

IMPORTANT MATTERS

IMPORTANT TIME LIMITATIONS -

The Family Law Act imposes important time limitations as follows:

Limitation Period

The Family Law Act 1975 imposes a limitation period after which court proceedings may not be taken for property settlement and or spousal maintenance claims (without the prior leave of the Court being given which is usually on in certain circumstances). The limitation periods are:-

- *If you were married* then the limitation period expires 12 months from the date of the Divorce Order being made by the Court; or
- *If you were not married but were in a defacto relationship* then the limitation period expires 2 years from the date of ending of the defacto relationship.

After the limitation period has expired it will be necessary for the Court to grant leave to proceed with Court action notwithstanding that the limitation period has expired and there is no certainty that this leave would be given. If leave of the Court is not given then Court proceedings cannot be continued. Accordingly, it is important that prior to the expiry of the limitation period that either all claims for property settlement and or spousal maintenance be finalised by the making of consent orders in the Court or the making of a financial agreement under the Family Law Act 1975 or court proceedings commenced.

In the event that the Court does not grant leave under the Family Law Act to proceed with the matter then the Supreme Court of Queensland will have jurisdiction to make orders for the sale of the jointly owned real estate (but not under the Family Law Act 1975 for the distribution of relationship property which is within the exclusive jurisdiction of the Family Law Act 1975) and in respect of real estate which is solely owned real estate the Court has limited power.

Ownership of Real Estate

If there is **real estate registered in the joint names** of yourself and your former partner as “joint tenants” then until documents are registered in the Land Titles Office to sever the joint tenancy, then in the event of the death of one of you then the surviving joint owner will be entitled to receive ownership of the whole of the real estate property. This applies even though your relationship has ended and even if your Will says otherwise. We recommend that the joint tenancy be severed but to enable us to undertake the work required to sever the joint tenancy you must retain us to do so. It is not necessary for the other joint owner to sign any documents for the joint tenancy to be severed in the Land Titles Office.

If there is **real estate registered in the sole name of the other party** then you should take steps to ensure that the real estate is not sold by the other party and the sale proceeds disposed of without your knowledge and without your claim for property settlement having been finalised. Accordingly, we recommend that a caveat be registered in the Land Titles Office to prevent any dealings with the real estate taking place. The caveat will prevent the registered owner from dealing with the real estate whilst

the caveat is registered. The caveat may be lodged before or after court proceedings have been commenced, but if lodged before court proceedings then it is necessary for court proceedings to be commenced within three months of the lodgement date of the caveat and notice of the court proceedings given to the Land Titles Office otherwise the caveat will lapse and it will not prevent the registered owner from thereafter dealing with the real estate.

We will only take steps to lodge a caveat if you retain us to do so.

Sale of Real Estate

If there is a pending sale of any real estate (particularly real property such as house, unit, land) you should also take steps to ensure that the proceeds from the sale are not distributed to either you or the other party without any claims by you for property settlement or spousal maintenance being finalised, but the sale proceeds are retained in a solicitor's statutory trust account subject to a professional undertaking given by the trustee solicitor not to distribute those funds until the claims for property settlement and or spousal maintenance have been finalised and legally documented either by a financial agreement or by a Court Order. These steps to control the distribution of the proceeds of sale need to be taken formally and in writing and prior to settlement of the sale of the property taking place or an order of the Court obtained.

Other Matters

Will: You should also give consideration to the contents of your Will having regard to your present circumstances. Your Will should be varied to properly reflect your current wishes as to the disposal of your property in the event of your death.

In respect of a marriage relationship:-

- if you were to die prior to your Divorce Order being made by the Court and without having removed from your Will the bequest in favour of your former spouse, then your former spouse may be entitled to receive a benefit granted under the Will.
- If you were to die after your Divorce Order being made by the Court and without having removed from your Will the bequest in favour of your former spouse then the Will is not revoked, however the divorce does revoke any provisions in the Will which are in favour of the divorced spouse so that the divorced spouse does not receive a benefit granted under the Will (there are certain circumstances where this does not apply such as -- where the provisions in the Will relate to the appointment of the divorced spouse as trustee of property for beneficiaries of the children of the marriage relationship or where power of appointment is exercisable by the divorced spouse only in favour of the children of the marriage relationship). The Will document itself can avoid the revoking of any provisions of the Will in favour of the divorced spouse only by showing an intention to prevent the effect of the divorce and accordingly you should be careful in the preparation of your Will.

