

# **Tax Planning and Family Law: Where They Intersect**

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# Overview

- The role of the tax advisor
  - Overriding principles
  - CGT
  - Division 7A
  - Trust considerations
  - Other taxes
  - Child maintenance trusts
  - Superannuation
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## Role of the tax advisor

- 48,517 divorces in 2015, with 47.5% involving children
  - Family lawyers often not qualified or insured to provide taxation advice
  - Their role is centered around the negotiations
  - Tax advisor is often then a secondary consideration
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# Overriding principles

- Property v financial resource
  - Transferring entity
  - Receiving entity
  - What is being received
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## Subdivision 126-A

- Same asset roll-over for marriage or relationship breakdowns
  - Deferral of CGT but preserves pre-CGT status of an asset
  - Requirements:
    - CGT event between:
      - Individual, company or trustee; and
      - Individual's spouse or former spouse;
    - CGT events to which the rollover can apply are: A1, B1, D1, D2, D3 and F1;
    - Trigger event occurs 'because of':
      - Court order under the Family Law Act;
      - State, territory law relating to de facto relationship breakdowns;
      - Binding financial agreement (provided spouses are separated and no likelihood of cohabitation)
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## Subdivision 126-A

- Things to note
    - Court order can be by consent
    - Court order need not specify specific assets transferred
    - Assets can be transferred at a later point in time, but not before the Court order (TD 1999/53)
    - Asset transfer has to be 'because of' the Court order (TD 1999/56)
  - Circumstances when the rollover doesn't apply
    - CGT asset is trading stock (126-5(3)(a))
    - Where CGT event B1 occurs – the CGT asset does not pass to the transferee at or before the end of the agreement (126-5(3)(b))
    - Transfer to someone else other than a spouse\*
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## Sandini Pty Ltd

- Sandini Pty Ltd v Commissioner of Taxation [2017] FCA 287
  - Can a Family Court order transferring to a family trust attract roll-over relief?
  - Facts:
    - Mr and Ms Ellison divorced on 9 May 2010
    - Family Court orders made requiring Sandini as trustee for the Karratha Rigging Unit Trust to “do all acts and things and sign all documents necessary to transfer” 2.5m worth of mining shares to Ms Ellison;
    - After some correspondence, documentation was drawn to transfer the relevant shares to a family trust controlled by Ms Ellison
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# Sandini Pty Ltd

- Rollover available
    - Change of beneficial ownership sufficient for CGT event A1
    - Court orders gave Ms Ellison absolute right to the shares within seven days, and Sandini held shares as bare trustee
    - Section 103-10 applicable
    - Ms Ellison didn't have to be the transferee under the marriage rollover, rather the individual needs to have sufficient involvement in the transfer
    - Noted that transfer to trust occurred at direction of Ms Ellison
  - Wait and see, Commissioner has appealed
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## Division 118

- Main residence
  - Section 118-178 - historical ownership period factored for receiving spouse if the property is on sold at a later date after the split to a third party, enabling a pathway for a partial main residence exemption
  - Consider:
    - Property historically used as main residence, then after a split, used as a rental property
    - Property historically used as a rental property, then after a split, used as a main residence
  - Also note collectables and motor vehicles
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## Pre-CGT assets

- Division 149
    - Consider 149-30(3) and (4)
    - Circumstances where a new owner stands in the shoes of the former owner
    - Applicable where CGT event A1 or B1 occurs and Subdivision 126-A applies
    - Transferee held to have the lower of the former owner's percentage or the acquired interest, on top of any other underlying interests
  - CGT event K6
    - Relevant consideration when transferring assets into a company to cause the company to hold more than 75% post CGT assets
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## SBCGT Concessions

- Consider the appropriateness of utilising these to uplift the cost base of any transferring assets
  - Also note, however, section 152-45, where a taxpayer may include a transferring party's time of holding an active asset as their own
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## Division 7A

