



PROPERTY AND FINANCIAL SETTLEMENTS

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OVERVIEW

When a shared lifestyle ends, it is necessary to untangle your financial affairs before you can truly move on. It can be confusing and complex determining who receives title to formerly shared property and this process is governed by family law. The Family Law Act applies to property settlements in relation to both marriages and de facto relationships (including same-sex relationships).

A property settlement is not based solely on legal title but also takes into consideration any contributions made to the relationship, as well as your future needs.



A property settlement is not based solely on legal title...

WHAT IS A PROPERTY SETTLEMENT?

Property settlement describes the process of finalising financial matters between two people whose relationship has ended. It involves determining who will receive legal title to property but also involves distributing any liabilities that arose during the relationship. In some circumstances, a property settlement can also involve third parties whose rights may be affected by the property settlement, for example, a bank, family member or business partner.

In Australia, there is no set formula to distributing assets (e.g. no assumption that property should be split “50/50”). The law requires a number of factors to be weighed, which are used to determine what percentage of the total property from the relationship (“the property pool”) a person will receive. The key considerations for determining property distribution will be discussed in detail below. Although the settlement process considers the property pool as a whole, this does not stop you from seeking ownership of specific items.



WHEN DOES PROPERTY SETTLEMENT OCCUR?

You can seek a property settlement after separation. Divorce and property settlement are two separate processes, and there is no requirement to have a finalised divorce before settling your financial affairs.

If you require the help of the Federal Circuit and Family Court of Australia to determine your settlement, the following time limits apply for property applications:

- For de facto partners – court proceedings for a property settlement or maintenance must be commenced within two years of separation;
- After a divorce is finalised – court proceedings for a property settlement or spousal maintenance must be commenced within 12 months;
- After a financial agreement is set aside or found to be invalid – court proceedings must be commenced within 12 months.

Not all settlements will require court proceedings, but it is important to keep these time limits in mind in case you find that you are not able to come to an agreement with your former partner.



WHAT PROPERTY IS INCLUDED IN A PROPERTY SETTLEMENT?

Generally, a property settlement will include property that you entered the relationship with, property acquired during the relationship and property acquired after separation. The property pool will include a wide range of assets, as well as liabilities.

Some examples of property included in a property pool are:

- Real estate
- Bank accounts and cash
- Cars
- Trusts
- Superannuation
- A family business
- Inheritances
- Loans and debts

Superannuation may be dealt with separately from the rest of the property pool. Orders can be made for superannuation to be split between the parties and distribution may not occur until the superannuation is payable under superannuation laws.

Financial resources will also be taken into account. Financial resources include rights that you may have to financial benefits in the future, for example under a trust, will or action for damages. Legal title to these resources cannot be altered but their impact on your financial position may be considered when determining the distribution of the property pool.



KEY CONSIDERATIONS

If your matter goes to court, the Court will consider and weigh a number of factors that will determine what percentage of the property pool will be distributed to you. These same principles should be followed when the parties agree to a settlement between themselves.

Those factors include:

- What are the parties' assets, liabilities and financial resources;
- What were the parties' respective direct and indirect financial contributions;
- What were the parties' non-financial contributions to the relationship;
- What are the parties' future needs, considering their relative earning capacities, state of health, education and responsibilities as primary carer of any children;
- What is just and equitable when considering all the circumstances.

SPOUSAL MAINTENANCE

Spousal maintenance means that one person from a former relationship provides financially for the other and can be sought when a marriage or de facto relationship comes to an end. An applicant for spousal maintenance must show firstly, that they are unable to adequately support themselves and secondly, that their former spouse or partner is in a position to contribute to them financially, after meeting their own reasonable living expenses.

An order for spousal maintenance is generally made for a limited period of time with the intention of providing support to one party while they re-establish themselves. Orders can be made on an urgent, interim, or final basis – i.e. they can be made to support a party while waiting for a property settlement to be finalised, or be made along with the final property settlement. Accordingly, an order for spousal maintenance can provide for payments to be made periodically (e.g. fortnightly or monthly) or in a lump sum.

There is no set formula to determine spousal maintenance, rather the Court will assess the circumstances of your particular situation.

Spousal maintenance is separate from child support and child maintenance payments, which are paid for the benefit of a child. A party can be ordered to pay both spousal maintenance and child support, however, the Court may take into consideration any child support payable when determining an application for spousal maintenance.

SEEKING FINANCIAL ADVICE

Seeking financial advice about your property settlement ensures that you understand the full financial implications of the settlement. It is important to consider the nature of assets retained or disposed of, as it may be more advantageous to hold onto one type of asset over another. It is also important to consider taxation and stamp duty implications and to utilise the best structure to manage liabilities and achieve legitimate tax savings.

If a superannuation split forms part of your property settlement it is important to evaluate the net result.

The splitting of superannuation does not convert its value into cash as it is still governed by superannuation laws and will generally only be accessible at retirement age.





MEDIATION

Most property settlements are successfully finalised without going to court and litigation should only be considered as a last resort. Generally, settling a matter outside court saves time, money and stress.

Mediation is a common method for resolving property disputes outside of court. It is a confidential, low cost and flexible method of dispute resolution that involves the parties meeting face to face with an impartial third party (a mediator). A mediator does not provide legal advice or determine the outcome of the matter but assists the parties in reaching a solution.

Mediation is most effective when parties are willing to negotiate and make genuine attempts to come to an agreement. It is a good method for parties who hope to preserve their relationship. This is often relevant in family law matters, for example, if the parties have children together and intend to continue a co-parenting relationship into the future.

FINALISING A PROPERTY SETTLEMENT

If parties reach an agreement through negotiation, mediation or another form of dispute resolution, the settlement can be documented in consent orders or as a binding financial agreement.

Consent orders are a written agreement that is filed with the Court. They are reviewed by the Court and if the Court believes that the orders listed are just and equitable, the Court will seal and publish the orders, which makes them legally binding and enforceable by the Court.

A binding financial agreement is a written agreement between the parties that complies with certain formal requirements. Both parties must receive independent legal advice before entering into a binding financial agreement and if all formal requirements are met it is legally binding.

Parties may also decide to distribute their property through an informal agreement – i.e. they agree not to document the settlement in any way.

There is some risk to an informal agreement because it is not binding and cannot be enforced.

GOING TO COURT

When litigation is necessary, property applications are heard by the Federal Circuit and Family Court of Australia. Before filing an application with the Court, the parties are required by law to make a genuine effort to resolve the matter by participating in dispute resolution. Once an application is filed the parties are required to provide full and frank disclosure of their financial situation to the Court and all parties. The Court will hear evidence and make binding orders determining the distribution of the property pool based on the key considerations listed above.



NEXT STEPS

Settling your financial affairs is an important step in moving on from a separation and is vital to gaining back your financial independence. Until a property settlement has been finalised, any assets you acquire may form part of a property distribution. The conclusion of a legal property settlement gives you a clean break.

This information is general only and is not legal advice. Laws and personal events change frequently, and it is important to obtain professional advice relevant to your individual needs and circumstances.



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