

FACT SHEET

Property Division After Separation



What is a property settlement?

The term property settlement is the legal term for the division of property at the end of a marriage or de facto relationship. A property settlement can occur any time after separation and for married couples, you do not have to wait until after you are divorced to finalise property settlement matters.

What is property?

Property includes all the assets and debts under the ownership or control of either or both parties to the relationship. This includes real estate, superannuation, shares, money in bank accounts, personal loans credit cards, vehicles, interests in a business/company, jewellery and furniture. There are also some financial resources that one party may have access to that should also be taken into account, such as an interest in a family trust or deceased estate.

Can parties come to their own agreement about property settlement?

It is a good idea for parties to try and come to an amicable agreement about the division of property. However, it is strongly recommended that you seek legal advice about your likely entitlements before you agree to anything.

How do you formalise a property settlement agreement?

Parties have two options:

1. A consent orders; or
2. A binding financial agreement.

Consent orders

If an agreement between parties is reached, it is preferable to formalise the agreement by seeking consent orders from the court. Consent orders are orders submitted to the court, after both parties have agreed to the orders.

The court will only approve the orders if they are satisfied the proposed settlement is fair and equitable.

Neither party needs to be legally represented to obtain consent orders, although it is recommended that legal advice is sought. The documents may be complex and need to be drafted correctly in order for the court to grant the orders sought.

Binding financial agreement

Alternatively, parties can formalise their agreement by way of a binding financial agreement. A binding financial agreement is a private agreement that is not filed in the court, but it is still enforceable by the court. Because a binding financial agreement is not filed in the court registry it is not reviewed by a court registrar and will be granted even if it is not just and equitable pursuant to the *Family Law Act 1975*. Both parties are required to seek independent legal advice and each person's lawyer must provide a signed document saying independent advice was given.

Binding financial agreements are often challenged and can be set aside for a variety of reasons. To cancel or change financial agreements, you must prove:

- there was a fraud;
- the agreement was not practical to carry out;
- there was a major change regarding a child/children care and welfare; or
- the other person acted in an unconscionable way.

How does the court decide how to divide assets and debts if parties cant come to an agreement?

The Family Law Act 1975 outlines the principles that the court considers when deciding property settlement matters following the breakdown of a relationship. The principles are the same for married and de facto couples and are based on evaluations of the:

- Assets and debts of both parties including joint and sole, and what they are worth (for example, a consideration of property includes joint property *and* debts in one parties name only);
- Direct financial contributions by each party to the marriage or de facto relationship such as salary earnings;
- Indirect financial contributions by each party such as gifts and inheritances;
- Non-financial contributions to the marriage or de facto relationship such as the care of children; and
- Future requirements - a court will take into account things like age, health, financial resources, care of children and ability to earn.

Time limitation period

If you cannot agree on how to divide your assets either by agreement or at a mediation, an application to the court for a property settlement must be commenced within 12 months from the date a divorce becomes final if you are married. If you are in a de facto relationship, an application to the court for property settlement must be commenced within two years from the date of separation.

You can only apply to the court for a property settlement after this time in special circumstances. The Family Court and the Federal Circuit Court can make orders in relation to financial matters following the breakdown of a relationship.

www.bcls.org.au

info@bcls.org.au

07 3162 3282

Wynnum Community Centre, 105 Florence Street, Wynnum QLD 4178

PO Box 103, Wynnum QLD 4178

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