

or of the person's ability to engage in "major life activities" (including communication) meets the definition of a disability.¹² The regulations that implement the ADA recognize that a number of mental health impairments substantially limit brain functions, including autism, major depressive disorder, bipolar disorder, post-traumatic stress disorder, and obsessive-compulsive disorder.¹³

Modification of Disciplinary Hearings

While students who suffer from those conditions may be capable of functioning in an academic environment, they may face greater challenges than non-disabled students when they are forced to represent themselves at disciplinary hearings.

Places of public accommodation are required to make reasonable modifications in policies, practices, or procedures.

Such modifications are necessary to allow a disabled individual to take advantage of the services that are provided to others.¹⁴ Education is among those services. Reasonable policy modifications must be provided unless a change of policy would "fundamentally alter" the nature of the service provided.¹⁵

When a school makes students participate in disciplinary hearings as a condition of acquiring an education, the school may need to modify its policies to allow disabled students to participate as meaningfully as a student who is not disabled. The modification requirement is intended to give disabled students the same meaningful

access to services that is afforded to non-disabled students.¹⁶

If a mental health condition impairs a student's opportunity to participate in a hearing, modifying the hearing to permit the student's representation by counsel would seem to be a reasonable and necessary modification of the school's policy.¹⁷

Schools sometimes object to modifying their "no lawyer" policies on the ground that disabled students are not entitled to preferential treatment.

In the context of providing workplace accommodations to disabled employees, however, the Supreme Court has recognized that "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal."¹⁸ The same is true of accommodations that give students the equal opportunity to complete an education.

The ADA's goal is to remove barriers that prevent disabled individuals from having the same access to services as non-disabled individuals.

Mental health issues often create formidable barriers to a student's access to justice. A student who suffers from depression might be unable to prepare for the hearing. A student who suffers from autism may be unable to present a defense with clarity. Any number of disorders may cause a student to respond poorly to the stressful hearing environment, harming the student's ability to understand the proceedings or to respond to accusations effectively.

A student whose disability impairs meaningful participation in

a hearing does not have the same access to participation that non-disabled students enjoy. A lawyer who understands the ADA may be able to force a college to change its no lawyer policy when an accused student suffers from a mental health condition that makes self-representation unusually difficult. ⚡

1. See, e.g., *Woodis v. Westark Cmty. Coll.*, 160 F.3d 435, 440 (8th Cir. 1998) (public university students have a property interest in education that is entitled to due process protection); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) ("a student's interest in pursuing an education is included within the fourteenth amendment's protection of liberty and property"); *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975) (recognizing due process protection of property interest in university education); see also *Goss v. Lopez*, 419 U.S. 565 (1975) (public high school student is entitled to notice and an opportunity to be heard before school imposes a significant suspension).

2. Rutgers, for example, contends that a student disciplinary hearing "is not adversarial; its purpose is to educate the student and contribute to their ethical growth." *Frequently Asked Questions from Attorneys*, Rutgers, <https://studentconduct.rutgers.edu/faqs/frequently-asked-questions-attorneys> (last visited Dec. 27, 2021). It is difficult to understand how expelling a student furthers the purpose of educating the student.

3. See Martin A. Frey, *The Right of Counsel in Student Disciplinary Hearings*, 5 Val. U. L. Rev. 48, 59-60 (1970) (surveying cases).

4. See generally Mark S. Blaskey, *University Students' Right to Retain Counsel for Disciplinary Proceedings*, 24 Cal. W. L. Rev. 65, 66-67 (1987) (surveying cases and observing that "courts are in a state of disarray on this issue with each jurisdiction creating its own rules").

5. *Doe v. Univ. of Notre Dame*, No. 3:17CV298-PPS/MGG, at *25 (N.D. Ind. May. 8, 2017).

6. *Id.* at *26.

7. 29 U.S.C. §794. See *Argenyi v. Creighton Univ.*,

703 F.3d 441, 448 (8th Cir. 2013) (university that "receives financial assistance from federal agencies including the Department of Education . . . must comply with §504 of the Rehabilitation Act").
8. 42 U.S.C. §12132.

9. See, e.g., *Zukle v. Regents of University of California*, 166 F.3d 1041, 1045 (9th Cir. 1999) ("Title II prohibits discrimination by state and local agencies, which includes publicly funded institutions of higher education.").

10. A "qualified individual with a disability" is a disabled individual "who meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 28 C.F.R. §35.104.

11. ADA Amendments Act of 2008, Pub. L. No. 110-325.

12. 28 C.F.R. §35.108(a)(1), (b)(1), (c)(1)(i).

13. 28 C.F.R. §35.108(d)(2)(iii).

14. 28 C.F.R. §35.130(b)(7).

15. *Id.*

16. *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (Rehabilitation Act); *Frame v. City of Arlington*, 616 F.3d 476, 484 (5th Cir. 2010) (ADA).

17. See Logan J. Gowdey, *Right to Representation of Students with Disabilities in the ADA*, 115 Colum. L. Rev. 2265 (2015) (arguing that the ADA may entitle students to representation at high school disciplinary proceedings when a disability impairs their meaningful participation).

18. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002).



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FOCUS: ESTATE PLANNING



Azriel J. Baer, LL.M.

The tech rush is on, and clients are increasingly asking about non-fungible tokens or "NFTs." This article will take a brief glance at the NFT frenzy and explore some of the estate planning considerations to think about when planning with these assets.

What Are They?

On a basic level, an NFT is a digital asset with a unique identifying code that allows the NFT to be verified through the use of blockchain technology.¹ For example, an artist may create a digital

NFT Essentials for Estate Planners: Not a "Token" Estate Planning Opportunity

artwork whose ownership is acquired through a code provided to the owner. When someone purchases an NFT, there is a public digital ledger entry which verifies the owner of the NFT. The only way to access the NFT is to have a private key, generally a series of twelve to twenty-four randomly generated words, that gives the purchaser access to the digital wallet that stores the NFT.²

Unlike cash in which one dollar can always be exchanged for another, no NFT can be directly substituted for another because each contains its own unique code. NFTs are often created by artists and celebrities as another way to monetize their work. In simple terms, instead of getting a painting to hang on a wall, the buyer of an NFT receives a digital file of an artwork.

The Craze

The value of the NFT market grew by 299% in 2020 when it was valued

at \$250 million. Technology for NFTs has been around since the mid-2010s, hit the mainstream in late 2017, and exploded in 2021.³ The first NFT, a color changing octagonal sphere titled "Quantum," was created by Kevin McCoy in 2014.⁴

In March of 2021, Mike Winkelmann, a crypto artist who goes by "Beeple," sold an NFT titled "Everydays—The First 5000 Days" through Christie's auction house for a total of \$69.3 million. This represents the third most expensive artwork sold at auction by a living artist. In February of 2021, another piece by Winkelmann sold for \$6.6 million. The piece had been purchased the previous October for \$67,000.⁵

Jack Dorsey, co-founder and CEO of Twitter, sold an NFT of his first tweet for \$2.9 million.⁶ What intrinsic value does an NFT have and why are people willing to pay vast amount of money for them is not clear. What is clear is that owners of

NFTs stand to make substantial gains if their NFTs appreciate in value.

Gifting Considerations

Entity Ownership: Although one of the appealing aspects of owning an NFT is its relative ease of transfer, clients should consider placing an NFT into a limited liability company ("LLC"). Having an LLC own the NFT will simplify the transfer and allows for the potential to take discounts when gifting minority interests.

Password Protection: Make sure the client keeps the private key to the NFT in a secure place as the loss of the password could prove catastrophic with no way to retrieve the underlying NFT. Consider the case of Stefan Thomas, who lost the password that would give him access to over \$250,000,000 worth of bitcoin.⁷ Some people have the

key engraved in a metal plate and store it in a secure location so that it can survive fire and flood. If gifting an NFT, the client needs to make the recipient understand the importance of securing the private key. In a gifting scenario, consider whether the IRS may try to include a gifted NFT in the estate of the donor if the donor retains access to the underlying password.

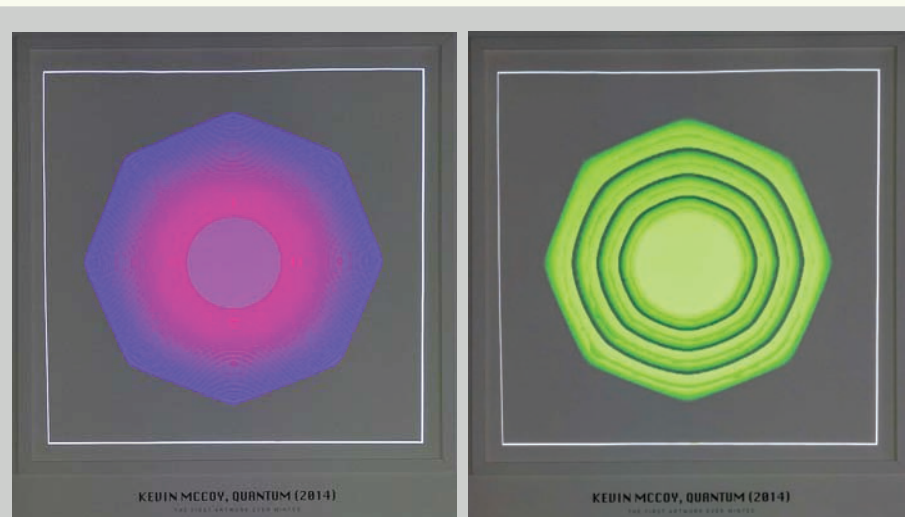
Basis Records: As with any asset, clients should keep careful records of the purchase price paid for an NFT in order to accurately report capital gain or loss on sale. When a donor gifts an NFT, the donee will receive the carryover basis of the donor. What can make basis reporting even more complicated is that many clients may purchase an NFT with crypto currency. This means that they may have to report a gain on the purchase itself in addition to when the NFT is later sold.

