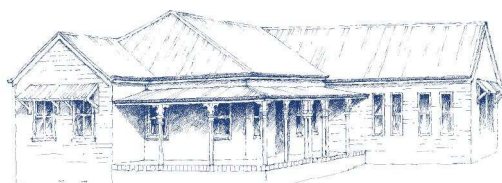


FAMILY LAW MATTERS

INITIAL ADVICE BOOKLET – PROPERTY AND CHILDREN



REABURN SOLICITORS

Unit 8, 18 Township Drive
Burleigh Heads QLD 4220
Ph 07 5586 2222

Email info@reaburn.com.au
Website www.reaburn.com.au
Our ref: MR

Copyright Reaburn Solicitors

FAMILY LAW ADVICE – INITIAL CONSULTATION

After separation, de facto or married couples usually wish to finalise the financial relationship between them. In legal terms this is called a Property Settlement. Many people consider that they do not need to do a Property Settlement as there may be very few assets to divide. This issue can be complicated, however, if one of the parties to the relationship subsequently receives an inheritance or a windfall such as a lotto win. A Property Settlement, whether by consent or ordered by the Court, severs the financial relationship between the parties unless there are children of the relationship. In that case, the parent with whom the children are not living with may have to pay child support until the children turn 18.

As a result of decided cases, there is a well established process for determining Property Settlements. The process is as follows:

1. Identify the Assets and Liabilities of the Parties

It does not matter whether property is in sole or joint names or whether a party has disposed of an asset since separation. The entire asset pool of the parties is taken into account. If assets have been disposed of since separation, the Court can bring these assets back into the pool.

Generally, unless there are special circumstances, the value of the property to be considered is the value as at the date of the Court hearing and not the date of separation. Where either the jointly held assets have increased in value since separation or one of the parties has acquired assets since separation, the Court will take into account the contribution made by the other party to the accumulation of that asset. Where no agreement is reached as to the value of the assets, a Valuer must be appointed, generally at the joint expense of the parties.

2. Contributions of the Parties

After identifying the parties “pool” of assets, the Court then looks at the contributions made by each of the parties to that pool. There are 3 main areas in which contributions throughout the relationship are taken into account for Property Settlement purposes:

(a) Financial Contributions

These are direct financial contributions. They may comprise assets owned by one of the parties at the commencement of the relationship or income earned during the relationship. These contributions include inheritances and gifts either from family members or other people.

(b) Non-financial Contributions

These are considered to be contributions which add value to the asset pool but do not require a financial outlay. These include items such as painting the house, landscaping, gardening, making curtains, etc.

(c) Homemaker and Parent Contributions

We describe these as the “cook, clean, wash” roles as well as any parenting contribution. This is particularly relevant when there are young children of the relationship. For example, if one party stayed at home to care for the children

while the other party worked, the homemaker and parent contribution is often considered to be substantial. In certain circumstances the homemaker and parent contribution can be considered equivalent to that of the breadwinner's contribution.

3. Future Needs

Because the Court has an obligation to sever the financial relationship, it must take into account what the future holds for each of the parties. An adjustment is made taking into account issues such as the age of the parties, state of health, standard of living during the relationship, capacity to work, and any ongoing parenting role.

There are a number of other issues which are relevant to Property Settlement proceedings such as:

1. Time Limit

If the parties are married, an application for Property Settlement must be lodged within 12 months of the date of the Divorce. After that time, leave of the Court is necessary to initiate proceedings. Property settlement proceedings in a de facto relationship must be commenced within 2 years of the relationship ending unless there are exceptional circumstances.

2. Consent Orders/Financial Agreements

If agreement can be reached by either negotiation or mediation, it is possible to finalise Property Settlement proceedings without having to go to the expense and trauma of Court proceedings. The agreement can be formalised by either Consent Orders, which are made in the Court without the necessity for a formal appearance, or by a Financial/Separation Agreement. These Agreements must comply with the formal obligations imposed by the relevant Legislation.

3. Disclosure

Non-disclosure or fraud will endanger a Property Settlement. We cannot emphasise enough the need to fully disclose your financial position. In the event that one party does not disclose their position fully to the other party, it may be possible for the other party to seek to set aside any Agreement/Consent Orders entered into. Further, where non-disclosure is proven, this may have a substantial impact on the Court's attitude to the division of property.

4. Spousal Maintenance

It is possible, only if the parties are married, to seek an order for spousal maintenance where one party is unable to support themselves as a result of the issues previously discussed. The capacity of a party to seek spousal maintenance is, however, dependent on the following:

- (a) The ability of the applicant to support themselves (you should note that any pension received from Centrelink will be disregarded from this exercise);
- (b) The ability of the other party to pay.

