

# CRYPTOCURRENCY:



## THE LATEST HEADACHE FOR LAWYERS

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The world of cryptocurrency came about following the introduction of Bitcoin in 2008. In light of the extreme rise of the value Bitcoin (and the thousands of other cryptocurrency options) these investments have become increasingly relevant to family lawyers and we have had to learn to deal with them amongst the various assets to be taken into account.

In January 2022, Law Society guidance (in collaboration with Tech London Advocates) said that '...there are (with only slight exaggeration) almost as many definitions of a cryptocurrency as there are cryptocurrencies'. The type of cryptoassets most frequently encountered in family law proceedings are notional payment tokens such as Bitcoin. Cryptoassets, which are themselves capable of subcategorisation to include cryptocurrencies, form part of a broader group of digital assets, including, for

example, digital files, digital records and domain names. This article will focus on cryptocurrency in respect of individuals, not businesses.

Cryptocurrencies are extremely volatile and may be subject to wild fluctuations in value within a short timeframe and these are frequently described as 'bull' (increase) and 'bear' (decrease) runs. So if that is the case, how does the court approach these assets when relationships break down?

Cryptocurrencies have been determined as 'property' in England and Wales (Bitcoin, *AA v Persons Unknown* [2019] EWHC - a large sum of Bitcoin paid in relation to a malware ransom attack was held to be property which the court could make orders to protect and recover) as they meet the four criteria set out in the classic definition of property in *National Provincial Bank v Ainsworth* [1965] 2 All ER 472 as being:

- definable
- identifiable by third parties
- capable in their nature of assumption by third parties, and
- having some degree of permanence

The consequence of this definition is that an individual asserting a proprietary interest in cryptocurrencies can protect their rights by injunctions over others claiming rights and seek to recover.

In some cases, there can be significant cryptocurrency and the next question that follows is; what are the tax implications if sold?

HMRC has published the approach to cryptoassets in a manual, which recasts HMRC's previous guidance on their website. In summary, the vast majority of disposals by individuals of cryptocurrencies are subject to capital

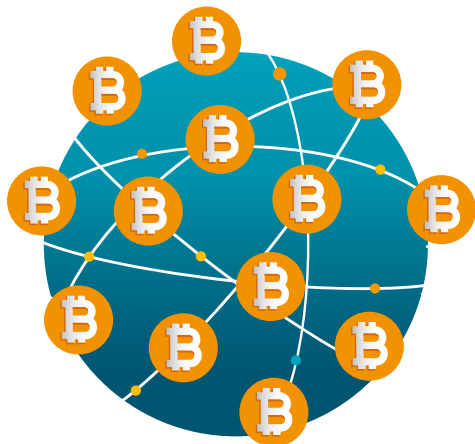


gains tax (CGT) as they are not being exempt as currency, rather than as part of income tax.

There are a few exceptions to this general rule, such as where a person is involved in mining, but otherwise it is only in exceptional circumstances that the above would not apply.

Digital currency is becoming more prevalent in the day to day in current society. Some employers are paying their employees with cryptocurrency and in these circumstances, both income tax and National Insurance contributions will be applied.

It should be noted when considering pensions in proceedings, that cryptoassets cannot be used to make tax-relievable contributions to a registered pension scheme, as they are not considered to be currency or money.



Until relatively recently, the family courts have failed to address the large volume of cases where one, or both parties have cryptocurrency. The fact that cryptocurrencies are regarded as 'property' means they may be the subject of, other orders including a property adjustment order. (s24 of the Matrimonial Causes Act 1973). Due regard must be had to the taxation consequences of any such order, as set out above.

The expectation within financial remedy proceedings is complete transparency. The principle was set out in *NG v SG* (Appeal: Non-Disclosure) [2011] EWHC 3270 (Fam):

***“The law of financial remedies following divorce has many commandments but the greatest of these is the absolute bounden duty imposed on the parties to give, not merely to each other, but, first and foremost to the court, full frank and clear disclosure of their present and likely future financial resources.”***

Cryptocurrencies should be disclosed in Form E in the same way as any other asset. However, the very essence of cryptocurrency is that they afford a level of privacy to investors which makes it difficult to trace a link to a particular individual beyond the initial investment, for example a transfer from a bank account or debit/credit card. Cryptocurrencies are held through digital wallets which are accessed using public and private keys. Without the keys, it is nearly impossible to identify what is owned.

If the holder has used a digital exchange, the exchange provides the owner with a platform in their name with records which should enable information to be obtained as to the holding, a record of trades and the value of the current holding. The wallet and transaction information should be sought in questionnaires to ultimately use a block explorer to confirm the contents.

A deliberate failure to disclose a cryptocurrency, or to co-operate in the disclosure and valuation process in relation to it, may potentially be considered conduct justifying a

departure from equality under s25 (2) (g) Matrimonial Causes Act 1973.

Where there is possibly a significant amount of cryptocurrency digital forensic expert evidence may, subject to the court's permission, be necessary from a cryptocurrency expert to reveal the user, cash value and their transaction history.

The courts are constantly having to evolve with the introduction of the digital world and it is safe to say, there is still a long way to go! Whilst the first steps have been taken, given the volatility of these assets the court and lawyers must appreciate and consider the possible life-changing valuations this type of asset can produce!

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