

IMPORTANT MATTERS

IMPORTANT TIME LIMITATIONS -

The Family Law Act imposes important time limitations as follows:

DEFACTO RELATIONSHIPS

The Family Law Act 1975 imposes a limitation period of 2 years from the date of ending of the de facto relationship. You may lose your rights under the Family Law Act It is important that prior to the expiration of the limitation period that property settlement is finalised by Court Orders or a financial agreement or alternatively court proceedings have been commenced.

To calculate the 2 year limitation period it is necessary to determine the date of ending of your de facto relationship, that is, when the de facto relationship ceased to exist. A de facto relationship may cease to exist prior to the date when the parties actually cease to reside in the same house.

Section 4AA(4) of the Family Law Act 1975 states that a Court in determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the Court in the circumstances of the case including: –

- a. *the duration of the relationship;*
- b. *the nature and extent of their common residence;*
- c. *whether a sexual relationship exists;*
- d. *the degree of financial dependence or interdependence, and any arrangements for financial support, between them;*
- e. *the ownership, use and acquisition of their property;*
- f. *the degree of mutual commitment to a shared life;*
- g. *whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;*
- h. *the care and support of children;*
- i. *the reputation and public aspects of the relationship.*
- j. *any circumstance to be regarded as necessary in deciding whether the persons have a de facto relationship.*

You cannot assume that you have 2 years from the date when you both ceased to reside in the same residence to make a property settlement within the limitation period under the Family Law Act as the ending of your de facto relationship may have been prior to that date.

Accordingly, you should ensure that the issues of property settlement and/or spousal maintenance are finalised by either consent orders made by the Court or the making of a financial agreement which is binding under the Family Law Act 1975 or proceedings have been commenced in the Court under the Family Law Act 1975 without delay.

Failure to take any of these steps prior to the limitation period expiring may result in your legal rights being prejudiced and you being prevented from proceeding with a claim for property settlement and/or spousal maintenance under the Family Law Act.

MARRIAGE

The Family Law Act imposes a limitation period of 12 months from the date that the Divorce Order made by the Court takes effect (refer to the Divorce Order which will state the date that the Divorce takes effect) after which time an application for property settlement and/or spousal maintenance cannot be made to the Court without leave of the Court firstly being granted (which is only in certain circumstances).

Accordingly, you should ensure that prior to the expiration of the limitation period that the issues of property settlement and/or spousal maintenance are finalised by either consent orders made by the Court or the making of a financial agreement which is binding under the Family Law Act 1975 or proceedings have been commenced in the Court under the Family Law Act 1975.

Failure to take any of these steps prior to the limitation period expiring may result in your legal rights being prejudiced and you being prevented from proceeding with a claim for property settlement and/or spousal maintenance under the Family Law Act.

OTHER MATTERS

Accounting and Taxation Advice and Stamp Duty Liabilities

Prior to you signing the Financial Agreement you should consult with your accountant and/or taxation advisor (and provide to them a copy of the Financial Agreement) to obtain expert advice in respect of any possible taxation or accounting implications which may impact upon you as a result of any terms set out in the Financial Agreement. We do not practice in the field of taxation law and as such we are unable to consider and advise you in respect of such issues which may arise from the Financial Agreement. Please ensure that your accountant/taxation advisor considers the impact of the whole of the Financial Agreement.

If your accountant/or taxation advisor raises any issues of concern you should discuss these issues with us and your accountant immediately and prior to the Financial Agreement being signed by you (you should not sign the Financial Agreement until these issues of concern have been resolved to your satisfaction and if necessary the Financial Agreement has been amended). The transfer or sale of assets (such as house, land, unit, commercial property, motor vehicles, shares, collectibles, etc) may result in a capital gains tax liability or stamp duty liability being incurred.

Accordingly, it is important that advice should be sought from your accountant or taxation advisor about the effect of the Financial Agreement involving a transfer and this should preferably be done prior to you signing the Financial Agreement so that if there are any issues then these can be properly considered.

