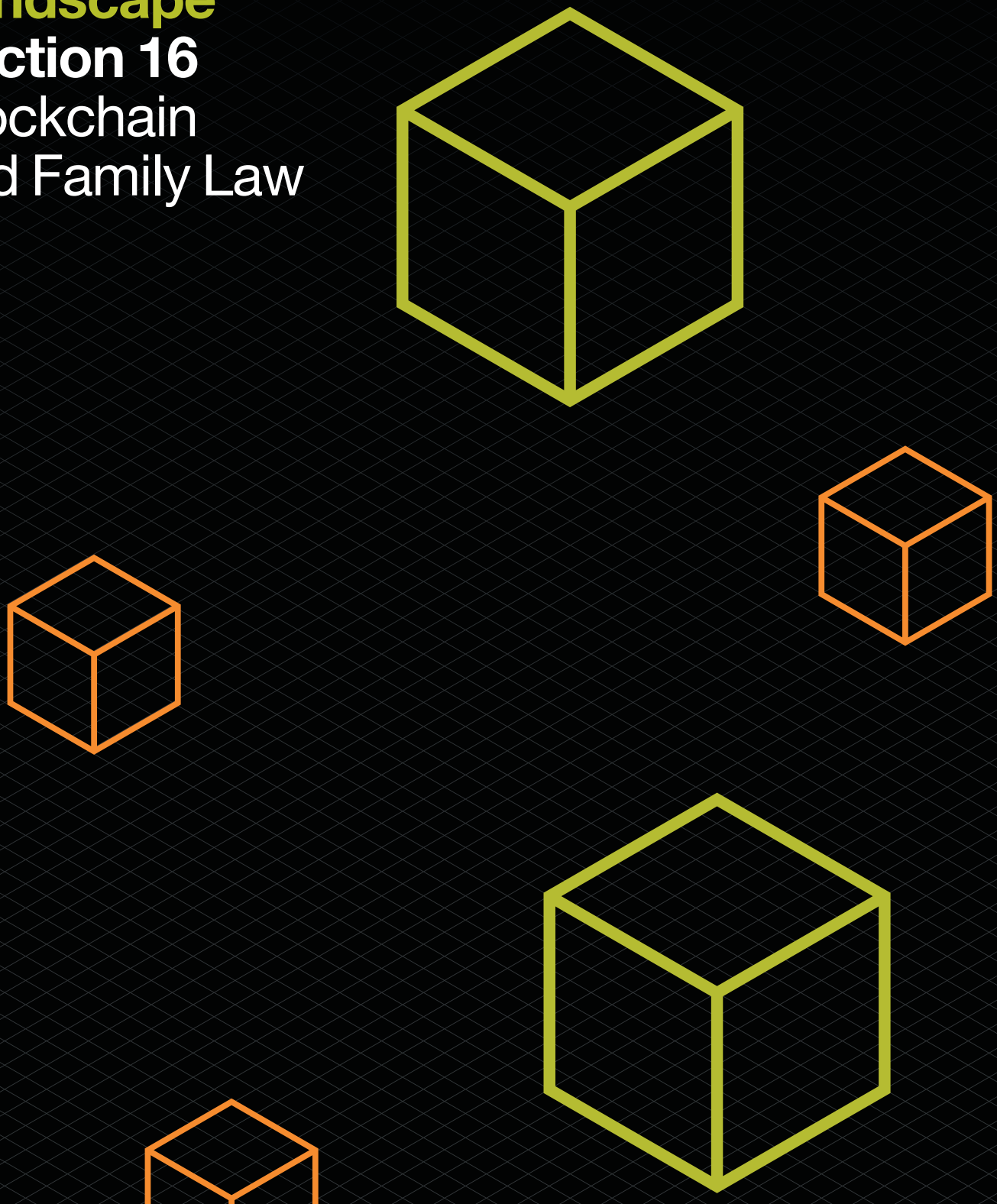
Part 2: Impacts on the Wider Landscape

Section 16
Blockchain and Family Law



Section 16: Blockchain and Family Law

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Introduction

When the Bitcoin white paper was published on 31 October 2008 it envisaged a world with a digital decentralised currency that would fall outside the control of governments and banks. It was a utopian ideal of individuals working together with a currency safe from the centralised currencies so badly affected by the financial crash of 2008. It also allowed users to obtain goods and services anonymously, and became the currency of choice on the dark web.

This anonymity has continued to be one of the most inviting features of cryptoassets within family law proceedings. Individuals can hold cryptoassets without a record anywhere of what they own, when it was obtained, or where it is being held. Arguably it is the latest in a history of tools to obstruct the Family Court from enabling a fair division of assets.

The history of illegality of some cryptoassets can cause concern to people who separate from a partner who owns such assets. It can lead to the belief that those who hold cryptoassets are also hiding other assets within proceedings. Because of this, those who hold cryptoassets are often treated with suspicion and distrust within family law proceedings leading to extensive questioning during disclosure, or a general mistrust of evidence that is provided, even if that evidence is completely accurate and detailed.

Cryptoassets in family law have not received a great deal of testing within the Court arena. This is mainly because family law cases are encouraged to settle, and the majority are unreported. Cryptoassets are also a relatively new asset, so those with significant wealth in cryptoassets may not actually be at the point of a marital breakdown. It is anticipated that more cases with cryptoassets will appear over time, through a combination of it becoming more mainstream and long-term relationships coming to an end where cryptoassets were obtained some time ago.

