

Stamp duty traps in family law transfers: What solicitors should look out for

Risk Management Topics:

Family Law

Property and Lending



Fiona Kim
Claims Solicitor

In family law matters, property transfers following a relationship breakdown are often governed by Court Orders or Binding Financial Agreements. These instruments can trigger stamp duty exemptions under section 163B of the *Duties Act 1997 (NSW)*, offering significant financial relief to parties navigating separation. However, solicitors must exercise caution, particularly when third parties such as children or trustees, are involved in the transaction.

The exemption framework

Stamp duty exemptions are available when property is transferred between former spouses or de facto partners as part of a property settlement following the breakdown of the relationship. These exemptions apply only if the transfer is documented in a Court Order or Binding Financial Agreement.

Where solicitors get caught out

If the documentation does not meet the statutory requirements, the exemption may not apply to the third party's share, resulting in stamp duty liability. Solicitors who overlook these nuances risk exposing their clients to unexpected financial burdens for failing to advise on duty implications.

Take the following example:

Following family law proceedings, John and Jane were required by a Court Order to transfer John's interest in their home to Jane and their daughter, Christine, in equal shares. They engaged a law firm to handle the transfer, which was completed and lodged. However, Revenue NSW later audited the transaction and determined that stamp duty, penalty tax, and interest were payable by Christine, as the transfer did not meet the exemption requirements under the *Duties Act* because Christine, as a third-party transferee, was not included in the original Court Order. This example highlights the risks for solicitors in family law property transfers involving third parties.

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Key risk areas for solicitors

- 1. Including third parties in the transfer:**
Transfers to children or trustees must be explicitly linked to the relationship breakdown and supported by appropriate legal instruments.
- 2. Failing to distinguish between exempt and non-exempt portions:**
If only part of the transfer qualifies for exemption, duty may still be payable on the non-exempt portion.

Risk management tips

- Avoid including non-exempt transferees unless their inclusion is legally justified and the duty implications are fully understood.
- Use Consent Orders or Binding Financial Agreements that clearly outline the transfer terms and parties involved.
- Ensure that any third party to the transfer is provided with independent legal advice regarding their potential stamp duty liability.

Remember that stamp duty exemptions in family law property transfers are not automatic. Solicitors must be vigilant in assessing the eligibility of all parties involved and ensure that documentation aligns with statutory requirements. Moreover, it is essential that all parties, especially any third-party transferees, receive clear legal advice regarding their potential stamp duty liability. A seemingly minor oversight can result in substantial financial loss for a client and may result in a professional negligence claim against the solicitor. Diligence, documentation, and legal clarity are key to avoiding these stamp duty traps.