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Family Law Update – Part 2
Update on Capital Gains Tax in Family Law Property
Settlements

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Update on Capital Gains Tax in Family Law Property Settlements

Capital Gains Tax has been a feature of the Income Tax Legislation in various forms for many years.

The current legislation that is contained in Part III A of the *Income Tax Assessment Act 1936* as from 20 September 1985 created the first absolute Capital Gains Tax. However, another effective form of Capital Gains Tax was to be found in Section 26 AAA of the legislation dealing with the realisation of a profit from the carrying out of a profit-making undertaking or scheme.

The Family Court has had to consider the impact of this legislation from time to time.

The first reported decision was in the marriage of **Gamer**¹ where one of the issues was whether or not a deduction should be made in respect of the notional costs of the liquidation of companies where the facts were that the husband did not intend to put the companies into liquidation and that he had no plans to dispose of any of the companies or assets. The case was ultimately determined on whether the correct approach to valuation was that of a notional liquidation or assets backing approach but the Full Court expressly indicated that the trial judge was not in error in holding that a deduction should be made for the notional cost of liquidation.

The matter was next considered in the Family Court in 1991 in an unreported decision of **Sorreson**². The Full Court there said:

"In the end result, however His Honour has appeared to have made no allowance for Capital Gains Tax, realisation costs or income tax on any of the husbands' property, whether a sale of any part thereof would have been necessary or not. In our opinion, his honour erred in this respect as he was bound to, in our view, to make an allowance in the circumstances of this case for all such liabilities before determining what the net property of the parties was."

The court in effect here allowed the deductions with respect to the whole of the property of the husband rather than limiting the deduction to that part which would have to be sold.

The matter was next considered in the Family Court by Lindenmyer J in **Gorway**³ where His Honour said:

"Although the husband has no present intention of disposing of (the relevant property), it is I think appropriate to take that notional tax liability into account in assessing the net value of the assets of the parties available for distribution between them"

The topic was then considered by Holden J (as he then was) in **Rothwell**⁴ where His Honour referred to the above authorities and also to a number of Canadian authorities including **McPherson**⁵ where it was said the (earlier) cases appear to stand on their own facts and, (as) a broad distinction, an allowance should be made in the case where there is evidence that the disposition will involve the sale or transfer of property that attract tax consequences, and it should not be made in the case where it is unclear when, if ever, a sale of the property will be made, and thus the tax consequences of such an occurrence are so speculative that they can be safely ignored.

His Honour reviewed a number of House of Lords decisions including **Winter and Inland Commissioner**⁶ in which Lord Reid referred to the contingencies that had to be fulfilled or the conditions that had to be "purified" before tax could be demanded from the company:

"the sums received from the sale must exceed the unallowed expenditure, and there must be no relevant change in the law." His Lordship said in effect that the question is whether in these circumstances there was a contingent liability of the company to pay tax:

¹ 1988 FLC 91-932 18 Fam LR 454

² Appeal Number 56/91, unreported

³ June 1992

⁴ (1994) Fam LR 454; FLC (1994) 92-211

⁵ 1988 13RFL (3d)1

⁶ 1963 AC 235

"I can not doubt that if the statute says if a person does something he must pay tax, that tax is a liability of that person" and,

"I am not bound to hold that no deduction can be made in respect of the company's contingent liability to pay tax...and not bound to hold that the state duty has to be paid on a fictitious sum...it would be fiction to say that the full value of the ships could be regarded as swelling the assets of the company".

