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Cryptocurrency and The Family Courts: Some International Experiences

Executive summary

Millions of people around the globe have funds in cryptocurrencies, with billions of dollars now invested. The nature of these funds is invariably secretive and non-national based. They present distinctive challenges for family courts around the world in ascertaining what are the overall assets in order to produce a fair outcome. These challenges should be addressed globally, by lawyers and judges, because it is an international resource which requires international collaboration to ensure full disclosure and proper understanding. Approaches and judicial devices successfully adopted in some countries can usefully be borrowed elsewhere. Distinctive orders made, and wording successfully used to enforce or implement, can be translated to other courts. This article sets out some global experiences with the intention of leading to a wider debate and sharing. It presumes a reasonable understanding of digital currency and related aspects.

The extent of the issue and the consequential need for information

In June 2022 it was estimated that more than $900 billion was held in digital currencies and more than $300 billion was traded daily. Such is the volatility of these currencies that their worth was much less in January 2023 due to a significant fall in prices in late 2022. But its short history has shown a remarkable resilience and multiple recoveries, not least because of the enthusiasm of those involved and the advantages of a resource which isn't often found in any documentation or represented by bank savings or gold or other traditional assets. This paper presumes digital currencies will not just remain but will increase in usage, acceptability in general commerce and personal retail and be an increasingly higher proportion of personal wealth.

Accordingly, the family court and family lawyers have a vital interest. Whether equal division of

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marital community resources or ascertaining a fair outcome to provide for needs, how much is held in a digital currency is crucial and must be known. Yet here comes the primary challenge. There is invariably a limited paper trail, perhaps only funds realised to make the digital investment. Whilst some crypto records can be obtained by a third-party, this requires significant expertise and associated costs. This is easier if the cryptocurrencies are held in a regulated centralised exchange that requires KYC compliance, but this is not always the case as it is possible to hold cryptocurrencies in self custody. Insofar as it could be said there is any organisation with control or responsibility, it is unclear how responsive it would be to requests or demands by family courts. Finding out is the biggest task. The next is enforcement against the digital assets. Sometimes enforcement follows a freezing order to ensure the asset remains available for the family court order. Both are immensely difficult. It is a little wonder that there has been limited reference in family courts.

It has to be acknowledged at the outset that the reason cryptocurrency is attractive to many people is a desire to keep financial interests confidential and to avoid regulatory and other oversight; the essence therefore of cryptocurrency is to be secretive. This of course can impact significantly on the efficacy of *“full and frank disclosure”* requirements of family law systems.

In mid-2022, specialist family court judges in England dealing with complex financial cases had the considerable benefit of training by crypto specialists. It was obvious to me that in England we could learn from what was happening in family courts around the world and in similar fashion we would be happy to share what we had discovered might work. With encouragement of senior judges, I resolved to find out and share, hence this article.

I approached a dozen specialist international family lawyers, each in leading jurisdictions with a fairly comprehensive questionnaire (see schedule). I was surprised by how many said they had no experience of the involvement of digital currencies, that it featured rarely or not at all in their country’s family judicial system, moreover they knew of no one in their jurisdiction identified as a digital currency expert in family cases and, unfortunately, they could not contribute. These were countries which I knew were in the top 10 of digital holdings yet there were no known references to digital currencies in family court proceedings, no judicial pronouncements, and no apparent expertise. It seemed to suggest family justice systems were not keeping pace with the financial circumstances of their citizens. In one leading country, a lawyer had written for a leading law publication about crypto assets in the family courts but despite 3 emails including a generic one to his firm, there was no response. In some countries I was promised a response, but nothing was received and I appreciate the complexity of this issue. Perhaps in these circumstances when the

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topic was discussed at the LawAsia conference in Sydney in November 2022, speakers from a number of the countries present felt little could be done to discover or enforce against digital currencies. I myself do not consider that is an option for us in the international family law community.

I received comprehensive responses from Australia, China and Switzerland, coupled with an awareness of the position in England. It was a good mix of common law, civil law and other systems across countries with leading digital holdings. I'm grateful to the lawyers who prepared extensive answers to my questions. They are named in the schedule, and this can only be a summary and I know they are happy to hear from lawyers around the world wanting to know more.

