



## PROPERTY PROCEEDINGS, DIVORCE, TIME LIMITATIONS and HARDSHIP

In some circumstances following separation, parties to a marriage decide that it is more important to obtain a divorce order, rather than first seeking a division of the matrimonial property.

Section 44(2) of the *Family Law Act 1975* states that proceedings in relation to the division of matrimonial property cannot be instituted 12 months after a divorce order has taken effect, or a decree of nullity made.

Therefore, in circumstances where one party may have the care and control of the matrimonial property, time limitations are of great importance. This is especially so when, save for being out of time, a party has an entitlement to the division of property.

If the division of property has not occurred prior to the expiration of 12 months, a party seeking the division is required to obtain leave of the Court to institute proceedings. In these circumstances, the Court may grant leave if it is satisfied that:

- A party to, or child of a marriage will suffer hardship if leave is not granted; or
- In proceedings that relate to maintenance payments, the circumstances are such that the applicant cannot support themselves without an income tested pension, allowance or benefit.

### Hardship

In the matter of *Sharp v Sharp [2011] FamCAFC 150* (at 17), the Court noted that hardship is more than the mere loss of the right to commence proceedings, but rather:

*It is the consequences attending to the loss of the right to commence proceedings that constitute hardship.*

Therefore, to establish hardship, the Court formed the view that the applicant must first have a *prima facie* claim worth pursuing, or, that the claim to a division of property has a 'real' probability of success (18). This requires an evaluation of the circumstances of each particular case in accordance with the *Family Law Act*.

### Reasons for Delay

If a party can establish that they have a *prima facie* claim worth pursuing and that to deny the right to litigate would therefore cause hardship, they are then required to provide an adequate explanation as to why the 12 month time limitation was allowed to elapse (*McDonald v McDonald (1977) FLC*). This again requires an evaluation of the circumstances of each particular case.

### Legal Advice

If 12 months has expired following the divorce order, and the matrimonial property has not been divided, it is important that prior to seeking leave of the Court to proceed out of time, legal advice is obtained in relation to:

- The *real probability of success* of an application for the division of property; and
- Whether the reasons for delay are adequate for the Court to grant leave.

If you do find yourself in this situation or someone you know is in this situation, we strongly recommend that you obtain urgent advice. Please contact our expert team on 03 9670 1734. Further delay may result in a loss of your entitlement to claim a fair share of matrimonial property or property you would otherwise be entitled to following the breakdown of your marriage or de facto relationship.