



LEGAL ALERT

CRYPTOCURRENCY AND ESTATE PLANNING

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Cryptocurrencies and other digital assets have emerged as a transformative force in global finance, with Kenya positioning itself as a notable player in this evolving digital economy. A 2022 report by the United Nations Conference on Trade and Development (UNCTAD) revealed that nearly 10% of Kenyans owned some form of cryptocurrency, a significant adoption rate that reflects the country's deep penetration of mobile money platforms and openness to fintech solutions. This growth has unfolded against a backdrop of shifting regulatory attitudes and deliberate policy development.

Evolution of Cryptocurrency and Other Digital Assets

In December 2015, the Central Bank of Kenya (CBK) issued a public notice warning against the use of virtual currencies, citing volatility, susceptibility to fraud, and the absence of legal recourse in disputes. At the time, this stance mirrored global skepticism toward digital currencies. However, by 2018, the Kenyan government had established a task force to explore blockchain and artificial intelligence applications, including their potential to improve service delivery, enhance transparency, and foster economic growth. A more progressive approach emerged in September 2023 when Kenya completed a national assessment of money laundering risks tied to virtual assets.

By December 2024, this evolving policy trajectory culminated in the unveiling of the **Draft National Policy on Virtual Assets and Virtual Asset Service Providers**, alongside the **Virtual Asset Service Providers (VASP) Bill**. The Policy sought to create a fair, competitive, and stable market for virtual assets (VAs) and virtual asset service providers (VASPs), while ensuring robust consumer protection, market integrity, and cybersecurity safeguards. It also acknowledged the unique challenges posed by the decentralized and borderless nature of digital assets — including the risks of money laundering, terrorism financing, proliferation financing, and tax evasion. Chapter Two of the Policy provided a comparative analysis of international regulatory approaches, noting that many jurisdictions rely on existing supervisory models (self-regulation, twin peaks, integrated systems) and that different agencies often share oversight responsibilities. Global cooperation has been a recurring theme, reflecting the inherently cross-border nature of virtual asset transactions. The Policy identified several critical gaps for Kenya to address:

- 1. Legal and Regulatory Framework** - Establishing a coordinated, comprehensive structure for VA and VASP oversight.
- 2. Risk Management** - Creating clear risk management guidelines for both providers and regulators.
- 3. Market Efficiency** - Strengthening consumer protection, market conduct, and operational standards for service providers.
- 4. Financial Innovation** - Promoting research, awareness, and innovation in the VA ecosystem.
- 5. Capacity Building** - Enhancing institutional competence in supervising and regulating VAs and VASPs.



The **VASP Bill, 2025**, now before Parliament, translates these policy aspirations into enforceable legal provisions. It designates the CBK, Capital Markets Authority, and Communications Authority as primary regulators, mandates licensing for all virtual asset service providers, imposes strict anti-money laundering (AML) and counter-terrorism financing (CFT) obligations, and requires robust consumer protection and cybersecurity measures. Only incorporated legal entities may be licensed, with operational requirements including a Kenyan office, a local bank account, and qualified directors. Unlicensed operations attract severe penalties, and a 3% digital asset tax is proposed on all transactions.

This measured approach reflects Kenya's attempt to replicate the success of M-PESA through which, according to Forbes, an astonishing 59% of Kenya's GDP flows in the realm of digital assets. By carefully balancing innovation and regulation, Kenya aims to position itself as a continental leader in digital finance, leveraging crypto currencies to promote economic growth and financial inclusion.

In this context, the intersection between virtual assets and **estate planning** takes on new significance. As more Kenyans hold wealth in crypto currencies and other digital investments, questions arise regarding their treatment in succession. The remainder of this article examines these questions, **exploring the place of crypto currencies within Kenya's succession framework, the legal tools available for their orderly transmission, reforms needed to harmonise virtual asset regulation with estate planning law.**

1. Options Available in Estate Planning for Crypto Holders

Cryptocurrency as Free Property Capable of Being Disposed Under a Will

The Law of Succession Act defines a will as the legal declaration by a person of their wishes or intentions regarding the disposition of their property after death, duly made and executed in accordance with the provisions of Part II of the Act, and including a codicil. It is clear from the statutory framework that the only category of property a testator may dispose of by will is free property.

Section 5(1) of the Act provides that, subject to Parts II and III, every person of sound mind and not being a minor may dispose by will of all or any of their free property, and may do so by reference to any secular or religious law they choose. The Act further defines free property in relation to a deceased person as property over which that person was legally competent to exercise free disposal during their lifetime, and in respect of which their interest has not been terminated by death.

From this definition, three elements emerge as essential for an asset to qualify as free property. First, it must be lawfully ownable and disposable during the deceased's lifetime. Second, the deceased must have held exclusive control over it. Third, their interest in the property must survive death, and must not have been extinguished by operation of law or arrangement such as through nomination, the right of survivorship in joint ownership, or by having made a completed gift before death. Applying these principles to crypto currency, there is at present no statutory prohibition in Kenya against the ownership or transfer of digital assets. While the Central Bank of Kenya and other regulators have issued public cautions emphasizing that crypto currency is not legal tender, no law renders its private ownership unlawful. Accordingly, an adult with legal capacity may validly acquire, hold, and dispose of crypto currency. Where such assets are held solely in the name of the deceased, under their exclusive control, and without any contractual or technical arrangement that transfers ownership automatically upon death such as a multi-signature wallet allowing surviving co-signers to act independently they meet the criteria for free property and may therefore be disposed of by will.



