

A Guide to Cryptocurrencies in Family Law

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Introduction

As cryptocurrencies are becoming more prevalent, we should understand what they are and how they affect different aspects of family law, such as equalization and support. This article provides an introduction to cryptocurrencies and examines the issues related to cryptocurrencies in family law.

What are cryptocurrencies?

Cryptocurrencies are types of exchange that are created and stored electronically in blockchains with the use of encryption to control the creation of monetary units and to verify the transfer of funds. A blockchain is a distributed digital transaction ledger that keeps a constantly growing list of transactions that are kept in “blocks”.¹ Every block has a timestamp along with a link to the block before it. These blocks join in a chronological fashion to create a blockchain.²

Cryptocurrencies have a few characteristics: (1) they have no intrinsic value; (2) they have no physical form; and (3) they are part of a decentralized system whereby their supply is not determined by a central bank.³ Cryptocurrencies are held directly, either in a digital wallet or a cryptoasset exchange wallet, or indirectly through a cryptoasset ETF.⁴ There are also many different types of cryptocurrencies, such as bitcoins.

Issues in Family Law

A. Non-disclosure of cryptocurrencies

Some people may use cryptocurrencies to try to hide their assets. It is impossible to know who the owner is without knowing their cryptocurrency’s unique private key. One way to find the private keys to cryptocurrencies is by finding the wallet where the private keys are held.⁵ This wallet is what the holder of the cryptocurrency utilizes in order to keep track of the private

¹ Judith Alison Lee, Blockchain 101, online: Thomson Reuters [<https://legal.thomsonreuters.com/en/insights/articles/blockchain-101>].

² *Ibid.*

³ Scott Likens, Making sense of bitcoin and blockchain technology: PwC, online: PwC [<https://www.pwc.com/us/en/industries/financial-services/fintech/bitcoin-blockchain-cryptocurrency.html>].

⁴ New Brunswick Financial and Consumer Services Commission, Crypto Assets and Cryptocurrency, online: New Brunswick Financial and Consumer Services Commission [<https://www.fcnb.ca/en/investing/high-risk-investments/crypto-assets-and-cryptocurrency>].

⁵ O’Reilly, Chapter 4: Keys, Addresses, Wallets, online: O’Reilly [<https://www.oreilly.com/library/view/mastering-bitcoin/9781491902639/ch04.html>].

key.⁶ Wallets are hardware or software that keep track of the numbers.⁷ People can also write down the number on a piece of paper, but many holders will use an “exchange”, which is a third-party service, to store the private keys.⁸

The courts are aware of the issue of non-disclosure of cryptocurrencies. They have made negative findings against a payor who refused to provide disclosure regarding their cryptocurrency holdings. These cases are as follows:

- i. In *M.W. v N.L.M.W*, 2021 BCSC 1273, the respondent refused to disclose his cryptocurrency assets and claimed that all evidence related to those assets were lost.⁹ The court heard evidence that the respondent had spent a lot of time investing in cryptocurrencies.¹⁰ Justice Veenstra held that \$60,000 would be attributed to the cryptocurrency accounts.¹¹ This finding was based on the evidence that showed that investments in cryptocurrencies were around \$100,000 and that there may have been losses.¹²
- ii. In *Schiebel v Lumb*, 2021 BCSC 2359, Justice Gaul found that Mr. Schiebel’s refusal or inability to explain certain flows of money “reflect[ed] badly on [his] credibility” and demonstrated that he had been “intentionally deceptive” during litigation.¹³ Mr. Schiebel refused to explain the regular deposits of around \$800 into his chequing account and other transfers from his mother’s account into his chequing account.¹⁴ He also disclosed for the first time during his testimony at trial that he had invested in cryptocurrencies during his relationship with Ms. Lumb.¹⁵
- iii. In *Kostrinsky v. Nasri*, 2022 ONSC 2926, the applicant was successful in her resulting trust claim in the respondent’s investment in bitcoin.¹⁶ The respondent did not include in his NFP cryptocurrency that he owned. The applicant argued that he had used her credit card without her consent to purchase the bitcoin and that as a result of s. 14 of the *Family Act*, the bitcoin belonged to her.¹⁷ She provided calculations of the value of the bitcoin.¹⁸ The respondent admitted in his testimony that he owned the cryptocurrency and also seemed to concede that

⁶ Jake Frankenfield, Cryptocurrency Wallet, online: Investopedia [<https://www.investopedia.com/terms/b/bitcoin-wallet.asp>].

