

IMPLICATIONS ARISING FROM “DECOUPLING” A PROPERTY

Posted on September 27, 2018

Category: [CNPupdates](#)

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Date Published: 27 September 2018

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In light of the latest revisions to the Additional Buyers' Stamp Duty ("ABSD") regime significantly increasing the ABSD liabilities for ownership of second and subsequent residential properties which were announced on 5 July 2018, joint property owners, in particular spouses, may consider "decoupling" as a solution to manage their stamp duty liabilities arising from the purchase of a second and subsequent residential property. Our firm's article titled "ABSD: Is "Decoupling" a suitable solution for you?" published on 1 August 2014 provides an insight on the legal process of decoupling a property with an illustration of how the decoupling of a property may possibly result in substantial savings for parties. You may access the article [here](#).

This article examines the legal characterization of property subsequent to a decoupling exercise.

The ownership of property subsequent to a decoupling

A property jointly held by two co-owners, H and W, is decoupled when W transfers her share in the property to H by way of gift or sale of a part share in the property. Upon the transfer of W's share in the property, H becomes the sole owner of the property. W would no longer hold the property in her name and can purchase another property that would only be subject to buyers' stamp duty rates for a first residential property without having to pay any ABSD.

The decoupling of property in this manner has the following legal implications:

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1. The change in ownership from co-ownership in joint tenancy to sole ownership;
2. The characterization of the “de-coupled property” in a familial relationship and a divorce.

The change in ownership from joint tenancy to sole ownership

In situations where H and W previously held the property in joint tenancy prior to the decoupling, the law of survivorship would apply. In other words, upon the death of H or W, the property would be passed on to the surviving party. Joint Tenancy is a very common form of ownership between husband and wife who are content for the surviving party to be the absolute owner of the property.

However, upon the decoupling of the property as set out by the simple illustration above, H becomes the sole owner of the property. If H and W are a married couple and H intends to pass on the property to W upon his death, it is advisable for H to make a will to devise the property to W. Without a will, the intestacy laws in Singapore would apply to the distribution of H's assets upon H's death and such manner of distribution may depart from H's intentions for W to inherit the property solely.

If W purchases a property in her name after the decoupling of the joint property, W should also make a will to devise her property to her intended beneficiaries in the event of her death.

The change in legal ownership may not be disposal or transfer of beneficial ownership

While the original property is now held in the sole name of one party (H), in the event of dispute, the other party (W) might apply to Court to declare that the property or a share of the property is held on trust by H for W. Such a trust is characterized as a resulting trust, or common intention constructive trust.

A resulting trust arises where a transfer of legal title in property has occurred and in circumstances in which there is direct evidence that the transferor has no intention to divest her beneficial interest in that property. When a transfer of title occurs in a decoupling exercise, it may not be possible to find such direct evidence of W's intention where the property transfer occurred solely for the purpose of a decoupling exercise to reduce ABSD liabilities and the parties may not have addressed their minds to the beneficial shares of the property.

A presumption of resulting trust may thus arise on the basis that the transfer of legal title in property had occurred for which W did not receive full consideration for the monies she had contributed towards the acquisition of the property. In a decoupling exercise, the full consideration would be the market value of W's share in the property at the time of the transfer. It is therefore presumed by law that the parties hold a beneficial interest in the property in proportion to their respective contributions to the purchase price, irrespective of the legal ownership post-decoupling.

In other words, W may argue that she has a beneficial share in the property that is proportionate to her

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contributions towards the acquisition of the property. W's beneficial share is being held in trust by H for her as she has transferred her interest to H only for the purpose of not paying or reducing the parties' ABSD liabilities in the purchase of a 2nd or subsequent property.

An illustration of this is a scenario in which W had contributed 40% towards the purchase price of the property and H had contributed the remaining 60%. Upon the decoupling of the property which caused a transfer of the property to H's sole name, the property is no longer held in joint names but solely in H's name. If W has not received any consideration or has received consideration which did not reflect the market value of her share, W may subsequently make an equitable claim for her beneficial share of the property by relying on the fact that she had contributed 40% of the purchase price of the property and did not receive full consideration for her share in the property during the decoupling exercise.

Alternatively, W may assert a common intention constructive trust by adducing evidence of parties' common intention at the time of the acquisition of the property to hold the beneficial interest in the property in a proportion that is different from the parties' financial contributions towards the purchase of the property. Such common intention may arise from an express discussion or infer from conduct which gives rise to an implied intention. For instance, if W can show evidence of H and W's original intention to hold the property in equal shares ie. 50% at the time of purchase of the property notwithstanding the fact that W may have contributed only 40% towards the purchase price, such express or inferred common intention may render H a trustee of 50% in the property for W notwithstanding the transfer by W to H at the de-coupling exercise.

A further question arises if W had contributed monies towards the discharge of an outstanding mortgage loan or the refund of CPF monies for the purposes of the decoupling exercise. Similarly, if at the time of decoupling, H took on a fresh mortgage loan to finance the property. Would these financial contributions change the proportion of the beneficial interest of the parties? This will depend on the evidence of the parties' intention at the time of the original purchase and/or at the time of the decoupling exercise as discussed above.

In the event that W is successful in making a claim for a beneficial share of the decoupled property, and if W has purchased a 2nd or subsequent property, W may be liable to pay ABSD based on the ABSD rate for the purchase of a 2nd or subsequent property. On the other hand, H may also assert a beneficial interest in the subsequent properties purchased in W's name by claiming a trust.

The characterization of the “de-coupled property” in a familial relationship

In certain categories of relationships such as a spousal relationship, the initial finding that the property is held on trust by H for W after a decoupling exercise may be challenged by the presumption of advancement. Because of the spousal relationship H would rely on the presumption that W had made an outright gift when she transferred her interest wholly to H. Similarly, if W and H were in a parent and child relationship, the presumption that W intended to make a gift to H may arise.

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The strength of the presumption of advancement is determined by the nature and state of the parties' relationship. The fact that parties had a close and caring relationship at the time of the transfer of the property would be relevant in determining the strength of the presumption of advancement to infer a gift by one party to the other.

The characterization of a “de-coupled property” in a divorce

It must be noted that if the parties subsequently undergo divorce proceedings, different considerations would apply when the Court exercises its matrimonial jurisdiction to divide matrimonial assets. Under Singapore law, a matrimonial asset includes any asset acquired by one party or both parties during the marriage as well as any asset acquired before the marriage which was ordinarily used or enjoyed by the family or has been substantially improved by the parties during the marriage.

Therefore, in ordering a division of the matrimonial properties, the Court looks at various factors beyond the legal ownership of the properties to determine the share that each party should have in the matrimonial assets. The fact that a joint property had been decoupled to give one party sole legal ownership of the property is not a bar to the Court including the decoupled property in the pool of matrimonial assets for purposes of division.

Conclusion

While a decoupling exercise is a convenient solution that can help to achieve some savings, property owners should bear in mind the various implications which may arise from a decoupling exercise. These issues should be discussed carefully with lawyers so that the parties' intentions in respect of the legal and beneficial ownership of their properties subsequent to a decoupling can be addressed.

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