In respect of a defacto relationship, if you were to die without having removed from your Will the bequest in favour of your former partner, then your former partner may be entitled to receive the benefit granted under the Will, even though your relationship has ended.

If you do not have a Will then the laws of intestacy will apply and your former partner may be able to claim an interest in your estate.

Whether you were married or in a de facto relationship, if you do not have a Will then the laws of intestacy will apply and your former partner may be able to claim an interest in your estate. Failure to have a valid Will may result in your estate being controlled or your assets being distributed not in accordance with your wishes. You should review your Will, or if you do not have a Will then you should make a Will. You should discuss this matter with us as soon as possible. To enable us to undertake the work required you must retain us to do so.

As part of the process of making a valid Will, you should consider: --

- who you should appoint as executor;
- who to appoint as guardian of your infant children;
- provisions to include in your Will to avoid challenges being made to your Will.

It is important for you to review your Will regularly to ensure that it meets your current requirements and there are no changes to be made to your wishes to be carried out upon your death and that the Will continues to have legal effect. We suggest a review of your Will should be undertaken at least every 2 years or in the event of any of the following:

- On marriage, separation or divorce
- On the birth of children or grandchildren
- On the death of a beneficiary or executor or trustee
- changes to your financial circumstances
- changes to your relationship.

Powers of Attorney:

If you have a general power of attorney or an enduring power of attorney where you have appointed your former partner as your attorney we recommend that you review the appointment given that your attorney can make financial decisions under either of these legal documents in relation to property held by you including bank accounts and real estate and in some circumstances could misuse the power granted. Also, under the enduring power of attorney your appointed attorney may have power to make decisions in relation to your health matters and this decision-making power may be something that you no longer wish your former partner to have. You may wish to revoke the power of attorney and make a new document to better reflect your current circumstances. To enable us to undertake the work required you must retain us to do so.

Superannuation:

Many superannuation funds and insurance policies have provisions for the nomination of a beneficiary. If you have nominated your former partner as a beneficiary you may wish to review that nomination with your superannuation or insurance company. We recommend that you nominate beneficiaries (if that is possible) as in doing so this can be of great assistance to both the superannuation fund and your estate administrator in the event of your death. You should also make enquiries with your insurance company and superannuation funds as to whether the nomination of beneficiaries is a binding nomination or not and request the insurance company or superannuation fund to discuss with you the effect of the nomination beneficiary which you can make.

Protection of Assets:

Additionally, you should consider whether you should protect your interests against your former partner accessing joint funds by withdrawal of monies from joint bank accounts, use of credit cards, drawback of monies from loan facilities, sales of shares or other assets or sale or disposal of real property or other assets. You should attend to some matters immediately such as withdrawing the authority to operate on accounts, changing access passwords and pin numbers on bank cards and accounts including Internet passwords and notifying each financial institution of your circumstances.

It is often the case that loans or credit facilities from financial institutions permit either party to operate on a facility (even if it is held in both names) and as a result we recommend that the authorisation be withdrawn and replaced with a requirement that the joint authorisation of both parties is required for any transaction.

Taxation Issues: The distribution or change in ownership of property may have taxation implications for you, in particular Capital Gains Tax. Accordingly, you should seek expert advice from your taxation advisor or accountant or if you do not currently have an accountant or taxation advisor able to professionally advise you with respect to such issues then you should consult such a person. This must be done before you agree to the terms of a property settlement so that you can be advised in respect of the taxation implications as we do not practice in this area and cannot provide this advice to you.

It is beyond the scope of our work to provide taxation and/or financial advice.

If you require further explanation of any of the matters raised you should contact us.

The Team at