

Testamentary Trusts and Capital Gains Tax Revisited by the Family Court

In **Lovine** [2012] FamCAFC 168 the Full Court granted an appeal and remitted the case for rehearing but not before there were some telling comments made concerning the treatment of:

- the residuary property in a testamentary trust which came into existence for the benefit of one of the parties during the course of the marriage; and
- CGT and other realisation expenses flowing from the Court's property settlement orders.

The testamentary trust issue

The husband had initially appealed against the trial judge's decision to include the testamentary trust's assets valued at \$1.4M in the parties' pool of matrimonial assets which totalled \$13M and had further submitted that the trust's assets should be excluded from the pool and treated only as a "financial resource" available to the husband.

However in the course of the appeal the husband's Senior Counsel elected not to pursue that submission and the Full Court tacitly endorsed that decision.

Indeed the husband's representative specifically conceded that as the assets of the trust were in his client's effective control and for his benefit they should be treated as property and included in the parties' divisible pool of matrimonial assets.

The husband's focus on the relevance of the testamentary trust's assets then shifted to consideration of the weight to be attached to his financial contributions and whether in the exercise of judicial discretion the trial judge had undervalued this contribution given the value of the trust's assets in the context of the matrimonial pool. The Full Court was not persuaded by this argument.

Capital Gains Tax and other Realisation Expenses

The Full Court endorsed the approach taken in **Rosati** [1998] that a specified CGT liability should be taken into account if it will clearly arise from a sale or transfer certain to flow from the orders

However in circumstances where the evidence is uncertain as to:

- what assets might have to be realised as a consequence of the orders made; and/or
- the precise financial imposts arising from such realisations,

the Full Court stated that the Family Court should not make assumptions and then seek to quantify and factor in such expenses.

Rather the Family Court should make orders that if one party may incur a liability or a legitimate realisation expense or cost in selling or transferring an asset to comply with the terms of settlement, the orders should also provide for the parties to share that liability in proportion to their beneficial entitlements pursuant to the Court's orders, even if that means the net settlement outcome is uncertain until the realisation process is complete.

Kim Henderson

kim@mediatefirst.com.au

0414 863 507