My hope therefore is that this can start an international conversation between international family lawyers and judges about how we can best deal with this resource in our cases. I'm pleased to see it is on the agenda of the IAFL European conference in Venice in February 2023. I set out some recommendations at the end on future progress.

Frequency of digital currencies arising in family court proceedings

The quick answer would seemingly be not often. Australia had no statistical evidence of frequency. In Switzerland it was thought that it might appear in as many as 30% of all cases, perhaps showing the sophistication of the financial holdings. In England it would be still relatively rare even in the complex finance cases. As to size of the digital holding proportional to the overall finances, it was again perceived to be relatively small with the expectation this would increase with confidence in the stability of the cryptocurrencies and its value. In other words, it is likely to arise more often and to a bigger proportion of the overall finances in the case.

There are relatively few reported family court decisions, and it would be hugely helpful if any could be shared with the international family law community. An important Australian decision is referred to below. A Chinese decision as far back as 2019, *Gui 0109 Min Chu No 735* had bitcoin worth about £15,000 at that time, a small percentage of the overall assets in the case. China may have had more family law cases concerning digital currencies which was reflected at more length in the paper from Claudia Zhao Ningning referred to in the schedule.

Although digital currencies are international, it's of interest that in China the central bank digital currency is legal tender on the basis that it is issued by the People's Bank of China. This gives the opportunity to be divided as marital property. Nevertheless it is a virtual commodity. In *Jing (2018) 01 Min Zhong No 9579*

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, the Beijing First Intermediate People's Court ruled bitcoin was a civil interest protected by law. International lawyers will follow closely what happens in China.

How to find out about the existence of a digital currency

Here is immediately one crucial issue. Present experience is that in many cases the applicant spouse is already aware that the other has or at least had or talked about having a digital currency investment (e.g., Jing (2018) Min Chu No 58471). The latter may be unwilling to disclose but it allows an entrée to the courts and lawyers to ask questions or make enquiries. Discovering one spouse has a digital investment, without any prior knowledge or intimation, is presently immensely difficult and unlikely.

Many family justice systems have requirements of duties of full and frank disclosure. However, because awareness of this issue is still so limited amongst family lawyers, there is a suspicion that lawyers simply do not ask clients if they have these holdings. Clearly there must be better training and awareness amongst family lawyers and as a minimum a form of good practice obligation to ask clients about these resources in the disclosure process.

It might be that inquisitorial jurisdictions, in which the responsibility for investigation lies with the court rather than the burden of proof on the applicant, may make greater progress if suitable court powers are available. In China, the People's Court will check bank statements and other documentation for evidence and perhaps produce an Investigation Letter to third parties. Civil law countries may have distinctive contribution on this topic on what can be undertaken by the courts in their inquisitorial role.

Some countries have documents for financial disclosure but then rarely refer to digital currencies e.g., in the description of investments and savings. Most were drafted before bitcoin existed! Therefore, these disclosure documents should be urgently reviewed and amended across the world to make it clear that digital currencies must be disclosed, as with all other resources. In China, the consequences of failure to give full disclosure is specifically spelt out on the Property Disclosure Form including compulsory measures against other assets. In England on the equivalent Form E there is reference to perjury and committal although in practice this almost never happens.

Investment in digital currencies often comes from existing, traditional/flat currencies as investments. Analysis of bank accounts and similar records, by the court or the applicant or an expert, may well show withdrawals or transfers without any obvious explanation, hence investment

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in a digital currency may be reasonably presumed. This is one of the primary means of finding out if there are digital resources hitherto undisclosed. However, if after the initial investment, a person continues to use an exchange platform to continue trading, only the initial investment will be visible on bank statements, which in some cases might mean being unnoticed or without true information about what was happening to the investment. Similarly claims for capital gains or losses in tax returns may not be fully explained by conventional shares and stock and again may highlight the existence of digital holdings. Of course, this will not prove the present value of the digital holding, simply because of the huge volatility of digital currencies. But it would certainly show how much was originally invested or was held at any one time and in many family justice systems will then put the significant burden on the holding party to give a good explanation. See below on how China and Australia have dealt with this exercise of proving value.

