

FAMILYLAW



LEGAL UPDATE

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When capital gains tax is considered in the valuation of assets

The valuation of the property pool can be significantly altered depending on the inclusion or exclusion of capital gains tax (CGT) liabilities. The recent case of Noetel (2005) illustrates the general principles on when CGT is to be taken into account.

Key message

Only in special circumstances will potential capital gains tax liability be taken into account in a property settlement.

Potential CGT is a factor the court may take into account when altering the interests of parties in property divorce proceedings. The full Family Court in Rosati (1998) enunciated the following general principles of when CGT is to be taken into account in the valuation of an asset:

- » if the asset will be sold, CGT should be taken into account
- » if there is a significant risk that the asset will be sold in the short or mid-term, CGT may be taken into account depending on the circumstances
- » if the asset will not be sold, the court may in special circumstances take CGT into account at a full or discounted rate.

These guidelines were applied in Noetel. The issue in this case was whether CGT should be taken into account in the valuation of two

properties belonging to the husband that had been inherited from his mother.

On appeal, the Family Court found that CGT should not be taken into account. There was no evidence that the husband intended to sell the properties in the foreseeable future, nor was there a risk that the husband would be forced to sell the properties to fund the acquisition of a new home.

The properties had not been bought for investment 'with a view to ultimate sale at a profit' and there had been no evidence of the quantum of CGT which would be payable on the short- or mid-term sale of the properties. Further, there was no evidence of special circumstances that would require the CGT to be taken into account.

Lara Ruddle | Senior Associate
Katherine Huynh | Seasonal Clerk

Rearing children after separation: valued differently in married and defacto disputes

*In the context of property disputes, married couples are governed by the Commonwealth Family Law Act 1975, while defacto couples are provided for under State property laws. The disparity between the two regimes is apparent when comparing two recent cases, **Spiteri v Spiteri** (2005) and **Giller v Procopets** (2004), both dealing with the value to be attributed to post-separation rearing of children. These cases reveal that defacto couples are at a significant disadvantage in terms of the scope of contributions a Court will consider in reaching a just and equitable division of property.*

Key message

The primary caregiver in a defacto relationship is likely to receive less in a property settlement than would a married person because courts treat post-separation contributions differently.

Spiteri

Spiteri was an appeal by the husband against an order for property settlement in the Family Court. The husband sought a greater proportion of the assets on the basis that he had made significant post-separation financial contributions to increase the value of the asset pool.

While accepting the husband's significant contributions post-separation, Justices Finn, May and Guest found that these should be offset against the wife's contributions in caring for the children up until the hearing without her husband's support.

Giller v Procopets

In *Giller v Procopets* the Supreme Court of Victoria made a completely opposite finding based on a similar fact scenario. This case concerned a four-year defacto relationship in which the parties had two children together.

The mother sought to rely on her post-separation contributions in looking after the children to support an adjustment of real property in her favour. Justice Gillard took a very narrow approach to the scope of the contributions referred to in the *Property Law Act (Vic) 1958* and refused to place any value on the wife's post-separation contributions.

His Honour made the following assertions:

- » that contributions to 'the welfare of the family constituted by the partners' meant those made during the existence of the family relationship
- » that there was nothing in the provisions of the *Property Law Act* to support the taking into account of contributions made before and after a defacto relationship.

The implication is that the primary caregiver in a defacto relationship is likely to receive less in a property settlement than would a married person, despite having made comparable contributions to the welfare of the family.

The future – towards the referral of power

In the midst of such inequality, it is encouraging to note that State and Territory Parliaments have recently agreed to refer their powers regarding the financial matters of defacto relationships to the Commonwealth Government. It will be interesting to see whether this step resolves the current disparity and inconsistency and affords defacto couples equal access to the legal principles and procedures available to married couples under the *Family Law Act*.

Lauren Constantopoulos | Articled Clerk

Child support reform: towards the better protection of the interests of the child

The cornerstone of the **Family Law Act (Cth) 1975** is the best interests of the child. Changes to the Child Support Scheme endeavour to strengthen this ethos and will be implemented over a two-year period in three stages commencing 1 July 2006, 1 January 2007 and 1 July 2008.

