

TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

The following information is only of a general nature and should not be taken as professional advice.

18 | Family Law

With time most of us will probably see a client go through a divorce or relationship breakdown. Which usually comes with a splitting up of assets. And that often has significant tax implications.

But before we look at the tax side, let's look at the family law that governs this splitting of assets. Because it is difficult to work on the tax side, when we have little idea about the legal side.

Family Law

Here are 20 things we learned about the legal side of relationship breakdowns when talking to Angelina Torrisi of Family Law Practice in this episode.

1 How is Family Law different to the Family Provisions Act?

The Family Provisions Act is about inheritances and unfair wills. If you feel unfairly left out of a will and want to get a different outcome, you would refer to the Family Provisions Act. It is covered by a different court, the Supreme Court.

Family Law deals with parenting – what will happen to the children? Who are they going to live with? Who are they going to spend time with? – and the property aspect of a relationship breakdown – What will happen to the assets? How is it going to be split? Who is going to get what?

2 Do you usually work alone on a case?

There are often several experts involved. Migrations lawyers, tax professionals and accountants are often involved in a family law dispute.

3 What is the area of greatest contention?

Every couple is different. For some it is assets, for others it is children, for many it is both and some are just out for revenge.

4 Do most couples come already with an agreement drawn up?

Most come without an agreement drawn up. Some do, but that is the minority.

5 How many cases settle before going to court?

Going to court is overwhelming. It is very scary and takes a long time. It might take 1 year, 2 years, 3 years or even longer. So about 70% of clients settle before the final hearing. A recent client entered into a consent order on Friday and the hearing was on Monday.

6 What is a binding financial agreement?

A binding financial agreement is only in relation to assets. It doesn't cover children. A binding financial agreement can be entered at any time of the relationship. At the very start or just before the wedding, while still married or even after the relationship broke down.

7 What is a parenting plan?

A parenting plan is usually done with mediators if they don't want to do consent or court orders. Consent or court orders is when a judge makes a decision about what is going to happen to the children.

A parenting plan is not a legal binding document. Parents do default. They breach orders from time to time.

8 Do most clients first see you before they see their accountant?

Funnily enough, most see their accountants first to discuss the tax implications. And then seek family law advice.

9 What issues does the tax practitioner work on?

CGT is a big issue. And potentially Div 7A when a company is part of the asset split.

10 How are assets split up?

The asset split is usually not a simple 50%/50% but it is a lot more complicated than that.

You start with an asset pool at the start of the relationship (start of cohabitation). And then you follow a timeline. Let's say the couple moved together in 2000. So you look at what they had in 2000. And then you look at what happened from 2000 until they split up in 2017. You look at their financial and non-financial contributions.

Non-financial contributions might be parenting, looking after the house, tending to the garden.

And then you also need to look at how the income earning spouse got their skills. Did the other spouse assisted the other to obtain his or her skills? For example did the wife work night shifts to finance her husband's medical studies?

If there was a simple formula regarding the split of assets, the courts would be empty apart from working out what happens to the children.

11 Does case law play a big role in Family Law?

Yes, case law plays a big role. Not because the legislation is flawed. But because there are so many cases. And also there is the just and equitable rule that requires us to look at the individual case.

12 Does the length of the relationship play a big role?

The longer the relationship, the closer it will go to 50/50. But it all depends. There are many factors that come into play. Part of the asset pool might include inheritances. An inheritance goes into the asset pool but where it goes from there depends on many factors.

13 Are inheritances set aside?

It depends on the relationship. If the husband assisted his in-laws for decades, built their house, looked after them when the parents got ill and drove them to all their medical appointments since his wife didn't drive, then in that case he contributed to the assets of his in-laws. And in that case he would have a claim to part of the inheritance in the asset pool.

But if there had been no close relationship, then there is a stronger case to put the inheritance aside in the asset pool.

14 What about a discretionary trust? Is it safe from family law?

Nothing is safe from family law. Everything goes into the asset pool but how the asset pool is then allocated and split depends on the individual case.

For a discretionary trust they first look at who is listed as a beneficiary and then look at the pattern of distributions over many years.

15 What is the relationship like between the lawyers for each party?

One spouse might have a barrister and a solicitor while the other spouse might only have a solicitor for financial reasons. That can sometimes make the interaction more aggressive.

You can go into the family law without legal representation. A solicitor and barrister can help you, but you are not obliged to have either.

16 What is the affidavit about?

The affidavit sets out the story of the relationship. How they lived. Who contributed what, when and how. And then it is backed up with annexes that support the statements made.

The tax accountant is usually not involved with the writing of the affidavit. Instead the tax accountant is usually involved with the draft of the family law balance sheet.

The family law balance sheet is not a standard balance sheet. But it is a balance sheet in a specific format for family law purposes. It consists of two columns, one column for each spouse. And then each column has separate headings: Assets, Financial Resources, Add Backs, Liabilities.

For liabilities we need the tax accountant's input re CGT, dividends, Div 7A, tax components for payments out of super.

17 What value does parenting get in this?

Parenting doesn't get a monetary value per se. It all depends on what a spouse did before, during and after the family leave. So parenting is not worth a specific amount but depends on the parent's background. Parenting only counts until a child reaches 18.

18 Do you usually involve a tax accountant?

Yes, because the tax implications can be huge. For example when the spouses own an investment property. Or have a sizeable assets in super.

19 What is an add back?

Here is an example. One of the spouses gambles. He or she redraws from the mortgage on the house and gambles these funds as well. So later the other spouse finds out that the fully paid off mortgage now has

TAX TALKS

\$500,000 missing.

That \$500,000 could be claimed as an add-back to the gambling spouse. The argument is that they had already received these funds. It is not a liability that both spouses should equally take on board.

But there have been cases over the past few years that indicate that the court are moving away from add-backs in family law. So add-backs are contentious and are not a clear cut case anymore, unless there are exceptional circumstances. The case of Stamford v Stamford in 2012 in High Court is one of the latest cases that support disregarding add-backs.

20 Have you ever seen couples reconciling while talking to you?

Never while they went through the break up. But four people reconciled later after the divorce and got back together. And to the best of our knowledge they are still together. But that is only four couples out of thousands of clients.

MORE

[SMSF Estate Planning Post July 2017](#)

[Electronic Signatures](#)

[US Nonresident Alien Spouse](#)

Disclaimer: Tax Talks does not provide financial or tax advice. This applies to these show notes as well as the actual podcast interview. All information on Tax Talks is provided for entertainment purposes only and might no longer be up to date. You should seek professional accredited tax and financial advice when considering whether the information is suitable to your or your client's personal circumstances.

The information above is for general information only and should not be taken as constituting professional advice from Tax Talks. We are not a financial, legal or tax adviser. You should consider seeking independent legal, financial, taxation or other advice to check how the above information relates to your unique circumstances.