

## Seven Years Late May Not Be Too Late (to file an Application)

**Stuart & Lawson [2015] FCCA 3299** involved a wife's Application for leave to institute property settlement proceedings seven years out of time based on her claim of hardship if she was refused leave to pursue her claim.

The parties separated under the one roof in 2003 and lived in separate residences from February 2004. Their divorce became final in 2006. The three dependent children of the marriage had lived with the wife since separation.

In June 2010 the Wife remarried and in 2011 had another child.

After separation, the husband remained living in the former matrimonial home which the parties owned as tenants in common in equal shares and which was the main asset of the marriage with equity of about \$470K.

These proceedings were commenced in 2015 over 8 years after the divorce order was made final in November 2006 and over 7 years after the prescribed time for the filing of a property settlement application had expired.

At the time of the hearing the wife, her second husband and the four children were living in rented accommodation and struggling financially.

Section 44 provides that the court shall not grant leave under section 44(3) and (3A) unless it is satisfied:  
(a) that hardship would be caused to a party to the relevant marriage or a child if leave were not granted.

**Judge Sexton** noted that the authorities make clear that the Court must adopt a two-step process:

- the first question is whether the court is satisfied that hardship would be caused to a party or a child of the marriage if leave were not granted, and that it is only if such hardship is established that the Court's discretion to grant leave is established and the second question addressed,
- the second question is whether the Court, in its discretion, should grant leave when consideration is given to the reasons for delay, prejudice to each party, interests of third parties, and each party's financial position.

The onus is on the Applicant to establish that they will suffer "*substantial detriment*" if refused leave to pursue their claim.

The Full Court in **Sharp [2011] FamCAFC 150** summarised the approach to hardship as follows:

*It is well accepted that hardship for these purposes is more than the loss of a right to commence proceedings. It is the consequences attending the loss of the right to commence proceedings that constitutes hardship. That is a matter to be determined by the circumstances of the particular case.*

*In assessing hardship in this context the well established test is that the applicant must have a prima facie claim worth pursuing or a "real" probability of success. Further, leave will not be granted if to do so would not, in the substantive result, alleviate that hardship. However, whether or not hardship exists is not to be assessed only by reason of the monetary value of the probable order to be made if leave were granted.*

It was common ground that the Wife had a claim for property adjustment. The question was whether she would suffer hardship if not granted leave to proceed under the Family Law Act as opposed to a partition application under State law, in which the Court could not exercise its discretion to apportion the value of the property to the wife by taking into account her contributions during and after separation and her future needs.

The Judge was satisfied that the Wife was likely to suffer hardship if leave was not granted and granted leave.

In relation to prejudice to the husband, he had not substantively changed his circumstances since separation. He had continued to pay the mortgage and continued to live in the home. He had not reorganised his financial or personal affairs on the reasonable expectation that no application would be made.