

7. Property

7.1 What is considered property of a relationship?

When your marriage or **de facto relationship** ends, all the **property** that you and your former partner own needs to be divided in a way that is fair to both of you.

Property includes things such as a house, land, superannuation, a business or company, cash, trusts, cars, caravans and boats, bank accounts, gifts and inheritances, lottery wins, compensation payouts, insurance policies as well as furniture and household items. Personal things like clothing are unlikely to be included.

Loans and debts are also considered property.

Property includes property each of you brought into the relationship, property acquired during your relationship and property acquired after separation.

Property of a relationship includes property that is in your name, property in your former partner's name and property in both your names. It does not matter if all the property is only in one person's name because the title to property can be changed from one partner to the other to make sure that the property is divided fairly.

7.2 How long after we separate do I have to sort out our property issues?

If you need or want a court to help you sort out your property issues, time limits apply.

If you were *married* you must apply to court **within 12 months** of your divorce order becoming final. If you were in a *de facto relationship* you must apply to court **within 2 years** from the date you **separated**.

The same time limits apply to applications for spousal **maintenance** by married and de facto couples. See ► *Chapter 6* for more on spousal maintenance.

If your time limit has expired, you can make a special application to the Court for permission to apply out of time and this is only given in exceptional circumstances.

7.3 Which law applies to me?

The *Family Law Act 1975* covers all separating couples, whether they are married or in a de facto relationship. This includes same sex couples.

However there are different time limits for applying to a court for orders about how the property is to be divided for couples who are married and those who are in de facto relationships. See above for information on time limits.

When can the family law courts make a decision about our property?

The court needs to have 'jurisdiction,' that is, have the power to make a decision about your property.

If you are married the court needs to see proof that:

- ▶ there is a valid marriage (under Australian law or another country – shown by giving them copy of the marriage certificate and/or certified translation if not in English); and
- ▶ either you or your spouse is
 - an Australian citizen; or
 - living permanently in Australia; and

- in Australia at the time a court application is made for a property settlement.

If you are a de facto couple the court needs to see proof that:

- ▶ you and your partner were living permanently in a participating jurisdiction (all States and Territories of Australia except WA) when your relationship broke down; or
- ▶ you and your partner live in a participating jurisdiction on the day the court application is made; and either:
 - both of you lived there for at least one third of your relationship; or
 - the applicant made a substantial contribution to the property or the finances of the relationship or the welfare of the family in a participating jurisdiction.

This can be proved with some basic information in an Affidavit.

How do I know if I am in a de facto couple?

The Court will find that you have been in a de facto relationship, if, having regard to all the circumstances of your relationship, you were a couple living together on a genuine domestic basis. Those circumstances may include any or all of the following:

- ▶ the length of your relationship;
- ▶ your living arrangements;
- ▶ your sexual relationship;
- ▶ your financial arrangements;
- ▶ your commitment to a shared life;
- ▶ any children of your relationship or whom you cared for;
- ▶ whether other people knew you were in a relationship;
- ▶ if your relationship is or was registered under a prescribed law of a State or Territory.

Once the Court is satisfied you were in a de facto relationship, it can make decisions about how to divide your property.

7.4 What if we can agree on how to divide our property?

If you can agree on how to divide your property, you have three options:

1. You can have an *informal agreement*. You and your former partner do not have to go to Court or have a formal written agreement about how you are dividing your property. However, an informal agreement is not legally binding, which means it cannot be enforced if one of you fails to follow the agreement. Also, stamp duty is only waived on the transfer of property if there is a court order. For these reasons, an informal agreement is not recommended in most circumstances.
2. You can ask the Court to turn your agreement into **consent orders** by completing an Application for Consent Orders and filing it with the Court. If the Court thinks that the agreement is fair it will make the agreement into orders. When the Court makes the orders, they become binding. This usually means that neither you nor your former partner can make any further claim on the property. It is very important to get your own legal advice prior to signing consent orders. For more about consent orders see ► *Chapter 2: Do I need a solicitor or barrister?*
3. You can turn your agreement into a **binding financial agreement**. This agreement must comply with formal requirements in order for it to be legally binding. You must receive your own legal advice before signing a binding financial agreement. Binding financial agreements are discussed later in this chapter.

It is important to obtain legal advice about your circumstances and whether an informal agreement, consent orders or a binding financial agreement would suit you best.

7.5 What if we can't agree on how to divide our property?

Can I go straight to court?

In most cases, the *Family Law Act* requires you to try to reach an agreement by using dispute resolution such as mediation before you can apply to the Court for property orders.

In some cases you may not have to try to resolve your property dispute before going to court, such as when:

- ▶ you have experienced family violence;
- ▶ your partner refuses to negotiate;
- ▶ there has been fraud;
- ▶ there is a reason to make an urgent application, for example, if there is a risk that your partner may sell property without telling you; or
- ▶ you are almost out of time to make your application.

