

DECIPHERING CRYPTOASSETS ON DIVORCE

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When a couple get divorced, one of the first questions that may spring to mind is “Who will get what?” For family lawyers who specialise in financial remedies, the answer starts with a two-stage process. Stage one: computation (working out what assets are there) and stage two: division (working out how the assets will be divided). Examples of potential assets include the former matrimonial home; other properties; bank accounts; investments; life insurance policies; chattels (jewellery, furniture and artwork); business interests and pensions. Since the advent of cryptocurrency in 2009, cryptoassets are something that family lawyers are increasingly likely to come across. Research conducted by the Financial Conduct Authority found that 9% of adults in the UK – 4.97 million – owned cryptoassets in August 2022⁽¹⁾ so there is a good chance that your next client will own some cryptocurrency. This article provides an overview of the key considerations if cryptoassets are owned by either spouse or civil partner in a separation seen through the prism of the above.

A cryptoasset is a cryptographically secured digital representation of value or contractual rights that uses a form of distributed ledger technology and can be transferred, stored, or traded electronically.⁽²⁾ The High Court case of *AA v Persons Unknown* (2019)⁽³⁾ held that cryptoassets such as Bitcoin are property as they are “definable, identifiable by third parties, capable in their nature of assumption by third parties, and having some degree of permanence”. However, to many family lawyers, cryptoassets are a mysterious new type of asset viewed with suspicion and uncertainty.

Computation

The computation stage will involve discussing with your client what their assets are and later assisting them with scrutinising their spouse’s financial disclosure for any gaps or irregularities. When people refer to crypto, they are most commonly referring to cryptocurrency (decentralized digital money). Currently, the most common types of cryptocurrencies are Bitcoin, Ethereum and Tether, so these are some of the big names to look out for. However, there are many other forms of cryptoassets such as non-fungible tokens (NFTs), Stablecoins and Privacy coins, to name just a few.



If your client holds cryptoassets these will need to be particularised in the Form E in the same way as shares, for example, the name of the cryptoasset, the amount held, and their value need to be stated. If cryptoassets are held on exchanges such as Coinbase or Binance, in a ‘digital wallet’, obtaining this information is straightforward, as your client (or the other side) can provide you with a ‘public key’ to view this information. You will be able to see the current holding, value and historic transactions in a matter of clicks.

Crypto can also be stored on an exchange (outside a wallet), offline in a wallet on a website extension, or offline in a ‘hardware wallet’ (a physical storage device that stores private keys, tokens or cryptocurrencies). If the latter does not have an internet connection, it can be referred to as a ‘cold’ wallet and is one of the most secure ways of storing this asset. If the existence of cryptoassets is undisputed, provided that the particular cryptosystem is traded, it will be straightforward to obtain a valuation for it by looking at exchanges (in the same way as looking at the price of publicly listed shares).

Due to the decentralised nature of cryptocurrencies and the anonymity that they facilitate, if disclosure of cryptoassets is not forthcoming, it can be difficult to prove a person’s ownership of them. In such circumstances, it will be necessary to dig deeper and it will be helpful to consider at a very early stage the following questions:

- Have you reviewed the other party’s bank statements to try and identify any transactions indicating that funds have been used to purchase cryptoassets?
- Have you identified any unusual activities in their bank accounts generally?

- Have you asked for PayPal or Revolut account statements? These accounts are often used for crypto trading.
- Where there is prior knowledge of cryptocurrency assets, have you assessed the other party's standard of living as against their disclosed assets or noticed any changes in their spending habits? If there is any unexplained or unexplainable wealth or spending, this could be a good door to push on when asking further questions in your questionnaire.
- Are there any third parties who may have potential control of an individual's cryptocurrency assets or knowledge of their existence?

You can also ask your client whether they recall their spouse having any digital wallets or crypto assets which they could reference in a questionnaire (although clients must be reminded that they should not improperly help themselves and access otherwise private email or other online accounts nor rummage through the other's party's documentation in order to avoid breaching their partner's privacy, which could have serious consequences).

If the statement of truth at the bottom of the Form E and the ongoing duty to provide full and frank disclosure is not enough to scare the other side into complete transparency, you could consider instructing a forensic accountant to undertake an asset tracing exercise. Within the crypto space there are companies (such Chainalysis) that can be retained to try and trace crypto transactions across various chains, protocols and tokens and produce a chronological narrative of connected crypto events. This could be particularly helpful where a spouse provides details of some wallets, but it is unclear whether their disclosure is exhaustive and especially so in a relatively nascent field where the decentralised nature of the asset is an often-lauded design feature.

Such an instruction must also be considered alongside the principle of proportionality, as these reports can be expensive and their preparation can cause delay. In a case where evidence of cryptoassets is compelling but is nevertheless not confirmed by the suspected owner, you could invite the court to make adverse inferences against that party but this will need to be supported by a significant amount of evidence in support of that contention which can be difficult to find and quantify.



Division

Once you have successfully defined the assets comprising the matrimonial pot, the question is how these will be divided. With other investment holdings or pensions, a common solution is to transfer half (or any such division agreed) to the non-owning spouse. With cryptoassets this may be more complicated. At this stage you will need to consider: is this cryptoasset capable of being divided and/or transferred (for example, it may not be practical to split an NFT). What steps need to be taken by the non-owning spouse to receive their new cryptoassets (e.g. new wallets)? When looking at division, what is the receiving party's attitude to crypto (since their knowledge and understanding of crypto will be relevant here, as well as their attitude towards risk, as crypto markets are notoriously volatile)? Would the receiving party prefer to receive an equivalent sum from elsewhere in the matrimonial pot?

If the receiving party is happy to receive cryptoassets as part of their financial settlement and they are capable of being transferred, before agreeing an order, it is important to consider whether an up-to-date valuation is required. If the cryptoasset is being divided in any way other than as a percentage split of the total holding with no reference to the value in pounds sterling, then it will be crucial to obtain updated valuations as markets fluctuate regularly and this could have a huge impact on the overall settlement (notwithstanding that eventually a fixed point will need to be chosen). If the particular cryptoasset has an especially unstable price, you could agree that an average price across a period of several months (for example) is used as the value for settlement purposes.

(1) Financial Conduct Authority, Research Note: Cryptoassets consumer research 2023 (Wave 4), June 2023

(2) Gov.uk, Economic Crime and Corporate Transparency Bill 2022: Factsheets, Policy paper: cryptoassets – key terms and definitions, 26 October 2023

(3) AA v Persons Unknown (2019) EWHC 3556 (Comm)

Conclusion

Despite the fact that cryptoassets are still relatively new and may feel alien to many family practitioners, the statistics demonstrate that people are increasingly investing in them. Despite the risks, including the large amounts of energy consumed by mining cryptoassets and their use by criminals in fraud schemes and money laundering,⁽⁴⁾ countries such as Singapore have decided it is desirable to position themselves globally as crypto hubs.

Several jurisdictions now recognise cryptoassets as 'property' and the UK's tax authority, HMRC, has published guidance on their taxation. Against this backdrop it seems that cryptoassets are here to stay and family law practitioners should be aware of their similarities to other investments as well as their differences, so that they can best advise their clients in cases where they appear.



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