Holden J then went on to consider the relevant facts and in particular as to whether notional Capital Gains Tax ought to be deducted to arrive at the net value of the husband's shareholding and he gave the following reasons:

- "1. I have not accepted a valuation based on a capitalisation of future maintainable profits but rather have accepted one based on the net realisable value of the shares...I have found that the husband could realise (a particular amount from the sale of the shares), if he did so there is no doubt that Capital Gains Tax would be attracted.*
- 2. This is a case where the assets that exist at the end of a marriage are of two distinct types - firstly those which do not attract Capital Gains Tax most of which the wife wants and will retain... the balance of the assets do attract Capital Gains Tax....it seems to me that it would be quite unfair to value the shares disregarding the Capital Gains Tax liability and then to award to the wife, as a cash sum, a percentage of that value on a completely tax free basis.*
- 3. The result would be that the wife would receive particular assets which she can deal with as she wishes unfettered by Capital Gains Tax consideration but the husband on the other hand will retain assets which he can not dispose of or convert to cash unfettered by tax implication. Before I found that the business faces substantial risks and uncertainties in the future...(may prosper and grow or it may shrivel and die)...if the husband does not wish to face the risks and uncertainties he should get out. If he quits his shares he will pay the tax...it will be unfair to subject the value of one spouse's assets to higher risks and unknown future disposition costs."*

In respect of another class of asset altogether, Holden J found that to apply a notional Capital Gains Tax was not justified for these reasons:

- 1. The evidence established that the same future risks did not exist as in the case of the shares.*
- 2. The units had not been valued on the basis of net realisable value.*
- 3. It was uncertain to whether the sale proceeds will be payable in Australia or else where in the world and if it were the latter Capital Gains Tax would possibly not apply.*

His Honour then dealt with the rate at which tax would be deducted.

Capital Gains Tax was next considered by the Full Court of the Family Court in the marriage of **Bland**⁷ where the trial judge declined to deduct notional Capital Gains Tax from the value of a business owned by the husband.

In dealing with the issues as to whether the husband's business was likely to be sold, the trial judge pointed to the fact that the husband's counsel declined an opportunity to obtain instructions from the husband as to whether or not a company controlled by him being the owner of the business would consent to an order for sale, and said:

"The husband has ... demonstrated that he is a man of energy, talent, ambition, enthusiasm, imagination and is highly motivated and proud of his achievement in building up the business from nothing. I have no doubt that (he) will seek to find some way of getting together the sufficient cash to pay out (wife) as soon as he knows how much he has to pay her. That being so I see no justification for valuing (the business) at a lower sum to take into account the Capital Gains Tax".

⁷ (1994) 19 Fam LR 325

The Family Court took the view that the issue was correctly decided by the trial judge and accordingly Capital Gains Tax was not taken into account.

The matter was next considered by the Full Court in *Harrison*⁸ where the trial judge ignored the incidence of Capital Gains Tax in relation to the value of the husband's shares in certain family companies on the basis of a finding that there was no evidence that an immediate sale was contemplated and in any event the assets themselves were acquired prior to introduction of the Capital Gains Tax legislation.

The matter was then considered by the Full Court in *Rosati*⁹.

One of the issues in this Appeal was whether the trial judge failed to give effect to the CGT implications faced by the husband upon the **necessary** disposal of his assets to meet his liabilities. The trial judge declined to make a specific allowance for any Capital Gains Tax payable by the husband upon the sale of his business, however, His Honour did take the possibility of such tax arising into account under Section 75(2).

The Full Court reviewed the authorities referred to above, and despite the fact that they offer perhaps different conclusions as to the appropriate approach, appeared to approve of them all.

The grounds for appeal on this issue were:

1. *That His Honour erred in failing to consider in the exercise of his discretion the economic consequences of the Orders.*
2. *That His Honour failed to take into account that to discharge the mortgage secured on the matrimonial home would have involved the sale of assets requiring Capital Gains Tax to be paid by the husband.*
3. *That His Honour erred in law in failing to consider the Capital Gains Tax consequences that would inevitably flow as the result of the Orders.*

The Full Court summarised the husband's argument as follows:

"The essence of Mr Bennett's argument in support of these grounds was that, having regard to the liabilities secured against the former matrimonial home (totalling \$486,000) it is inevitable that the husband will be obliged to sell assets in his name to meet his obligation, under His Honour's orders, to discharge those liabilities within 30 days. In the proceedings before His Honour, the husband sought an order for the sale of the assets, and gave evidence that it was his intention to sell the business.