Countries such as Australia have moved ahead significantly in the disclosure process on the enquiries made of third parties such as subpoenas. The primary problem is whom to subpoena! Blockchains are international and multinational. Invariably expert help will be needed.

It also depends on the exact nature of the holding. As was pointed out from Switzerland, if the spouse holds the assets in the custodial wallet, the crypto exchange that holds it might be ordered for disclosure, subject to the usual national rules on disclosure obligations. However, if a non-custodial wallet is involved, it is far more difficult. This means no third party, such as a centralised crypto exchange, has access to a person’s crypto. As all cryptocurrencies are stored on public block chains, they are accessed through private keys. If the crypto assets are held in a centralised exchange, it is the exchange that holds the private key required to access it. In the case of a non-custodial wallet, the owner is the sole entry point, unless sharing the private key with a third party.

In some jurisdictions, if it is unclear how much a respondent has by way of the resources because of his failure to disclose but there is a good confidence there are undisclosed assets, judicial inferences can be made and consequently orders made (the Australian case of *Weir* (1992)). It may be particularly valuable where there is a real impasse when it comes to the respondent disclosing reliable evidence. This may be coupled with offsetting, a device in which a judge will direct an applicant to have more of the known, disclosed assets with the respondent having the inferred, undisclosed assets such as a digital currency. These devices of inference and offsetting may be far more frequently used in this context.

In most jurisdictions there is a huge benefit in finality, the conclusion and dismissal of all claims so the parties can move on with their lives. However, where it is uncertain how much is held in a

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digital currency and if it may be a significant amount so that the family court cannot produce a just outcome without better knowledge, one device might be to adjourn the proceedings. If then subsequently assets come to light for example real property purchased with a digital currency, the case could be restored, and a now fairer outcome imposed. This lack of finality is not a preferred solution but might be appropriate and has been distinctly raised by judges in some countries. China goes one stage further. By Article 1092 of the PRC Civil Code, it is explicitly stated that if a party conceals, destroys, disposes of marital property they should be granted less or no property and moreover if discovered after the divorce a new action can be brought for fresh redistribution of marital property.

Sometimes the family court will simply be frustrated. For example, the Haidian District Primary People's Court of Beijing Municipality in (2020) *Jing 0108 Zhi Hui No.1202*, ruled that the virtual currency that should be returned in this case had been lost and the enforcement was unable to execute. Nothing against which to enforce could be found. The Fangshan District People's Court of Beijing in the case of (2021) *Jing 0111 Zhi No. 305,* ruled that even though orders against bitcoins had not been enforced, further enforcement had to be terminated because no more property nor the legal representative or shareholders could be found.

Transfer orders

Family courts transfer assets from one spouse to another to produce a fair outcome according to national law. This might be real property or money in a bank account. There are however limited examples of transfers of digital currencies. A case is running in Switzerland for the transfer of the respondent's wallet together with provision of unrestricted ownership and power of disposal. However, an order for sale would be far more problematic. Again, there will be a huge benefit in sharing experience globally.

On one Australian case (unreported as resolved without Judgement), one party asserted that her investment in cryptocurrency was lost as she was unable to *"find"* the key to the account. By its very nature that claim was unable to be proved, or disproved. An agreement was reached, and Order made, that if the key was found, the cryptocurrency account would be closed and the proceeds of the account divided. Of course, although the order exists, there is little possibility of enforcement of it.

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Service via blockchain

In both the USA and England in civil cases (rather than family law cases), service has occurred through a blockchain when the location of the respondent has otherwise been unknown. This is likely to be adopted elsewhere. By extension, in England in a child abduction case where the abducting parent could not be located but was using digital currency, orders were made to trace him through these means.

Awareness of digital currencies within family justice

All reports are of significant lack of awareness on this topic by family law professionals and judges. This is understandable given the complexity of the digital technology. It's not understandable where there are now significant family resources held in this fashion. In England there has been a concerted attempt, led by digitally aware judges and lawyers, to educate and discuss how to deal with such cases. Some family lawyers now hold out as having a distinctive expertise in cases with digital currencies such as my colleague, Agata Osinska. But very little is happening around the world. It is essential there is early awareness and understanding. If necessary, in these early days, judges in jurisdictions should be earmarked, ticketed with a docket, to deal with these cases. Lawyers should transfer cases to those lawyers aware of these issues. Anything else will fail the parties needing justice.

