CRYPTO AND ENGLISH COURT PROCEEDINGS UPON DIVORCE

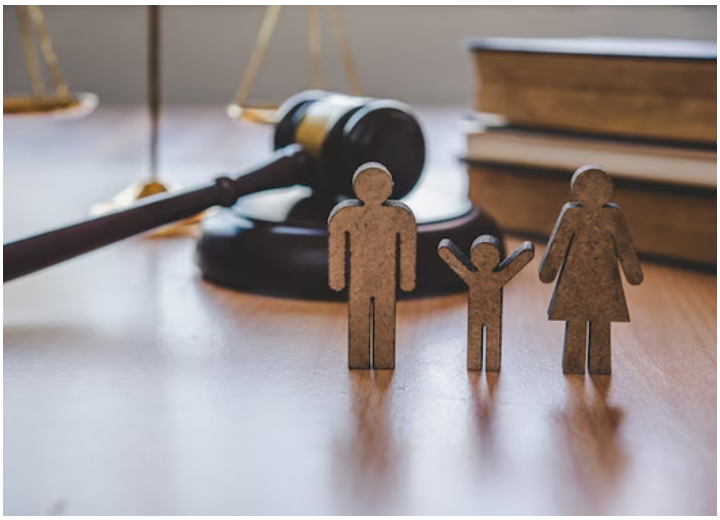
Authored by: Sophia Leeder, *Senior Associate*, Charles Russell Speechlys

The UK tax authorities estimate that 10% of UK adults hold or have held a cryptoasset. Cryptoasset holders in the UK tend to be younger than the general population (76% are under 45) and most owners are male (69%). With the average age of divorce in the UK being 46 years old for men and 44 years for women, it is to be expected that the English family courts will see more cases involving cryptoassets over the coming years.

In the UK, whilst cryptocurrency is considered 'property' (as per the UK's Cryptoassets Taskforce's final report of October 2018), cryptocurrency is not considered 'currency' or 'money' in the UK. In English divorce proceedings, crypto as 'property' can be the subject of an order to be sold or transferred to the other party. It has been suggested that the English courts should not make lump sum orders or maintenance orders expressed as being payable in a cryptocurrency, as crypto is not 'currency' in the eyes of the English family courts.

When financial proceedings in connection with a divorce are issued in England, the parties' first task is to provide each other and the court with full and frank financial disclosure of all of their assets, a duty that is ongoing during the proceedings. A person's cryptocurrency holdings should be disclosed in the same way as any other asset.
However, some spouses may attempt not to disclose cryptocurrencies believing that, by its nature, it is easier to hide than other assets.

Financial disclosure includes the provision by each party of 12 months' worth of bank statements for each bank account, together with details of all investments and the latest statement available for that investment, and their most recent tax return. Each party can then ask the court to order the other party to provide further financial disclosure, such as more historic bank statements and additional tax returns. Bank statements can help identify initial investments into crypto assets and credits stemming from the disposal of crypto, whilst tax returns can identify any declared capital gains. There are specialist investigative firms who can assist a party in tracing cryptocurrency assets but directions for further financial disclosure must be proportionate to the assets in the case and relevant to the issues in dispute.



The court also has the power to make other orders, such as search orders, orders for inspection appointments and for freezing orders. Search orders are rare and are only for the preserving of evidence or property, rather than being a way of obtaining evidence or enforcing a party's obligations to give disclosure. To obtain a freezing order, the applicant needs clear evidence of unjustified dealing with the assets in question showing that there is a solid risk of dissipation of the assets to the applicant's prejudice.

The English court may draw adverse inferences where a party does not provide full, frank and clear disclosure, to the effect that it is assumed they have undisclosed assets and could pay a higher award if it were ordered by the court. For example, in the 2013 case of Young v Young, the court found that the husband likely had undisclosed assets of circa £45 million and ordered the husband to pay a lump sum of £20 million to his wife, even though he was an undischarged bankrupt (and no payment was ever made to the wife).

A person who owns crypto assets may be more concerned about privacy and confidentiality than others would be, given the need for protecting financial information from potential hackers and other interested parties. There is an implied undertaking of confidentiality in relation to financial information provided within English court proceedings upon divorce, which is seen as supporting the duty to give full financial disclosure. Documents on the court file may not be read by any person (save for the parties to the proceedings), without the court's permission, except for orders made in open court.

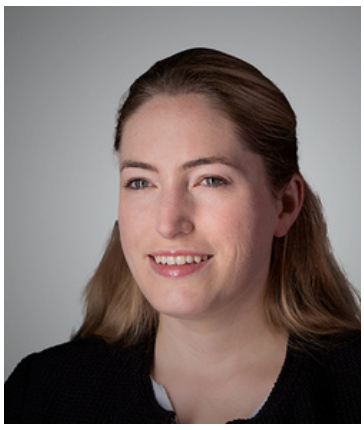
CRS
CharlesRussell
Speechlys

However, in October 2021, Sir Andrew McFarlane, President of the Family Division published his review on the question of whether there should be more openness in the conduct of family proceedings, given that up to then the English family court had been a largely closed system. In May 2023, the Financial Remedies Court's sub-group produced its report on transparency issues and made a number of recommendations, for example that the Royal Courts of Justice (where the 'big money' cases are heard in London) should adopt the practice of publishing court lists using the names of the parties involved (previously they had been anonymous), so that reporters are aware of where a particular case is being heard.

Pilot transparency schemes for financial cases are being launched at specific English courts in January 2024 and from November 2024, including at the Royal Courts of Justice. Where a reporter attends a hearing, that should be recorded on the face of the order made at the hearing and the court should also consider making a transparency order; such orders being designed to preserve the parties' anonymity and confidentiality. The parties' advocates are expected to be prepared to address the court on whether a transparency order should be made, and to what extent, at the start of the hearing. The advocates can ask the court for permission for documents which are expected to be provided to the reporter (such as the advocates' position statements setting out the issues for the judge) to be redacted if those documents include information which is prohibited from publication by the transparency order, such as details on specific financial instruments owned by the parties. The court has the power to vary the rules about which documents are to be provided to the reporter, either widening or restricting it.

These changes may push a party with concerns about privacy to consider out of court resolutions. The report stated that, whilst the judicial exercise of approving a financial settlement agreed outside of court is more than simply 'rubber stamping' an agreement, this exercise is not of such significance to justify any requirement for transparency. The increased transparency in the English family courts may well incentivise a party with sensitive financial information to seek a resolution outside of court, such as through mediation or arbitration. However, both parties have to agree to mediate or arbitrate and it can often be one spouse's view that it is their interest to refuse and instead issue court proceedings. In some cases, this may push the party with privacy concerns to settle the case on terms which they might not have otherwise agreed, so as to avoid the potential publicity from court hearings.

In international divorce cases, where more than one country has jurisdiction to deal with a divorce and its financial consequences, this has led to 'forum shopping' where lawyers in London and other jurisdictions are consulted by individuals who wish to see where might be most advantageous for their divorce and financial settlement The move to greater transparency in the English family courts is likely to be a factored weighed up by a spouse when considering where to issue their divorce proceedings. For spouses with sensitive financial information, the risk of such information being disclosed will be a consideration as to whether to seek to settle matters outside of court, for example through mediation or arbitration.



Sophia Leeder, Senior Associate, **Charles Russell Speechlys**