SAME SEX MARRIAGE – DE FACTO V MATRIMONIAL – WHAT IS ALL THE FUSS ABOUT?

JUNE 4, 2015 | GENERAL

There has been a great deal of media attention on whether or not “it is time” to legislate for same sex marriage in Australia. If this legislation is enacted, what will be different for same sex couples who are married to those in de facto relationships when it comes to property settlement and spousal maintenance?

Married couples and property settlement

Married couples are entitled to file an application for property settlement in Court within 12 months of a divorce becoming final. Property settlement is the process by which matrimonial assets are divided between the parties to the marriage.

The Court will first decide whether it is just and equitable that an order for the alteration of property interests be made. After being satisfied of this requirement, the Court will then embark upon the following process:

- Determine the assets and liabilities of the parties, including superannuation;
- Assess the contributions made by both parties during the marriage or relationship including financial, non-financial and homemaker contributions; and
- Ascertain the future needs of the parties having regard to matters such as age, health, care of children, income and financial resources of the parties.

The Court will then divide the property in the matrimonial pool to reflect each party’s respective entitlement.

Married couples and spousal maintenance

Spousal maintenance is financial support paid by a husband or wife in circumstances where the other spouse is unable to adequately support themselves. Like a claim for property settlement, married couples must commence spousal maintenance proceedings within one year of their divorce becoming final.

There is no exact formula applied in determining the amount of spousal maintenance payable. The Court has discretion to order an amount it deems is appropriate in the circumstances. Relevant factors considered by the Court include the age, health, income and property of the parties, the capacity of the parties to gain employment, the duration of the relationship and any responsibilities to care for children.

De facto v married couples – are their rights the same?

A de facto relationship is defined under family law legislation to encompass two people who are not married to each other, whether of the same or different sex, who have a relationship as a couple living together on a genuine domestic basis.
There are only a few small differences between the rights of a de facto couple and a married couple in relation to family law matters, including property settlements and entitlements to spousal maintenance.

Requirements to seek a property settlement or spousal maintenance

For a de facto partner to seek an order for property settlement, the Court must be satisfied of at least one of the following:

- the period of the de facto relationship was for at least two years; or
- there is a child in the de facto relationship; or
- the relationship is or was registered under a prescribed law of a State or Territory; or
- that failure to make an order would result in serious injustice due to the significant contributions made by one party.

In comparison, for a married couple, it is enough merely to have been married to attract the jurisdiction of the Court for property and spousal maintenance.

Requirement of separation before seeking orders

Under the Family Law Act a de facto relationship must have ended for the Court to make an order for property settlement or spousal maintenance.

However, for married couples, whether or not the marriage has ended is not determinative of whether property or maintenance orders can be made. In fact, couples who are still married may apply to the Court for property or maintenance orders.

Time limits for commencing proceedings

De facto parties have two years from the breakdown of the relationship to make a property or spousal maintenance claim against their former partner. As outlined above, married couples must make an application for a property or maintenance order within one year of their divorce becoming final.

However, whether you are married or in a de facto relationship, if the time in which to file proceedings has passed, special leave from the Court can be granted if the Court is satisfied that hardship would be caused to the party if the leave was not granted.

Couples who are or were married also have the option to agree to an extension of time in which to file property and/or spousal maintenance proceedings. No such provision exists for de facto couples.

What’s all the fuss?

So, essentially, married and de facto couples have very similar rights with respect to property and spousal maintenance, subject to the few distinctions set out above. Putting aside religious, cultural and other beliefs, legislating to allow same sex marriage changes mean little from a property settlement or spousal maintenance perspective.

So, you might find yourself asking... what’s all the fuss about?

Please also refer to our earlier article “Same sex marriage – is it time?”

Should you have any questions surrounding this issue, please contact our Family Law Team.

Article by Scott Wedgwood, Partner, Sally Cooper, Senior Associate and Caitlin Elliott, Solicitor.

AUTHORS