In Queensland stamp duty is payable to the Office of State Revenue (Queensland Government) on the transfer of any “dutiable property” (which includes real estate, business assets, motor vehicle or other property in Queensland) except where the transfer is to give effect to a Financial Agreement made under the Family Law Act 1975 for the transfer of property between the parties of the relationship after the ending of the relationship. The exemption will not apply where the transfer is prior to the financial agreement taking effect or where the transfer is not clearly stated in the financial agreement.

Ownership of Real Estate

Where real estate (house, land, unit) is registered jointly in the names of you and your former partner as “joint tenants” then until documents are registered in the Land Titles Office to sever the joint tenancy creating a tenancy in common, then in the event of the death of one of you the surviving joint owner would be entitled to receive ownership of the whole of the real estate property even though your relationship has ended and even if your Will says otherwise.

You should consider severing a joint tenancy and creating a tenancy in common in circumstances where you wish to leave your interest in your property to your beneficiaries under your Will.

Your Will

You should give consideration to the contents of your Will and your Will should be amended to reflect your current wishes as to the disposal of your property in the event of your death. If you do not have a Will then your estate may be controlled and your assets distributed not in accordance with your wishes. If you do not have a Will then you should make a Will. The Will is a legal document that provides for the distribution of your assets according to your wishes after your death. In your Will you appoint an executor (which can be more than one person) to carry out your wishes expressed in the Will for the distribution of your estate to the beneficiaries that you name in your Will. Your choice of executor should be carefully considered as the role can often be demanding, complex and carries with it legal responsibility.

Superannuation and Insurance

Many superannuation funds and insurance policies have provisions for the nomination of a beneficiary. You should review that nomination and you may take steps to either remove the nomination (so that your estate is distributed in accordance with your Will) or nominate persons as the beneficiary to receive the benefits. This nomination of beneficiaries may be either "binding" or "non-binding" depending upon the terms of your superannuation or insurance policy. Accordingly you should make enquiries with your superannuation fund and insurance company to determine whether the nomination that you have made is a "binding" nomination which can ensure the benefits are paid to your nominated beneficiaries in accordance with that nomination, or a "non-binding" nomination which is a request only and does not provide certainty that the payment will be made to your beneficiaries as nominated.

Power of Attorney/Enduring Powers of Attorney

If you have a general Power of Attorney or an Enduring Power of Attorney, we recommend that you regularly review the document and 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, etc. Under the Enduring Power of Attorney your appointed attorney may have power to make decisions in relation to your financial and health matters. You should consider revoking the power of attorney and making a new document to better reflect your current circumstances.

If you do not have an Enduring Power of Attorney, we recommend that you make one. There is a general misconception that "only old people need an Enduring Power of Attorney" but this is not correct. A person who is severely injured in a motor vehicle accident may not be able to temporarily speak or have the mental capacity to make decisions about medical treatment or financial affairs because of the injuries, and in that case if there is no Enduring Power of Attorney then decisions regarding the health treatment and finances will be made by Government employees and not by trusted friends or loved ones. This can be avoided by making an Enduring Power of Attorney.

Under the terms of an Enduring Power of Attorney, the attorney that you appoint has power to make decisions relating to your financial affairs and your health care (such as in the case where you lose your mental or physical capacity to make those decisions) when you are alive. An Enduring Power of Attorney gives you peace of mind during your lifetime in the event that should you lose the mental or physical capacity to make decisions about your financial affairs or health treatment then your appointed attorney/s is given the power to make decisions on your behalf and deal with all or any part of your financial, personal and health matters.

You cannot make or change an Enduring Power of Attorney while you are suffering from a loss of the legal capacity or do not have the physical capacity, and therefore you should make an Enduring Power of Attorney before any unfortunate event occurs.

Advanced Health Directive

You can give specific directions about your future health care which take effect should you lose the capacity to make such decisions. These specific directions go beyond the general health treatment that your attorney can make under the Enduring Power of Attorney. The directions permitted by the Advanced Health Directive can include such things as preventing certain types of medical treatment designed to prolong life, preventing blood transfusions, etc. The Advanced Health Directive requires both advice and guidance from your lawyer and your treating doctor.