DIVORCE IN THE DIGITAL AGE:

CRYPTOCURRENCY

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By now we have all heard of cryptocurrency – Bitcoin, Litecoin, Ethereum – and whilst we might not know how it works or the computer science behind the block chain or the decentralised nature of digital currency, we know what it is (more or less).

First appearing in 2009, it is now commonplace in the news; be it the rise, the fall, Elon Musk's influence or simply a new cryptocurrency to market.

This article looks at how cryptocurrency, first left in the hands of computer scientists, is now so much a part of the news and the effect it is having on the "Divorce in the Digital Age".

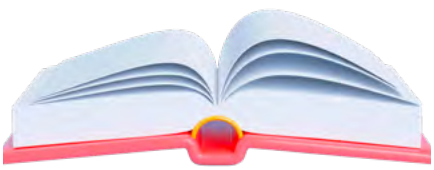
WHAT IS CRYPTOCURRENCY

A cryptocurrency is a digital currency traded through an online ledger, known as a blockchain. It does not physically exist and transactions take place via a system of encrypted online code. Cryptocurrency purchasers own encrypted digital wallets and transactions are effected by sharing keys (or code) which is attributed to each individual crypto-asset. Figures are hard to pin down due to the very nature of crypto, however one commentator has estimated that over the past two years $2.8trillion has been traded via various blockchains.

HOW IS CRYPTOCURRENCY HELD

Once an online wallet has been set up, the code can be traded online through a decentralised system via an exchange (such as Coinbase), this means that no one person or no government controls it. The code is a series of numbers and letters and the code in an individual's online wallet correlates to that which is held on the currencies' account ledger. Due to the complex web involved in owning and trading cryptocurrencies, the Family Courts are more frequently encountering issues surrounding the non-disclosure of these assets, as well as difficulties valuing and distributing them on divorce.

The trading platforms must conform to the laws of the host country, and therefore in many countries need to be compliant with anti-money laundering rules. If an individual opens a Coinbase account they will need to provide ID documents and the account must be linked to a traditional bank account. So although the blockchain is anonymous and outside of government controls, laws, regulations and taxes do still apply.



CRYPTO AND THE COURTS

Cryptocurrency is treated like any other asset in the Family Courts. As part of disclosure, details must be provided confirming units held and a current value, much the same as the more traditional assets, such as properties, bank accounts and shares. The court has the power to make the same type of orders against crypto assets – from freezing injunctions to prevent sale or dissipation or property adjustment orders to transfer assets between parties.

Whilst most are familiar with the further information might be requested when dealing with more traditional assets – property particulars, mortgage redemption figures, pension statements for example, the questions that should be asked regarding crypto assets are less well known – so what should be asked for?

Below is a short list of things to consider:

- **Ask for the public key** – the blockchain is public after all. If you have the public key you can search the blockchain for transactions (or there are now companies out there who will do it for you).
- **Full account history** – do not just settle for a screenshot of the trading platform. Like bank accounts, you should see the detail too. The full trading history is available.
- **Evidence of purchases**. If a party is using a widely recognised online exchange, their traditional bank accounts will show payments credited. Ask for these to be identified.

Unlike traditional assets however, the volatility of crypto is well reported and that causes difficulties when trying to assign a value. For example, if the parties completed Form E on 1 January 2022 and the wife owned 1 Bitcoin, the value noted in her Form E would have been $47,738.59. If the Final Hearing was then held on 1 September 2022, the value would have fallen significantly to $20,045. Of course this would be picked up during the course of updating disclosure, however the volatility is stark. The question therefore is, how are the courts dealing with this as part of a financial settlement?

A couple of options include:

- Division upon crystallisation: An order for sale could mean the crypto will be crystallised, turned into cash and divided - a fair solution where the market dictates the price. Caution should be taken with this approach as the proceeds of sale will be paid to the crypto owner and could be whisked away before being divided, so security may need to be put in place.
- Off-setting: The date for valuing the crypto will need to be agreed and any tax taken into account. As with all assets, the true net position needs to be understood if off-setting is to work effectively.

Importantly, tax must not be forgotten. Selling crypto is a chargeable event for Capital Gains Tax in England and Wales and therefore appropriate tax advice may be required.

Cryptocurrencies are likely to become more commonplace in the future and despite appearing mysterious at first, it is important that practitioners become familiar and comfortable dealing with them.