
Property & Financial Matters Family Dispute Resolution

Property Division (Married Couples)

This information applies only to couples who are or have been married.

When couples separate they need to make decisions about how to share the joint property and joint debts. In order to make those decisions, a number of questions often need to be answered.

When should we divide our property?

Parties do not have to be divorced, before they divide their property. However, it helps if they are over the worst of the emotional upheaval associated with separation, have made arrangements for the children and have some idea of their future situation. Once the parties are divorced they can only apply to the court for property settlement within 12 months of the divorce, except in special circumstances.

Can we reach our own agreement?

If parties are able to agree on how to divide their property and wish to formalise that agreement there are several options available to them. The Family Court of Australia has produced a Consent Order kit which is available from the Family Court or by visiting the Court website on www.familycourt.gov.au. See also handout titled “Making Agreements Legally Binding”.

What if we can't agree?

If parties are unable to agree on a property division, either party can apply to the Family Court or the Federal Circuit Court of Australia for a decision. There is no monetary limit on the jurisdiction on these two courts with respect to property proceedings.

What principles does the Court apply?

The Family Law Act lists the factors which the judge must take into account, but does not provide the judge with a set of rules or mathematical formula to be applied in each case.

The Act also says that the decision should be ‘just and equitable’ i.e. fair.

Court proceedings for property settlement follow three basic steps.

1. Collection of information about the property
 - The court makes a comprehensive assessment of the financial circumstances of the parties at the time of hearing. This includes all property, whether owned by one party or jointly, all debts, income and expenditure as well as superannuation. The parties are required to disclose this information on oath, or by making a promise to the court that the information disclosed is complete and accurate.

- Once the court has a full picture of what property there is, it may treat certain items of property differently. For example, the court may decide that some items of property should not be included in the pool of assets to be divided, but should be seen as the property of one party only, for example, a recent inheritance or gift.
2. Assessment of contribution made by each of the parties towards the property.

These include:

Direct or Indirect Financial contribution, for example:

- money for the deposit on a house;
- money paid into a family business;
- money paid towards home improvements;
- money paid towards superannuation interests;
- one party paying the bills freeing the other party's income to buy or improve property;
- one party putting their money into buying furniture and the other into buying the house;
- a relative making a financial contribution to the family assets on behalf of one of the parties.

Direct or Indirect Non-financial contribution for example:

- contributing labour in building the extensions or landscaping the yard;
- skills in running the family business;
- a contribution of labour or skills by a third person (e.g. a relative) on behalf of one of the parties.

Contribution to the 'welfare of the family'

- most relevant where there are children involved;
- recognises the contribution of the spouse who may not be bringing in an income but who takes on the job of home duties e.g. cooking, cleaning, shopping, looking after children etc.

3. Assessment of future needs of both parties.

In arriving at a decision about property division the court must take into account each party's financial prospects for the future, including:

- the earning capacity of each party i.e. income level, employment history, level of skills, qualifications, age, state of health and the extent to which the marriage has affected that earning capacity;
- the financial resources of each party i.e. investments and inheritances;
- the financial responsibilities of each party i.e. where one party has residence of the children, or has a responsibility to support someone else e.g. – an elderly parent.

How is child support relevant to property settlement?

The division of property after separation and the responsibility to pay Child Support are two completely separate issues.

Child Support may be capitalised and paid by way of a greater share of the property. However this is paid in addition to a party's entitlement to property assessed in accordance with the principles outlined above.

It is strongly recommended that legal advice is obtained if an amount of Child Support is capitalised.

Spousal Maintenance

Refer to handout on Spousal Maintenance.

Do I need to see a solicitor?

As is clear from the above information a judge's job in making a decision about division of property is neither simple nor straightforward and discretion plays a large part. It pays to keep this in mind when approaching a solicitor for legal advice.

If you wish to reach your own property settlement, without resorting to the courts, then legal advice becomes very important in assisting you to negotiate effectively.

It is important that, in obtaining advice you:

- provide your solicitor with the whole picture, in an objective way taking into account factors on both sides;
- request a range of likely outcomes in the event of the matter going to court, expressed either in dollars or percentage terms, including an indication of the worst possible outcome for you, the best possible outcome, and the most likely outcome;
- obtain an idea of the likely cost and time delays involved in taking the matter through the various stages of the court process.

Your solicitor's responsibility is to advise you of your legal rights. It is entirely up to you whether you act upon the advice you receive.

What happens if we cannot agree?

If you cannot reach agreement about how to divide your property, it is important to seek legal advice about what options you have. You may need to apply to the court for a decision.

If that is the case please note that there are time restrictions on starting court proceedings for spousal maintenance and property settlement.

The Family Law Act provides that proceedings with respect to maintenance and property shall not be instituted (except by leave of the Court or with the consent of both parties to the marriage) after the expiration of 12 months after the date on which a divorce order took effect.

The following is a list of property items and financial resources which may be owned by you or in which you may have a legal interest. The division of these items may need to be discussed in Family Dispute Resolution.

Property Item

Real estate	Furniture and household effects
Money owed to you	Motor vehicles
Life assurance policies	Personal property (jewellery, boat, artwork etc)
Credit in banks, building societies and credit unions	Anticipated tax refund
Cash in hand	Value of business or partnership, including plant and equipment
Shares and debentures in public companies	Collection (stamps, records, books etc)
Shares in private companies	Cause of Action for damages (personal injuries)
Interest in unincorporated business partnerships, syndicates, joint ventures	Superannuation Interests (total gross value)
Loan accounts (company, partnership, or trust)	

Liabilities

Mortgage	Loans	Credit Cards	Other
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Financial Resource

Long Service Leave Entitlements (accumulated)	Interest in any trust
Interest in deceased estate	Retirement benefit
Sick Leave (cash entitlement)	Fringe benefits from employment
Annual Leave (accumulated)	Goodwill, special skills

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We strongly recommend the obtaining of specific independent legal advice.