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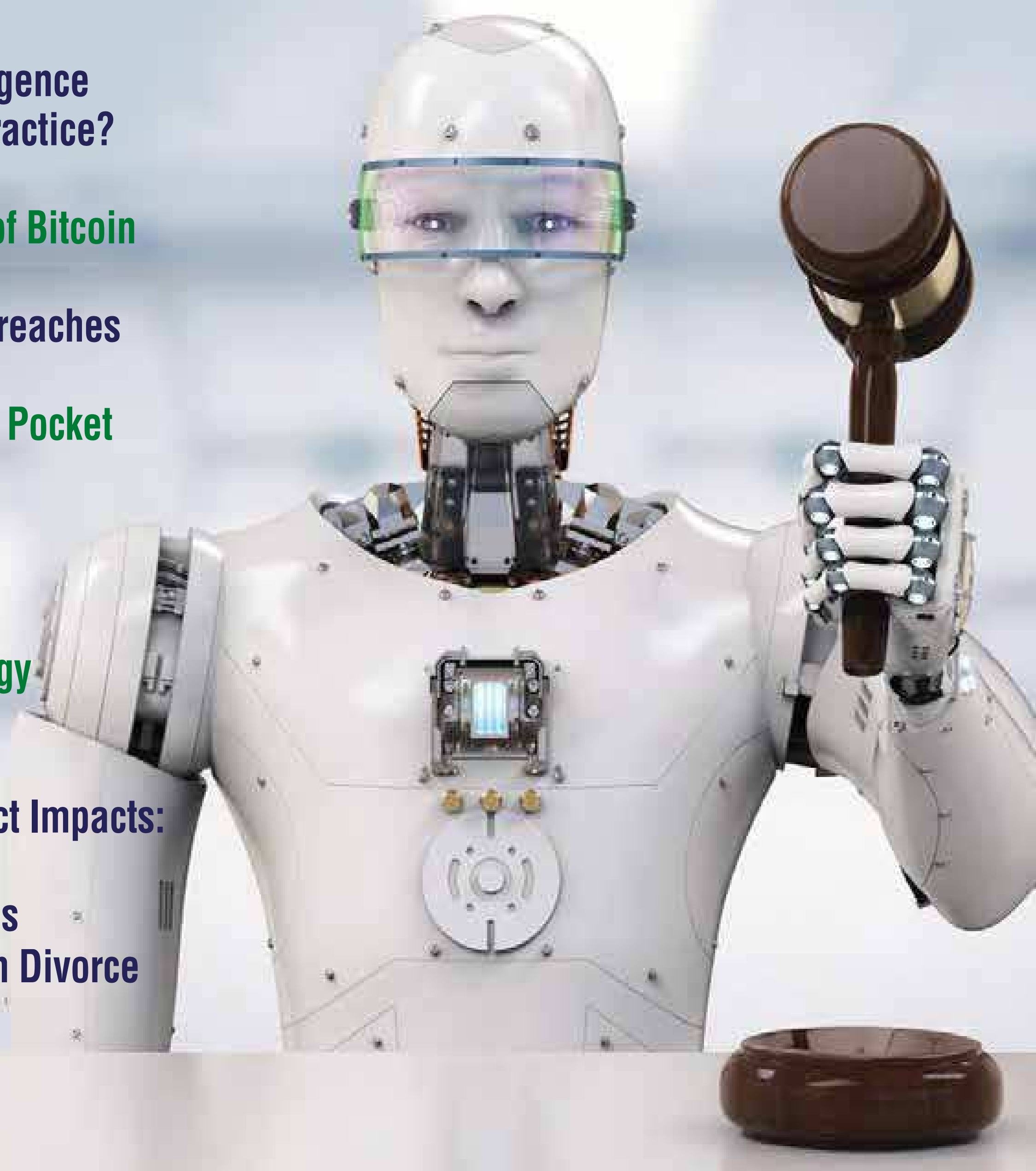