How will the Court divide our property under the Family Law Act?

There is no formula about how to divide your property. The Court will look at the facts of your case and use the following four steps to decide a fair way to divide your property. You and your former partner should use the same steps if you want to divide your property without asking the Court to decide for you.

1 Identify what property you have and how much it is worth

Identify and value the property of the relationship. Property includes such things as property owned by you or your partner at the start of the relationship, property purchased by either or both of you during the relationship, superannuation, gifts and inheritances received by either of you, goodwill in a business, compensation payments, lottery winnings, redundancy payouts, and loans. Property also includes any debts owed individually or jointly. The property is valued as at the date of settlement or court hearing.

If you do not know what property your partner owns you can ask the Court to issue a **subpoena**. A subpoena requires banks, employers or other organisations to send the information to the Court for you or your **lawyer** to look at. See ▶ *section 7.7* for information about how to find out about your partner's superannuation.

2 Work out what contributions you both made to the relationship

Consider what contributions you and your partner made to the relationship. Contributions made after your relationship ends and up to the time you finalise your property division may also be relevant.

Contributions can be non-financial and/or financial.

Financial contributions include any money provided by you or your parents or other family members, wages or a deposit paid on a house. They also include initial contributions (any property you had at the start of the relationship).

Non-financial contributions include any unpaid work you or others have done repairing, improving or maintaining property, or work done in a business owned by your partner.

Contributions made as a *homemaker or parent* are also considered as non-financial contributions.

In some cases the contributions may not be seen as equal, such as where the relationship was short or the contributions of one partner were particularly large.

Domestic violence, or behaviour such as gambling or drug and alcohol addiction may be taken into account in property cases. The violence or other behaviour must have significantly impacted on a person's ability to make contributions to the relationship. In these circumstances, it may be fair to increase the victim's contributions and reduce the violent person's contributions.

3 Work out your future needs

Future needs are worked out by looking at the following factors for you and your partner:

- ▶ age and health, including any disabilities;
- ▶ income;
- ▶ ability to earn an income and entitlements to any financial resources;
- ▶ responsibility to support children or others, including how many nights children live with each parent; and
- ▶ whether or not the relationship and your role in it (for example as the primary caregiver) has affected your ability to get a job.

For example, if the Court decided that your contributions were equal in the past and that you have two young children who live with you most of the time and your partner makes more money than you do or can, then the Court may order a distribution of the property to you which is more in your favour than it is to your partner.

4 Think about whether it is a fair division of the property in the circumstances

Work out if the way you have divided the property between you and your partner is fair. The Court assesses this by looking at the overall financial position after the first three steps have been considered. The Court should only make an order if 'it is satisfied that, in all the circumstances, it is just and equitable to make the order'.

Important Information

To start most property cases under the Family Law Act, you need to eFile the following documents on the Commonwealth Courts Portal (www.comcourts.gov.au):

- ▶ an Initiating Application form), which must state the orders that you want the Court to make (you can change the orders you are asking for later on if you get new information about your property);
- ▶ a Financial Statement; and
- ▶ an Affidavit in support.

If you are or were married, give the Court a copy of your marriage certificate and if relevant, divorce certificate.

If you want the Court to make interim or urgent orders you must file an Affidavit saying why it is an urgent matter and ask for leave (permission) to have your case heard more quickly.

There will be a filing fee unless you are eligible for an exemption or a waiver of court fees. See ▶ *Chapter 9: Family Law Fees for current fees.*

You can also apply for orders about your children at the same time. See ▶ *Chapter 4: Children.*

It is a good idea to go to the **Family Law Courts** website or call the Court first to check the current court rules and to get copies of the right forms.

What happens after I have eFiled my Initiating Application form?

You must arrange for a copy of all documents eFiled to be served on (formally given to) your partner by hand by anyone over 18 (except you).

Your partner should then file and serve you with a Response to Initiating Application, Financial Statement and Affidavit (if required) **within 14 days** of your documents being served on him or her. Your partner can oppose all or part of your application and ask for different orders to be made.

What will happen at court?

There are a range of events which may happen at court including:

- ▶ directions hearings – where orders about court process can be made such as a list of documents to file and by what date; and
- ▶ conferences – where a Registrar will meet with you and your partner and your lawyers to try to settle your dispute.

If you cannot reach an agreement with your partner, your matter will eventually be listed for a trial (this is also called a final hearing). In most cases both you and your partner will need to give oral evidence at the trial. This means you may be asked to answer questions after taking an **oath** to tell the truth.

What if we reach an agreement after our court case has started?

If you reach an agreement after your court case has started you can ask the Court to make consent orders, sometimes called 'Terms of Settlement'. Once the Court approves the orders they will be just as binding and enforceable as orders made by a judge.