Key message

Changes to the Child Support Scheme are intended to more fairly apportion of the costs of child raising – and make it easier to recover outstanding contributions.

The updated Child Support Scheme is the result of an initiative to reflect the changing attitude of Australian society towards shared parental responsibility. The changes are based on recommendations made by the Ministerial Taskforce on Child Support. Key changes include:

Stage 1 (1 July 2006):

- » minimum payments will be increased to reflect inflation
- » parents who have care of their child for at least one night a week are eligible to receive a higher 'with child' rate of some government payments
- » circumstances under which the Child Support Agency (CSA) can determine that a parent has a higher capacity to earn for child support assessment purposes will be limited
- » the amount of income above which no additional child support is payable will be capped at \$104,702 to reflect the true cost of children. The previous cap was \$139,347. This figure may again be altered by 1 July 2008 changes
- » non-resident parents will be able to seek credit for direct payments towards specific needs of the child of up to 30% of their assessment
- » there will be increased use of court action by the CSA to recover outstanding amounts of child support.

Stage 2 (1 January 2007):

- » the Social Security Appeals Tribunal will receive powers to independently review CSA decisions
- » parents will be able to pursue court enforcement of child support debt while the CSA collects ongoing payments
- » courts will have increased powers to make temporary arrangements about child support.

Stage 3 (1 July 2008):

- » a new formula for calculating child support will be introduced to better reflect the true costs of children
- » non-resident parents will have to pay the minimum amount of child support for each child
- » income from second jobs and overtime will be excluded in the first 3 years after separation
- » the process to seek a 'Change of Assessment' will be simplified.

The most significant change will be the introduction of the new child support formula which will draw together various changes implemented through the stages of reform. Affected parents will be notified by the CSA before any changes are made.

Lara Ruddle | Senior Associate
Katherine Huynh | Seasonal Clerk

Special skills: the individualistic v the egalitarian approach to contributions

The case of Figgins (2002) has cast serious doubts on the individualistic Australian approach to assessing the contributions of parties to a marriage when redistributing assets in divorce proceedings. Nicholson CJ and Buckley J of the Family Court of Appeal expressly declared their preference for the English partnership approach to dividing property.

Key message

Courts are tending to play down the value of the one spouse's 'special skill' contribution to a couple's assets, preferring equality to be the yardstick.

There is no presumption that equality is equity in the division of property under the *Family Law Act 1975* (Cth). If a spouse brings to the marriage an outstanding 'special skill' that generates considerably large assets, this would be reflected in the distribution of property by giving that spouse a greater percentage of the property pool.

The court in *JEL* (2000) made it clear an individualist approach must be taken when apportioning assets. A value must be placed on each of the contributions made by the parties to the marriage and the property is to be divided on this basis to avoid windfall distributions.

In order to reflect the 'modern recognition of equality of the sexes', the judges in *Figgins* expressed the view that the doctrine of special skills should be reconsidered in favour of the English approach in *White* (2001), where equality was the yardstick by which fairness of outcome was determined. In their view marriage should be a 'genuine partnership' and 'cases such as *JEL* ... have missed this point [leading] to an imbalance of gender considerations in arriving at results that unduly favour the male partner'.

In *Figgins* the Full Court re-exercised its discretion to grant the wife the \$2.5 million that she sought. Significantly, the Court indicated that the wife would have received more if she had asked for more, reflecting a partnership approach to the division of property.

Consistent with *White*, the English Court of Appeal in *Lambert* (2002) indicated that the doctrine of special skills should be confined to exceptional cases such as the creative artist, the superstar footballer and the inventive genius.

The fate of the doctrine of special skills is uncertain. Although current legislation mandates courts to consider the financial and non-financial contributions made by parties to a marriage when redistributing assets, the impact of *Figgins* is that special skills may only be relevant in exceptional cases.

Lara Ruddle | Senior Associate
Katherine Huynh | Seasonal Clerk

Further information

Paul Fildes
Partner
T: +61 3 9205 2006
F: +61 3 9205 2500
E: paul.fildes@middletons.com.au