

Dividing Property

**Can be married or can be a de facto relationship

Section 4(1)ca 'Matrimonial Cause': with respect to the property of the parties to the marriage or either of them, being proceedings:

- (i) arising out of the marital relationship;
- (ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties; or
- (iii) in relation to the divorce of the parties to that marriage, the annulmentbeing a divorce, annulment or legal separation effected in accordance with the law of an overseas jurisdiction....is recognised as valid....

Section 4(1)Definition 'De Facto Financial Cause'

(a) proceedings between the parties to a de facto relationship with respect to the maintenance of one of them after the breakdown of their de facto relationship; or

(c) proceedings between the parties to a de facto relationship with respect to the distribution, after the breakdown of the de facto relationship, of the property of the parties or either of them; or

Married couples

After divorce, have one year to file for a property settlement. Once that year has expired, need to seek leave of the court and have to have special circumstances- s44(3) FLA

'Clean break Principle'- s81 (90ST): Duty of court to end financial relations. In proceedings under this Part, other than proceedings under s78 or proceedings with respect to maintenance payable during the subsistence of a marriage, the court shall, as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them.

Parties can consent for application brought out of time: (3AA) However, if such proceedings are instituted with the consent of both of the parties to the marriage, the court may dismiss the proceedings if it is satisfied that, because the consent was obtained by fraud, duress or unconscionable conduct, allowing the proceedings to continue would amount to a miscarriage of justice.

When will court grant leave- 44(4) property proceedings: (4) The court shall not grant leave under subsection (3) ... unless it is satisfied:

- (a) that hardship would be caused to a party to the relevant marriage or a child if leave were not granted; or
- (b) (b) in the case of proceedings in relation to the maintenance of a party to a marriage--that, at the end of the period within which the proceedings could have been instituted without the leave of the court, the circumstances of the applicant were such that the applicant would have been unable to support himself or herself without an income tested pension, allowance or benefit.

De Facto Relationships

Need at least 2 years separation before you can commence. Unless there are children or it is registered (S90SB)

Time for Commencement of Property Proceedings? S44(5)-De Facto

- Subject to subsection (6) [hardship], a party to a de facto relationship may apply for: an order under section 90SE(maintenance),...or 90SM (property); or
- only if the application is made within the period of 2 years after the end of the de facto relationship (the **standard application period**).

Is it Property?

S4(1) definition of property- 'in relation to the parties to a marriage or either of them means property to which those parties are, or that party is, as the case may be entitled to either in possession or reversion'.

Duff 1977: Property means property both real and personal and includes choses in action. 'property is that which belongs to a person exclusive of others and can be subject of bargain and sale. It includes goodwill, trademarks, licences to use a patent, book debts, options to purchase, life policies and the rights under a contract'.

Financial resources: Financial advantages that you are going to get. Not put into the pool as such but is given weight afterwards.

- Financial Resource - No Definition - interpreted to 'cover all financial advantages that either are, or are likely to be, enjoyed by a party.'
- 'A financial stock or reserve over which a party has sufficient control as a matter of fact to draw upon when necessary towards supplying some financial want or deficiency of the party'. Kelly and Kelly (No. 2) (1981 FLC)91-108