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# Uncovering Cryptocurrency NFTs and other Digital Assets in Family Law Property Settlements

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# Uncovering Cryptocurrency, NFTs and other Digital Assets in Family Law Property Settlements

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## Introduction

Cryptocurrency is a burgeoning asset class in Australia that is disrupting societal traditions, with recent studies suggesting between three and five million Australians own cryptocurrency. The availability of smartphone apps for cryptocurrency exchanges and wallets means an increased number of Australian taxpayers are now accessing this new and emerging form of investment.

## Digital assets – what are they?

This paper focuses on cryptocurrency as the type of digital asset most commonly discussed in the media in recent years (and one of the more mystifying types of digital assets to the casual observer). This paper also addresses two other types of digital assets based on the same technology as cryptocurrency (NFTs and smart contracts) and social media accounts.

### Cryptocurrency (e.g. Bitcoin, Ethereum, Dogecoin, Litecoin)

"Cryptocurrency" is more than just a digital type of currency. Rachell Davey of Lander & Rogers writes:

> "*The terms "digital currencies" and "cryptocurrencies" are not interchangeable; they are separate concepts. Digital currencies are centralised, meaning that the network is regulated in a centralised location, such as a bank. We all use digital currencies every day when we purchase goods online or use PayPal or Western Union. Cryptocurrencies are a form of digital currency that is secured by cryptography and decentralised, with the network regulations determined by the users. They are a specific sub-category of digital currency. Unlike digital currencies, cryptocurrencies are completely transparent, however ownership of the asset can be anonymised. Although everyone is able to see any and all transactions made and received by any user, as all transactions are stored in the central public blockchain, the identity of the user may not be known…*"[1]

There are two things inherent to how "cryptocurrency" is defined that distinguish it from digital currency:

> "*Crypto assets are a subset of digital assets that use cryptography to protect* ***digital data*** *and distributed* ***ledger technology*** *to record transactions. They may run on their own blockchain or use an existing platform such as Ethereum. A blockchain is a form of secure digital ledger used to store a record of crypto transactions.*
>
> *Crypto generally operates independently of a central bank, authority, or government…*
>
> *For tax purposes, crypto assets are not a form of money.*"[2] (emphasis added)

In other words, cryptocurrency is a type of digital currency defined by its use of a special type of ledger known as a "blockchain" created using computer networks and cryptography. It does not look like a bookkeeper's ledger—it is a complex string of code which we can interact with using websites or apps that simplify that code for us and present it in a way we can read. A "blockchain" is designed to record digital transactions in a way that is permanent and verifiable. The rationale for having a ledger that records transactions in a permanent and verifiable way is so that transfers of digital cash can occur only once—otherwise, there would be problems akin to people creating counterfeit money in the physical world. It also solves other problems when dealing with digital cash that does not exist in a physical form, such as being able to verify that parties to a transaction have the money they claim to have. In the physical world, we solve these problems either with cash or through an intermediary (i.e. bank) who manages transactions between parties. Because cryptocurrency doesn't need an intermediary such as the government or a bank to avoid the problem of double-spending, it is sometimes referred to as "decentralised" (although purists reserve this description for cryptocurrency exchanges where the "minting" of new coins is not managed by a single issuer). In short, cryptocurrencies rely on

[1] Rachell Davey, "Digital assets in family law property settlements", May 2021 (https://www.landers.com.au/legal-insights-news/digital-assets-family-law-property-settlements).
[2] The Australian Tax Office, "What are crypto assets?", 30 June 2023 (https://www.ato.gov.au/individuals/Investments-and-assets/crypto-asset-investments/what-are-crypto-assets-/).

cryptographic proof to facilitate payments instead of intermediaries (i.e. banks) and trust (between parties to transactions).

While it is easy to feel mystified by the notions of cryptography and "the blockchain" when reading about cryptocurrency, it is useful to remember that the main purpose of the underlying mathematics and programming involved in this technology is to avoid double-spending/digital counterfeiting and to verify that people have the digital cash they say they have.

Another important concept to understand in relation to cryptocurrencies is the notion of a "wallet". A crypto "wallet" is a term used to describe what is more technically known as "public-key cryptography". A "key" is a string of random unpredictable characters (i.e. numbers, letters, symbols). In public-key cryptography, two strings of characters or "keys" are used: a public key and a private key. A public key is what a person uses to interact with the blockchain—by publishing your key, you can send and receive transactions (e.g. like giving out your bank account number to receive money). A private key is how you alone can access transactions that belong to you – the private key "decrypts" your transactions and only you can decrypt them using your private key (e.g. like your online banking password). You can have different types of wallets, including:

- Digital: for example, web-based (e.g. logging into a website) or an app (e.g. on your phone);
- Physical: for example, on a UBS drive or even on a piece of paper; and
- Online/offline: whether or not connected to the internet.

## Non-fungible tokens or "NFTs"

A non-fungible token is another way of using a blockchain apart from using it to create a currency. Because of how a blockchain creates permanency and excludes duplication, it can also be used to create a system of "proof of ownership" or "certificates of authenticity". An NFT is a data file stored on the blockchain and, when transferred to someone, that person can be understood to own that token/piece of code—they can prove they own it and they can prove it is not "fake" because of how blockchain works. A token can then be linked to a digital or physical item in a way agreed between parties to a transaction to prove who owns that item (e.g. like how a certificates of title were historically used to prove who owned a parcel of land).

Edmund P. Daley, Cory S. Flashner and Frank L. Gerratana write:

> *"A common misconception has been that the NFT "token" is also the property it represents. But NFTs can be thought of as having two basic components: (1) the digital token that functions as a certificate of ownership and authenticity that is recorded on a blockchain; and (2) the property itself that is linked to the token. These two components are intrinsically linked but usually separate*."[3]

The rationale for using NFTs is the way they are protected against duplication and tampering. NFTs are secured with encryption and then recorded in the digital ledger/blockchain. The blockchain will record future sales to keep track of who owns the item, through a system of encryption keys that preserves the anonymity of everyone involved.

## Smart contracts

Another use of the blockchain is a technology called "smart contracts". Because a blockchain exists as computer code, additional code can be inserted into the code that performs the contract itself. In this way, smart contracts can be self-executing, operating on an "if X happens, then Y happens" premise of coding.[4] Imagine, for example, a Pexa-type platform where settlement was automatically triggered upon a successful transfer of Bitcoin, without any additional human input. Stuart D. Levi et. al write:

[3] Edmund P. Daley, Cory S. Flashner and Frank L. Gerratana, "NFTs: A Flash in the Crypto Pan or Virtual Gold? (Part 1)", Mintz, 2 August 2022 (
[4] Barry Frakes, supra.

