DIGITISATION IN DIVORCE

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Introduction

Every divorce brings discussion about the division of assets; what makes High Net Worth divorce complex is the different types of assets involved. Such assets can traditionally be property, cars, artwork, unique jewellery, or collector's items. However, more recently, there is also a digitalisation of assets; these can be NFT's (Non-Fungible Tokens) or digital currency such as Bitcoin, for example.

Traditional assets, which are unique, are often difficult to value but the legal sector has become accustomed to using insurance policies, storage costs, expert reports or auction valuations to produce an estimate of value.

The difficulty with the digitisation of assets is that values can vary greatly over relatively short periods of time. You may be familiar with reports of Justin Bieber's Bored Ape NFT, plunging from $1.3 MILLION in value in January 2022 to around just $70K in November 2022.[1]

The legal sector has quickly had to adapt not just to the digitisation of assets, but also the digitisation of evidence regarding values. This article takes a look at two key digitisation challenges, crypto-assets and digital evidence and what both lawyers and clients need to be conscious of moving forward.

Crypto assets

Since the launch of Bitcoin in January 2009, crypto-assets have soared in popularity. As of May 2023, there are in excess of 23,000 different types of cryptocurrencies. Whilst the more well-known coins, such as Bitcoin, are still leading the way with one Bitcoin currently valuing c. £21,600. This coin has fluctuated over the last 3 months significantly, namely dropping to c. £16,000 at the start of March 2023. This demonstrates the extreme volatility in value within a short timeframe.

It was estimated by the Financial Conduct Authority in April 2023 that 3.3 million people in the UK hold some form of crypto-assets. This 'boom' of investments in this market means that the financial remedy process, family practitioners and the courts need to adjust.

Crypto assets now form part of the various assets that must be disclosed within Form Es and taken into account upon divorce. There is a significant disparity in practitioners detailed disclosures for stocks and shares investment, in comparison to the information provided for crypto-assets. As this is such a new asset with ever-changing values, the courts and practitioners need to continually re-assess the values of client holdings. These assets must be particularised

1 (https://www.dailymail.co.uk/tvshowbiz/article-11441763/Justin-Biebers-Bored-Ape-NFTs-value-plunges-1-3M-just-70K-FTX-crash.html; 18th November 20022)

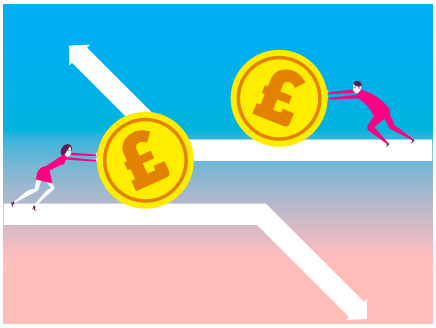
and set out; the value at the time of Form E, the amount of the asset held (i.e. coins- which can be held in portions) and the name of the individual crypto-assets held (i.e.. Bitcoin or Ethereum)

Whilst the courts and practitioners need to adjust, there has also been recognition by the UK government that these type assets are here to stay, and they need to be regulated and taxed accordingly. As of the tax year ending in April 2025, taxpayers will be required to record any crypto gains separately. At present, there is much discussion between UK MPs on how these assets are to be regulated whether they should be akin to investments or whether gambling regulations should apply. This will need to be kept in mind by practitioners.

In Bitcoin, AA v Persons Unknown [2019] EWHC 3556 (Comm), the court held cryptocurrencies to be 'property' and as such are subject of property adjustment orders under section 24 of the Matrimonial Causes Act 1973, and deliberate failure to disclose crypto assets may be considered conduct that justifies a departure from equality under section 25(2)(g).

Laura Buchan and Trina Little of Westgate Chambers comment:

"In light of the summary above, it is paramount that practitioners move with the digital age. The future (and current) generation of counsel must not be ignorant to these assets. Employers are beginning to pay bonuses in this form, holdings can be linked to bank accounts and understanding these assets will be necessary to properly particularise questionnaires in the best interest of our lay clients and represent them to our fullest. "



Digitisation of documents

By the very nature of financial remedy proceedings, the parties are to give full and frank disclosure. However, the existence, and more importantly the discovery, of falsified and manipulated documents undermines this, to the detriment of any claim.

Recent case law of X v Y [2022] EWFC 95 highlights the potential for digital manipulation of documents by a party, and reminds practitioners on both sides of the fence, that they must be extremely careful in accepting documents for face value in the digital age we now find ourselves in.

It is generally easy to create, manipulate, re-write or alter the contents of documents. Equally, documents can be printed, scanned and manipulated thereafter, particularly with programs being available free of charge or at a low cost. These programs often have features that 'match' the font included within the document, so that any manipulation is unlikely to be detectable. In the same breath, it is possible to take photographs of documents and edit them on a smart phone or tablet, which is of great importance when considering that litigants in person frequently provide photographs rather than hard copy documents or direct downloads.

There are some clear red flags, the most obvious being any history of fraudulent behaviour. The general evasiveness or obstructiveness of a party may also cause alarm bells to ring. Wherever possible, physical documents or original downloads should be provided. This may also help to identify any irregularities, as comparing versions may reveal differences.

Inconsistencies in the appearance of a document, however minor, should be scrutinised. Typographical errors in company names or bank account numbers, incorrect dates such as 31st September, missing company logos or discoloured text, and possibly so far as the overall tone of correspondences need to be carefully balanced when considering conduct.

As stated by HHJ Hess, X v Y highlights "the ability of dishonest parties to manufacture bank statements (and other documents) which, for all practical purposes, look genuine, but which are in reality not in that category".

The challenge for practitioners remains determining the appropriate level of investigation in circumstances where the prevalence of fraud or manipulation of documents is unknown. As a starting point, we should not trust the content of any document that has not been verified, either by the original third party or other means of cross reference, although this is not without further expense or delay to the client.

Conclusion

Digitisation within the legal sector has undergone a period of acceleration particularly since the global pandemic. It brought with it advances in service such as virtual hearings and remote working, electronic sharing of documents and data rooms but what we have witnessed over the course of the last few years is an organic evolution of legal practice driven by necessity and circumstance, wherein the law has retrospectively created a framework to regulate and support itself. Similarly, where digital assets and evidence is concerned, the legal scaffolding has been very much superimposed ex post facto. We as practitioners, are now encountering cases where the pace of digitisation has outpaced practice and we need to proceed with caution to ensure our client's assets are valued and reported correctly.