

Property rights for all but capital gains tax still unfair

Financial advisers need to be aware of the tax and property rights implications following the passage of new legislation passed by the NSW Parliament in June 1999. **NABIL WAHHAB** reports the consequences could cost or save their clients tens of thousands of dollars in tax.

Up until the end of June 1999, the only people who could apply for property division on the breakdown of their relationship were heterosexual couples who had lived together for at least two years.

Up until June 1999, people who lived in intimate relationships, but were not married and were not covered by the then De Facto Relationships Act had limited rights to a share of property. According to Jeff Shaw QC, the then NSW Attorney General, these people had to rely on "the vagaries of the common law relating to constructive trust on the breakdown of a relationship".

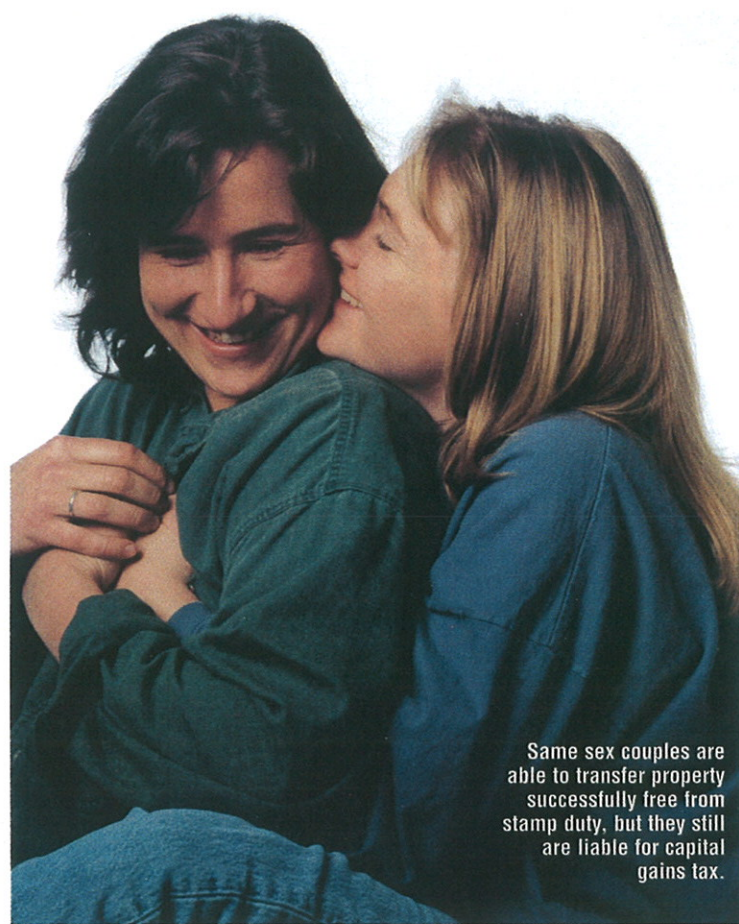
The new legislation, the Property (Relationships) Act 1984 (the PR Act), extended the class of people who can apply for property division on the breakdown of a relationship. They include people living in a close personal relationship such as same sex couples and a daughter who cares for an elderly parent (as well as heterosexual couples). In enacting the PR Act, Shaw said that the Government has recognised "that contemporary society has developed to a point where laws that regulate the division of property on the failure of a broad range of intimate relationships are necessary and desirable".

The PR Act now provides for property division on the breakdown of a Domestic Relationship. This means that same sex partners have the same rights as heterosexual partners. What is also important is that other relationships are covered by the definition such as a daughter who cares for her elderly parent residing together for the purpose of obtaining and giving domestic support and personal care. Only relationships falling within this definition are within the scope of the PR Act.

There are a number of differences between a de facto relationship and a close personal relationship. First, a close personal relationship may exist between people who are related by family whereas a de facto relationship may not. Second, a de facto relationship is defined by reference to a list of relevant matters, whereas the concept of a close personal relationship is left undefined except for a list of excluded cases. Third, whereas all de facto cases come within the ambit of the PR Act, only those close personal relationships in which (a) the parties are living together and (b) in which one or both provide the other with "domestic support and personal care" are included.

People who live in a domestic relationship (whether or not they are de facto or people who live in a close personal relationship) can enter into Domestic Relationships Agreements at the beginning of or during cohabitation. These agreements make provision with respect to financial matters and provide the mode of dividing the property on the breakdown of relationships well in advance of any breakdown.