> "*Smart contracts are presently best suited to execute automatically two types of "transactions" found in many contracts: (1) ensuring the payment of funds upon certain triggering events and (2) imposing financial penalties if certain objective conditions are not satisfied. In each case, human intervention, including through a trusted escrow holder or even the judicial system, is not required once the smart contract has been deployed and is operational, thereby reducing the execution and enforcement costs of the contracting process.*
>
> *As just one example, smart contracts could eliminate the so-called procure-to-pay gaps. When a product arrives and is scanned at a warehouse, a smart contract could immediately trigger requests for the required approvals and, once obtained, immediately transfer funds from the buyer to the seller*."[5]

### Digital presence

"Digital presence" is a term used as a shorthand for all of the things that create someone or some entity's online brand. The things that make up an online brand include, among other things, websites, and social media accounts:

> *"Digital assets contained in the cloud may include copyright to digital photographs, websites (e.g., blogs), social media accounts on websites (e.g., Facebook and Twitter* [Provided these profiles may be monetised, as not every Facebook or Twitter profile has economic value]*), videos uploaded to the internet (e.g., YouTube), music files, online gaming characters or items, computer, books stored on services such as Kindle, and online currencies or accounts (e.g., PayPal Wallets and Bitcoin*)."[6]

## Legal recognition – are they "property"?

### Are digital assets treated as "property" by Australian courts?

In recent years, Australia's family law courts have at the trial level commonly treated digital assets, particularly cryptocurrency, as property available for adjustment and distribution in property settlement proceedings.[7] We are yet to see a direct challenge to this at the appellate level, but it needs to be remembered that cryptocurrency and NFTs are similar to existing technologies the property rights attached to which we take for granted (e.g. digital bank balances such as PayPal accounts or patents and trademarks). There is little reason to think digital assets that use blockchain technology will not continue to be treated as "property" by the Australia family law courts.

The High Court of New Zealand decision of *David Ian Ruscoe and Malcolm Russell Moore v Cryptopia Limited (in liquidation)* [2020] NZHC 728 (8 April 2020) considered the legal standing of cryptocurrencies as "property". In this case, the respondent, Cryptopia Ltd, operated a cryptocurrency exchange and generated income by charging fees for transactions on the exchange. The exchange was compatible with approximately 900 different cryptocurrencies. The exchange was established in 2017 and became popular later that year when the value of Bitcoin increased significantly. In January 2019, Cryptopia Ltd's servers were hacked and a portion of valuable cryptocurrencies were stolen by the hacker. Cryptopia Ltd went into liquidation but had nearly 1 million users whose accounts/wallets had a positive coin balance. The liquidators applied to the Court for guidance as to whether the various cryptocurrencies fell within the definition of "property' under the relevant legislation and, if they were property, whether Cryptopia Ltd held the cryptocurrencies on trust for the account holders.

The Court constituted by Justice Gendall considered decisions from other courts in England and Singapore and noted the following extract from the UK Jurisdiction Taskforce's Legal Statement on Cryptoassets and Smart Contracts:

> "*Why does it matter if a cryptocurrency asset is capable of being property. It matters because in principle proprietary rights are recognised against the whole world, whereas other – personal*

[5] Stuart D. Levi and Alex B. Lipton, Skadden, Arps, Slate, Meagher & Flom LLP, "An Introduction to Smart Contracts and Their Potential and Inherent Limitations", Harvard Law School Forum on Corporate Governance, 26 May 2018.

[6] Tan, James, "Identifying Complex Assets in Family Law Property Settlements", TEN, July 2021.

[7] See, e.g., *Mabbitt & Mabbitt* [2021] FCCA 675; *Wade & Alawi* [2020] FCCA 832; *Rademaker & Everhart* [2021] FedCFamC2F 171; *Fallins & Fallins* [2022] FedCFamC1F 495.

> *– rights are recognised only against someone who has assumed a relevant legal duty. Proprietary rights are of particular importance in an insolvency, where they generally have priority over claims by creditors, and when someone seeks to recover something that has been lost, stolen, or unlawfully taken. They are also relevant to the questions of whether there can be a security interest in a crypto asset and whether a crypto asset can be held on trust.*"

Justice Gendall wrote:

> '*before a right or an interest can be admitted into the category of property … it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability*.'

His Honour discussed the four requirements for property set out by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth [1965] 2 All ER 472*. His Honour was satisfied that the four requirements were met:

> "*1.* ***identifiable subject matter*** *was satisfied because computer-readable strings of characters recorded on networks of computers, established for the purpose of recording those strings, are sufficiently distinct to be capable of being uniquely allocated to an accountholder. Here, the unique public key means that data allocated to one public key will not be confused with another;*
>
> *2.* ***identifiable by third parties*** *was satisfied by the existence of the private key. This aspect turned on the requirement at law that the owner of property must be capable of excluding others from using it. The combination of the private key, which is allocated to the account holder only, and the requirement that a transactor have both keys in order to make a transaction with a particular cryptocurrency is what gives the cryptocurrencies this necessary degree of control;*
>
> *3.* ***capable of assumption by third parties*** *was satisfied on the basis that cryptocurrencies can be, and many are, the subject of active trading markets; and*
>
> *4.* ***some degree of permanence or stability*** *was satisfied by the blockchain methodology because the entire life history of cryptocurrency is available in the public recordkeeping of the blockchain. Similarly, His Honour noted that one cryptoasset stays in existence and stable unless and until it is spent, and the fact that standard cryptocurrency systems do not provide for the arbitrary cancellation of coins further supports the notion of permanence or stability*."[8]
>
> (emphasis in original)

In other words, when we revert to the fundamental common law principles of what constitutes "property", the mystique created by the intangible nature and esoteric concepts of blockchain technology is quickly dispelled.

## Regulation

According to a new study conducted by Luxembourg-based finance broker Forex Suggest, Australia is one of eight countries that currently have the strictest regulations for cryptocurrency[9]. The metrics of the study included:

- whether cryptocurrency was legal to own;
- whether a licence or registration was required for cryptocurrency businesses;

[8] Jardine, Darrell, "Cryptocurrency – is it "property" and why does it matter?", 25 May 2020 (https://www.hopgoodganim.com.au/page/knowledge-centre/blog/cryptocurrency-%E2%80%93-is-it-%E2%80%9Cproperty%E2%80%9D-and-why-does-it-matter).

[9] Forex Suggest, "Crypto Regulation Index" (https://forexsuggest.com/crypto-regulation-index/).

