Cryptocurrency in Property Settlements: How will it be dealt with?

With the rise of cryptocurrency as an alternative form of currency, it's increasingly common for a party to a family law property settlement to own cryptocurrency.

Within the field of family law, cryptocurrency is categorised as an asset and as such, is included in a **property settlement** between two parties. In essence, cryptocurrency is a digital form of money that allows users to transfer currency without any bank involvement and hefty fees or charges; common crypto assets include coins and tokens such as Bitcoin, Ethereum, GALA and BAYC.[1] So as part of the family law process the ownership and value of cryptocurrency needs to be

ascertained and added to the property pool for division.

Disclosure

As cryptocurrency is an asset, it falls squarely within a party's obligation to make full and frank disclosure of all matters relevant to their proceedings, including their income, assets, liabilities and financial resources. This includes disclosing any cryptocurrency holdings, along with any information and documents within their possession relating to the cryptocurrency. This may include screenshots showing the present balance of each crypto asset in their digital wallet, exchange or cryptocurrency account, and a ledger of all transactions for each wallet, exchange or account. Details of any purchases (including the source of funds) and sales of cryptocurrency is also relevant.

Although there is little case law on this issue, if a party can prove that the other has deliberately failed to disclose how much cryptocurrency they have, the Court may draw an adverse inference to this and potentially award the non-offending party a greater share of the identifiable asset pool in question.
If you therefore believe or suspect that your former partner possesses cryptocurrency but has failed to disclose it, the next step would be to try and gather evidence of any cryptocurrency holdings or cryptocurrency-related purchases. This may be found in bank statements, credit card statements and tax returns. A check for any cryptocurrency exchange applications in their App Store account may also be useful.

Value

One of the primary difficulties in valuing any crypto asset is its volatility. As such, the monetary value of a particular crypto asset, per its current market price on the relevant exchange, may drastically fluctuate on a frequent basis, and although a Court may account for some appreciation or depreciation of the crypto asset, timing is still crucial.

Whilst the crypto asset may be worth a substantial amount one day, its value may

drastically decrease in a matter of hours or days.

In terms of valuing crypto asset for the purposes of a property settlement, a potential option may be to convert the crypto asset into cash so that the funds can then be contributed to the asset pool in a more stable form. However, as this may not always be possible or wanted, a property settlement may instead need to account for the crypto asset's extreme volatility. Alternatively, another option may be for both parties to agree upon a specific date to value the crypto asset.

A Court will use the value of an asset as at the date of trial (or most recent date for negotiated settlements) so beware that this may be substantially different to the date of purchase for assets such as cryptocurrency.

Tax consequences

It is important to note that crypto assets are taxed as CGT assets which may mean that, over an extended period of time, parties may hold substantial unrealised capital gains. This would in-turn result in the accumulation of a significant amount of tax payable upon any sale of the cryptocurrency.
The parties should obtain independent taxation advice about potential CGT on sale of the cryptocurrency.

Cases

Although this is a developing area of law, the few cases where the family courts have considered cryptocurrency in detail, as illustrated below, reveal that judges may adopt differing approaches to the handling and valuing of cryptocurrencies within property settlements.

Powell v Christensen [2020] FamCA 944:

In this case, the husband had invested $100,590 ($75,000 from his business funds

and $25,590 in joint funds) in cryptocurrency after separating from his wife, having breached an injunction that had earlier been ordered and which restrained him from dealing with any property owned by him or in which he had an interest.

Despite not producing any documents, the husband stated that all of the purchased cryptocurrency was now only worth approximately $44,000-47,000. Following this, the wife asked the Court for the amount to be "notionally added back" to the pool in order to restore the value to the original purchase price.

The Court found that, as the husband failed to disclose or produce any material to establish the apparent decrease in value of the cryptocurrency, the purchase price should be found to represent the current value. The Judge notionally included the cryptocurrency in the balance sheet at their original purchase prices of $75,000 and $25,590 (totalling $100,590).

Wade v Alawi [2020] FCCA 882:

In this case, the husband drew down $274,913 post-separation in his own name on a mortgage in order to purchase Bitcoin. He did not consult with his (now former) wife.

He stated that he "lost the whole of his investment in Bitcoin when the price crashed". His investment therefore failed such that, at the time of trial, there was little equity remaining in the home.

The wife's counsel suggested that the husband was being "completely reckless" in investing in Bitcoin. He disagreed and contended that had he made a substantial profit, and that those assets existed, the wife would make a claim against that property.

The Judge accepted that the investment failed but stated that this "was not a case where the husband had deliberately wasted funds". The judge was of the view that if the investment had returned a substantial profit, those funds would have been taken into account in adjusting the property interests of the parties (i.e. the profited funds would have formed part of the parties' overall property pool).

The Judge therefore held that the parties should share in the losses incurred as a result of the failed investment in Bitcoin.

Fallins v Fallins [2022] FedCFamC1F 495:

In this matter, the husband conceded during cross-examination that he had spent $100,000 of joint funds on Bitcoin post-separation and had subsequently lost the whole of the funds. He asserted that he had been caught by a scam.

The Court held that, as those funds could have been applied to legal advice, preparation of affidavits and representation at trial, the husband solely retained the $100,000 loss on the balance sheet (reflected as $100,000 for 'funds invested and lost in cryptocurrency').

How can Andersons Solicitors help?

Wherever a significant crypto asset is held by a party, a great deal of attention and care will be required in approaching any sort of property settlement and division of assets.

Andersons has an experienced **Family Law team** which can assist with any family law-related matters, ranging from **divorce** and **property settlements** to **parenting arrangements**, custody agreements and the like. Should you require any assistance, please reach out to today's writer **Ryan Thomas** or contact our offices on 8238 6666 to make an appointment and discuss your legal needs.

[1] https://www.ato.gov.au/individuals/Investments-and-assets/crypto-asset-investments/what-are-crypto-assets-/.