The agreements may be made in contemplation of the parties entering into a domestic relationship or during cohabitation. Domestic Relationship Agreements



Same sex couples are able to transfer property successfully free from stamp duty, but they still are liable for capital gains tax.

are enforceable as contracts. They provide certainty well ahead of any breakdown. Provided the parties receive legal advice as to whether to enter into the Agreement and a certificate is attached to the Agreement, the Agreement operates in substitution for the parties rights to obtain orders for maintenance and property under the PR Act.

A Termination Agreement is an agreement that persons who lived together in a close domestic relationship can enter into with a view to severing and finalising their financial relationships on the breakdown of their relationship. Parties generally enter into such agreements when they have reached an agreement as to the division of their assets.

The NSW Parliament also amended other Acts of Parliament to ensure equitable and just treatment of relationships on the breakdown of a relationship. One such Act that was amended by Parliament is the Duties Act 1997 (NSW) (DA 1997), which provides that stamp duty is not payable on a transfer on the breakdown of a relationship not just de facto relationship.

Therefore, under the DA 1997 no duty is chargeable where, for example, a Termination Agreement between John and Jill provides for John to transfer a relationship property to Jill on breakdown of their relationship.

The same applies in respect of same sex

couples who enter into a Termination Agreement or where a court makes an order for the transfer of a property. In such a situation no duty would be payable on the transfer of the relationship property between say Joanne and Jill who have entered into a Termination Agreement, which provides for Joanne to transfer a property to Jill.

It is submitted that under the DA 1997 a transfer of property from a parent to a daughter who had been caring for her elderly parent for a number of years under a Court Order or pursuant to a Termination Agreement would also be exempt from stamp duty.

The Federal Government, however, is lagging behind with the Tax Act still discriminating against people who live in a domestic relationship such as homosexual couples and the daughter caring for an elderly parent. It is discriminatory as on the transfer of property on breakdown of such a relationship the parties to the relationship do not get the Capital Gains tax roll-over relief that heterosexual couples receive on transfer of property in the event of a breakdown of their relationship.

The capital gains or losses tax roll-over provisions in the Income Tax Act 1997 (Cth) (the ITA 1997) are very beneficial financially for separating couples whether or not they are married. Under the ITA

1997 roll-over relief is afforded to a spouse on the transfer of property (or shares) where Orders are made under the Family Law Act 1975, or a Maintenance Agreement approved by the Court under Section 87 of the Family Law Act 1975, or where a Court order is made under the PR Act or pursuant to a Termination Agreement.

The roll-over relief provisions in the ITA 1997, however, do not apply on the breakdown of a close personal relationship (other than a marriage or a de facto relationship). That is unless the parties are a heterosexual couple the roll-over provisions do not apply.

This is because of the definition of Spouse under the ITA 1997. Spouse is defined in Section 995-1 of the ITA 1997 to mean as follows:

"Spouse as a person includes a person who although not legally married to the person lives with the person on a genuine domestic basis as the person's husband or wife."

It is evident from the above that the capital gains or losses tax roll-over provisions do not apply to transfer of property between same sex couples who enter into a Termination Agreement or where a Court makes an order under the PR Act. The same is true in respect of other close personal relationships, which break down such as a relationship between daughter and a parent who reside together and where one provides domestic support and personal care to the other because these classes of relationships fail the "Spouse" test under the ITA 1997.

NSW, Queensland and the ACT have amended their respective de facto relationships Acts to extend the definition of de facto relationship to also include close personal relationships. It is unfortunate that to date the Federal Government has not amended the ITA 1997 to provide roll-over relief on the breakdown of a close personal relationship (other than a marriage or a de facto relationship).

Until such time as the Federal Government amends the Income Tax Act 1997, professionals such as lawyers, financial advisers and accountants must be vigilant when they are approached by clients who are in or are about to enter into a domestic relationship so that the asset ownership is structured in such a way to maximise their entitlement and benefits in the event that there is a breakdown in the relationship or at least ensure that such structure leaves them neutral in respect of any capital gain or loss. One way to do so would be to ask who would wish to retain the property in the event the relationship breaks down and put that property in that party's name. The Domestic Relationship Agreement can then be drafted in such a way so as not to affect the other party's enjoyment of the property during the parties cohabitation.

If you or your client may be affected by the unfair treatment of the capital gains tax roll-over provisions you should lobby your federal member of Parliament and write to the Treasurer so that this discriminatory aspect of the ITA 1997 be remedied.

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