- TR 2014/5 – Payments by company to a shareholder or associate of a shareholder, as part of a matrimonial proceedings not included under section 109J ITAA 1936
  - Change from the historical position
  - Consider if there is a better way – don't pay, declare a fully franked dividend
  - Drafting the orders such that it is not a payment that falls within Division 7A
  - Question though whether relevant entities are party to the proceeding
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# Trust considerations

- Trust distributions as part of settlement:
    - Is intended recipient a beneficiary of the deed (read the deed) – war stories
    - If recipient only falls within class of beneficiaries, will it cover an ‘ex-spouse’
    - Family trust elections broad enough to include ‘ex-spouses’
  - Removing references to the ‘ex-spouse’:
    - Why?
      - Reference as a beneficiary – if a discretionary trust, why?
      - Remove from a control role – yes, good idea
    - Ensure appropriate powers, otherwise a variation may be required
    - What about disclaimers or renunciations
    - If removing as a beneficiary, consider if it will trigger any adverse tax consequences (including stamp duty)
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## Other

- Loan accounts and the impact of forgiving
  - Stamp duty – check on a State by State basis but at least in QLD, consider the following as well
    - Dutiable transactions
    - Landholder duty
    - Motor vehicle registration duty
    - Trust acquisition/surrender rules
  - GST – Private dealings are fine, but what if assets transferred relate to an entity's enterprise
  - Tax indemnities? Sometimes just work it out
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## Child maintenance trusts

- Child support payments under section 66 Family Law Act
  - Excepted trust income per section 102AG ITAA 1936
  - Requirements:
    - Children named as primary beneficiaries and must be younger than 18 at the time the trust is established;
    - Income is derived from property transferred to the trust for the benefit of those primary beneficiaries as a result of a family breakdown;
    - There needs to be an order requiring maintenance payments
    - Children must receive all the capital from the trust in equal shares
  - TR 98/4
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## Child maintenance trusts

- CMT may continue after minor beneficiaries turn 18, or the maintenance obligations cease provided those beneficiaries acquire the relevant property – Private ruling 1011320
  - Minor beneficiaries must acquire proportional interest in the trust property when the trust ends → deceased infant proportion passes to estate
  - Undistributed trust net income where no beneficiary is presently entitled taxed generally at section 99 tax rates (per exception in section 99A)
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# Superannuation

- Superannuation splitting (an agreement to partially pay a superannuation payment to the other spouse once a condition of release is met)
  - CGT rollover 126-D from one superannuation fund to another complying fund
  - But stop and consider other tax implications
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# Family Courts and trusts

- The myth
  - Property v financial resource
  - But is it better for assets held in a trust to be a financial resource?
  - *Kennon v Spry*
  - Family Court powers
    - Bringing assets into matrimonial property pool
    - Setting aside transactions
    - Declaring purported trust arrangements to be a sham
    - Altering ownership of a third party and making binding orders on third parties
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# Family Courts and trusts

- Matrimonial property cases:
    - *Kennon v Spry* – transactions to relinquish control and being a beneficiary considered a ‘sham’ and assets considered as property
  - Financial resource cases:
    - *Essex & Essex (No 2)* – husband’s brother controls and gave evidence husband was not meant to be a beneficiary. Financial property given husband was a discretionary beneficiary
    - *Keach & Keach and Ors* – husband’s father operated trust, but husband received distributions
    - *Harris & Harris* – husband’s mother as appointor, but insufficient evidence that she was a puppet
  - *Searle & Pencious* – no financial resource or property
    - Wife’s parents were appointors and guardians
    - Wife and husband never contributed or received distributions from trust
    - Considered a potential future inheritance, and of no value
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# Family Courts and trusts

- Lessons?
    - Who are the beneficiaries? Are they named?
    - Nature of beneficial interest? Contingent or discretionary?
    - Who controls the trust? Relationship between party and controller?
    - Has either party contributed to the trust?
    - Has either party received distributions from the trust?
    - What is the intention for the trust?
  - Ultimately, a binding financial agreement provides certainty
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# Questions and thank you

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