HIDDEN EXPENSES

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Property settlement can be a challenging process, which can involve arguments between the parties over contributions, valuations and also whether real estate and businesses should be sold or transferred into one party's name. Once assets have been divided between the parties, the issue can arise as to whether transaction costs in selling the investment properties or businesses should be considered in the property settlement - does the Court make adjustments for these expenses?

These hidden expenses can include the Capital Gains Tax (CGT) cost that would fall on the party selling an asset, such as, an investment property or a business. How can this adjustment be included?

What Does the Court Consider?

The Court has recognised that in order to make an allowance for CGT, this will depend on the circumstances of each individual case.

In the most pivotal case on the topic, the Court noted that there was wide-spread confusion as to the approach that should be taken. Accordingly, the Court set out some general principles that the Court will consider, i.e.

- The circumstances of the case are taken into account in determining whether CGT should be taken into account in valuing a particular asset. These circumstances will include the method of valuation, the evidence of the parties' intentions for the asset, the likelihood of the asset being realised in the future.
- Allowance should be made for CGT, if the Court Orders the sale of the asset, or is satisfied that a sale would probably occur in the near future, or if it was acquired as an investment.
- If none of these circumstances apply and an adjustment for CGT cannot be made, but the Court is satisfied that there is a significant risk that the assets will have to be sold in the short term, the Court may take the risk into account and give weight to it.

In the case in question, the Court determined that, whether adjustments are made for these transaction costs will come down to the evidence provided by the party seeking the adjustment. In that case, the Husband Appealed the Trial Judge's decision, on the grounds that the Trial Judge failed to consider the CGT costs that would arise as a result of the Order.

The Facts:

- The Husband, 44 and Wife, 34 were married for 8 years.
- The Husband had purchased a real estate agency business and also purchased business premises for a company both partners created.
- The property pool consisted of assets worth $1.5 million.
- The Husband wanted to sell the business and become employed at a lower income. The Trial Judge stated that it was appropriate to take into account his capacity to continue the running of the business. He noted that, since there was no satisfactory evidence as to whether the business would be sold and

he did not propose an Order to sell the business, it was not appropriate to make adjustments for future CGT.

- The Husband retained the former matrimonial home, however, he argued that with having liabilities against the home, he was obliged to sell assets in his name to meet his obligation, which would attract CGT.
- The Husband held 3 assets, some or all of which needed to be sold to provide funds to pay out the liabilities on the matrimonial home.
- These assets included the real estate where the business was conducted, the "rent roll" of the business, which involved the management of rental properties assigned to the business and the balance of the real estate business.
- The Husband's expert calculated the CGT on the sale of the entire business to be $52,879. The Wife produced a different calculation of $73,901. The Wife argued that no allowance should be made for the CGT, but noted that the Order might include that if CGT is incurred within 6 months of the judgment and this is used towards the matrimonial home, then an appropriate adjustment should be made to the Husband.
- The Husband argued that the Trial Judge should have Ordered the sale of all assets or treated the sale as inevitable and thereby made allowance for the CGT payable.
- **Appeal Found:**
- The Trial Judge was not mistaken in declining to make an allowance for the CGT payable upon the sale of the business.
- It was open to the Trial Judge to provide an allowance, and the amount would have been $73,901.
- The evidence was not clear in this case and the prospect of selling the entire business in the short term was not so likely that an error was made in not making adjustment for CGT.