

## **PROPERTY SETTLEMENT**

### **Introduction:**

Inform the client of what matters will be addressed. Are the parties *still* married (for how long)? If yes, the time limitations below do not apply. Also, if there is a house involved, applying party should consider registering a caveat in order to prevent its disposal. Finally, consider any potential injunctions and spousal maintenance relevant to the circumstances.

<b>Subject Matter</b>	<b>Matrimonial</b>	<b>De facto</b>
Commencement of proceedings	44 (3) & (4)	44 (4) & (5)
Urgent maintenance	77	90SG
Injunctions	114	90SS(1)(k)
Alteration of PI	79	90SM
Just & Equitable Requi.	79(2)	90SM(3)
Contributions taken into account	79(4)	90SM(4)
Other matters taken into account	75(2)	90SF(3)78
Declarations interest in property	79	90SL
Setting aside order altering PI	79A	90SN
Duty to end financial relations	81	90ST

### **STEP 1: Time limitations**

- 1) 12 months for matrimonial property (from date of the divorce, or by leave of the court) (s 44(3)); and
- 2) 24 months for *de facto* property proceedings (except by leave of court):

s 44(4) and (6)- party can apply for leave to apply outside the designated time limits in the case of hardships (to the relevant marriage or children).

‘Hardship- substantial detriment by way of causing ongoing or persistent suffering, difficulty or disadvantage (*Whitford & Whitford*). Often occurs when parties agree to an informal settlement, which the other reneges from after the time limit or undisclosed facts that suggest the existence of assets that were previously unknown to the party.

Court will take into account 1) the cause of the delay; 2) merits of the application; and 3) prejudice to the respondent.

### **STEP 2: Jurisdictional matters**

- a. The *Family Law Act* 1975 (Cth) applies;
- b. Marriage- marriage (even if later declared void) under the *Marriage Act* 1961 (see Marriage notes for determination);
- c. *De facto* relationship- the start date for the de-facto provisions in SA was 1 July 2010. Parties must have separated after this date for the new provisions to apply, is this

satisfied? Sections 90RD, 90SB and 90SM are relevant sections for property settlement where the parties are in de-facto relationship (see *de facto* notes for determination);

- a. If *de facto* disputed- party can apply for a declaration under s 90RD supporting the existence of such a relationship.
- d. Are the parties Australian residents and ordinarily reside in Australia for the purposes of instituting any family law proceedings (s 90RG)? The proceedings can be commenced in South Australia as the parties were resident in South Australia.

**Final jurisdictional considerations:** i) *The Relationships Register Act 2016* (SA), which came into operation on 1 August 2017, makes it possible for a couple (irrespective of their sex or gender identity) to register their relationship with the office of Births Deaths and Marriages in South Australia.

### STEP 3: Is there any INTERIM or URGENT spousal maintenance required?

- A. An order for interim spousal maintenance can be made in regards to marriage (s 74) and *de facto* relationships (s 90SE). Such an order is temporary and will be in place until the matter is resolved by consent, on a final basis, along with all other issues in the property settlement.

Interim spousal maintenance may be ordered in circumstances where a party requires maintenance immediately after the breakdown of the relationship or marriage. However, an order for interim spousal maintenance cannot be made until both parties, being the party wanting to receive the maintenance and the party who is proposed to pay the maintenance, has filed affidavit evidence and a financial statement so the Court is aware of each party's financial position and relevant information relating to the proposed payer's capacity to pay spousal maintenance.

After reviewing the evidence and determining that one party has a need and the party has a capacity to pay to meet that party's need, the order for interim spousal maintenance can be made by the Court.

- B. An order for urgent spousal maintenance can be made pursuant to s 77 (marriage) and s 90SG (*de facto* relationships). Urgent spousal maintenance can be by way of a lump sum payment, or by way of payments made periodically over time.

Unlike an order for in interim spousal maintenance, urgent spousal maintenance applications are dealt with in a summary way, meaning parties do not necessarily have to provide for the Court's review evidence of their financial circumstances in support of their claim for spousal maintenance.

Such an order for urgent spousal maintenance is usually made in circumstances that could be considered an emergency and when there is a clear need, but no time for parties to provide evidence. In *Williamson & Williamson* (1978) the court provided that the purpose of s 77 (and similarly, s 90SG) is to provide a party orders to relieve their pressing, present need and the Court shall determine whether to make an order for urgent spousal maintenance on a pragmatic basis, rather than taking their time to hear the application upon merit.