

FAMILY LAW MATTERS
INITIAL ADVICE BOOKLET – PROPERTY



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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.

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 Contributions

We describe these as the “cook, clean, wash” roles. In certain circumstances this 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, any ongoing parenting role and the "income, property and financial resources" of each of the parties.

4. **Just and Equitable**

Finally, the Court must make Orders which are just and equitable, in other words fair. This is the fourth element which the Court takes into account and gives the Court discretion to make Orders which it considers appropriate taking into account all of the matters mentioned previously.

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. 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.

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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.