In those circumstances, Mr Bennett submitted, His Honour should either have ordered the sale of *all* the assets or, alternatively, treated such a sale as inevitable and, in either event, made an allowance for the capital gains tax which would be payable upon the sale of the business. He submitted that in those circumstances, cases such as *In the Marriage of Bland* and *In the Marriage of Harrison* where sale was not a virtual certainty, or even a probability, have no application. Rather, he submitted, dicta of Baker J (with whom Ellis and Coleman JJ agreed) in *In the Marriage of Eelsey*¹⁰ about the obligation of a trial judge to have regard to the economic consequences of any proposed orders, are apposite.

He also relied on the New Zealand case of *Hatrick v Commissioner of Inland Revenue*¹¹. That was a revenue case involving the valuation of shares in a company. Its only relevance, for present purposes, is that it was held by the New Zealand Court of Appeal, that if, in a given case, the value of the shares in a company is properly to be arrived at by the "assets-value method" (i.e. on a notional liquidation of assets basis), then allowance should be made for any dividend tax upon undistributed profits which would be payable upon such a liquidation.

⁸ (1996) 20 Fam LR 322; FLC 92-682

⁹ (1998) 23 Fam LR 288

¹⁰ (1996) 21 Fam LR 249 at 257; FLC 92-727

¹¹ [1963] NZLR 641

Mr Bennett QC, also referred to and relied upon two unreported decisions of O'Ryan J in support of those grounds. Those decisions were in the matter of *Perkins v Perkins*¹² and in the matter of *Holzner*¹³.

In reply, Counsel for the Respondent admitted that there was no evidence about the incidence of CGT upon the sale of certain of the assets, only in relation to the entire business of the husband:

1. That the husband did not give any precise evidence relating to any proposed sale of the assets in question;
2. The trial judge had made a finding that there was a lack of satisfactory evidence to enable him to make a reasonably confident prediction about whether, and if so when, for how much, and in what circumstances the business might be sold."

The alternative submission of the Respondent wife's Counsel was that His Honour's conclusion that it was inappropriate for him to attempt to calculate and adjust for the Capital Gains Tax consequences, but rather that he had taken that potentiality into account in a general way under Section 75(2), was one which was open to him in all the circumstances of this case.

In the course of argument, a member of the Court suggested that an appropriate way of dealing with the problem might be

"to make an allowance for Capital Gains Tax in a specific amount with a provision in the Orders that if tax were not assessed as payable within a specific period the husband should pay an appropriate adjustment".

However, in the earlier matter *Perkins*, as the Full Court noted O'Ryan J had said:

"In my view whether or not allowance is made for CGT depends on the circumstances of the case including the nature and method of value of the particular asset under consideration. I do not accept that simply because there is no evidence that it is intended within a specified period to realise an asset that no deduction should be made for CGT. Obviously, if the evidence reveals that either it is intended or it will be necessary to realise a CGT asset then allowance should be made for CGT."

Their Honours referred to the unreported decision of (*Holzner*) and noted that O'Ryan J had there said:

"The Full Court recently said (In the Marriage of Harrison (1996) 20 Fam LR 322 at 332; FLC 92-682 (FC)) that the reality is that any liability for capital gains tax can only be calculated if an immediate sale is contemplated and that if no sale is contemplated then any capital gains cannot be reasonably calculated. There is no evidence that the company proposes to dispose of its assets or that the husband proposes to dispose of his shares. I should add that I am bound to follow what the Full Court said. However with respect to the Full Court, in my opinion, in the circumstances of a particular case, it may be necessary to take into account the incidence of capital gains even if there is no intention to effect an immediate sale. The fact that it may be difficult to calculate the quantum of tax payable is not necessarily a reason for excluding consideration of the tax payable."

