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family law sting

This article appeared in this month's edition of the Law Society Journal (NSW).

You are acting for Peter in family law proceedings and have successfully negotiated an agreement in relation to property matters with the solicitor for his wife Rachel.

There is a lot of property involved and negotiations have become acrimonious. Nevertheless, you have reached the stage where everything is agreed and the terms of settlement have been drafted by which each side consents to proposed orders by the Family Court.

You are aware that capital gains tax is an issue but the accountants for Peter and Rachel have both advised that transfers under a Family Court order are exempt from CGT. You are aware that the same thing applies in relation to stamp duty.

To ensure that neither side changes their mind pending the orders being made, both sides have agreed to include the following clause in the terms of settlement:

"That the parties hereby acknowledge that pending completion of these Orders they hold their respective interests in the property dealt with in these Orders upon trust pursuant to these Orders".

Eventually the orders are made and the property divided. You breathe a sigh of relief.

The sting

You have blown the CGT exemption. You may have also created a stamp duty problem.

While property transfers under orders by the Family Court are exempt under s.126-5 of the *Income Tax Assessment Act 1997*, declarations of trust pending the making of agreed Family Court orders are not.

In brief, this is because the exemption applies to CGT event A1, which applies to transfers (and to some other CGT events) but not to CGT event E1, which applies to declarations of trust.

You are saved if the assets involved were acquired before capital gains tax commenced on 19 September 1985. But for assets acquired after that date CGT will apply, based either on the amount of money or value of assets received in exchange or the market value of the assets subject to the declarations of trust. It depends on the circumstances but either way it is pretty nasty.

So far as stamp duty is concerned the exemption from duty under section 68 of the *Duties Act* applies to property transfers under the *Family Law Act* and related situations. However, again the word is "transfer" not "declaration of trust", and there does not appear to be any interpretive provision that would help.

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