

The Busy Practitioner's Guide to Recent Journal Articles

Which recent articles appearing in journals should we be familiar with? As non-fungible tokens (NFTs) continue to take the world by storm, estate planners and advisors are trying to keep pace with this relatively new asset class. We identified three NFT-themed articles that we think could be of great interest to you. The topics include: the debate over whether NFTs are intellectual

or personal property; the economics and legal issues of virtual art and NFTs; and estate planning for NFTs. We then asked our board members to review the articles for your benefit and to determine if they're "must reads." We hope you enjoy the reviews.

Anna Sulkin, legal editor, Trusts & Estates



REVIEW BY: **Avi Z. Kestenbaum**, partner at Meltzer, Lippe, Goldstein & Breitstone, LLP in Mineola, N.Y. and New York City and adjunct professor at Hofstra University School of Law in Hempstead, N.Y.

AUTHOR: **Joshua Fairfield**, professor of law, Washington and Lee University School of Law, Lexington, Va.

ARTICLE: **"Tokenized: The Law of Non-Fungible Tokens and Unique Digital Property,"** Indiana Law Journal (forthcoming)

By now, we've all heard of non-fungible tokens (NFTs), and some of us may even have personal experiences owning them or advising our clients regarding them. However, to many of us, including me, they remain mysterious, amorphous and almost make-believe, and the laws, rules and regulations surrounding them are confusing at best. The author explains the current intellectual property laws that govern NFTs and argues that NFTs are really personal property in nature due to how they're transacted. Therefore, the laws governing the sales of personal property, and not the laws that apply to intellectual property, should apply when NFTs are bought, sold or otherwise transacted. Furthermore, the author advocates that digital property in general should be governed by personal property laws and not by intellectual property laws, and this would benefit consumers and the overall marketplace for these items.

While the purpose of this article isn't to explain or clarify the history, fundamentals and essence

of NFTs, it does just that, and it does it very well. For the NFT novice, this article does a great service explaining how NFTs operate and function, and it provides many useful examples of highly publicized NFTs, such as MLB Champions, NBA Top Shop, Crypto Kitties and Axie Infinite. The author also elucidates on certain NFT exchanges such as Rarible and Super Rare. I learned a great deal about what truly makes NFTs valuable, mainly their "uniqueness" and "rivalrousness," as the article describes in a clear and easy to understand manner.

The reader also learns and begins to understand the foundations and underpinnings of the manner in which NFTs are exchanged, in terms of protecting against fraud, illegal use, duplication and copying. After all, the entire notion driving the value of an NFT is that it's a one-of-a-kind item that's "non-fungible." An NFT's uniqueness and inability to be duplicated must be very securely safeguarded and preserved or the entire NFT system is eviscerated. Additionally, it's eye-opening to learn and understand that both digital and real-world objects (cars, real estate and art) could someday be "tokenized" and turned into NFTs that can be bought and sold easily on blockchain technology, which would totally change the world and the way everyday commerce is conducted.

Among the significant legal hurdles and issues is that the law, which hasn't yet caught up to the technology and the legal system, including for such common items as Amazon Kindle and online movies, is based on fundamental intellectual property law. These items are "licensed" under the current rules and aren't bought and sold. Therefore, the buyer doesn't have total legal control over the items purchased and may be subject to substantial regulations and restrictions of the seller or of

the marketplace in which the item exists. These limitations may include issues with consumer protections, warranties, disclaimers, the legal right to sue in a U.S. court if conflicts arise and not being subject to strict arbitration provisions, sometimes under the laws of foreign jurisdictions. NFT owners don't currently have a full set of legal rights that the owner of personal property, such as an MLB baseball card or a painting, would have. The author feels strongly that shifting from intellectual property laws to the laws governing personal property would address many of these issues. This would allow both the NFT marketplace, as well as more common online items such as e-books, Google Play movies and digital art, to flourish because the owners will have more control and true legal ownership and less limitations and restrictions.

The author does an excellent job explaining the history, technology and legal framework.