Their Honours then set out what they suggested would be the proper approach to be adopted by a Court in Section 79 proceedings in relation to the effect of potential CGT and suggested:

"The following general principles may be said to emerge from those cases:

- (a) *Whether the incidence of capital gains tax should be taken into account in valuing a particular asset varies according to the circumstances of the case, including the method of valuation applied to the particular asset, the likelihood or otherwise of that asset being realised in the foreseeable future, the circumstances of its acquisition and the evidence of the parties as to their intentions in relation to that asset.*

¹² FC of A, O'Ryan J, 2 May 1995, unreported

¹³ FC of A, O'Ryan J, October 1996, unreported

- (b) *If the court orders the sale of an asset, or is satisfied that a sale of it is inevitable, or would probably occur in the near future, or if the asset is one which was acquired solely as an investment and with a view to its ultimate sale for profit, then, generally, allowance should be made for any capital gains tax payable upon such a sale in determining the value of that asset for the purpose of the proceedings.*
- (c) *If none of the circumstances referred to in (b) applies to a particular asset, but the court is satisfied that there is a significant risk that the asset will have to be sold in the short to mid term, then the court, while not making allowance for the capital gains tax payable on such a sale in determining the value of the asset, may take that risk into account as a relevant s75(2) factor, the weight to be attributed to that factor varying according to the degree of the risk and the length of the period within which the sale may occur.*
- (d) *There may be special circumstances in a particular case which, despite the absence of any certainty or even likelihood of a sale of an asset in the foreseeable future, make it appropriate to take the incidence of capital gains tax into account in valuing that asset. In such a case, it may be appropriate to take the capital gains tax into account at its full rate, or at some discounted rate, having regard to the degree of risk of a sale occurring and/or the length of time which is likely to elapse before that occurs."*

The Court did not adopt the suggestion as to a formula, although as will be seen later that such a formula has been adopted. Ultimately the Full Court concluded that it was not satisfied in the exercise of discretion into making a specific allowance and:

... "rather we think that it was within the proper exercise of His Honour's discretion to take the prospect of such a tax being incurred by the husband into account as a relevant Section 75(2) factor, as His Honour said that he did".

Their Honours were accordingly not satisfied that the grounds for appeal were made out.

A number of Full Court decisions post *Rosati*, as O'Ryan J noted in *Ashton*¹⁴, (as to which see later) applied the *Rosati* approach "in varying degrees". These were:

1. *Hordern*¹⁵
2. *Cerini*¹⁶
3. *JEL & DDF*¹⁷
4. *Lisdale*¹⁸
5. *Noetel & Quealey*¹⁹

In *Ashton* however and G & G²⁰ O'Ryan noted that the Full Court "applied a wide interpretation of *Rosati*".

In G & G the conclusion was:

"104. ... We would perhaps go even further, and say that in our view, where property which is held by a party or the parties to proceedings under s.79 of the Act was acquired as part of a business of acquiring, developing and reselling real property for profit (i.e. essentially, as trading stock of that business) then, in valuing that property for the purpose of the proceeding, the Court should ordinarily take into account both the estimated realisation costs and the tax (in that case, "mainstream" income tax) which will ultimately be paid on its sale, even if the Court's orders leave the property in the hands of one party and the sale of it is not seen as an inevitable or even a likely consequence of those orders."

¹⁴ FCofA, O'Ryan J, 10 November 2007, unreported.

¹⁵ (1998) Fam CA 73

¹⁶ (1998) Fam CA 143

¹⁷ (2001) FLC 93-075

¹⁸ (2003) Fam CA 1066

¹⁹ (2005) FLC 93 -230

²⁰ (2001) Fam CA 1453

O'Ryan J also noted the Full Court's decision in *Cameron*²¹ where that Court justified not taking into account the Capital Gains Tax that might be payable by the husband because the Court could not be satisfied as to the extent of the asset pool itself.

