You have Questions & We have Answers

FAMILY LAW - PROPERTY

Who is covered by the Family Law Act 1975?

Laws in Australia covering areas such as divorce, children's orders, property division and spousal maintenance are primarily dealt with in the Family Law Act 1975, which now includes all manner of family structures whether the parties be in a marriage, domestic relationship (de facto), or same sex relationship.

A Relationship Register for *domestic relationship*s has been created and is maintained by the Registry of Births, Death And Marriages.

A "registrable relationship" is defined as a relationship between an adult couple, who are not married to each other, where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the *material* benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include domestic care for fee or reward.

A *domestic relationship* is either a registered relationship or an unmarried couple living together on a genuine domestic basis irrespective of gender. If the relationship is not registered, the relevant factors for courts to consider in determining whether a domestic relationship exists include:

- the degree of mutual commitment to a shared life;
- the duration of the relationship;
- the nature and extent of common residence;
- whether or not a sexual relationship exists;
- the degree of financial inter-relationship;
- the ownership, use and acquisition of property;
- the care and support of children; and
- the reputation and public aspects of the relationship.

This principal definition applies to property and other financial schemes, including property settlements, compensation and superannuation schemes.

So now in Australia the financial matters of all separating parties, irrespective of gender, are dealt with under the same Act.

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What are Pre-action Procedures?

Pre-action procedures aim to explore areas of resolution and if the dispute cannot be resolved, to narrow the issues requiring a Court decision. Ideally this would control costs where possible and resolve disputes more quickly, if possible without the need to apply to a Court.

Parties are required to genuinely try to resolve their dispute prior to issuing proceedings, except in instances where exemptions do occur eg: allegations of fraud.

Aside from exempt matters, all prospective parties must participate in some form of dispute resolution including counselling, negotiation, conciliation or arbitration. In the event this is unsuccessful, a party must write to the other party setting out the claim and options for settlement and comply as far as practicable with the Duty of Disclosure.

What are the party's Duties of Disclosure?

Duty of Disclosure starts with the Pre-action procedure and continues until the matter is finalized.

All parties to a Family Law dispute are required to provide to the other party all relevant information whether that information be recorded on paper, or stored by some other means including computer storage devices and includes documents that the other party may or may not be aware of.

There are specific rules about full and frank disclosure in financial cases and disclosure must be of each of the party's total direct and indirect financial circumstances.

All sources of earnings, interest, income, property and other financial resources must be disclosed whether or not they are owned by or come to the party directly or go to some other person or beneficiary, or are held in corporations, trusts, company or other structures.

Information regarding the disposal of any property, whether by sale, transfer, assignment or gift that was made in the 12 months prior to the separation date that may affect, defeat or deplete a claim must also be disclosed.

Are there Penalties for failing to make Full and Frank Disclosure?

Yes, if you fail to disclose or file an undertaking or file a false undertaking, the Court may:

- Refuse to allow you to use that information or document as evidence in your case.
- Stay or dismiss all or part of your case.
- Order Costs against you.
- Fine you or imprison you on being found guilty of contempt of Court for not disclosing the document or for breaching your undertaking.

What factors does the Court take into consideration when making a determination?

When considering an appropriate division of property, the Court takes several factors into account. The same factors need to be taken into account in all Family Law Property matters, whether the matter is proceeding to Court or not.

The Court will not make an Order unless it is satisfied that it is just and equitable to make the Order under the circumstances. A basic overview of some of these factors is included below, however for a complete list please refer to s.79, s90SM, s75 and s90SF of the *Family Law Act 1975* :

- The financial contribution and the non financial contribution made directly or indirectly by or on behalf of a party to the relationship, or a child of the relationship to the acquisition, conservation or improvement of any of the property of the parties whether or not that property has since ceased to be the property of the parties to the relationship.
- The contribution made by a party to the relationship to the welfare of the family constituted by the parties to the relationship and any children of the relationship, including any contribution made in the capacity of homemaker or parent.
- The effect of any proposed order upon the earning capacity of either party to the relationship.
- The age and state of health of each of the parties.
- The income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment.
- Whether either party has the care or control of a child of the relationship who has not attained the age of 18 years.

At Chinka (HEP) Steel we believe that the first approach and continuing approach throughout Family Law matters, should be a non adversarial one with the issuing of proceedings being advantageous only in urgent matters or as a last resort.

Each Family Law matter involves a different set of circumstances. There is no "one size fits all" solution. For a full understanding of your particular circumstances, please contact the friendly and compassionate Chinka (HEP) Steel Team for an appointment.

"I would like to thank all the staff at HEP. Steel for the friendly and courteous way they looked after me when I required the services of a Solicitor. The willingness to listen to my needs and guide me regarding the legal implications of my decisions was helpful and professional." **Regards M G - Woodend**