⁷ *Ibid.*

⁸ Jake Frankenfield, Private Key, online: Investopedia: [<https://www.investopedia.com/terms/p/private-key.asp>].

⁹ *M.W. v N.L.M.W*, 2021 BCSC 1273, 2021 CarswellBC 2061 at para. 361 [*M.W. v N.L.M.W*].

¹⁰ *Ibid* at para. 334.

¹¹ *Ibid* at para. 361.

¹² *Ibid.*

¹³ *Schiebel v Lumb*, 2021 BCSC 2359, 40 A.C.W.S. (3d) 182 at para. 53.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Kostrinsky v. Nasri*, 2022 ONSC 2926, 2022 CarswellOnt 7576 at para 163.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

he had bought the bitcoin with the applicant's funds.¹⁹ He did not provide a calculation of the value of the Bitcoin, so Justice O'Brien used the applicant's calculation of the bitcoin to include in the respondent's NFP.²⁰

B. Determination of income

Determining someone's income from cryptocurrencies requires more than just proof of capital gains from the sale of cryptocurrencies. In *Hauber v. Sussman*, 2020 ONSC 6695, the mother claimed that for the purposes of child support, the father's income, which was based on a 5-year average and significant capital gain income from the sale of cryptocurrencies, was \$3,276,000.²¹ The father, on the other hand, alleged that this capital gain income was non-recurring and should be excluded as income for child support. He also claimed that his income should not be averaged to determine child support. The father argued that his business was in the verge of collapse due to the pandemic, leading him to have to use his own capital to sustain the business.²² His position was that child support should not increase pending trial.²³ Both of the parties retained their own expert reports. Justice Horkins determined that on a temporary motion, section 17 of the *Child Support Guidelines* could not be applied in this situation where the father had significant capital gains throughout the years from the sale of cryptocurrencies.²⁴ To arrive at this conclusion, Justice Horkins examined the mother's budget, which had indicated that the child's annual expenses were \$33,684.²⁵ Justice Horkins further implied that it would have been helpful for the mother to provide a childcare budget: While not mandatory, a budget is very helpful and important when seeking support from a high-income earner. A budget provides some evidence, albeit imperfect, of a child's needs (see *Francis v. Baker*, [1999 CanLII 659 \(SCC\)](#), [1999] S.C.J. No. 52 at para. 45).²⁶ The father had also paid nearly all of the child's expenses.²⁷ Justice Horkins concluded that the characterization of the father's capital gains, the retroactive child support claim, and the issue of the father's income were left to be determined at trial.²⁸

Hauber shows that at least on a temporary motion for support, it is not enough to simply claim that as a result of significant capital gains from the sale of cryptocurrencies, a payor's income should be determined under s. 17 of the *Child Support Guidelines*. Lawyers should also provide a childcare budget to support a s. 17 argument.

In *M.M.D. v. J.A.H.*, 2019 ONSC 2208, while Justice Nakonechny agreed with the mother that the father had "more income available to pay child support than is reflected in his 2017 net self-employment income", Justice Nakonechny refused to impute income to the father for a

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Hauber v. Sussman*, 2020 ONSC 6695, 326 A.C.W.S. (3d) 639 at paras 5 and 35.

²² *Ibid.* at paras 5 and 6.

²³ *Ibid.* at para 6.

²⁴ *Ibid.* at para 46.