- whether cryptocurrency is taxed as an asset or as currency;
- the extent to which cryptocurrency can be used to purchase goods; and
- the involvement of central banks, including in the development of their own cryptocurrencies.

That's keeping in mind, however, that regulations for the industry in this country are still under review and development.

Reeves, O'Grady and Shen[10] provide the following summary of the Australian regulatory landscape for digital assets:

> "*Australia is regarded as a relatively neutral and stable jurisdiction for blockchain and cryptocurrency businesses, which has caused the product landscape to expand significantly in recent years. This expansion has been generally led by businesses in the payments, crypto asset, lending, investment and custodial services spaces, and has, in part, been driven by the Commonwealth Government of Australia's (Government) overall approach to the financial technology (fintech) sector and its broad support for new and innovative financial services and products.*
>
> *The Government has historically taken a minimal intervention approach to the regulation of cryptocurrency. However, 2021 saw a raft of government reviews into both the cryptocurrency and fintech sectors, each of which sets out recommendations for expanded and clarified regulatory regimes around cryptocurrencies and payments. In March 2022, Australian Treasury released a consultation paper on a proposed regulatory framework for crypto asset secondary service providers (CASSPrs) ... it is broadly expected that Australia will see a licensing regime introduced at some stage in respect of businesses providing certain crypto asset services.*
>
> *In August 2022, the new Government announced that it is ready to commence consultation with stakeholders on a regulatory framework for the crypto sector and the first step will be Treasury prioritising a token mapping exercise in 2022 to better inform regulation. Token mapping will seek to define different types of digital assets and the overall aim will be to "identify notable gaps in the regulatory framework, progress work on a licensing framework, review innovative organisational structures, look at custody obligations for third party custodians of crypto assets and provide additional consumer safeguards"…*
>
> ***Australian law does not equate digital currency with fiat currency and does not treat cryptocurrency as money.*** *There has been some general clarification of the application of Australian regulatory regimes to the sector. For example, digital currencies have been caught by Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime since 2018, recognising a shift towards digital currencies as a method of transferring value and the associated money laundering and terrorism financing (ML/TF) risks. In 2021, Australia's primary corporate, markets, consumer credit and financial services regulator, the Australian Securities and Investments Commission (ASIC), clarified its expectations for crypto assets that form part of the underlying assets of exchange-traded products (ETPs) and other investment products (set out in ASIC Information Sheet 230 (INFO 230)). This is in addition to ASIC's expectations regarding the regulatory status of certain crypto assets (set out in ASIC Information Sheet 225 (INFO 225)) …*
>
> *ASIC has released its 2022–2026 corporate plan, which highlights crypto assets as a key focus for the regulator. ASIC indicated that it will support the development of an effective regulatory framework for crypto assets focused on consumer protection and market integrity …*
>
> *While there is currently no legislation created to deal with cryptocurrencies as a discrete area of law, this does not prevent them from being captured within existing regimes under Australian law … Cryptocurrency that is, or forms part of a collective investment product that is, a financial product under the Corporations Act 2001 (Cth) (Corporations Act) will fall within the scope of Australia's existing financial services regulatory regime … Where such activities*

[10] Reeves, Peter, O'Grady, Robert, Shen, Emily, (Gilbert + Tobin) publication "Blockchain & Cryptocurrency Laws and Regulations / Australia" published in Global Legal Insights.

[cryptocurrency lending activities] *fall within the scope of the credit activities and services caught under the National Credit Consumer Protection Act 2009 (Cth) (NCCP Act), the relevant entities may need to hold an Australian credit licence or be otherwise exempt from this requirement…*

*ASIC has clarified expectations for crypto assets that form part of the underlying assets of ETPs and other investment products (see INFO 230). In INFO 230, ASIC sets out expectations for market operators, retail fund operators (i.e., responsible entities), listed investment entities (including listed investment trusts and listed investment companies) and Australian financial services licence (AFSL) holders dealing in crypto assets…*

*There are currently no specific regulations dealing with blockchain or other distributed ledger technology (DLT) in Australia. However, ASIC maintains a public information sheet (INFO 219 Evaluating distributed ledger technology) outlining its approach to the regulatory issues that may arise through the implementation of blockchain technology and DLT solutions more generally…*

*Various cryptocurrency networks have also implemented "smart" or self-executing contracts. These are permitted in Australia under the Electronic Transactions Act 1999 (Cth) (ETA) and the equivalent Australian state and territory legislation…*

*The sale of cryptocurrency and other digital assets is regulated by Australia's existing financial services regulatory regime … persons providing financial services in relation to crypto assets that constitute financial products will trigger the AFSL requirement and associated compliance and disclosure requirements … Entities dealing in financial product crypto assets will need to comply with the regulatory requirements under the Corporations Act, which generally include disclosure, registration, licensing and conduct obligations …*

*Carrying on a financial services business in Australia will require a foreign financial services provider (FFSP) to hold an AFSL, unless relief is granted …*

***For income tax purposes, the ATO views cryptocurrency as an asset that is held or traded (rather than as money or a foreign currency). The tax implications for holders of cryptocurrency depend on the purpose for which the cryptocurrency is acquired or held é If a holder of cryptocurrency is carrying on a business that involves sale or exchange of the cryptocurrency in the ordinary course of that business, the cryptocurrency will be held as trading stock é If cryptocurrency is not held or used in carrying on a business, or as part of an isolated transaction with a profit-making intention, a profit on sale or disposal should be treated as a capital gain. In this regard, the ATO has indicated that cryptocurrency is a capital gains tax (CGT) asset é a capital gain ar on its disposal may be disregarded if the cryptoc it was acquired for A$10,000 or less é***

***The ATO has created a specialist task force to tackle cryptocurrency tax evasion. The ATO also collects bulk records from Australian cryptocurrency designated service providers to conduct data matching to ensure that cryptocurrency users are paying the right amount of tax é***

*Digital currency exchange (DCE) providers are required to register and enrol with the Australian Transaction Reports and Analysis Centre (AUSTRAC) as a reporting entity under Australia's AML/CTF regulatory framework. There is a penalty of up to two years' imprisonment or a fine of up to A$111,000, or both, for failing to register. Broadly, registered exchanges will be required to implement know-your-customer processes to adequately verify the identity of their customers, with ongoing reporting obligations such as annual compliance reporting and the requirement to monitor and report suspicious and large transactions. Exchange operators must also keep certain records relating to customer identification and transactions for up to seven years …*

*With the rise of cloud-based Bitcoin mining enterprises in Australia, mining businesses should carefully consider cybersecurity issues in relation to mining activities …*

(emphasis added)