It was also evident from the responses, including experience in England, that in these early days the involvement of digital currency experts is invaluable. They may provide merely a better understanding of what is involved. Certainly, assistance is necessary in knowing what to look for in the disclosure process and then what orders are appropriate. In each jurisdiction, as with any other area of specialist valuations, a list of experts who can assist in family justice is needed. However, given this is an international currency, and with a relative shortage of experts familiar with family law aspects, lawyers may find themselves instructing an expert from abroad. It would be ideal if a list of global experts in digital currencies familiar with family court requirements was available.

Freezing injunctions

Because of the real difficulties of identification including of relevant parties with any control over

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the digital currencies, there are no reports of successful freezing orders from family courts, to ensure the digital currency remains available for the final settlement. It will be invaluable for this to be shared globally if any are successfully obtained. Some have been obtained in the criminal courts, (see examples from China below), and family lawyers will want to observe and borrow.

Sometimes freezing orders are made regarding worldwide assets but this has distinctive issues of enforceability. This is again an issue for digital currencies where injunctions or other orders require involvement of institutions outside of national borders. For example, in the case of Bitcoin Refund executed by the Baoshan District People's Court of Shanghai, PRC, the Court judicial assistance notice for enforcement was proposed to be issued to the Bitcoin trading platform. Unfortunately, the notice was not able to be issued because the platform is outside of PRC without a valid postal address to receive the notice. For this reason, as well, jurisdictions have to be particularly creative regarding matters of service as below.

Alongside freezing injunctions, some jurisdictions have the power physically to enter properties and take possessions in furtherance of disclosure, sometimes known as Anton Piller orders. These were useful until data on computers was stored in the cloud at which point passwords were necessary. It might sometimes be successful if the private keys to a wallet can be found on the computer of the respondent as a consequence of the implementation of this sort of order.

The operating entity of the digital currency registered within China can be used for freezing or preservation, although it is not feasible for the offshore entity. In (2019) *Su 0681 Enforcement 3099* in the context of the crime of raising funds by means of fraud, the Court successfully froze all the properties in the account in okcoin.cn belonging to two persons subject to enforcement. Even though the court was not instructed how to deal with the bitcoins, the freezing measures were successfully taken.

Like many countries, Chinese courts are not able to issue the enforcement decree and judicial assistance notice to trading platforms located national borders. In (2020) *Hu 0113 Min Chu 23704*, the Court ruled that within 10 days, the defendant return bitcoin to the plaintiff. Due to the defendant's failure to fulfil the obligation, the Court was going to issue the enforcement decree and the judicial assistance notice to the concerning bitcoin trading platform requesting the assistance for the enforcement. However, the Court couldn't find anything about the platform's effective postal address and contacts information in China. This sums up the frustration globally of the family courts in dealing with these form of assets.

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Volatility of value

An order by a family Court to transfer real property or money in a bank account has relative certainty of the value to be received. It is the opposite with digital currencies. Late 2022 saw an amazing 65% decrease in value of bitcoin at the time of any transfer from 2021 values. How will the applicant know what they are getting? They won't! A response is that if they are receiving a share, the share of the respondent could have equally fallen in value. The real problem is where the digital currency being transferred in the settlement represents needs or other provision which will therefore be inadequate.

This specifically arose in the Australian case of *Powell & Christensen [2020] Fam CA 944* where one party had purchased cryptocurrency in contravention of an order that restricted them from dealing with or disposing of property, as well as with their own funds. The other party sought the cryptocurrency be reckoned at its original purchase value, arguing that it be notionally *'added back'* to the property pool. The party who purchased the cryptocurrency argued the value of it had decreased significantly since the time of purchase but did not disclose any documentation to support his case. The Court found there had been a deliberate non-disclosure as to the apparent decrease in value and so the purchase value should be found to represent the current value. It was said the court should not be unduly cautious in inferring best evidence of value was the purchase price. The Court also noted the cryptocurrency purchased from the restricted funds should be subject of an add back to restore to its original purchase value and protect the pool. If documents are offered to provide value of the cryptocurrency, this order would obviously change (either to the point at which the cryptocurrency is sold or to the date of the order).

