



CRYPTO CURRENCY ON DIVORCE – SCOTLAND

Authored by: Susie Mountain - Brodies

There is a famous legal bookshop in Edinburgh called Avizandum. If one could conjure up an image of the type of place you might expect a traditional lawyer to inhabit, this would be it. Set in the Old Town with its winding cobbled streets and the soft murmur of pedestrians moving past, it is the perfect place in which to immerse oneself in law (despite my family's contention that it sounds like something out of Harry Potter).

However, family lawyers are required to maintain a far broader range of skills than wandering dreamily between shelves of legal tomes. Our clients are often sophisticated and commercially minded. In the last decade, we have become au fait with a full range of new

technology: recording a child handover with a doorbell; presenting legal productions on an iPad; conducting entire hearings via virtual means... if you don't know your Facebook from your Snapchat, or your Twitter from your TikTok, your clients will soon ensure you do.

This is a serious point: clients expect their solicitors to be up to date – and rightly so.

North of the Border, where I practise, I have often heard financial provision on divorce/dissolution cases being described as a three stage process.

Firstly, matrimonial property is identified. It is then valued (that is stage two). Finally, we look at what might constitute a "fair" division. Please note: no needs-based approach here, although there is scope for considerable discretion during the third and final stage, and it is at this point that clients tend to disagree (with each other... and occasionally with their legal representatives). This approach necessitates being able to identify, locate and, crucially, to accurately value, the matrimonial assets.

In a digital age, gone are the days where clients would bring bin liners of papers into our office for us to photocopy within the hour before they were returned back from whence they came, with a little luck, before

the unsuspecting spouse returned home. Details of parties' assets are carried on tablets and phones, heavily password protected. We resort instead to scouring bank statements for clues, employing forensic accountants where necessary. We can readily deal with savings accounts, ISAs, shareholdings, partnership agreements, SIPPS, assets held in trust, liferent interests, bonds, hedge funds, QROPS.. you name it, we know about it.

However, just when you think you have it all covered... enter... the crypto currency.

Crypto currency has no central authority. Indeed, it has no tangible form. There are well over 20,000 types of it and it can be traded anonymously. An asset unlike any other, it remains an asset (ironically, just like any other) in terms of the law and as such needs to be identified, valued and taken into account in determining a fair sharing of the matrimonial property.



Stage one: identification

Those investing in crypto currency often like to talk about it, so in initial meetings with clients we ought now to be making enquiries with clients as to whether crypto has been mentioned by a spouse, in the same way that we might enquire about the existence of any other type of investment. If parties are unsure, bank statements may assist in demonstrating that funds have been transferred to fund the purchase of crypto currency. Although most information regarding crypto is stored digitally in a "wallet", although sometimes written down instead, specialists can be instructed to carry out further investigations, particularly if there is some suspicion as to the existence of such assets. Clues may also be found in annual tax returns. This is not straightforward and there has been much concern that, due to its anonymity, it can be difficult to link crypto currency to an individual. Courts can be invited to make orders forcing disclosure where necessary.



Stage two: valuation

The best way to identify the value of crypto currency held by a party at a given date is to view the transaction history. This reads something like a bank statement. In Scotland we would be valuing any crypto currency held by one party as at the date of separation, regardless of the passage of time since that date (a date which can be hotly contested as a result).

Where crypto currency forms a significant proportion of one party's investments, market fluctuations can be significant and ultimately make a huge difference to the value of the "pot". (nb. Scots Law does specifically state that any financial award made on divorce should be reasonable having regard to the parties' resources. There might therefore be scope for some judicial sympathy in the event of the value of crypto monumentally plummeting between the date of separation and the date at which any financial award is ultimately made.)

Expert evidence may require to be obtained and led on the value of crypto-currency, so be advised that this is not an area in which to dabble.



Stage three: fair sharing?

Often, one party may have no interest having crypto-currency transferred to them on divorce, although in theory this may be done. Off-setting can be used as an alternative option, and may well be more attractive in most cases given the inherent difficulties of enforcing any order relating to crypto-currency. The objective in the vast majority of cases is to achieve a clean break.



The future

It is within our gift to equip ourselves with the knowledge to navigate this evolving area of the law, and from a risk management perspective, appropriate that we do so, not only in relation to crypto-currency, but all of the other digital advances moving forward. Who knows what we will be faced with next... marriage in the metaverse, perhaps?