The *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2018* established a register and further reporting and record keeping requirements for cryptocurrency exchange operators in Australia:

> "*The Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (AML/CTF Act) mandates that both individuals and businesses must submit reports where physical currency in excess of A$10,000 (or foreign currency equivalent) is brought into or taken out of Australia … the intangible nature of cryptocurrency remains a bar to it being captured by declaration obligations under the AML/CTF Act."*

In 2022, the Australian government announced it was taking steps towards regulating cryptocurrency. The Hon Jim Chalmers MP as Treasurer and the Hon Dr Andrew Leigh MP as Assistant Minister for Competition, Charities and Treasury published a joint media release stating:

> "*Australians are experiencing a digital revolution across all sectors of the economy, but regulation is struggling to keep pace and adapt with the crypto asset sector.*
>
> *The Australian Taxation Office estimates that more than one million taxpayers have interacted with the crypto asset ecosystem since 2018.*
>
> *As it stands, the crypto sector is largely unregulated, and we need to do some work to get the balance right so we can embrace new and innovative technologies while safeguarding consumers.*
>
> *As the first step in a reform agenda, Treasury will prioritise 'token mapping' work in 2022, which will help identify how crypto assets and related services should be regulated. This hasn't been done anywhere else in the world, so it will make Australia leaders in this work*."[11]

The Australian Prudential Regulation Authority (APRA) (whose role is to supervise authorised deposit-taking institutions (ADIs), such as banks, building societies and credit unions, as well as insurance companies, including private health insurers, and superannuation funds, to promote the careful, or prudent, management of these financial institution) in its paper "Crypto-assets: Risk management expectations and policy roadmap" states:

> "*APRA therefore expects that all regulated entities will adopt a prudent approach if they are undertaking activities associated with crypto-assets, and ensure that any risks are well understood and well managed before launching material new initiatives.*"

Australian Border Force issued Australian Customs Notice No. 2022 / 42 concerning the conversion of cryptocurrencies into Australian dollars – customs valuation which provides:

> *"This notice is designed to assist owners who have paid for their imported goods using a cryptocurrency rather than a traditional fiat (government issued) currency to comply with obligations under the Customs Act 1901…*
>
> *Cryptocurrencies are not included in the list of foreign exchange rates published by the Reserve Bank of Australia, a compilation of which the ABF gazettes regularly and which are used for valuation purposes in the Integrated Cargo System. This notwithstanding, as explained above, a payment in cryptocurrency must still be converted into Australian dollars. The ABF has decided to treat cryptocurrencies in the same manner the Act requires us to treat any fiat foreign currency. This means a payment in cryptocurrency will need to be converted into Australian dollars based on the exchange rate for that cryptocurrency on the day of exportation.*
>
> *Owners will be required to use an exchange rate provided by a reputable cryptocurrency exchange.*

[11] Joint media release with the Hon Jim Chalmers MP Treasurer and The Hon Dr Andrew Leigh MP Assistant Minister for Competition, Charities and Treasury, "*Work underway on crypto asset reforms*", 22 August 2022 (https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/work-underway-crypto-asset-reforms).

The Australian Taxation Office has various useful online pages containing extensive information and references for treatment of Crypto assets and NFTs. The ATO states for tax purposes, crypto assets are not a form of money. The Australian government announced in its budget in October 2022 that it intended to legislate to provide that crypto is not foreign currency.

## Managing risk in property settlement matters

From the onset of receipt of instructions from your client that their former partner owns digital assets, an assessment of the risk attributable to the personality and behaviour of the other party, the proportionate mix between digital assets held by that party to the overall property pool and the risk that the other party may dissipate the digital assets, may predicate taking pre-emptive actions to preserve the property. Lawyers should exercise an additional level of caution when dealing with financial disputes that involve digital assets, particularly if they do not have a great understanding of how the asset works and how a value can be ascribed.

The Australian family law courts have wide powers to make orders preserving property pending final orders for property settlement which are useful when dealing with digital assets, see:

- undertakings: rule 10.18 of the Federal Circuit & Family Court of Australia (Family Law) Rules 2021 (**the Rules**);
- injunctions: section 114 of the *Family Law Act 1975*; and
- general power to make orders under Part VIII dealing with property settlement and spousal maintenance: section 80(k) of the *Family Law Act 1975.*

### Undertakings

If your client has genuine and reasonable concerns about the other party's capacity to dissipate digital asset such as cryptocurrency, an early step they can take is to propose that the other party enter into an undertaking. This is a "win-win" in some cases because:

1. if done properly, an undertaking has the same force and effect as an order of the court (rr. 10.18(1) of the Rules); and
2. if the other party declines, it can be used as evidence in support of a subsequent injunction.

The limitation of this strategy is that there is authority that an undertaking has to be given to a court (i.e. filed or offered in open court) in order to have legal effect — an express undertaking (as opposed to an implied undertaking, such as the *Harman* undertaking regarding the use of documents) must be accepted by the court either tacitly or expressly.[12]

### Injunctions

The Australian courts' approach to injunctions is typified by the leading decisions of *Waugh* [2000] FamCA 1183, *Mullen and De Bry* (2006) FLC 93-293 and *Tsiang & Wu and Ors* (2019) FamCAFC 128. In the latter case, the Full Court of the Family Court of Australia held at [20] – [27]:

> *"The grant of an injunction is discretionary and the basis on which such an order is made is well established. A purpose, as in this case, is to preserve the status quo pending resolution of the controversy**. An applicant must demonstrate first that there is a serious issue to be tried.** While that statement has been the subject of various iterations, in essence it requires the demonstration of an arguable case or as was said in Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57 at [65], the applicant must "show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo".*
>
> ***Next the applicant must demonstrate that the balance of convenience favours making the order sought. As part of this, the applicant***

[12] *Oswal v Burrup Holdings Ltd (No 2)* (2012) 297 ALR 599.

> ***of dissipation of or dealings with assets which will frustrate any judgment in favour of the applicant.***
>
> *It is unnecessary to demonstrate a positive intention but merely the possibility of the event occurring. The determination about the balance of convenience may thus be an inference drawn from the facts and circumstances established by the applicant's evidence."*
>
> (emphasis added)

The Rules provide for injunctions in the form of freezing orders (known at common law as "Mareva" injunctions). Pursuant to rr.5.23 of the Rules, an order can be made without notice to the respondent that has the effect of "freezing" their ability to deal with property in or outside of Australia.

