

WHAT'S YOURS IS MINE PART II

MAY 28, 2019 | PROPERTY SETTLEMENTS

In an [earlier article](#) we wrote about the Full Court of the Family Court's decision in *Tomaras & Tomaras & Anor and Commissioner of Taxation*^[1]. In that decision the Full Court concluded that one spouse could be substituted for another in relation to a taxation debt. An appeal against that decision was made to the High Court of Australia. The High Court has subsequently confirmed that the Court does have the power to substitute one spouse for the other in respect of a taxation debt, but "there will seldom, if ever, be occasion to exercise that power".

BACKGROUND RECAP

Mr and Mrs Tomaras married in July 1992 and separated in July 2009. During the marriage, the Commissioner issued various assessments requiring Mrs Tomaras to pay income tax, the Medicare levy, penalties and the general interest charge. Mrs Tomaras failed to pay the amounts assessed and did not lodge objections under Part IVC of the *Taxation Administration Act 1953* (Cth). In November 2009, the Commissioner obtained default judgment against Mrs Tomaras. By August 2016, Mrs Tomaras' liabilities to the Commissioner totalled \$256,078.32, being the judgment debt of \$127,669.36 and general interest charges in the amount of \$128,925.73.

Mr Tomaras was declared bankrupt in November 2013. In December 2013, Mrs Tomaras commenced proceedings in the Federal Circuit Court of Australia against Mr Tomaras seeking, relevantly, orders under section 79 of the *Family Law Act* for alteration of their property interests. Initially, Mrs Tomaras sought an order that Mr Tomaras be *responsible* for her tax debt but amended her application to seek an order that Mr Tomaras be *substituted* for her as the debtor, and that he be solely liable to the Commissioner for that debt. The Commissioner was granted leave to intervene in the proceedings in relation to that order.

The Federal Circuit Court trial judge asked the Full Court of the Family Court of Australia for a determination on the following point of law: does s90AE(1) and (2) grant the court power to make an order in s79 proceedings substituting one party to a marriage for another in relation to tax debt? The Full Court concluded that one spouse could be substituted for another in relation to a taxation debt, but declined to make an order that Mr Tomaras be solely liable for the debt.

JUDGMENT OF THE HIGH COURT OF AUSTRALIA

The Commissioner appealed the decision of the Full Court of the Family Court, arguing that section 90AE of the *Family Law Act* did not apply to taxation debts because Crown immunity was engaged.

In the High Court judgment, Gordon J said:

"The relevant provisions of the Family Law Act do not expressly state that they bind the Crown. The presumption that general words of statutory provisions will not bind the Crown operates as no more than a general principle of statutory construction; or an aid to statutory construction. In certain circumstances, the presumption may represent little more than the starting point of the ascertainment of the relevant legislative intent. The ultimate question must be whether the presumption has, in all the circumstances, been rebutted and, if it has, the extent to which it was the legislative intent that the relevant statutory provisions should bind the Crown. The 'circumstances include the terms of the statute, its subject matter, the nature of the mischief to be redressed, the general purpose and effect of the statute, and the nature of the activities of the Executive Government which would be affected if

the Crown is bound'. That list is by no means exhaustive."

The Commissioner also tried to make a distinction between tax debts and other debts. Three of the High Court justices rejected this distinction. Kiefel CJ and Keane J said:

"Nothing in Pt VIII of the Act suggests an intention to differentiate between Commonwealth, State and Territory revenue authorities or an intention to differentiate between revenue authorities and other creditors."

HAS THE LAW CHANGED?

The High Court held that it is difficult to identify a circumstance where any order would be made under section 90AE of the *Family Law Act* if it diminished the ability of any creditor to recover a debt owed to them by one or both parties to the marriage:

"The fact that the husband in this appeal was bankrupt is reason enough not to make the order sought by the wife under s 90AE. But there are other facts, matters and circumstances which compel the same conclusion in this appeal: the inability of the husband to exercise the Pt IVC rights of objection and review (both because the time allowed to the wife for objections has long expired, and because of the difficulties identified above); the fact that the debt owed to the Commonwealth, in relation to which the Commissioner has obtained default judgment, is long overdue; and the fact that the size of that Commonwealth debt continues to increase, not just on a daily basis, but at a higher rate, because of the accruing GIC. That list is not and cannot be exhaustive. However, those facts and matters, or even some of them, compel the conclusion that a court could not be satisfied of the matters prescribed in s 90AE(3) and, therefore, the court would not be empowered to make a substitution order under s 90AE(1) in Pt VIII A A."

The orders that a court may make under section 79 and section 90AE which bind a third party (here, the Commonwealth), are confined by the terms of section 90AE. The High Court held that for the purposes of the present appeal, a court may only make an order concerning a debt of a party to a marriage which binds a third party if *"it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full"*.

The High Court noted that s90AE(1) conferred power on the court to make an order that the Commissioner be directed to substitute Mr Tomaras for Mrs Tomaras in relation to the taxation liability, holding that:

"Although in relation to a debt owed to the Commonwealth by a party to a marriage s 90AE(1) confers power to make an order that the Commissioner be directed to substitute the husband for the wife in relation to that debt, it is otherwise inappropriate to answer the question without it being found, or agreed, that, within the meaning of s 90AE(3), the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage, and it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and without the court being satisfied that, in all the circumstances, it is just and equitable to make the order."

It is important to note that whilst s90AE(1) of the *Family Law Act* confers power on the court to order that the Commissioner be directed to substitute one spouse for another in respect of a taxation liability, in making such an order, the court must also be required to consider and answer the following questions:

- Is the making of the order reasonably necessary or reasonably appropriate, or adapted to effect a property division between parties to a marriage?
- That it is not foreseeable at the time of making the order that the order would result in the debt not being paid in full; and
- That the court is otherwise satisfied that the order is just and equitable.

These considerations are important in the context of Tomaras' case. At the time Mrs Tomaras sought an order that Mr Tomaras be substituted in respect of her taxation liability; Mr Tomaras had entered into bankruptcy.

In short, in the circumstances of this case, the ATO was never going to be paid the liability by Mr Tomaras

and therefore, whilst the power existed to make an order for substitution, it was most unlikely that the discretion to utilise this power would ever have been exercised.

[1] *Tomaras & Tomaras & Anor and Commissioner of Taxation* (2017) FamCAFC 216

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