This well-researched and elucidating article, which has close to 250 footnotes at last count in the draft, expounds on several legal principles. Moreover, just as important to the neophyte in this area, it cites to articles, offers explanations and analogies and is a good read in this new and rapidly developing world of NFTs. The author does an excellent job explaining the history, technology and legal framework, which is mostly understandable, even to a reader like me, who isn't well versed in this subject matter. As a mild critique, I would have liked to have seen much more (and it could just have been my lack of understanding) and very detailed elaboration of how differently NFTs would be regulated and administered if they were governed by personal property laws and how this would truly benefit the consumers and society at large. Meaning, it would really benefit and help the reader if the author pointed out in far greater detail and specificity, both what would be lost and what would be gained, the pros and the cons under the two legal systems and what complex issues could arise

from moving to a personal property legal system, as well as legally and administratively how difficult this would be to achieve. Perhaps even a chart comparing and contrasting the two governing systems for NFTs (and online items) would have helped me better appreciate and comprehend the author's thesis.



REVIEW BY: **Lawrence Lipoff**, director, Trusts & Estates, at CohnReznick LLP in New York City

AUTHOR: **Lawrence J. Trautman**, associate professor, business law and ethics at Prairie View A&M University—College of Business, in Prairie View, Texas

ARTICLE: **“Virtual Art and Non-Fungible Tokens”** 50 *Hofstra Law Review* (Winter 2022)

Virtual art and non-fungible tokens (NFTs), combined with the related involvement of artificial intelligence, are increasingly among the holdings of ultra-high-net-worth individuals and families, as well as desired as inheritances of and from them. This makes knowledge of the issues crucial to estate planners domestically and internationally.

Lawrence J. Trautman wrote an excellent paper providing welcome details and insights for those seeking concepts regarding the future potential of virtual art and NFTs. For purposes of this review, I was asked to comment solely as to whether the paper is helpful for estate planners, irrespective of if they have clients with virtual art and NFT holdings. Keeping in mind that the author doesn't mention estate-planning issues and presumably estate planners weren't his focus, I respectfully suggest the typical readership of *Trusts & Estates* may look to other articles on virtual art and NFT holdings in which the author focuses on estate matters.

Given the paper focuses on the future of virtual art and NFTs and doesn't address estate issues, as it was likely written for a different readership, the typical *Trusts & Estates* reader should give deep thought before developing actionable ideas for clients relating to virtual art and NFTs.

SPECIAL REPORT: REVIEW OF REVIEWS

Trautman provides a plethora of research and distills for the reader what he believes remains to be determined in the short and long term regarding the use, economics and legal issues of virtual art and NFTs.

The author's abstract nicely summarizes what's in the article:

This article proceeds in seven parts. First is a discussion about the new and explosive market for digital art. Second, I explore the evolution of the digital world and virtual property. Third is an explanation and historical account of the blockchain and virtual currencies. Fourth is coverage about non-fungible tokens. Fifth is a brief look at unresolved issues impacting the law of NFTs and potential solutions are provided. Sixth is a few thoughts about the future of digital property. And last, I conclude. ... This paper is a valuable addition to the literature by providing a readable introduction and overview of what is now known about the likely impact of blockchain technology and non-fungible tokens to music and art.

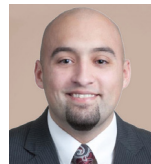
The varying speed of development of virtual art and NFTs and the economic and legal uncertainty may lead to relatively low estate-planning valuations along with potential for explosive value growth until economic and legal stability is attained.

The author does exactly as he claims and should be commended for this.

An estate planner may still take away from the article opportunities to ponder. The varying speed of

development of virtual art and NFTs and the economic and legal uncertainty may lead to relatively low estate-planning valuations along with potential for explosive value growth until economic and legal stability are attained. Purely from an economic wealth transfer viewpoint, this may reinforce an estate planner's consideration of outright gifts (perhaps to trusts), grantor retained annuity trusts and installment sales to grantor trusts. Similarly, post-mortem, an estate planner may suggest funding of testamentary, generation-skipping tax transfer or otherwise credit shelter trusts.

Another aspect an estate planner might glean from the article goes back to the general estate tax principle that the guiding law needs to be determined and only then the estate tax rules are applied. To the extent the guiding law is uncertain, the estate tax law will be as well. Therefore, the estate planner needs to address the lack of certainty and figure how to communicate and make a client comfortable regarding the planning advice being provided.