In *Brott v Drew* (1993) FLC 92-358, Justice Kay made the following observation about Mareva injunctions:

> "*8. In general, the concept of a Mareva injunction is to prevent a defendant from removing assets from the jurisdiction or from disposing of or dealing with them within the jurisdiction in such a way as to frustrate execution under proceedings brought or to be brought by the plaintiff (see Spry Equitable Remedies Fourth Edition, page 504).*
>
> *9. It is necessary, in my view, to demonstrate that firstly there is a cause of action available to the plaintiff and, secondly, that action is likely to be defeated if the behaviour complained of is not restrained.*"

The freezing order must be incidental to an existing or prospective order made in favour of the applicant (i.e. a property settlement application) or the applicant has an existing or prospective claim that is able to be decided in Australia (rr.5.23(1)).

The Rules provide that when applying for a freezing order, the applicant must file a supporting affidavit that includes the following:

- a description of the property, its value, and whether it is in or outside of Australia;
- the basis for the belief that the respondent may remove or deal with the property;
- the damage the applicant is likely to suffer if the order is not made; and
- any third parties who might be effected by the order and how.

Jamie Burreket and Barbara Vrettos suggest the following considerations to take into account in seeking an injunction:

- undertaking as to damages – a respondent to an injunction application may argue, in cases where a restraint on their conduct could lead to loss or damage to them or their business, that the applicant ought to promise to rectify that loss if it occurs. As to the undertaking as to damages refer to rule 10.18(5) of the *Federal Circuit & Family Court of Australia (Family Law) Rules* (and see *White & Green & Ors* [2009] FamCA 237 and *Blue Seas Investment Pty Ltd v Mitchell & McGillivray* [1999] FamCA 745)
- nature of the crypto holding;
- likelihood it is a scheme;
- amount at risk;
- pre-separation conduct; and
- disclosure history.

## Search orders / Anton Piller orders

Search orders specifically known at common law as "Anton Piller" orders had their genesis in the information technology/intellectual property context, meeting the need for the courts to make *ex parte* orders for searching and copying of electronic data records. The advent of digital assets has enlivened the potential use of the search and seizure order.

Anton Piller orders have been recognised (see (former section 34(1) of the *Family Law Act 1975* now repealed) and section 44 of the *Federal Circuit and Family Court of Australia Act 2021*[13]) and granted by the Australian Courts[14] over the years and with the advent of digital assets we predict we will see a resurgence in their use.

The Rules contain a process that parties must follow when applying for search orders. Pursuant to rr.5.19 of the Rules, a party can apply for a search order without notice to the respondent requiring:

- the respondent to permit the applicant to enter the respondent's premises to inspect or seize documents or property or take copies of documents;
- the respondent to disclose specific relevant information; and
- restraining the respondent from notifying anyone else (other than a lawyer) that the order has been made for a period of no more than 7 days.

When applying for a search order, the applicant must file a supporting affidavit that includes the following:

- a description of the document or property to be seized/inspected;
- the address of the premises in question;
- the basis of the belief the applicant has about the risk of removal, destruction, or alteration of the document/property;
- a statement about the damage the applicant is likely to suffer if the order is not made;
- a statement about the value of the property to be seized;
- the name of a person the applicant wishes to accompany them to the premises (**e.g. a technology expert if dealing with digital assets**); and
- **the consent of one or more lawyers to act as independent lawyers and information as to their fees**. If the Court makes a search order, an independent lawyer must be appointed to supervise the execution of the order (see rr.5.21).

Pursuant to r.5.20, the applicant must satisfy the Court that:

- they have a strong prima face case for final orders (i.e. property settlement);
- the potential or actual loss or damage will be serious of the search order is not made; and
- there is sufficient evidence that the respondent possesses important evidentiary material and there is a real possibility it might be destroyed or made unavailable.

[13] The Federal Circuit and Family Court of Australia (Division 1) has power, in relation to matters in which it has jurisdiction, to:
(a) make orders of such kinds as the Court considers appropriate; or
(b) issue, or direct the issue of, writs of such kinds as the Court considers appropriate.

[14] See e.g. *Mazur* (1992) FLC 92-305 where the wife had given evidence that neither party (who had originated from Poland) had faith in the Australian banking system and, accordingly, each kept cash in a briefcase in the wardrobe of their home; *Rolands & Dibbs* [2015] FCCA 3544; *Foster & Foster* [2018] FCCA 1006; *Tassinari & Pesalaccio & Ors* [2018] FamCA 12; *Myrtle* [2012] FamCA 460.

Anton Piller orders physically secure the hardware on which parties' "wallets" are held. The success and effectiveness of the orders depend on seizure and control of the relevant passwords (the public and private keys) to access the software contained therein. As such, an order of this type may need to include further orders authorising the technology expert to break into the hardware seized if cooperation is not obtained from the subject of the orders in implementing the seizure.[15]

Anton Piller orders may also be accompanied by orders appointing an expert to value the wallets that have been seized.

### Other provisions in the legislation and the Rules

It is worth being aware of other options available for managing the risk in cases involving digital assets:

- Appointment of experts: see Chapter 7 (Experts and Assessors) of the Rules.
- There is no reason that a court expert in a financial matter must only be appointed to give an opinion a valuation. Where complex technologies are involved and essential to understanding the nature of digital assets – particularly when parties cannot agree on the nature of the assets or whether they exist at all – it might be worth considering whether an industry expert (e.g. a specialist software engineer) should be appointed to provide clarification to the Court and the parties.
- In respect of third parties (such as related entities, companies, trusts etc holding digital assets) the very broad powers under Part VIIIAA of the *Family Law Act 1975*.

## Disclosure

From a family law perspective, the blockchain has the capability to provide secure and transparent records of asset holding which, in theory, could lead to fewer disputes and reduced fraud. In fact, over time, the digitalisation of asset holdings may mean that determining an individual's asset wealth will be easier than ever before. This could provide very useful in property adjustment matters.

The very virtual and intangible nature of digital assets particularly cryptocurrency and NFTs lends itself to unscrupulous spouses who want to hide assets and obfuscate. Most of the reported decisions to date feature attempts to minimise or provide no disclosure.

Yet the very nature of digital assets based on blockchain technology where transactions are authenticated and cannot be counterfeited or duplicated means the transactions are traceable and transparent if you know the means to locate the information – that is the task that confronts you and your client.

> "*The process of buying and selling cryptocurrencies takes place through the use of a "wallet". The wallet contains a public key and private key in respect of each piece of cryptocurrency owned. These "keys" are a series of numbers or characters which act as "passwords". You must have both a public key and the private key in order to transact (which means activating self executing smart contracts or dealing with cryptocurrency) using the Blockchain. The public key is an address to and from which payments are received and is visible (by way of an account number) on the public ledger. It is traceable but does not contain any user information. The private key, which is retained by the seller, approves the transactions. It contains user information, but is not traceable.*
>
> *Therefore no personal information that identifies the buyer/seller is recorded on the ledger and the user remains anonymous. This makes the exchange of cryptocurrencies on the Blockchain much like exchanging cash …*

[15] Barry Frakes, "Hide and seek: From the "Silk Road" to mining and finding hidden money and other virtual transactions: Injunctions, Anton Piller Orders and the New Money.

