



NICHOLLES
Family Lawyers

The Nicholes Newsletter.
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NEWS & EVENTS:

Law Institute Intensive - Seminar presented on recent Children's Laws

*Sally Nicholes gave a Seminar to
Family Lawyers at the Law Institute
Intensive on Friday 23 March 2007
on an update to the Shared Parental
Responsibility Laws. Sally's paper
will be shortly posted on our website*

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Recent Statistics

On March 2007 the Age reported that although women are overwhelmingly responsible for the bulk of care after a relationship break down, recent figures from the Child Support Agency show that about 21% of new cases in 2006 listed fathers as the primary care giver. This compares with 7.5% of all cases in 1997.

Dewi Cooke March 27, 2007, The Age

CAPITAL GAINS TAX ROLLOVER RELIEF:

Amendments have been made to extend the scope of Capital Gains Tax (CGT) rollover relief which apply to CGT events occurring after 12 December 2006. The amendments provide for less involvement by the Family Court in marriage breakdown settlements involving Capital Gains Tax rollover relief. Capital Gains Tax is not relevant if an asset was acquired before 20 September 1985 or if other exemption or rollover relief applies in respect to the asset.

Amendments

The amendments to Capital Gains Tax have now been extended to assets which are transferred to a spouse or former spouse due to the following:

- a. A Binding Financial Agreement;**
- b. An Arbitral Award under the Family Law Act;**
- c. A written agreement under State Law relating to a de facto marriage breakdown which cannot be overridden by an Order of a Court.**

In example a. whereby Binding Financial Agreements allow spouses to settle property issues before, during and after marriage and

in example b. where an Arbitral award allows spouses to settle marital property issues using arbitration the Court will look at the way in which both spouses used the dwelling during their combined period of ownership in respect to the asset to determine the extent to which the main residence exemption applies on the sale of the property. The test in relation to the main residence exemption is based on the following:

- a. The spouse who is transferring the dwelling (or interest in the dwelling) acquired it on or after 20 September 1985;
- b. Marriage breakdown rollover applies to the transfer; and
- c. CGT event happens after 12 December 2006.

The second amendment insures that cash settlements made on a marriage breakdown do not give rise to Capital Gains Tax liabilities. The exemption also applies to cash settlements made after 12 December 2006.

Rollover Relief

In the event of a marriage breakdown, rollover relief means that the person transferring the asset can now disregard the Capital Gains Tax or capital loss that would otherwise arise by way of such transfer. The spouse who receives the asset will now only pay any Capital Gains Tax when they subsequently on sell such asset. If the person transferring the asset required it before 20 September 1985 (pre CGT) and the rollover applies the former spouse is taken to acquire it pre CGT which generally means that no CGT is payable by the former spouse when they sell the asset. Subsequently, if the asset transferred was always the main residence by the spouse it will be usually exempt from

CGT when the asset is sold. If it was the main residence of either spouse for part of the period they owned it, a part exemption may apply on the sale. The rollover can also apply to assets transferred from a company or trust to a former spouse on marriage breakdown.

The main amendment deals with the marriage breakdown rollover relief which means that in the process of a marriage breakdown the transfer of assets from one spouse to the other will no CGT liabilities. Still though, one has to take into account the CGT payable when the receiving spouse subsequently sells the asset to a third person. The new rule applies to any kind of assets including those from companies and trusts. The rollover on a marriage breakdown applies automatically once the respective conditions are met with no need for an Application by any of the spouses. In addition, there is no CGT obligation if the spouse that transfers the asset acquired it before 20 September 1985 for reason being that the former spouse is taken to have acquired it pre CGT. In case involving a matrimonial home of either one of the spouses when transferred, one has two differing scenarios pursuant to the amendments.

If the house was always the main residence for either spouse it would usually be exempt from Capital Gains Tax when it was sold. In the other of majority of cases when the property was the main residence of either spouse for part of the period the property was owned, only a part exemption may be relevant on sale. This will only apply if the spouse transferring the dwelling acquired it on or after 20 September 1985, a marriage breakdown rollover relief applies to the transfer and the CGT event happens after 12 December 2006.