REVIEW BY: **Frank Paolini**, partner at Neal, Gerber & Eisenberg LLP in Chicago

AUTHOR: **Gerry W. Beyer**, professor of law, Texas Tech University School of Law in Lubbock, Texas

ARTICLE: **"Non-Fungible Tokens: What Every Estate Planner Needs to Know,"** *Wealth Strategies Journal* (Nov. 19, 2021)

It's not everyday that an entirely new asset class surfaces in the estate-planning world. That day has come, though, as planners are now being confronted having to build an estate plan around their clients' non-fungible token (NFT) holdings. The precarious and ever-murky legal footing of NFTs doesn't change the fact that estate planners must now find ways to use existing estate and tax planning tools to help their clients manage, hold and transfer NFTs and related digital assets based on blockchain technology. For planners to wade

through these waters, though, they must acquire a baseline understanding of this digital asset.

This article, though brief, provides a thorough primer for estate planners who've been, or expect to soon be, approached by clients seeking advice on how to build an estate plan around NFTs and crypto currencies. It provides an avenue for estate planners to avoid a gridlock in the planning process and overcome the inevitable learning curve associated with getting your hands around this new technology. Crucially, the article lays a framework for planners to follow and spot issues that are perhaps uniquely associated with NFTs.

The article paves its way through these issues by setting out a set of basic questions that planners will need to address during the process. Questions like: What *is* an NFT? What does an NFT represent? How are NFTs created? How's an NFT stored and where? How do you establish and transfer ownership of NFTs? Do NFTs have any implications in securities law? What are the tax implications for transferring NFTs? And, perhaps most importantly, how do you assure that a fiduciary can obtain access to an NFT after the client's death?

The article answers these questions by using analogies to existing, well-known legal principles. In the context of blockchain or digital assets, Bitcoin (like cash) is fungible, but NFTs are unique or nonfungible, like artwork. However, the article acknowledges that this is where the analogy may break down, as NFTs could also represent any number of unique items, concepts, ideas or representations. Whereas a casino chip is a physical representation of a specific number of dollars, NFTs are digital representations of virtually any type of specific property.

The nuances and difficulties regarding NFTs don't end there, though. The article advises on how planners should guide their clients through the various other legal worlds that NFTs touch, such as intellectual property rights and securities laws. For example, if a client acquires an NFT that represents a specific piece of art, it doesn't necessarily mean that the intellectual property rights associated with the real-life artwork follows along with the NFT. That will be dictated by the legal contracts embedded in the smart contracts associated with

the NFT during the minting process. It's therefore incumbent on the planner to make certain that the client truly understands what legal rights are associated with the NFT, and to do that, the planner must have a sufficient command of the legal rights attached to the digital token.

A lawyer will run into even more basic hurdles during the planning process. For instance, NFTs are generally held in digital wallets that may only be accessed with a unique key, which could be a series of randomized numbers or words. Without those keys, the client (or more likely, the personal representative of the client's estate) can't access the NFT, leaving the asset perpetually stranded on the blockchain. As such, planners should know how to advise their clients on storing the keys in a safe and secure location that's nonetheless accessible to their family members or fiduciaries.

NFTs, and other digital assets based in blockchain technology, also have unique tax characteristics. For instance, the article explains that, because the Internal Revenue Service considers cryptocurrencies "property," any sale or disposition of that asset would result in a capital gain or loss to the client. So, if the client purchases an NFT using cryptocurrency, the acquisition of the NFT would result in a capital gain or loss that's calculated based on the client's cost basis in that cryptocurrency. As such, planners should be advising their clients to track all of their purchases and sales of digital assets.

This article is an exceptionally useful and approachable primer for all planners, both the uninitiated and experts alike. Given the tremendous splash that this technology has made in the public recently, it's only a matter of time until you'll be confronted with some or all of these issues. Ultimately, the most useful advice to be taken from this article is that the best way to learn how to handle these assets is to create a wallet and mint an NFT yourself. I've actually gone through this process myself and can attest that you'll naturally learn about how best to advise clients on managing these assets for estate-planning purposes. As the author aptly notes, "then you will not be like a marriage counselor who has never been married giving advice on how to maintain a successful marriage." 