> *Because of the ease of transferring cryptocurrencies, they can be transferred to another wallet owned by the same person or to family and friends, including wallets in different jurisdictions instantly (with all such accounts being anonymous and therefore the identities of the true owner of the asset and the eventual recipient being illusive).”*[16]

Trevor Vella, a highly regarded forensic accountant from Sydney makes the following suggestion[17]:

> “***The most obvious starting point to look for undisclosed holdings by an individual of a cryptocurrency is an examination of bank statements to search for payments to an exchange or broker.*** *Once one payment to, or credit card charge in favour of, an exchange is discovered a subpoena could be issued seeking details of all transactions on the wallet of the party effected via an exchange. However, only the initial purchase of CC may be via the exchange, in which case it is necessary to seek to locate the wallet of the party on his or her device or USB. In some circumstances the other spouse could search for the information on the home computer. Another possibility may be the seizure of an identifiable computer via an Anton Pilar order.*”

Jamie Burreket and Barbara Vrettos suggest the following request for disclosure of digital assets[18]:

> *In relation to all:*
>
> *a) digital assets that include cryptocurrencies, digital or virtual currencies, virtual assets and non-fungible tokens that use cryptography to secure transactions and don’t rely on a financial intermediary (Crypto-Asset); and*
>
> *b) the provisions of a Crypto – Asset secondary service including a range of services to allow customers and businesses to access and use Crypto- Assets such as:*
>
> - *custody and storage;*
> - *exchange, brokerage and dealing services; and*
> - *operating a market*

Apart from the above the following is a hotchpot of information you might seek out and considerations in respect of different types of digital assets.

## Where and what to search for? Some suggestions

In relation to cryptocurrency:

- review bank statements, and seeking to identify transfers for the purposes of purchasing cryptocurrencies, including transactions through third parties, such as PayPal and search for names of exchanges/ cryptocurrency platforms and other services related to cryptocurrency;
- review tax returns, as the sale of cryptocurrencies create capital gains tax events. Note that the Australian Taxation Office requires tax payers to keep records:

  “*You need to keep the following records in relation to your cryptocurrency transactions:*

  - *the date of the transactions*
  - *the value of the cryptocurrency in Australian dollars at the time of the transaction (which can be taken from a reputable online exchange)*

[16] Barry Frakes, supra.

[17] Trevor Vella, “Hidden Wealth, Disclosure Obligations and Financial Statements”, TEN, April 1999.

[18] Burreket, Jamie and Vrettos, Barbara, presentation, “The Rise and Rise of Cryptocurrencies – are there Pitfalls Ahead for Family Lawyers?” presented to the 19th National Family Law Conference, Adelaide, 14-17 August 2022.

- *what the transaction was for and who the other party was (even if it's just their cryptocurrency address)."*

- web browser search history;
- review business accounts where the business accept virtual currency; and
- review electricity accounts: Massive spikes in power bills. Mining cryptocurrencies and managing transactions on the Blockchain require significant computing power and transactions consume huge amounts of electricity.[19]

Apart from the above, Rachel Davey suggests that a party seek at least the following documents by way of disclosure[20]:

> "*screenshots that show the current balance of each cryptocurrency in each digital wallet, exchange or cryptocurrency account;*
>
> *a ledger of all transactions for each wallet, exchange or cryptocurrency account;*
>
> *copies of bank statements and credit card statements that reflect transactions for each wallet, exchange or cryptocurrency account;*
>
> *copies of any brokerage account statements; and*
>
> *list of any purchases of goods and/or services through the use of cryptocurrency.*"

If parties are not forthcoming with disclosure, the usual issues created by non-disclosure are exacerbated. Statements evidencing the wallet holdings of a party are key documents that can be used to substantiate the value of a person's cryptocurrency. Some exchanges will also produce end of year statements.

For the purposes of identifying assets the following is helpful[21]:

> "*In Australia, digital currency exchange providers (DCEs) are required to register with AUSTRAC and information on Australian digital currency transactions are provided to the ATO under a data matching program, however, there is no regulated centralized register of digital currency ownership.*"

In relation to other digital assets "in the cloud":

- review bank statements, to determine the value of any financial investment into the digital asset;
- call for disclosure of any expressions of interest in relation to the purchase of the digital asset; and
- if the digital asset is owned or developed by a start-up corporate entity, then call for thorough disclosure of that entity, and a valuation.

In relation to social media accounts:

- review bank statements and tax returns, to assess average income generated from these activities; and

[19] Barry Frakes, supra

[20] Rachell Davey, supra.

[21] RSM, Tax Insights: Cryptocurrency – Issues in Family Law Property Settlements

- review sponsorship, service provider, exclusivity or any other contracts which may contribute to the income earning capacity of the party.

The ability to hide digital assets and obfuscate gives rise to the potential for the *Weir* principle to be applied by the Australian Courts as happened in *Powell & Christensen* [2020] FAMCA 944*.* The Full Court of the family Court of Australia in *Weir* [1992] 16 FamCA 69 at [33] held:

> *It seems to us that once it has been established that there has been a deliberate non-disclosure, which follows from his Honour's findings in this case, then the Court should not be unduly cautious about making findings in favour of the innocent party. To do otherwise might be thought to provide a charter for fraud in proceedings of this nature… We should have thought that the Court's jurisdiction to make an order going beyond the identified property arises once there is sufficient evidence to support a finding that the party has not made a full disclosure of his or her assets.*

In *Powell*, one party had purchased cryptocurrency in breach of an existing injunction 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 but did not disclose any documentation to support his case. The Court found there had been deliberate non-disclosure as to the apparent decrease in value and so the purchase value should be found to represent the current value. The Court also noted the cryptocurrency purchased from the restricted funds should be subject of an add back to restore and protect the pool.[22]

If the party who holds the digital asset fails to make disclosure or threatens to take action to move the assets beyond the reach of their spouse may require pre-emptive action by the innocent spouse.

### Subpoena

Trite as it seems, a subpoena to a third party in support of an interim or interlocutory application is a useful means of procuring evidence when disclosure is not forthcoming.[23] Refer to Part 6.5 (rules 6.26 to 6.41) of the Rules which addresses subpoena. Where the spouse is trading on a cryptocurrency exchange / platform then a subpoena ought to be issued to the exchange.