The majority of this chapter will therefore consider the issues arising within the voluntary settlement process, things for new couples to be aware of, and what should be considered when attempting to reach an agreement or inviting a Court to become involved.

Pre-Nuptial / Cohabitant Agreements

For those going into a new marriage, or beginning a cohabiting relationship, there is benefit to entering into an agreement setting out what would happen at the termination of that relationship. And as younger generations increasingly see the value in these documents, there needs to be consideration for how cryptoassets would be treated within these agreements.

Rather than using a generic “cryptoassets” definition, any agreement should have clear definitions of the different types of cryptoasset that are part of the agreement. If there are any identifiable wallets such as a specific cold wallet, for example a Ledger, Trezor, or other model, these should be specified within the definitions.

The public keys for any shared access wallets, or wallets containing shared cryptoassets, should also be set out in the definitions. This will avoid any future dispute over which wallets were considered shared.

If there is to be a division of any shared cryptoassets on separation, the parties could also consider a nominated wallet for cryptoassets to be transferred into, prior to division. The parties will however need to be aware that the wallets are asset-specific – for example a Bitcoin Wallet, or an Ethereum Wallet. They may therefore have to nominate a wallet per asset.

Disclosure of any separate cryptoassets should be provided in the same manner as

any other disclosure within the preparation of a pre-nuptial agreement or cohabitant agreement. This can take the form of a transaction history for a trading account that holds cryptoassets, or the history of a wallet, which is often easy to download within the interface for managing that wallet.

Financial Disclosure on Separation

There is now a Cohabitant Separation Agreement precedents book provided by Resolution, the body of family lawyers who promote the constructive resolution of family disputes.

Whilst cryptoassets are not raised within this version of the precedents, it illustrates that there are many more couples cohabiting in today's society than before. This social structure is growing in popularity, particularly with younger generations. This, together with the fact that obtaining cryptoassets is most popular amongst younger generations, makes it a fair assumption that any division of cryptoassets is likely to occur where couple are cohabitees, rather than married or in a civil partnership. There are no statutory laws to give guidance to cohabitees in England and Wales. Any agreement would effectively be a contract between the parties, with enforceability through the civil courts. It is therefore imperative to ensure that any agreement is clear and accurate.

The provisions for the split of any cryptoassets upon separation can be addressed in the same way as above. Clear definitions of the various relevant wallets will be required, with the public key where it is appropriate.

On separation, the provision of public keys will need to be considered carefully. A public key gives an individual the ability to view the balance and movement of transactions, and that degree of access following a separation may be considered excessive. Practitioners may therefore need to consider whether it is onerous to request or provide this information.

If a party is reluctant to provide their public key, this should be explained clearly to the opposing party to avoid any suggestion of withholding information or frustrating the disclosure process. It should also be recorded in any separation agreement to avoid any suggestion of failure to provide disclosure at a later date.

Financial Settlements within the Court system

The current judicial system is still working to understand cryptoassets and blockchain technology within the family courts. Things are slightly further advanced in the civil courts as there are more cases brought through civil claims between cryptoasset companies, blockchain providers, and trading platforms. The only two reported cases regarding the recognition of cryptoassets as property are both civil cases, and the only other reported case regarding cryptoassets, specifically serving an Order via NFT, was also a civil case.

It is therefore necessary for family lawyers and barristers to explain these assets to a Judge in a clear and precise manner. If not, the risk is that the importance of cryptoassets will be dismissed when considering a Final Order. Judges have been known to ignore tokens that are about to be released through an Initial Coin Offering or accepting that tokens have a nil value because they are not currently listed on a trading exchange, despite there being evidence of their value. Judges have also made Freezing Orders incorrectly, at one point freezing the UK business bank account for a global training platform because the applicant did not correctly explain that they were trying to freeze a user's trading account rather than the bank account itself. There are also professionals advertising order templates that are wrong. Some encourage practitioners to request private keys, which in itself is incorrect and could create significant harm for those that either refuse to provide these keys or provide them and have their wallets affected.

Issues for Solicitors to consider

Practitioners should ensure that clients do not consider taking purely cryptoassets by way of a financial settlement. The explosiveness and volatility of cryptoassets means that a party cannot rely solely on these assets to meet their needs. There should be a balance of centralised and decentralised assets to ensure that even at the bottom of the market, a party can meet their reasonable needs.

Clients must also investigate their tax liabilities as a part of the disclosure process. It is likely that clients will not have made any tax declarations during their trading or mining years, mainly because HMRC did not declare that these were taxable events until 2018. Practitioners should ensure that their clients accurately ascertain their tax liability as part of the disclosure exercise, to ensure they are accounting for what could be quite a large tax bill depending on how long they have held their cryptoassets.

Conclusion

Cryptoassets are here to stay, and they will form part of our society for the foreseeable future. Younger generations have grown up in a digital world, and a digital currency is one step closer to the Metaverse that is becoming more and more accessible.

Whether cryptoassets are used as a currency, or as a traded asset, they will continue to grow and develop. NFTs have had an initial peak but their intrinsic value is still appealing to many. There are those who value digital artwork, and they do not need to hold a tangible object in order for it to retain value.

These views will result in the adoption of cryptoassets increasing, and we as family law practitioners will be exposed to it more frequently. The unpredictability and complexity of these assets means that they should be respected, and understood, before being advised upon. There are practitioners who consider them on the same level as a car or artwork, but they should not be overlooked as this could cause problems for family lawyers in the future, especially if it appears that a client was not properly advised. They should be approached with caution from those with minimal experience, and expert advice be sought if a practitioner is not confident in their own knowledge of the asset.