A recent illustration of how this issue might be approached by the Court was in an unreported decision of O'Ryan J in *McKibbin*²². His Honour was faced with uncertainty as to what might be done with a particular asset, which if sold, would clearly attract CGT.

His Honour adopted the formulaic approach in these terms:

- "16. *In the event that in any of the financial years ended 30 June 2008 to 30 June 2010 inclusive the Husband sold as an undivided lot as it is presently held the property called "....." then the Husband do all acts and things and execute all deeds, documents, instruments and writings necessary to diligently lodge his personal income tax return for the financial year in which the property is sold and to obtain from the Australian Tax Office an assessment of his liability for tax for the relevant financial year ended and forthwith upon receipt of the assessment provide to the Wife a copy of the assessment together with a copy of the tax return and also a calculation certified by his accountant as to the amount of the assessable tax that was referable to the inclusion in the Husband's assessable income of the taxable capital gain made from the sale of the property.*
17. *Within 28 days of receipt by the Wife from the Husband of the documents in Order 16 hereof the Wife pay direct to the husband an amount equal to one half of that portion of the assessable tax of the Husband for the relevant financial year that represents the capital gains tax only in relation to the taxable capital gain from the sale of the property called.....".*

Effectively, His Honour, whilst providing a timetable or time span, plucked out of the air as it were without reference to any evidence about what that time span might properly be, at least gave the husband the benefit of a contribution by the wife to any CGT which he might incur if he disposed of the relevant property within the time frame arbitrarily chosen by His Honour.

In *Ashton*²³ O'Ryan J decided a "big money" case where the total assets were nearly \$35 million with liabilities of a little over \$10 million.

The assets were of differing character and His Honour dealt with each of them in turn having regard to their relevant history and character in so far as it was quite clear that the great majority of the assets would attract tax of some kind if realised.

It is instructive to deal with each of these assets in turn and observe His Honour's approach:

1. **The Investment Unit**

The property in question was the last of 12 units which the husband had constructed as a development and which he retained, having sold 11 out of the 12 development units in the previous 11 years.

There was no dispute that the retained unit was CGT prone and that the issue was the allowance to be made both for realisation costs and CGT.

Here the husband had capital losses which could be off-set against future capital gains.

Accordingly, O'Ryan J determined "*it would not be correct to simply include as liability the amount of (notional CGT applicable) or for that matter any amount*". His Honour noted that the husband's Counsel conceded that His Honour was being asked to "speculate on the ultimate quantum of tax".

²¹ [2000] FamCA 832

²² FCofA, O'Ryan J, 21 December 2007, unreported.

²³ FCofA, O'Ryan J, 6 November 2007.

However, His Honour concluded "*simply because I cannot include a quantified amount does not.....mean that I should ignore realisation costs and capital gains tax*". His Honour was satisfied that at some future point the asset would be sold and a taxable capital gain derived. His Honour concluded "*I cannot envisage an appropriate formulaic order²⁴. Thus, as the Full Court suggested in IABH HRBH I will take this unquantified liability into account when considering the matters in Section 74(2) or perhaps Section 79(2)*".

2. **The Training Venue**

The next asset was a property acquired 16 or more years previously with the husband's brother and used as a training venue for polo ponies and agistment of stock. The wife submitted that there was no evidence from the husband that either he or his brother intended to dispose of this property, however, His Honour concluded that the asset was "a capital gains tax asset" and indicated he proposed to take it all into account when considering the matters in Section 75(2). However, he then qualified this by saying that he thought that (the sale) "is unlikely for some time to come given the nature of the asset and the use to which it is put" and His Honour intended to give less weight to this than the previous property.

3. **The Ski Lodge**

A ski lodge had been acquired more than 10 years before. It was CGT prone. There was no evidence that the husband intended to sell it. His Honour indicated that he would take it into account under Section 75(2) but give it less weight than the weight to which he would give the unquantified liability for capital gains tax with respect to the first unit.

4. **The Subdivision**

The next property was a potential subdivision property for which development consent had been given. Some development works had commenced.