The Rules do not specifically refer to a process for issuing a subpoena outside of the country. However, the Rules contain a process for how documents are to be served outside of Australia. It is suggested that this process be carefully complied with. The process distinguishes between service where a country is a party to the Hague Service Convention or a party to another convention about legal proceedings. There is then a process to be followed set out in the *Family Law Regulations 1984.* Importantly, service of a document in a non-convention country, where a party is relying on a diplomatic channel as may sometimes be the case, requires permission from and involvement of the Registry Manager of the Court.

## Valuations

There is little assistance to be gained from the current reported decisions to the approach to valuation. In most instances, the parties seemed to have agreed to the value of the digital assets particularly cryptocurrency included in the balance sheet.

There are significant challenges confronting parties and their lawyers endeavouring to obtain valuation evidence of digital assets where the value is disputed. As Trevor Vella notes [24]:

> *Valuation of* [cryptocurrency] *is problematic. The volatility of the price is notorious. In line with general principles the valuation should be effected at the time of making orders. In practice this is as close to the date of trial as possible.*

[22] Fraser Bax and Yehanka Ranasinghe, "The rise of cryptocurrency and digital assets in family law disputes", HopgoodGanim Lawyers.
[23] Refer to *Lea* (1990) FLC 92-172; *De Graff* (1991) FLC 92-224; *Epstein* (1993) FLC 92-384 and *Sharpe and Dalton; Twigg (Other Party)* (1990) FLC 92-167.
[24] Trevor Vella supra.

For the purposes of the balance sheet, any realised gains on disposal or transacting cryptocurrency will raise potential taxation liabilities to be accounted for subject to the *Rosati* principles[25]:

> *It appears to us that although there is a degree of confusion, and possibly conflict, in the reported cases as to the proper approach to be adopted by a court in proceedings under s 79 of the Act in relation to the effect of potential capital gains tax, which would be payable upon the sale of an asset, the following general principles may be said to emerge from those cases:—*
>
> *(1) Whether the incidence of capital gains tax should be taken into account in valuing a particular asset varies according to the circumstances of the case, including the method of valuation applied to the particular asset, the likelihood or otherwise of that asset being realised in the foreseeable future, the circumstances of its acquisition and the evidence of the parties as to their intentions in relation to that asset.*
>
> *(2) If the Court orders the sale of an asset, or is satisfied that a sale of it is inevitable, or would probably occur in the near future, or if the asset is one which was acquired solely as an investment and with a view to its ultimate sale for profit, then, generally, allowance should be made for any capital gains tax payable upon such a sale in determining the value of that asset for the purpose of the proceedings.*
>
> *(3) If none of the circumstances referred to in (2) applies to a particular asset, but the Court is satisfied that there is a significant risk that the asset will have to be sold in the short to mid term, then the Court, whilst not making allowance for the capital gains tax payable on such a sale in determining the value of the asset, may take that risk into account as a relevant s 75(2) factor, the weight to be attributed to that factor varying according to the degree of the risk and the length of the period within which the sale may occur.*
>
> *(4) There may be special circumstances in a particular case which, despite the absence of any certainty or even likelihood of a sale of an asset in the foreseeable future, make it appropriate to take the incidence of capital gains tax into account in valuing that asset. In such a case, it may be appropriate to take the capital gains tax into account at its full rate, or at some discounted rate, having regard to the degree of risk of a sale occurring and/or the length of time which is likely to elapse before that occurs.*

## Value of cryptocurrency

The value of cryptocurrencies is fluid, can fluctuate by the minute and markets can be highly volatile making it difficult to determine and apply a representative value at a specific point in time.[26]

As noted above apart from the cases where the value of the cryptocurrency is agreed between the parties or the court adopts the purchase price, there is no current authority concerning valuation of cryptocurrency.

In some instances, cryptocurrency exchanges may assist in fixing the value.

Where the parties disagree about value then it will be necessary:

- if a party seeks to retain the cryptocurrency, to engage an expert to value; or
- to sell the cryptocurrency.

## Value of NFTs

Non-fungible tokens (NFT) may be easier to value, as NFTs are generally a non-fungible digital representation of a separately identifiable and valuable asset (e.g. painting, musical work, real estate).

[25] *Rosati* (1998) FLC 92-804

[26] RSM, supra.

Identifying the existence of an NFT however will present similar challenges to those with cryptocurrency because of the lack of any regulated centralised register of NFTs.[27]

### Value of digital assets "in the cloud"

James Tan raises the following considerations about assets "in the cloud":

> "*What are the digital assets and records owned or controlled by both parties?*
>
> *Is it commercially viable to attribute a value to these digital assets and records? For example, does a copyright attach to the digital asset and record, or is there a patent attached to the code?*
>
> *If so, do these digital assets and records have a re-sale price?*"[28]

### Value of influencers and content creators: personal / celebrity goodwill?

Gregory Gilston observes:

> "*As social media expands throughout society, many individuals have turned their social media presence into a source of income through their influence over others who follow that individual on social media. These individuals, labelled "social media influencers," use their social media personas to create both tangible and intangible value." Determining whether the social media presence of a divorcing spouse is marital property, personal separate property, or a hybrid needs consideration in each jurisdiction…. Ultimately, the issue herein lies with the classification of the goodwill stemming from the social media account. Should the goodwill linked to the account be treated as enterprise goodwill or personal goodwill?*[29]

Content creators and social media influencers are the new celebrities feted by social media followers and businesses marketing their products and brands via social media. The content creators and influencers reputably earn eye watering income.

James Tan notes:

> "*Some of these personalities rely upon their content, reputation and social media influence to receive significant income streams from avenues such as advertising revenue or sponsorship agreements, largely in connection with their content published on their social media platforms*."[30]

Do such income streams / social media accounts / businesses constitute "property"?[31] Is such celebrity goodwill of any value in property settlement proceedings? What about their IP?

James Tan raises the following considerations:

- social media platforms have further developed monetisation avenues, for example, by way of contributions, subscriptions and "tips" to social media personalities; and
- many social media accounts, including Instagram, do not permit the buying, selling or transfer of their account. This makes social media accounts difficult to value as an asset.
- a social media account:
  - may be considered an asset;

[27] RSM, supra.

[28] James Tan, supra.

[29] Gregory Gilston, supra.

[30] James Tan, supra.

[31] In re: CTLI, LLC, Debtor, Case No. 14-33564, a decision of the United States Bankruptcy Court, S.D. Texas, Houston Division, the Court held that social media accounts are property in the context of a bankruptcy estate.

