A guide to family law property settlement

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When couples separate, they usually need to divide up the property between them. This is known as property settlement in family law. There is no presumption at law that property will be distributed equally. Instead, the Court has broad powers to make orders on how property is to be divided. As every couple is different, it is important to know your entitlements and how the law applies to your individual circumstances.

Family law property settlements for married couples and de facto couples

Broadly speaking, the process of determining property settlements between married couples and de facto couples is effectively the same. One key distinction between them is the time limits given to married and de facto couples to apply to the Court for a property settlement.

Married couples have 12 months from the date of their divorce becoming final to make an application to the Court for a property settlement. De facto couples have 2 years from the date of separation to apply to the Court for a property settlement.

Once the time limit passes, an application for a property settlement can only be made with the consent of the parties or by applying to the Court for permission to make an application. This permission may not be granted so it is important to seek legal advice well before the time limit expires.

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What is the Court's approach to determine family law property settlement?

The *Family Law Act 1975* (Cth) contains a number of provisions that guide a Court in the exercise of its discretion when determining property settlements. These are summarised below.

Is it just and equitable to divide property?

The Court will assess whether it is just and equitable for there to be a property division.

A division of property is usually appropriate in long relationships, where there is a joint accumulation of wealth or merging of assets or where the parties have children. The effect of such a division is to sever the financial relationship between the parties.

There are limited circumstances in which there may not need to be a division of property such as the relationship being particularly short in duration or a party has not made a contribution towards the asset pool. It is prudent to obtain legal advice early to help you understand your rights.

What is the property of the parties?

The Court considers all of the property of the parties when it comes to property settlement.

There is a need to identify and value all the property of you and your former partner. This includes assets, liabilities and superannuation in which you and/or your former partner have an interest jointly, individually or, in some cases, via corporate entities or trusts.

Property can include:

- Real estate, such as your family home or investment property;
- Savings in the bank account;
- Investments such as shares and cryptocurrencies;
- Motor vehicles;
- Interest in a business, company and trust;
- Superannuation, including self-managed superannuation funds; and
- Liabilities such as loans, credit cards and personal debts.

Property is valued at the time of the property settlement and not at the date of separation. If you and your former partner cannot agree on the value of a particular item of property, then it may be necessary to obtain an independent valuation by an expert such as a property valuer.

During the process of a property settlement, there are disclosure obligations on you and your former partner to provide each other with all relevant information and documents regarding your

financial circumstances. This includes disclosing all property held in Australia and overseas property.

It is important to disclose all property as a failure to do this may have serious consequences, including fines or, in some cases, imprisonment.

What contributions have the parties made?

The Court considers contributions made by each party to the property pool/asset pool. Contributions can be direct and indirect, financial and non-financial and include those that relate to the care and welfare of the family.

The Court will assess the following contributions:

- Direct financial contributions such as income earned during the relationship and significant property that either you and/or your former partner owned at the start of the relationship;
- Indirect financial contributions such as gifts or inheritances received by you and/or your former partner;
- Non-financial contributions such as conducting renovations on the family home or unpaid work in a family business; and
- Contributions as homemaker and parent.

The Court does not generally perform a mathematical assessment of the contributions each party has made.

The length of the relationship and the timing of the contributions will be relevant. Any contribution made at the commencement of the relationship or towards the end of a relationship may be treated differently from a contribution made during the course of the relationship, where there is usually an intermingling of finances.

What are the future needs of each party?

After assessing contributions, the Court will consider and assess the future needs of both parties to the marriage or de facto relationship. In doing so, the Court will look at each party individually and take into account a range of factors, including but not limited to:

- their age;
- their state of health;
- their income and capacity to earn income in the future;
- their property and financial resources; and

• responsibility for the care of any children under the age of 18 years.

If one party has greater future needs than the other, an adjustment may be made in that party's favour to compensate for any difference in the parties' future circumstances.

Formalising agreement on the division of property

Many couples reach an agreement about their property matters by negotiation and/or through family dispute resolution. Once you and your former partner have reached an agreement about the division of property, it should be formalised to provide certainty and finality.

There are two ways to formalise your agreement.

Property settlement Consent Orders

In many cases, parties formalise their property settlement by making an Application for Consent Orders. Consent Orders are proposed orders which you and your former partner agree on and ask the Court to formalise as court orders.

Consent Orders are usually made in chambers, without anyone having to physically attend Court. Once orders are made by the Court, they are legally binding on both parties, and each party must follow the orders. Breaching a court order can have serious consequences and the Court can impose penalties if you or your former partner fail to comply.

Financial Agreement

In some cases, parties may choose to formalise their agreement about property matters by entering into a Financial Agreement.

A Financial Agreement is essentially a contract between two parties made under the *Family Law Act 1975* and requires both parties to obtain independent legal advice from an Australian lawyer. The law about Financial Agreements can be complex, so it is best to speak with a family lawyer to determine the best way to formalise your property agreement.

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If parties cannot agree on the division of property

If you and your former partner cannot agree on property matters, you can apply to the Court for a property settlement. There are ongoing opportunities for you and your former partner to agree on a property settlement after filing an application. Most property settlement applications filed in Court are settled without the need to proceed to a Final Hearing and a decision being made by a Judge.

Get help from a family lawyer

Dividing up property after separation can be emotional and stressful, particularly when determining what happens to the family home or where complex financial structures are involved.

A family lawyer can guide you through a property settlement and ensure that your interests are protected. Contact us to speak with one of your experienced family lawyers about your circumstances.

Contacting Smith Family Law

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Further reading on property settlement

- Time limits for property settlement and spousal maintenance
- Was it a gift or a loan? The difference is critical in family law property settlement
- My former partner is delaying property settlement
- Calculating the asset pool for family law property matters

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.