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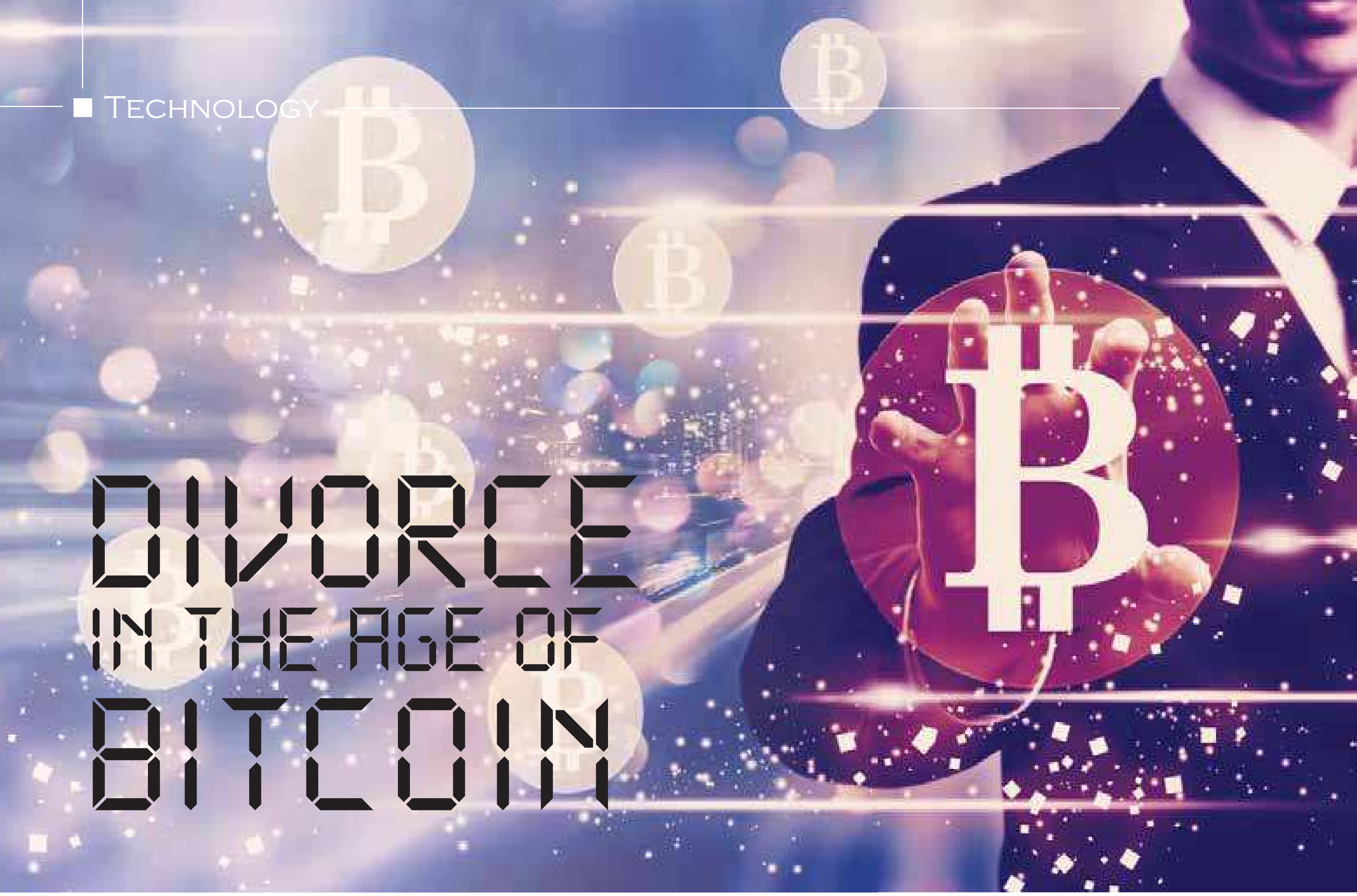


DIVORCE IN THE AGE OF BITCOIN

Since they are often traded pseudonymously, cryptocurrencies can be difficult assets to locate – and potentially a good place to hide assets during divorce. Here is what family lawyers must know about cryptocurrency.

By Carl Taylor, Family Lawyer

IN full disclosure, for quite some time my general attitude toward "crypto currencies" has been as follows: ignore them and hope they go away. Unfortunately, as family lawyers, we can no longer bury our heads in the proverbial sand.

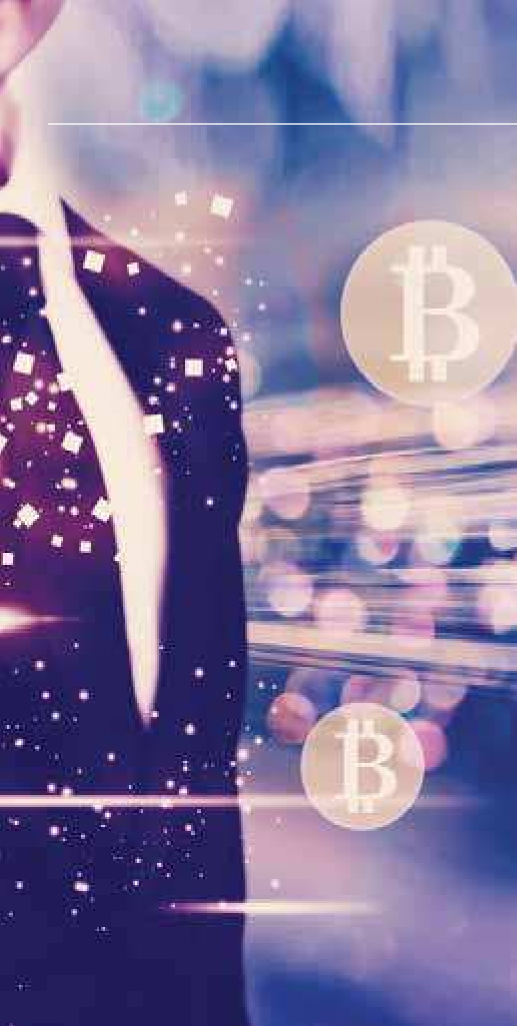
Cryptocurrencies and "blockchain" technology may or may not be the wave of the future, but they are an increasingly commonly-held "asset" class – and one that will have to be dealt with in equitable distribution, and in divorces in general. As usual, the law tends to lag behind technology, meaning there are few if any published opinions on this subject. This article will attempt to address basic principles that may apply to this volatile and burgeoning class of assets.