The evidence appeared to point to the fact that the husband would in fact be developing it and selling it, he having made application "in recent times for a further subdivision". However, in the absence of anything having been sold by the time of the hearing and the absence of evidence of steps being "undertaken to continue with the works" and the husband having held the property for 8 years, His Honour declined to quantify any CGT and said he would take it into account under Section 75(2).

5. **The Unit Trust**

The next item was units in a unit trust acquired with 12 other investors in 1994. There was no evidence of intention to sell. The property was used for horse agistment and polo practice. His Honour adopted the same approach as for the first unit. Again His Honour felt that the weight to be given was not as significant as to the first property.

6. **The Interest in an Investment Company**

The next asset was in relation to an interest in an investment company holding a cattle and sheep grazing property with development consent for subdivision.

The company had owned the property since 1978 however what was being considered here was the value to the husband of the realisation of his shares in the company.

His Honour found that it was not possible to quantify the tax nor what would happen in this case. His Honour decided to proceed by taking the matter into account under Section 75(2) but indicated that he was satisfied that a CGT event was unlikely for 4 to 6 years.

His Honour noted that the husband would take advice as to "an effective tax method" to take funds out of the company in consequence of sale of the property.

²⁴ IBID, Para 290 of Judgement.

7. **The Family Trust**

This Trust owned a cattle and sheep grazing property purchased in 1999, and also held certain investments in shares.

His Honour concluded that while some parts of the overall property might be sold the husband's home was located on one of the lots. In the circumstances he made the same findings as previously, noting however that in determining the weight he would give he was satisfied that in relation to the share investments a capital gains tax is likely and that also some portions of the property may be sold (and CGT incurred).

8. **The Investment Company**

This company owned a sheep and cattle grazing property acquired in 1987. The Council had approved a development application for a proposed 13 lot subdivision. The evidence was that whilst one of the lots on a separate title had been sold in 1990, there was no evidence of any attempt to dispose of the remaining lots during the last 16 years, and no evidence by the husband of any intended sale. There was no evidence of any development-type expenditure.

His Honour applied the same reasoning as to the previous asset and decided to proceed under Section 75(2) noting that it was not possible to determine "an appropriate formulaic order".

9. **Public Company Shares**

His Honour said:

"The husband for many years acquired and sold shares.....I have no doubt he will continue to do so and there will be included in his assessable income any net taxable capital gains....however, the approach of (the husband's valuer) assumes that he will sell all his portfolio in the same tax year and I do not accept this will happen. I do not know in what tax year the shares will be sold and what the husband's assessable income would be in consequence of the inclusion of any taxable capital gain".

His Honour decided to proceed by way of taking the realisation costs and CGT into account under Section 75(2) noting he was satisfied that a CGT event is likely, given the nature of the asset.

10. **Options**

The husband had share options and whilst His Honour was satisfied that a capital gains tax event was likely at some time in the future, given the husband's history of share trading, His Honour nevertheless decided to take the matter into account under Section 75(2).

11. **Public Company Shares**

The husband had been a founding shareholder in a recently listed ASX company. The shares were held in escrow as is usual in such circumstances.

Wayne Lonergan, the husband's valuer, gave evidence as to what the "escrow discount normally was to recognise that the shares could not be immediately sold". There was no evidence that the husband intended to dispose of the shares. His Honour applied the same Section 75(2) approach.

12. **Livestock**

As the husband was a farmer and grazier he had large quantities of stock (sheep, cattle and horses).

The wife submitted that there was no evidence by the husband that he proposed to dispose of all of his livestock and that tax and realisation expenses should not be allowed.

His Honour criticised the expert evidence of the husband here by saying "*This is another example of the insufficiency of evidence to enable the reliable quantification of the incidence of tax. It assumes that all the stock will be sold in the same tax year. It assumes that in the next year the husband would have no other assessable income.*"²⁵ It makes no allowance for trading expenses and assumes that all of the income will be taxed at 48.5%.