Crypto Custody and the Question of Nomination

In the cryptocurrency space, "custody" refers to the holding of another person's cryptocurrency private keys or seed phrases on their behalf. Custodial services, whether institutional, such as Coinbase Custody, or online data custodians are increasingly used by investors who wish to ensure their digital assets can be accessed after their death.

Some online custodial solutions go beyond mere storage. They allow account holders to pre-designate ("nominate") a guardian or beneficiary who will receive the private keys or seed phrases upon the holder's death. In practice, this arrangement bypasses traditional estate administration because the nominee gains direct control of the asset, often without the delays of probate. While such arrangements functionally resemble statutory nominations found in pensions, insurance policies, or co-operative society shares, they are not currently recognised under Kenyan succession law as statutory nominations. There is no equivalent legislative framework for cryptocurrency. As such, any designation made through a custodial service is a private contractual arrangement with the service provider.

This lack of statutory recognition creates two legal uncertainties:

- 1. Ownership vs. access:** A nominee given the keys gains control, but unless the arrangement is incorporated into a valid will or trust, the beneficial ownership of the cryptocurrency may still vest in the estate. This could trigger disputes between the nominee and the beneficiaries under the will or intestacy.
- 2. Bypassing personal representatives:** Because crypto-assets can be transferred instantly, a nominee could remove them from the deceased's wallet before personal representatives are aware of their existence, making recovery difficult.

This grey area mirrors the broader challenge of regulating and transmitting crypto-assets on death. Until a statutory framework for digital asset nominations is enacted in Kenya, holders should expressly address custodial arrangements in their wills or other estate planning tools to avoid costly and protracted litigation.

Crypto Currency as a Gift in Contemplation of Death

Cryptocurrency can, in appropriate circumstances, be the subject of a donation mortis causa under section 31 of the Law of Succession Act. The doctrine applies where a person, in contemplation of their imminent death from a specific cause, makes a conditional gift that only becomes absolute if they die from that cause, and delivers the subject matter to the intended recipient.

In the context of cryptocurrency, the first requirement contemplation of death would be satisfied where, for instance, a crypto holder facing serious illness, dangerous surgery, or another peril, transfers access to their digital wallet because they believe death is near. The second requirement that the gift be conditional upon death would require a clear intention that the transfer is effective only if the donor dies from the contemplated cause. This could take the form of giving a private key with instructions that it be used only if the donor does not survive.

The third requirement delivery can be fulfilled in various ways. Actual delivery may occur through handing over a hardware wallet, while constructive delivery could be effected by providing the seed phrase, private key, or login credentials that grant immediate control over the asset. In the crypto context, delivery is generally satisfied the moment the donee obtains the private key, as possession of it confers full dominion over the asset.

Given that crypto currency is a form of movable property and is not excluded by the Act from the subject matter of a gift in contemplation of death, it falls within the ambit of section 31. Its decentralised nature and ease of transfer align with the doctrine's rationale, which is to allow for emergency transfers in circumstances where formal testamentary processes may be impractical. Nevertheless, because private keys grant absolute control, such transfers are susceptible to abuse, and courts are likely to scrutinize claims closely to guard against fraud, particularly where the transfer bypasses the formalities of a will



Challenges that Crypto would Subject Personal Representatives in its Administration

Personal representatives administering cryptocurrency face several challenges. First, locating the assets can be difficult as crypto leaves no central registry or paper trail, especially if the deceased did not disclose their holdings. Even when discovered, access is impossible without the private keys or seed phrases. Valuation is equally problematic due to extreme price volatility, which complicates tax assessment and equitable distribution. Foreign-based exchanges may further frustrate the process by resisting or delaying release under Kenyan law. There is also a heightened risk of misappropriation since whoever controls the keys can transfer assets instantly, potentially before probate is granted.

Uncertainty in Kenya's evolving tax framework adds compliance risks, while nominee arrangements where a person is given access to private keys can spark disputes between them and residuary beneficiaries over beneficial ownership.

Further, where crypto currency prolonged dormancy and failure to trace the owner could result in such assets being reported and remitted to the **Unclaimed Financial Assets Authority (UFAA)**. This exposes beneficiaries to additional administrative burdens of reclaiming the property through UFAA, and in some cases, to permanent loss where the crypto is self-custodied without disclosure of private keys.

Administering crypto currency in succession remains uncertain, complicated by access, valuation, tax, and unclaimed assets risks. The pending bill on Virtual Asset Service Providers may provide clarity, but its real test will lie in how Kenyan courts interpret and apply it. All eyes are on the judiciary to shape the future of crypto succession.

Should you have any questions on this legal alert, please do not hesitate to contact us,



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