Overview of Cryptocurrencies

Created in 2009, cryptocurrencies ("cryptos") are a form of decentralized virtual currency that have been increasingly traded, often on virtual currency platforms. They are often anonymously owned and thus pseudonymously traded. They are "stored" in virtual or cryptocurrency "wallets": desktop, smart phone, or cloud-based software. These currencies generally utilize novel "blockchain" technology to record permanent, decentralized, and encrypted transactions to and from a virtual wallet.

In 2014, under Notice 2014-21, the IRS defined cryptocurrencies as follows: "Virtual currency is a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value." The IRS also noted in 2014-21 that: "The IRS is aware that 'virtual currency' may be used to pay for goods or services, or held for investment."

Security is a great concern regarding these types of currencies. Although Bitcoin is the most well-known type of cryptocurrency, there are now various types of these "coins" ranging from Bitcoin down to "penny-stock" type of exchanges. There has been a great deal of volatility in cryptocurrency value: during 2017, the price of one Bitcoin rose from around $900 to a high of $20,000. There have also been well-known scams, thefts, and the shutting down of crypto-exchanges. In other



words, it's the Wild West of investing.

In a run-up commonly compared to Holland's 17th Century "Tulipmania" bubble, the investment class has outpaced a hot stock market. You can now hear about cryptocurrency investment tips while getting your haircut, riding in an Uber, or talking to your cousin at the annual family get-together. Its relative anonymity makes it a difficult asset to locate – meaning it may be ripe for inappropriate divorce-planning attempts. That risk coupled with its increasing use amongst the general population means that divorce attorneys must learn the basic principles of cryptocurrencies to provide clients with necessary guidance.

Cryptocurrencies and Equitable Distribution

The treatment of cryptocurrencies for equitable distribution purposes is in theory not too dissimilar from any other asset. If at the time of divorce there exist two Bitcoins and no marital exemptions apply (such as non-commingled premarital property, gifts, inheritance, etc.), then each party should generally be entitled one Bitcoin. Likewise, one party could buy the other out provided there is agreement as to the valuation. The more interesting questions arise under protecting against a party attempting to hide these digital assets.

Because cryptocurrencies can be pseudonymously transferred to others, it may be difficult to determine ownership. In an article on the subject of cryptocurrencies and divorce on mensdivorce.com, Mat Camp calls the attempt to hide such assets: "The high-tech method of burying a sack of cash in the woods." As divorce practitioners, what can we do to effectively prevent such inappropriate actions?

First, we should consider adding specific cryptocurrency questions to all initial discovery requests. Although general questions as to currencies, monies, or assets may be sufficient, it may be helpful to ask in interrogatories whether the spouse owns or has ever owned any cryptocurrencies. Likewise, this issue can be specifically raised in requests for admissions, at depositions, and at trial. By specifically addressing the issue of cryptocurrency, the opposing spouse is more likely to be upfront and also more likely to be sanctioned if it is later discovered they are attempting to hide assets.

Finding Hidden Cryptocurrency

If you suspect a client's spouse of harboring hidden cryptocurrency, then there might be ways to discover the asset. Although Bitcoin and the like are generally pseudonymously held, their purchase and sale do create trails: cryptocurrency is generally purchased using fiat currency (creating a record), and most cryptocurrencies are purchased via an exchange (the largest one at the moment is Coinbase.com), which will charge transaction fees. You could subpoena such exchanges to procure transaction records.

The IRS has recently issued a summons seeking "a wide variety of records [from Coinbase.com] including: taxpayer identifiers for all of its customers who have bought, sold, sent or received cryptocurrency worth $20,000 or more in any tax year from 2013 to 2015; transaction logs; and correspondence." Accordingly, there may be ways to obtain releases and/or to subpoena such records to determine the existence of cryptocurrencies.

Tracking these assets on tax forms in the future should make it easier to follow the crypto trail in years to come. As always, consider retaining forensic accounting experts if you or your client believes sufficient hidden cryptocurrency assets may exist.

Are Cryptocurrencies a Passing Fad?

Whether cryptocurrencies will be merely a "flash in the pan" or the start of a new way of global commerce, not even our foremost futurists know for sure. But in the short term, there will be more and more cases where a portion of marital wealth will be a cryptocurrency held in the blockchain. Using innovative discovery and forensic accounting techniques to locate these assets will become increasingly important – both today and in the future. ■

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