Types of Gifts to Consider: Although the expected reduction in the exemption amounts that many feared would occur in 2021 have yet to pass, the current increased federal estate, gift, and generation-skipping transfer (“GST”) tax exemptions of \$12.06 million are still scheduled to “sunset” on

January 1, 2026 and revert back to their pre-2018 levels (approximately \$5.49 million), indexed for inflation. In late 2019, the IRS announced, via final regulations, that individuals taking advantage of the increased gift and estate tax exclusion amounts in effect from 2018 to 2025 will not be adversely impacted after 2025 when the exclusion amount reverts to pre-2018 levels. Thus, individuals planning to make large gifts between 2022 and 2025 can do so without concern that they will lose the tax benefit of the higher exclusion level once it decreases after 2025. Current historically high exemption amounts mean that there is still a window for clients to make substantial gifts.

Outright gifts are popular as they are simple and can be completed swiftly. Such gifts, however, are included in the recipient’s estate for estate tax purposes and do not provide any spousal or creditor protection.

Gifts to dynasty trusts, if structured correctly, have the added effect of removing the gifted property from the beneficiary’s estate. If proper gift and GST tax exemptions are allocated to the gift, the future appreciation on the gifted property will not be subject to estate or GST tax on the beneficiary’s death. Furthermore, the gift will



Pictured—Kevin McCoy, “Quantum” (2014-21), the first non-fungible token, which sold for \$1.4 million in June of 2021 (image courtesy of Sotheby’s)

be protected from spouses and creditors.

Example: Jack purchases an NFT for \$50,000 that he thinks will substantially appreciate in value. He transfers it to a trust for the benefit of his daughter, Jane, and he uses \$50,000 of his lifetime gift and GST tax exemptions. Five years later, the NFT has increased in value to \$2 million. Jack has essentially removed \$2 million from his estate and only used \$50,000 of his exemptions. The trust property (including future appreciation) will be available for Jane’s benefit but will not subject to estate or GST tax on her death and will not be reachable by her creditors or her spouse.

Caution: Clients need to understand the risk of gifting assets that can decrease in value. When a client makes a completed gift, he or she generally will not be able to get back the exemptions that were applied. Given the volatile nature of the NFT market, clients should try to make gifts when values are low to reduce the risk of wasting exemptions.

Practical Tips

Remember to ask clients if they own NFTs when compiling asset lists. Consider granting trustees the power to invest in NFTs in the trust document as the prudent investor rule might preclude investment otherwise given the associated risk and market volatility.⁸

Make sure fiduciaries have the necessary skill set to manage NFTs and consider having clients name someone specifically to help with NFT administration if they think their named fiduciary will have problems.

Remember to attach a qualified appraisal when reporting NFT values for gift and estate tax purposes.

Conclusion

Under the right set of circumstance, NFTs can provide

a powerful asset class for gifting. NFTs are complex, but planners who gain a basic understanding of how they work will better be able to spot issues as they arise. While it may be that NFTs are a fad or bubble waiting to burst, the current enthusiasm for NFTs does not appear to be waning. 🏹

1. Josie Thaddeus-Johns, *What Are NFTs, Anyway? One Just Sold for \$69 Million*, N.Y. Times, March 11, 2021 last visited January 26, 2022, <https://www.nytimes.com/2021/03/11/arts/design/what-is-an-nft.html#:~:text=An%20NFT%20is%20an%20asset,proof%20of%20authenticity%20and%20ownership.&text=Now%2C%20artists%2C%20musicians%2C%20influencers,previously%20been%20cheap%20or%20free>.
2. Gerry W. Beyer, *An Update on NFTs-Non-fungible token*, The ACTEC Foundation (last visited January 26, 2022). Available at: <https://actecfoundation.org/podcasts/non-fungible-token-nft-update/>
3. Thaddeus-Johns, *supra* note 1.
4. Sarah Cascone, *Sotheby’s is Selling the First NFT Ever Minted – and Bidding Starts at \$100*, Artnet News, May 7, 2021, last visited January 26, 2022, available at: <https://news.artnet.com/market/sothebys-is-hosting-its-first-curated-nft-sale-featuring-the-very-first-nft-ever-minted-1966003>
5. Scott Reyburn, *JPG File Sells for \$69 Million, as ‘NFT Mania’ Gathers Pace*, N.Y. Times, March 11, 2021 (last visited January 26, 2022). Available at: <https://www.nytimes.com/2021/03/11/arts/design/nft-auction-christies-beeple.html>.
6. *Id.*
7. Nathaniel Popper, *Lost Passwords Lock Millionaires Out of Their Bitcoin Fortunes*, N.Y. Times, January 24, 2021 (last visited January 26, 2022). Available at: <https://www.nytimes.com/2021/01/12/technology/bitcoin-passwords-wallets-fortunes.html>.
8. Gerry W. Beyer, *Non-Fungible Tokens: What Every Estate Planner Needs to Know* (August 24, 2021). Available at SSRN: <https://ssrn.com/abstract=3965888> or <http://dx.doi.org/10.2139/ssrn.3965888>.



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