It is important to affirm the benefit this brings to the power of courts to deal with in any way, perhaps creatively or laterally, digital assets in financial proceedings. This decision shows that where a party does not make full and frank disclosure in relation to digital assets, the court should not be unduly cautious in what they estimate to be the value of the assets e.g. if a court is confident the digital assets exist, but the party is refusing to disclose evidence as to value, the court can simply use best available information to guess its value when adding it to the property pool, and if appropriate be generous in its estimation. This should act as a strong deterrent to any party attempting to hide assets, digital or otherwise.

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In determining a digital currency's price, the following circumstances from Chinese cases are worth taking into consideration:

- Referring to the transaction price of BTC on Huobi and ZB on the date of the dispute, as well as the price mutually confirmed by the parties to the case: (2020) *Yu 13 Min Zhong No.3607*
- Determining the price of virtual currency based on the mutual agreement of both parties but not the exchange: (2019) *Hu 01 Min Zhong No.13689*
- Determining the value of virtual currency based on the price agreed in the Agreement previously concluded by both parties: (2021) *Liao 13 Min Zhong No.3736*
- Determining the value of the virtual currency based on the price of purchase as in the Australian case above and see also (2021) *E 0582 Min Chu No.983*.
- Determining the value of digital currency based on the result of judicial expertise

Taxation

Reports indicate that fiscal authorities are, on paper at least, fairly ahead of the game. In Switzerland, England, China and Australia, gains and income from crypto assets are taxable and should be declared on tax returns including specific coins. Nondisclosure to fiscal authorities may be viewed by the family courts as evidence of nondisclosure in respect of the financial settlement. In Switzerland, a cryptocurrency must be declared as an asset on tax returns. Perhaps unsurprisingly, experience is that they are not declared, by mistake or purpose.

Conclusion

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From these reports internationally and from the experience in England, some tentative and provisional recommendations can be made:

- Lawyers should make it clear to clients, including as part of any good practice obligation, that the duty of disclosure of financial circumstances specifically includes any form of digital resource and asset
- Pro forma disclosure documents used in many countries should be redrafted specifically to set out the requirement to include any form of digital asset
- There must be greater awareness by specialist family lawyers and family court judges of digital currencies; this will start with basic education about the nature of digital assets and then how family lawyers and family courts should deal with them
- In these early days of reference to digital currencies, there may be benefits in such cases being heard before specialist, ticketed judges
- Lawyers should consider transferring cases with either any digital currency or issues of disclosure or enforcement of digital currency to a specialist lawyer experienced in this work
- It would be useful to have a list of experts in digital currencies able and familiar to assist family courts and family lawyers including investigation of disclosure; in these early days this is likely to be an international list given the initial lack of any number of national experts in most countries
- The judicial power to make inferences of likely level of assets when there is

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nondisclosure is particularly important in the context of digital assets and should be explored as to availability in jurisdictions where not presently used

- For applicable law, choice of law, jurisdictions there needs to be additional collaborative international work to consider what and which law would be applied to digital assets if not national law
- Family justice can usefully learn from the experience of the criminal courts and civil courts in dealing with digital currencies, including any freezing orders, discovery and enforcement
- It would be valuable to create an ad hoc group of international family lawyers with a knowledge of these matters to pool and share developments around the world
- In any event, family lawyers are invited to share with the global family law community what is happening in their jurisdiction on the basis that approaches, orders, knowledge and similar can be usefully borrowed as a collaborative process

This article is published in Financial Remedies Journal 2023, Issue 1

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www.iflg.uk.com
© January 2023

The original questionnaire:

In your experience based on what you know in your jurisdiction, with what sort of frequency and how often in family law cases does either party have cryptocurrency? How much approximately

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would have been invested as a proportion of the overall assets of both parties i.e., relatively small or maybe 50%

One of the major difficulties often is finding out if a party has any digital currency. The exercise of disclosure. In cases of which you have knowledge in your jurisdiction, did the party with the digital currency themselves volunteer information about their digital currency holding and/or their spouse was already aware, alternatively more difficult and yet more vital for us, was knowledge obtained through a disclosure exercise whether the courts or questionnaires or similar? Obviously, it's the latter which most affects us in our work.