²⁵ *Ibid.* at para 47.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.* at para 48.

temporary order for child support.²⁹ The father had retained an expert to provide an income report, which was not available at the time of the motion.³⁰ Justice Nakonechny held that “[w]ithout the benefit of the income valuation and cross examination [...] it would not be appropriate to impute income to the Respondent from his business income or his cryptocurrency.”³¹ Based on this case, in situations where the payor has significant income from the sale of cryptocurrencies, it would be useful for an income analysis report to be produced.

C. Seizing/Freezing of Cryptocurrencies

The courts have the power to execute and seize digital assets or funds including cryptocurrencies to satisfy a debt. In *Li et al. v. Barber et. al.*, 2022 ONSC 1176, Regional Senior Justice MacLeod heard a motion brought by citizens of Ottawa against organizers, participants, and supporters in the “Freedom Convoy”, which had blockaded Ottawa for many weeks.³² The plaintiffs brought this motion without notice to the defendants as it was the plaintiffs’ position that the defendants were going to move assets and if they were aware of the proposed injunction, they would take steps to defeat it.³³ Justice MacLeod ordered a *Mareva* injunction without warning to the defendants.³⁴ The plaintiff had “clear evidence” that some of the defendants were the owners of digital wallets that had significant cryptocurrencies.³⁵

This case can be extended to apply to family law cases. It may be possible for the court to freeze assets related to cryptocurrencies.

Future issues

While the value of cryptocurrencies has had a boom for the past few years, recently their value has dropped significantly. When a support payor’s income predominantly from the trade of cryptocurrencies drops in value may support a material change application.

Another issue that has not been dealt by the courts in great detail is the valuation of cryptocurrencies for equalization purposes. There are several methods that can be used to value cryptocurrencies: cost of production (mining costs), income approach (equation of exchange), and market approach (network value to transactions ratio).³⁶ Each approach has its advantages and shortcomings. For example, the market approach can have limits, such as the

²⁹ *M.M.D. v. J.A.H.*, 2019 ONSC 2208, 306 A.C.W.S. (3d) 591 at para. 108.

³⁰ *Ibid* at para. 38.

³¹ *Ibid* at para. 108.

³² *Li et al. v. Barber et. al.*, 2022 ONSC 1176, 2022 CarswellOnt 2019 at paras 1 and 2.

³³ *Ibid.*

³⁴ *Ibid* at para. 5.

³⁵ *Ibid* at para. 24.

³⁶ Tara K Singh & Tylar St. John, “Decrypting Crypto: An Introduction to Cryptoassets and a Study of Select Valuation Approaches”, online: (2019) 207:3 CBV 1 < <https://cbvinstitute.com/wp-content/uploads/2019/12/DecryptingCrypto-Final-DIGITAL-VERSION.pdf>>.

lack of historical data, while the cost of production approach does not consider transaction fees.

Conclusion

So far, the case law in family law regarding cryptocurrencies is still developing. Clients must provide disclosure regarding cryptocurrencies that they hold and earn income from. Family lawyers should ask their clients whether they have income or assets from cryptocurrencies. If the clients do have cryptocurrencies, request clients to provide regular and ongoing downloads of wallet/exchange transaction activity. Clients should also provide the source of funding for cryptocurrency transactions through bank statements, line of credit statements, credit card statements, and PayPal activity. If clients refuse to provide disclosure related to their cryptocurrency holdings and/or income, the court can make negative findings against them. Moreover, holders of cryptocurrencies may need to retain a business valuator to determine their income and the value of the cryptocurrencies. Finally, the court can freeze digital assets including cryptocurrencies.

In many respects cryptocurrencies are treated in a similar fashion to other types of assets for support or property purposes. Cryptocurrencies are different due to the lack of regulations, opportunities of the owner of cryptocurrencies to conceal their holdings, and the volatility of this asset's value. Cryptocurrencies also raise exceptional challenges to disclosure and enforcement in family law.