

RECTIFICATION OF ASSET PROTECTION POST BOSANAC V FCT

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The Problem – Bosanac Case Blows the Lid on Spouse Holding Assets

Have you heard or read this before:

“It is important to be able to identify which individuals or entities are considered ‘high risk’ (and are hence more likely to be at the mercy of creditors in difficult times) and which ones are ‘low-risk’. Upon making this risk assessment, ideally the ‘high-risk’ individuals or entities are divested of any valuable assets so to try and keep them out of the creditors’ reach. In turn, the group’s ‘low-risk’ individuals or entities would be best to hold these assets. In the end, if the ‘high-risk’ individual or entity is pursued by creditors then further losses may be kept to a minimum where the individual or entity does not actually have any assets for the taking.”

The Problem – Bosanac Case Blows the Lid on Spouse Holding Assets

FEDERAL COURT OF AUSTRALIA

Commissioner of Taxation v Bosanac [2021] FCAFC 158

Appeal from:	<i>Commissioner of Taxation v Bosanac (No 7)</i> [2021] FCA 249
File number:	WAD 82 of 2021
Judgment of:	KENNY, DAVIES AND THAWLEY JJ
Date of judgment:	31 August 2021
Catchwords:	EQUITY – presumption of advancement – purchase of property by husband and wife – title registered in wife’s name only – whether presumption of advancement is qualified by statements in <i>Trustees of</i>

Let's look at what we need to look at...

1. Look at who is impacted and why
2. Methods of rectification
3. Two solutions to tighten up asset protection
4. How the decision impacts on estate planning for clients affected.

BOSANAC FACTS

“The issue in this appeal is whether, contrary to the judgment of the primary judge, Mr Bosanac held an equitable interest in residential property purchased for \$4.5 million in the name of Ms Bosanac only. The deposit of \$250,000 was paid with funds from a joint loan account. Mr and Ms Bosanac then jointly borrowed \$4.5 million from Westpac and this was used to pay the balance of the purchase price.”

BOSANAC

THE ISSUE

- There were no documents or evidence to show what was going on in terms of the ownership of the property
- There were two choices:
- Advancement: This is an equitable principle the same as a gift and assumes that there was an intent for one party to gift to the other

OR

- Resulting Trust: This is also an equitable principle whereby the owner of the property holds that property on behalf of another in a bare trust arrangement fashioned by the Courts

BOSANAC

THE RESULT

"27. It seems to us that, ultimately, the most significant fact in favour of the operation of the presumption of advancement in this case was simply that, at the time of purchase, the Dalkeith Property was put into Ms Bosanac's name, notwithstanding that Mr Bosanac contributed half the purchase price. This was, of course, sufficient to attract the presumption, absent rebutting evidence. For the reasons we have stated, we have concluded that in this case the evidence and the facts as found by the primary judge based on that evidence rebutted the presumption. We infer from these facts that at the time of the purchase Mr Bosanac and Ms Bosanac intended that Mr Bosanac would have a 50% beneficial interest in the property that was to be their matrimonial home.

28. For the reasons stated, we would allow the appeal and make the declaration sought by the appellant in his notice of appeal. The parties will be given an opportunity to make submissions as to costs."

THE SOLUTIONS

Remember without a document the Court needs to come to a legal solution based on the evidence

Solution One: Deed of Rectification and Gift: This is an old school method of evidencing the intervention of the parties and would have made a big difference with the Court. Abbott & Mourly offer this service which is separate to LYD packages

Solution Two: The Protector: Enables the equity from the spouse to be gifted to the Family Protection Trust in toto protecting the whole family and to be preferred

Important: Make sure any common ownership is evidence by a related party partnership agreement

PROTECTING FAMILY WEALTH WITH THE PROTECTOR

Line of Succession is important

- 1. Leading Family Member (LFM)
- 2. Successor LFM
- 3. Second Successor LFM

TRUSTEE COMPANY FOR LONGEVITY

FAMILY PROTECTION TRUST TO HOLD THE CROWN JEWELS

1. Set up the Family Protection Trust (FPT)

LOAN

4. Lend \$1.15m back

5. Secure the assests with mortgage

GIFT

3. Gift \$ 1.15 Value to the FPT with Cheque



Value = \$1m



Value = \$150,000

2. Value assests less money owing

Client Booklet

The guide to protecting Family Wealth



 lightyear soap

UPCOMING

- 2 December in Brisbane and 3 December in the Gold Coast we are having our Strategy Breakfast session and launch of LYD 2
- On 2 December there will be a launch of the Succession, Asset Protection and Estate Planning Advisers Association
- 19-21 January 2022 is our next three day SAPEPAA accreditation course

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