RE-OPENING A FINAL PROPERTY SETTLEMENT – CAN IT BE DONE?

At Oner Family Law, we receive regular enquiries as to whether or not a property settlement can be "re-opened" once it has been finalised by way of Consent Order through the Family Court of Australia.

Most agreed property settlements, whether with regards to a matrimonial or defacto relationship breakdown, are documented by way of a Consent Order. Parties are not required to seek independent legal advice before signing the documents, although they are able to if they wish.

A Consent Order documents how parties have agreed their assets such as real estate, bank accounts, shares, motor vehicles and superannuation are to be divided.

Parties need to remember that once a Consent Order has been approved by the Court, it becomes a final property settlement.

It is virtually impossible to re-open a property settlement once it has been finalised. It is therefore very important when signing off on such documents, you are 100% sure that you can live with the agreement reached in the long term.

Where a party does attempt to re-open a property settlement, such an application to the Court is commonly referred to as a "Section 79A Application". This is because section 79A of the *Family Law Act* set outs on what basis the Court is able to set aside a final property settlement Order.

There are a number of grounds set out in section 79A, however, the most common ground relied on by litigants is where there has been an alleged miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information) and the giving of false evidence. This basically means that the other party lied about relevant assets/information, such as having a secret hidden bank account. The standard of meeting this ground is extremely high as indicated below:

(a) Where it has been alleged that there has been fraud or suppression of evidence, the party seeking to set aside the Consent Order, would need to show that the asset which was hidden or not disclosed (whether it be an interest in real estate, shares, bank accounts or other assets) was so significant that it would be unjust for the property Order not to be set aside. Furthermore, if that asset was not brought to light because the party alleging the fraud/non-disclosure did not properly investigate the other party's financial position when they had an opportunity to do so, the application to re-open the case may be unsuccessful. An example of this would be where a party discloses an interest in a business and asserts that the value is minimal. If the other party chose not to pursue a valuation of the business, and it was subsequently discovered that the business interest was worth a significant sum of money, the Court may refuse to re-open the property case on the basis that a valuation of the business

should have been pursued prior to the Consent Orders being signed by the parties and filed with the Court for approval.

(b) Where it has been alleged that there was duress (meaning that one of the party's was forced or felt pressured to sign the Consent Order documents), this again is very difficult to prove. It is not enough to say that the other party continually harassed and pushed you into signing the Consent Order documents, and that you eventually signed the documents so as to get the other party "off your back". Running that argument would most likely result in your Court application failing. Rather, you would need (as one example), to be able to prove that you were threatened with your life, and honestly felt that your life was in danger if you did not sign the Consent Order documents.

Most litigants who file an application seeking that their Consent Order be set aside fail from the outset. The general process is that the Court will run a hearing first, on whether the litigant has met one of the grounds in the legislation to warrant the Order being set aside. If the Court finds that your matter does not meet one of the grounds, then the application will be dismissed and the original Consent Order stands. In very limited circumstances, the Court will set aside final Orders. However, this is very uncommon.

Potential litigants need to be aware that the legal costs of running a section 79A application run into thousands of dollars. Furthermore, if the litigant fails, it is more than likely that he/she will need to pay the opposing party's legal costs.

Any person considering going down the path of re-opening a property settlement matter needs to seek specialist family law advice first. Failure to do so could result in a doomed application being filed from the outset, and with potential severe cost ramifications for the applicant.

Oner Family Law can assist with all your family law needs. Contact us for more information.