intangible nature” which is to be treated as gross income or alternatively as capital for income tax purposes.

As a consequence of its novelty, many common legal aspects surrounding crypto assets are unclear in comparison with assets of a similar nature such as bonds and shares.

By regulating cryptocurrencies, we may secure them as assets, but that could ultimately take away from the anonymity that people so desire, says Stephan Haynes of [Gillan and Veldhuizen](#) explains that following behind the uncertainties involving future tax consequences and possible external regulation, the crypto owner’s biggest uncertainty should concern the question – “What happens to my crypto assets in death and divorce?”

When it comes to death

It is undisputed that cryptocurrency is an asset which naturally forms part of a person’s estate and, as such, it is eligible for inheritance (estate duty) in a deceased estate. Despite its novel nature, the general principles of the law of succession apply to cryptocurrency as with any other investment forming part of a person’s estate.

However, the uncertainty creeps around the practical aspect of leaving behind a crypto asset. Cryptocurrency is held in the form of a wallet which is accessible only by means of a virtual key, in the form of a password, which is known only to the owner of the wallet. Without such a key, it is virtually impossible to gain access to the wallet, as was recently the case in the UK where a deceased's heirs were left perplexed in light of the fact that they had no means to access their crypto inheritance.

"In order to ensure your estate is divided between your heirs, it is of critical importance to keep an updated will so as to ensure that your estate is not dissolved on an intestate basis. This is particularly important with regard to crypto assets which may only recently have been acquired, and may as such not yet be included in your will. Subsequent to including crypto assets in an updated will, it is crucial to include all relevant information concerning access to your crypto wallet or ensuring that your heirs are at least apprised of such information. Caution is key, as criminals and hackers will gain complete access to your crypto assets when in possession of the crypto key that unlocks an otherwise virtually impenetrable wallet," he says.

And divorce

The fact that cryptocurrency is regarded to be a new asset class does not change its applicability to the general principles of South African matrimonial law. Of course, the manner of distribution of assets in divorce naturally depends on the type of marriage entered into and whether or not the system of accrual applies. The potential difficulty, however, comes into play when determining the value of a spouse's estate for distribution purposes when the said estate owns crypto assets.

Cryptocurrency is often associated with tax evasion and money laundering due to its inherent anonymity and, as such, it is feared that spouses may use such a platform to hide assets from a soon-to-be-divorcee. As is the case with other financial accounts, Haynes warns, it is important to formally request documentation concerning crypto assets. Additionally, it is important to review the financial statements provided to ascertain whether there are any transactions that indicate the possible existence of crypto accounts. In this regard, Section 7 of the Matrimonial Property Act 88 of 1984 provides for disclosure of spouse's assets in divorce proceedings and any contravention in this regard can be dealt with under the relevant remedies provided by our law.

Another consideration to bear in mind when dealing with cryptocurrency in cases of divorce is the uncertainty surrounding its value for purposes of tax and distribution. Cryptocurrency is infamous for being a volatile asset wherein one can make a substantial profit or incur an equally great loss in a matter of hours. As such, a spouse's estate may materially change during divorce proceedings in that it may be wiped out or a penniless estate may grow into a fortune. "Consequently, capital gains and income tax need also be borne in mind as swings in value will trigger tax considerations in the dissolution calculation."

"An advised point of departure from Haynes is to "ensure that the necessary arrangements and provisions are in place to guarantee your crypto assets are well directed in death and divorce. If anything, these provisions may give you certainty in the otherwise uncertain realm of crypto."