It Looks Like A Gift Until The ATO Pops Up!

Bosanac's case has taken a turn for the worse.
https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2021/2021fcafc0158?fbclid=IwAR3KR9OTbrHLVJh6xLCx7Sb0nkX5KK1JHhrdIhcmRc6XIAamXH8TgQKbCn4

Initially, before a single judge of the Federal court Ms Bosanac was successful in holding onto the family home which she held in her name only. The ATO was after half of it to pay her husband's tax bill. The Federal court found that even though the deposit came from both of them and the loan was in both their names it was reasonable to assume that Mr Bosanac's contribution was a gift to his wife so beyond the ATO's grasp.

The ATO appealed before a full bench of the Federal court and won. The Federal court considered that there were two possible outcomes. That Mr Bosanac gifted his contribution to the house or that Ms Bosanac held half the house in trust for Mr Bosanac and it was just a matter of looking at the facts to see what was the most likely.

The gifting of the deposit seemed feasible however the joint borrowing worked against the gift concept. What seemed to push it over the line for the ATO was that Mr Bosanac used the

house as security for a loan to buy shares in his own name. I have got to admit that none of this has much of a character of a gift.

This case is significant because it undoes a long held asset protection strategy of holding assets in the name of the spouse least exposed to creditor risk. It is now far from the black and white of the name on the title. Even if you can wrap it up nicely as a gift this concept only applies to gifts from a husband to a wife. Not from wife to husband or same sex relationships.

It may be too early to decide how far this is going to be taken. Could it even go as far as assets held in a trust? Nevertheless, this is not a reason to abandon the idea of holding the family home in the non risk spouse's name. What we now need to do is to put up as many barriers as we can to rebut the argument that the low risk spouse holds half the property in trust for the high risk spouse. Ideas that come to mind:

- Keep a paper trail showing the deposit came from the low risk spouse's bank account and have the borrowings in their name even though the bank will probably want the high risk spouse to be guarantor.

- Make the arrangement part of a pre nup that the low risk spouse is to retain the family home no matter what.

- Do not allow the high risk spouse to treat the property in anyway that suggests the low risk spouse holds it on their behalf. For example to not use it as security for borrowings by the high risk spouse. A possible, though untested, solution maybe that the low risk spouse borrows in their own name using the house as security and then formally on lends, at the same interest rate, the borrowed funds to the high risk spouse.

- Buy the property in the low risk spouse's name before marriage.

If right now you are considering transferring the family home solely into the low risk spouse's name. Firstly, do not do it to defeat current creditors, you can only do this when you are solvent. Then make sure all documentation show it as a gift. Have a reason for the gift. Maybe transfer on the low risk spouse's birthday, birth of a child, wedding anniversary. Maybe as part of a binding financial arrangement with a view to separation. And sort it out with the bank as best you can.

Holding the house in the low risk spouse's name is always going to be better than not so it is worth giving it a try just realise now it is worth putting in the extra effort to avoid it appearing that the low risk spouse holds the property in trust for the high risk spouse.

If you feel that your circumstances show that it is really held in trust or you are single then consider a mortgage trust arrangement where you set up a trust to lend you money in return for taking a mortgage over the property.

It is important that the property is at least held in the name of a real person, who is living in the house. Holding it in a trust instead is a real win for the ATO because the capital gains tax over a few decades could be huge, trusts do not qualify for the main residence exemption.

Further, moving it into a trust may still expose you to the ATO arguing that the trust holds the property purely for your benefit so the ATO can recover your tax debts from it.

Bosanac's case is the thin end of the wedge for the ATO arguing that just because an asset is not held in your name, that does not prevent the ATO from accessing it to pay your tax debt.