His Honour then indicated that he proposed to deal with this matter under Section 75(2).

The Decision

His Honour found that the husband had significantly greater assets than the wife and the responsibility to provide for the maintenance and support of the two young children of his current relationship for some years.

His Honour noted that the husband "*will have the obligation to pay realisation costs and tax which may include a capital gain when he sells various assets and he may well also wind up certain companies....and the amounts he will have to pay may be significant*".

The husband had contended that an amount of over \$4 million should be deducted in arriving at the net assets for this purpose.

His Honour noted that he was not prepared to give that deduction but "*as I said, I cannot ignore the nature of the husband's assets and business activities.....in my opinion cumulatively significant weight must be given to these unquantified liabilities*".

It is interesting to note that His Honour does not at this stage specify a particular amount or percentage adjustment in relation to those specific matters, rather His Honour goes to the conclusion and says this:

"The relevant matters that favour the wife include the age of the parties, the capacity for gainful employment, the greater income of the husband and the significantly greater assets of the husband.

The relevant matters that favour the husband are his responsibility for the support of the twins and the liability for realisations costs and tax on the realisations of assets.

In all the circumstances, I am of the view, that there should be an adjustment of 5% or \$1,404,320.95 of the net assets of the parties to the contribution based entitlement of the wife."

In His Honour's determination of the adjustment for the 75(2) factors he fails to mention how he has concluded how the manner in which the potential capital gains should be dealt with or how these are to be offset against relevant matters going to the Wife's Section 75(2) entitlements.

The decision is under appeal, but for other reasons than CGT, it would seem.

Is the method of adjustment selected by His Honour, that is, 75(2)(o) adjustment, appropriate? Whilst on the one hand CGT is potentially a discrete figure able to be established on the evidence, the use of 75(2)(o) is not.

However, one should not be too critical about a Trial Judge taking a 75(2)(o) approach in circumstances where whilst **at some point in time** there will be a discrete figure as to CGT given:

1. The date of disposal; and
2. The other taxable income of the disponent at that time;

there is no certainty as to either of those matters.

Perhaps in the circumstances a formulaic approach - such as was laid down in **McKibbin** - offers to the litigants greater certainty. Indeed, in **McKibbin** His Honour's approach gave the husband a little flexibility as to when he should dispose of the relevant asset, and gave him a guaranteed amount that the wife would be

²⁵IBID, Paragraph 263

asked to contribute to assuming that, if she then had assets which the husband could look to for such contribution.

SUMMARY

The *Rosati* approach, or at least a variant of it, coupled with the formulaic (McKibbin) approach in appropriate cases seems to be preferred.

What has to be kept in mind by those representing the party with CGT prone assets is the need to give some credible evidence as to the party's intention.

Whilst on the one hand the party could quite easily say, "look, if I have to pay the other party X dollars then clearly I am going to have to sell some assets", the party would then also have to concede (at least in cross examination) "however, if I only have to pay X dollars, then I won't need to sell those assets".

Therefore, the correct approach may well be as follows:

1. Regard must be had to all of the circumstances, including the valuation methodology applied to the particular asset.
2. One has to consider the likelihood or otherwise of the asset being disposed of.
3. Evidence as to this likelihood must be given.
4. If the asset was acquired as an investment with a view to ultimate sale, then generally allowance should be made for any tax.
5. That if none of the above applies "*but the Court is satisfied that there is a significant risk that the asset will have to be sold in the short to mid-term*" the Court may take that risk into account as a relevant section 75(2) factor. The weight to be attributed to that factor will vary according to the degree of the risk and the length of the period involved.
6. Otherwise it may be necessary to consider whether, in the matter, special circumstances notwithstanding, the absence of certainty or likelihood of a sale could make it appropriate to take the estimated CGT into account. Whether at a full rate or some discounted rate needs to be determined according to those circumstances.

Good Luck!

Michael Paul,
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