If the existence of a cryptocurrency held by one party only arose as a consequence of seeking disclosure and information, how and in what circumstances was the initial enquiry made about whether there was cryptocurrency in the case? For example, why were any questions raised if there was no suspicion of any digital currency holding? In your family resolution process, is there a standard questionnaire or standard disclosure requirement which includes asking about any digital currency? I would really like to understand what is the general procedure in your family justice system for disclosure of cryptocurrency in circumstances where there wasn't previous knowledge or suspicion that there might even have been any cryptocurrency in the case held by either party? In other words, how often might this remain a hidden, undisclosed asset? This is the challenge for us in my assessment.

Once it was known that a party had cryptocurrency, whether by their admission or the knowledge of the other spouse, what court procedures are then available in your jurisdiction to find out full details if the spouse is unwilling to give them. Presumably, the usual orders for disclosure can be obtained and are there any particular words or specific orders used?

Are you aware of lawyers in your jurisdiction obtaining subpoena or disclosure orders against any 3rd parties to produce evidence of investments into a cryptocurrency? If so, what sort of orders were requested and obtained and how did it work?

Similarly, are you aware of lawyers in your jurisdiction obtaining inspection or disclosure orders against the computers or other digital devices alternatively cloud-based access of the other party in order to see whether they had any cryptocurrency resources? We are very aware that without tangible evidence, such as bank statement entries showing an investment clearly into a digital currency, it is very difficult to get hold of evidence other than access to a hard drive or cloud-based information.

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In the US and in England in civil cases, service has occurred through a blockchain when the location of the respondent has otherwise been unknown. Has this occurred in your jurisdiction and what happened? One of the inevitable problems is that service might be outside traditional national borders. Yet, cryptocurrency is not held in any national regime. Would you anticipate that the usual national and international laws regarding service might be relaxed or changed in this sort of situation and how?

How in practice would family lawyers in your jurisdiction learn about cryptocurrencies and all other information necessary to make enquiries, to find out what resources exist and how to make enforceable orders? What is the general knowledge in your family law profession in your jurisdiction about digital currencies generally and what more could be done to help?

In similar fashion, how aware are your judges of cryptocurrencies, how knowledgeable about what can and can't be done and how willing to make orders specific to this form of asset and resource?

Please confirm a cryptocurrency would be treated as a resource, marital or nonmarital, within family court proceedings and resolution of division of marital property? In what circumstances might it not be brought into account?

If orders have been made in your courts for the sale, realisation or transfer of the holding of a party in a digital currency, could you let us have the wording in the order please as it may be possible to adapt in other jurisdictions.

How would you anticipate enforcing a financial order against a digital currency held by the other party? What information would you need and what do you believe the family court would order?

Do you know if in your jurisdiction a freezing order has been made against a digital currency in the family courts i.e. to prevent selling or other disposals to frustrate the family court? In what circumstances was the order made and, as above, could you share the wording of any order? Was the freezing order effective? What has been the response if offshore platforms and entities have been served with a freezing order, alternatively served with an order to make disclosure of the holdings of any party?

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Digital-currency prices are very volatile, even in a matter of minutes. How have your courts and how have your lawyers in your jurisdiction been reaching any financial settlement given the great risk that the asset may be worth much more or less at the time of implementation compared to the time of the order or settlement?

Where a cryptocurrency is a feature in a case, do family lawyers instruct experts? How are such experts found in your jurisdiction; or are experts consulted from other countries given the extra-national element of these currencies? What sort of questions are normally asked and do you have a pro forma questionnaire which could be shared? Is their report likely to be acceptable when presented to a family court?

In England, there are substantial tax ramifications, including treating gains made in cryptocurrencies as income and therefore taxed at high rates. What is the tax treatment in your jurisdiction and how effective are the tax authorities believed to be?

Cryptocurrencies invariably feature in cases involving resolution of marital property, provision for needs and similar on distribution on divorce and relationship breakdown. But it also features in international children cases where parties use these currencies to avoid being traced. Are you able to let us have instances where the family courts have dealt with these digital currencies other than in the division of assets and provision of needs?

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