According to the new legislation cash settlements due to a marriage breakdown also do not have relevance to a CGT liability as long as the settlement was made after 12 December 2006.

NEW DEVELOPMENTS IN THE LAW:

Child Support Reforms - Stage 2

Stage 2 of the reforms to the Child Support Scheme came into effect on 1 January 2007 following on from the first stage of the child support reforms which became operative on 1 July 2006. The main reforms which form the basis of the second stage are as follows:

1. The provision for independent review of the Child Support Agency decisions to be made by the Social Security Appeals Tribunal.
 2. The ability for payees to be able to enforce a child support debt in the Family Court even if the debt is registered with the Child Support Agency for collection.
 3. The increase in the Family Court's power to make Orders staying a child support assessment and the collection or enforcement of a debt.
 4. New legislation which provides that decisions cannot be backdated more than 18 months prior to the date of the Application without leave of the Family Court.
 5. An extension of the period for which separating parents who are eligible to receive family benefits are now required to take reasonable maintenance action from 28 days to 13 weeks.
- The third stage of the reforms to the Child Support Scheme will become operative on 1 July 2008. We will keep you abreast of these changes in the coming months.

Issues concerning superannuation pensions in matrimonial proceedings

Superannuation entitlements may either be superannuation pension or a superannuation annuity. Both options provide regular periodical payments to individuals, although the difference is the source of the payment. Sec 267 of Income Tax Assessment Act 1936 defines an annuity as a benefit provided by a life insurance company or a registered organisation, while a pension includes a benefit provided by a fund for example a superannuation fund.

Since 1 July 2005 nearly every employee is eligible to choose a superannuation fund:

- the superannuation is paid under state award, industrial agreement, certified agreements or an Australian Workplace Agreement
- an employee working in the state public sector, are excluded from choice by law or regulations

The Three-Step Approach

The prevailing opinion of the Family Court is that superannuation entitlements of litigants should be dealt with in the same way as other assets of the parties.

The Family Court takes the following steps in determining how to divide matrimonial assets:

1. identify the property and attribute a value to each item;
2. assess the extent of each party's contributions in both a financial and non financial way to the assets and towards the welfare of the family; and
3. consider the financial resources, the means and needs of each of the parties and in particular, the matters set out in Section 75 (2) of the Family Law Act so far as they are relevant.

When looking at splitting superannuation entitlements the main question is, in which ratio the splitting shall be converted.

In the majority of Family Law cases there is generally one (1) partner who earns the income and contributes to the superannuation during the marriage, while the other partner is responsible for the children and the home. The court must then consider the future earning capacity of the parties especially if there are any dependant children who will be residing with either of the parties.

Another issue is the date on which the splitting of the property particularly the superannuation should be taken. The question is should the superannuation split be taken as at the date of separation, or as at the date of the trial, which in most cases can be several years later.

The prevailing opinion is to set the date of splitting superannuation entitlements as at the date of separation and that if the values of any of the superannuation interests have increased since the date of separation by reasons of post-separation contributions by one partner, the other party shall not share in these additional monies especially when there is a long period between the date of separation and the date of trial as mentioned in *Wilkinson v Wilkinson* (2005) FLC 93-222.

Although if the other party makes any direct or indirect contributions for example pursuant Sec 79 (4) of the Family Law Act 1975 after the date of separation these have to be considered by the Court as mentioned in *Ilet v Ilet* (2005) FLC 93-221.



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New Changes to Legislation

The Government announced that they are planning to change the legislation in order to simplify and streamline superannuation.

The changes are as follows:

- for people over 60, there will be no tax on lump sum and pensions;
- Reasonable benefit limits (RBL's) will be abolished;
- the age based deduction limits will be replaced with universal contributions limit;
- the self-employed will be eligible for 100 per cent deduction and get access to the Government co-contribution scheme;
- compulsory cashing restrictions will be removed;
- deductible contributions will be allowed up to age 75; and
- superannuation accounts will be consolidated by the ATO.

If you have any family law queries or questions arising from this Newsletter, please do not hesitate to contact our office.

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