

# Should Cryptocurrency be part of my Divorce Settlement?

Cryptocurrency, though used by only a small part of the general population, is increasingly subject to litigation as its use becomes more widespread and it starts to figure in disputes, both commercial and personal.

An increasing number of divorce cases feature cryptocurrency so it is more important than ever for the couple divorcing and their lawyers to be clear on the status of cryptocurrency and how it should be treated within a divorce case.

## What is Cryptocurrency?

Blockchain technology makes cryptocurrency possible. Pieces of computer code spread throughout the internet can, once combined with complementary pieces of code which are kept private, hold value in much the same way as money in the form of a note or coin represents value. The first part of the code is in the public domain (for those who would know where to find it), the second part is either held in a digital wallet or in '*cold storage*'. '*Cold storage*' refers to saving the data away from the internet, most commonly on a USB drive or written down somewhere. The currency is entirely virtual, though in some cases can be spent in physical shops and vending machines. It is entirely decentralised and unregulated.

The most common types of cryptocurrency are currently Bitcoin and Ethereum but there are dozens of other less-well known digital tokens being traded online.

There is long-running debate over the status of cryptocurrency as property. Happily, no family law cases have had to wrestle with the complexities of whether cryptocurrency is actually property within the meaning of the law: those debates were heard in commercial courts where the overwhelming conclusion was that cryptocurrency is an item of property capable of ownership and regulation in much the same way as a house, cash or a pension. Perhaps the clearest endorsement of cryptocurrency as property, is that Her Majesty's Revenue and Customs will tax gains on the currency just like any other capital asset.

Cryptocurrency should, if owned by one or both of the parties in a divorce, form part of their financial settlement. Cryptocurrency must be fully and frankly disclosed and can potentially be divided up by a court.

## Problems for family law – changing hands and changing values

The issue of whether or not cryptocurrency should be included in a divorce settlement has been confirmed beyond doubt. However, there remain several practical problems with doing so.

One of the selling points of cryptocurrency (as compared with *fiat* currency – money backed by a government) is that it offers enhanced levels of anonymity and security. The difficulties this could cause a divorce lawyer – working within a system based on full and frank disclosure of assets – are clear.

Cryptocurrency transactions can be very hard to track. It is easy to sell and trade at the click of a button and there can be very little paper trail beyond the initial purchase of the currency. There is no central register of ownership for cryptocurrency and there are many dozens, if not hundreds, of exchanges operating in each jurisdiction through which the currency can be stored or traded. Currency in *'cold storage'* is virtually untraceable – it can exist on a USB stick or a piece of paper which can be tucked into a pocket or stored in a drawer, with almost no one any the wiser as to its existence or the fact it holds the key to, possibly, many hundreds of thousands of pounds. Even more so if the currency is traded directly on a peer to peer basis, bypassing an exchange. If one party fails to disclose the existence of a cryptocurrency asset, without any clear evidence the other party may have in relation to it, a specialist may be needed to try to uncover the true extent of the asset. Even with specialist help, tracing may be virtually impossible in some cases.

The ease with which cryptocurrency can be traded all over the world, instantly and at the click of a mouse button, means it can be easily dissipated, and potentially very hard to track and recover. Solicitors faced with potentially undisclosed cryptocurrency may have to consider special injunctions to trace assets. Orders would potentially have to be served not only the person purported to own the asset, but also on crypto exchanges (of which there may be many).

If an asset cannot be successfully traced but a court is satisfied based on what evidence there is that it does indeed exist, there may be scope for it to be *'added back'* into the settlement.

Where there is a risk that disclosed cryptocurrency might be dissipated to put it beyond the reach of the court, a freezing injunction can be sought. Again, such an order may have to be served upon many people or bodies. It may be necessary to take steps to physically secure the means of storage on which the private codes needed to make up a unit of cryptocurrency are stored so as to prevent transfer or even destruction of the means of storage. For example, in the same way solicitors hold passports to order, it may become increasingly common for them to hold data files or USB sticks on which valuable code is preserved.

Cryptocurrency is extremely volatile. Bitcoin, for example, has reached a high of \$19,783 in the past: considerably more than the average of \$7,000 per coin (as at April 2020). This causes obvious issues in respect of valuation: the asset value at the date of Form E could be significantly different for the date at settlement/a hearing and significantly different again at the date of implementation. At the very least a long-term view of pricing will be required and possibly even expert evidence.

How the cryptocurrency is treated as part of a settlement is impacted by its volatility. If it is split *'in specie'*, divided between the parties, then risk or benefit of changes in value are shared. However, with its very specific market and specialised trading platforms, not everyone will want to take on a significant cryptocurrency investment. It may be more likely that one party retains all the cryptocurrency, offsetting it against another asset. This could be problematic in the event of fluctuation: what if one party walks away with bricks and mortar property worth £500,000 and the other with £500,000 in cryptocurrency but the value of that currency drops significantly? Or they become an overnight millionaire? Is there any recourse to the court? In short, the answer is no. It is an established principle that where price fluctuations can be anticipated as part of the natural function of a type of asset, the court will not re-open a case which is now *'closed'* even where those price fluctuations prove to be extreme (whether for better or worse). In the event a hearing has concluded but an order is not yet made, or where an order has been made but not implemented, there may be some scope to revisit the terms of the order. Specialist family law advice should be sought urgently if this may be the case.

The volatility of cryptocurrency also makes cost-benefit considerations difficult for solicitors. An expert tracer may be excellent value when the currency is at a high, but a sustained dip in value may mean more is spent on confirming the existence of a falling asset than the asset is worth.

If you are concerned about any aspect of digital currency within a divorce settlement, please contact me or my colleagues for an expert view on how to safeguard your assets and position within your divorce settlement.

Megan Bennie  
megan.bennie@iflg.uk.com <sup>[2]</sup>  
The International Family Law Group LLP  
www.iflg.uk.com <sup>[3]</sup>

© June 2020

**Posted by Megan Bennie** <sup>[9]</sup>

Megan is a solicitor at iFLG. She specialises in divorce and financial matters and all issues regarding children. Megan has had much experience in dealing with intractable contract disputes and drafting pre-nuptial agreements. Many of Megan's cases have an international element and involve complex financial issues often with assets worldwide. Megan deals with child relocation and child abduction cases (Hague and non-Hague) as well as urgent injunctions under the Family Law Act regarding domestic abuse and the occupation of property.. Speaks German and Dutch

---

**Source URL (modified on 10/06/2020 - 12:26pm):** <https://www.iflg.uk.com/blog/should-cryptocurrency-be-part-my-divorce-settlement>