- may not be able to be valued as an asset with realisable value; and
- may contribute to a significant income earning capacity.

The Australian Courts approach to valuation of businesses and entities accords with general accounting principles for valuation and the "value to owner concept", e.g. see *Turnbull* (1991) FLC 92 – 258.

## Assessment of contributions and "wastage" arguments: two contrasting examples

An aspect of property settlement proceedings that is heightened when dealing with digital assets that have been dealt with by one of the parties surreptitiously and without any consultation with the other party is the question of add backs. The involvement of digital assets in property settlement proceedings with its inherent volatility, invested at times without the knowledge of the other spouse leads to arguments about differential contributions for "waste" particularly that the innocent spouse ought not be sheeted with any consequent losses.

It often comes down to a question of is it waste or simply you take the good with the bad?

The Court may notionally add back to the pool a premature distribution of a proportion of the matrimonial assets.[32] There is a long line of authority where the court is reluctant to add back expenditure post separation sourced from property in existence at the time of separation.

The leading authorities including *Kowaliw* (1981) FLC 91-092 and *Browne v Green* (1999) FLC 92-873 have featured in the recent digital assets case *Wade & Alawi* [2020] FCCA 832. In *Wade*, a husband had unilaterally drawn down on a mortgage facility to purchase cryptocurrency. The husband then gave evidence that the value of the cryptocurrency "plummeted". The wife complained about the state of the husband's disclosure.

The trial judge found that the parties should share in the loss equally as there was no evidence that the husband had deliberately wasted funds, it was simply a failed investment, and the only recklessness conduct he could be said to have engaged in was no consulting the wife:

> "*In the present case the husband did not produce any documents in support of his contention that he had invested in Bitcoins and that investment had failed. He accepted that he had not consulted the wife regarding that investment. Notwithstanding the absence of any documents, I accept that the husband invested in Bitcoin. It was not suggested by Counsel for the wife that he had disposed of those funds otherwise or that he retained the funds elsewhere. I found the husband's evidence with respect to his investment credible. He was distressed that this investment had not gone well and he had lost a substantial amount of money.*
>
> *I accept that the investment failed and this was not a case where the husband had deliberately wasted funds. I accept that the failed investment has diminished the asset pool however in my view the loss was unintentional. I accept that the husband may be considered to have been reckless in the sense that he disregarded any potential impact of his investment on the wife however I accept that he did not consider that the wife had a legal interest in the B Street, Suburb C property. I also accept the husband's evidence that if the Court determined that a de facto relationship existed after December 2012 he would accept the Court's decision in that regard.*
>
> ***I am of the view that if the investment had returned a substantial profit it is without doubt any funds still in existence would have been taken into account in adjusting the interests of the parties in property. I find that the parties should share in the losses incurred as a result of the failed investment in Bitcoin.*** *The reality is that the mortgage on the B Street, Suburb C property is about $820,000.*"

The decision of *Powell* discussed above is a contrasting example of the Court adding back to the property pool the funds applied to purchase cryptocurrency and then attributing those funds to the husband as part of his share of the property settlement. The distinguishing feature of *Powell* was the

[32] *Omacini and Omacini* (2005) FLC ¶93-218; *Townsend and Townsend* (1995) FLC ¶92-569.

husband's disregard of an injunction/breach of a court order which combined the lack of disclosure and made the Court more willing to exercise its discretion to "add back" the lost funds.

What the decisions of *Wade* and *Powell* suggest is that, given the decision as to whether to add-back funds/allocate losses between the parties is highly discretionary, it will be important to have evidence of:

1. a party's compliance with their disclosure obligations, court orders, and undertakings;

2. whether a purchase of digital assets was unilateral or done with both spouse's knowledge;

3. whether a party who embarked on a course of conduct with respect to digital assets was deliberate or reckless or whether they genuinely believed it to be a good investment; and

4. a prior history of one party acquiescing to the other party's investment decisions, including good and bad investment decisions.

## Carving up digital assets – liquidity issues and fluctuating values of digital assets

There is no reason that orders cannot be framed to deal with digital assets including:

- retention of the digital asset by the owner for the value agreed or found by the court;
- sale of the digital asset on such terms and conditions as ordered by the court; and
- transfer and assignment of the digital asset/s to the other spouse in whole or part.

Theoretically, orders could also be framed requiring the parties to enter smart contracts to secure interest and transactions on the blockchain (combined with the power of a Registrar of the Court to do all acts and things necessary to enter the smart contract where a party defaults via section 106A of the *Family Law Act 1975*).

Parties must be cognisant of the risks that are posed by the liquidity (or lack thereof) of some digital asset holdings and the volatile nature of asset values, when framing orders.

## Future trends in family law

The future of family law and digital assets is uncertain and will be influenced by advancements in technology, changes in regulations, and societal attitudes towards digital ownership. To stay current, it's essential for family law practitioners to continually educate themselves on emerging trends and seek specialized expertise in the field of digital assets.

Potential trends:

- Ownership of digital assets becoming more common place – as the majority of current holders are under 35 years of age at least in Australia, over time it will be more likely that these persons become parties to family law litigation.
- Use of technology experts as single experts – technology experts may be needed in cases involving search orders or to help the parties/court explain technologies underpinning digital assets. Your client may not be qualified to give these explanations and, if it is important that this evidence be before the court, it may be necessary to get an expert opinion to avoid your client's evidence being struck out.
- Blockchain-based prenuptial agreements: Prenuptial agreements might include clauses related to digital assets, specifying how these assets should be handled in the event of a divorce. These agreements can use blockchain technology to ensure transparency, security, and enforceability of the terms agreed upon by both parties.

- International jurisdictional challenges: With the global nature of digital assets, family law cases involving such assets may present jurisdictional challenges. Courts may need to address cross-border issues, different regulatory environments, and the enforceability of decisions related to digital assets across multiple jurisdictions.

- Estate planning and digital asset management: Estate planning may include provisions for the management and distribution of digital assets in the event of death or incapacity. Family law practitioners might need to work alongside estate planning lawyers to ensure that clients' wishes regarding their digital assets are adequately addressed in their estate plans.

- Data privacy and security concerns: As digital assets can contain sensitive personal information, data privacy and security concerns could become more prominent in family law cases. Ensuring the protection of personal information and preventing unauthorized access to digital assets may become a critical aspect of legal proceedings.

- Innovative dispute resolution methods: Technology-driven alternative dispute resolution methods, such as online mediation platforms, may emerge to handle family law cases involving digital assets more efficiently. These platforms could provide secure and transparent ways to resolve disputes while considering the intricacies of digital asset ownership and valuation.