5. Childrens Issues

Unless the parties can agree, either together or with the assistance of ourselves or a Counsellor/Mediator (or their Solicitors), it is the Court which determines with whom children are to live. In making this decision, the Court will have regard to the *Family Law Act* ("the Act") which was amended on 1 July 2006 and now sets out the principles and objects under which decisions regarding children are to be made. The objects of the amendments are to ensure:

"(1) That the best interests of children are met by:

- (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and*
- (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and*
- (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and*
- (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.*

(2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and*
- (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and*
- (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and*
- (d) parents should agree about the future parenting of their children; and*
- (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).*

(3) For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

- (a) to maintain a connection with that culture; and*
- (b) to have the support, opportunity and encouragement necessary;*
 - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and*
 - (ii) to develop a positive appreciation of that culture."*

Section 60CC of the Act sets out how a Court determines what is in a child's best interests on the following terms:

"Determining child's best interests

- (1) Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).*

Primary considerations

(2) *The primary considerations are:*

- (a) *the benefit to the child of having a meaningful relationship with both of the child's parents; and*
- (b) *the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.*

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

Additional considerations

(3) *Additional considerations are:*

- (a) *any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;*
- (b) *the nature of the relationship of the child with:*
 - (i) *each of the child's parents; and*
 - (ii) *other persons (including any grandparent or other relative of the child);*
- (c) *the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;*
- (d) *the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:*
 - (i) *either of his or her parents; or*
 - (ii) *any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;*
- (e) *the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;*
- (f) *the capacity of:*
 - (i) *each of the child's parents; and*
 - (ii) *any other person (including any grandparent or other relative of the child);**to provide for the needs of the child, including emotional and intellectual needs;*
- (g) *the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;*
- (h) *if the child is an Aboriginal child or a Torres Strait Islander child:*
 - (i) *the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and*
 - (ii) *the likely impact any proposed parenting order under this Part will have on that right;*
- (i) *the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;*
- (j) *any family violence involving the child or a member of the child's family;*
- (k) *any family violence order that applies to the child or a member of the child's family, if:*
 - (i) *the order is a final order; or*
 - (ii) *the making of the order was contested by a person;*

- (l) *whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;*
 - (m) *any other fact or circumstance that the court thinks is relevant.*
- (4) *Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:*
- (a) *has taken, or failed to take, the opportunity:*
 - (i) *to participate in making decisions about major long-term issues in relation to the child; and*
 - (ii) *to spend time with the child; and*
 - (iii) *to communicate with the child; and*
 - (b) *has facilitated, or failed to facilitate, the other parent:*
 - (i) *participating in making decisions about major long-term issues in relation to the child; and*
 - (ii) *spending time with the child; and*
 - (iii) *communicating with the child; and*
 - (c) *has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.*
- (4A) *If the child's parents have separated, the court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.*
- (5) *If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2) or (3).*

Right to enjoy Aboriginal or Torres Strait Islander culture

- (6) *For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:*
- (a) *to maintain a connection with that culture; and*
 - (b) *to have the support, opportunity and encouragement necessary:*
 - (i) *to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and*
 - (ii) *to develop a positive appreciation of that culture."*

If the parents have already separated and the children are already living with one parent in a stable, happy and healthy environment the Court is generally reluctant to change that status quo.

The Court also has jurisdiction to make Orders as to whom the children will "spend time with". This had been previously known as access or contact. Whilst there is no such thing as a standard arrangement, the Court now has an obligation to consider shared parenting. This certainly does not mean that the children are to spend equal time with both parents, for instance "week on, week off". It remains a matter for the Court to determine based on what is in the children's best interests. In the past, it has been common for the parent with whom the children are to spend time to have the children in their care as follows:

- (a) Each alternate weekend;
- (b) Half the prescribed school holidays;
- (c) Half of the "special days". These include the children's birthdays, fathers day, mothers day and possibly the respective parents birthday.

It is yet to be seen whether the attitude of the Court will change as a result of the recent amendments however the Court is obliged to consider the issues set out previously.

6. Divorce

Where the parties are married, a Divorce can be obtained by either party to a marriage provided that they have been separated for 12 months. Parties to a marriage can be regarded as being separated whilst living under the same roof, however evidence would need to be presented by an independent person to confirm that the relationship is at an end.

The Court needs to be satisfied that the parties have been separated for 12 months. That is the grounds for the Divorce. If there are children of the marriage, the Court must also be satisfied that proper arrangements are in place for the children. Details of those arrangements are set out in the Divorce Application.

- ooOoo -

This document has been prepared in an attempt to clarify issues discussed at our initial consultation. It is a very brief summary of the issues and is intended as a guide only. For more detailed advice please contact our office.