For more about **consent orders**, see ▶ *Chapter 2: Do I need a solicitor or barrister?*

Can I appeal a court order?

If you think the Court has made an error in deciding your case, you can file an appeal **within 28 days** of the judgment and ask for the decision to be set aside. This is not a rehearing of your case, but an appeal based on an **error of law**.

If your time limit has expired you have to make a special application to the Court for permission to appeal out of time and this is only granted in exceptional circumstances.

You should get legal advice about the appeal process as it is very complex and can be very expensive.

7.6 Can we make an agreement about our property before we separate?

Yes, you and your partner can make a binding financial agreement (**BFA**) before, during or after your relationship.

A BFA can deal with how your property and financial resources are to be divided on the breakdown of your relationship and the payment of spousal maintenance in some situations.

The Court is not required to approve a BFA but can enforce the agreement if the necessary requirements are followed, which include:

- ▶ you and your partner must obtain independent legal advice before entering into a BFA and produce a certificate stating that you received this advice; and
- ▶ at least one of you must sign a separation declaration.

You will need a solicitor to prepare your BFA as they are complex and must satisfy many legal requirements. BFAs are expensive to enter into and they can only be set aside by the Court in limited circumstances.

If you are in a de facto relationship and have a BFA you will need to make a new BFA if you later marry your partner.

7.7 Superannuation

How is superannuation dealt with under the Family Law Act?

The *Family Law Act* allows superannuation to be split at the end of your relationship. Usually superannuation can be taken from your partner's fund and put into a superannuation fund in your name (or the other way around). Sometimes the superannuation will be put in your name into the same fund as your partner because of the legal requirements of the fund.

How do I find out about my partner's superannuation?

You can ask your partner's superannuation fund to tell you the value of their superannuation.

The Family Law Courts website has a Superannuation Information Kit which contains the forms that you must send to the trustee of the fund, which are:

- ▶ Form 6 Declaration; and
- ▶ Superannuation Information Request Form (accompanied by the appropriate Superannuation Information Form).

The fund may charge a fee to provide you with this information.

Handy Tip

Keep a record of the name of your and your partner's superannuation funds and membership numbers.

How do I divide superannuation?

If you ask for some of your partner's superannuation, the following options are available:

- ▶ reach an agreement with your partner to split the superannuation and enter into a Superannuation Agreement, which is a Financial Agreement that includes superannuation. You must provide a certificate stating that you have received independent legal advice regarding this split. You do not have to register this agreement in court, so you must keep a copy of the agreement. The *Family Law Act* does not require that the fund be given notice of the terms of a superannuation agreement, but it is wise to do so to ensure the terms can be carried out by the fund; or
- ▶ register an agreement with the Court so it becomes consent orders (see earlier in this chapter for more details about consent orders). You must notify the superannuation fund which must approve the orders. This must be done at least **28 days** before filing the Application for Consent Orders; or
- ▶ apply to the Court to make an order regarding your partner's superannuation. You must tell the superannuation fund about the orders you are asking the Court to make about superannuation. You must provide the fund with an opportunity to attend the court hearing and object to the orders.

If you and your partner split your superannuation, you will not receive any cash payments from the superannuation fund until retirement. However, in

some cases of severe financial hardship it may be possible to apply to the fund to have the superannuation released to you before retirement age.

Sometimes you can ask the Court to order the superannuation fund to flag when a superannuation payment is due. This can be done to make sure that the benefit is not paid out to your partner before the property division is resolved. Flagging a superannuation interest can be useful when your partner is close to retirement age.

You should get legal advice about how to deal with superannuation in your property settlement. It is a complex area of law.

7.8 What else should I think about?

Can I get an urgent court order to protect our property?

Yes, if you are worried that your partner may sell or give away property or get a new loan without telling you, the Court can make an urgent order (**injunction**) to stop this happening until a final decision is made about your property. This includes property which is owned in the sole name of your partner.

Can I get an order for my partner to give me money to pay for a lawyer?

In some cases you can ask the Court to make an order for your partner to pay you some money for your legal fees or other expenses. However, before the Court will do this they must be satisfied that you will get at least that amount of money at the end of your property dispute and that your partner has enough money left for themselves.

Any money you get in advance may be taken off the amount you get at the end of your property dispute. This will depend on things like how much money your partner has spent on their legal fees and other expenses during the court case.

The Court does not make these orders very often – usually only where your partner has a very high income compared to you, or valuable property in his or her name that can be used as security for borrowing money from a bank.

Can I live in the house after separation?

If you are both named on the title or the lease, you and your partner are entitled to live in the family home unless there is a court order that says either you or your partner must leave. If only one of you is named on the title or the lease, the person named can exclude the person not named. In limited circumstances, you can get a family law order giving you the right to stay in the house, to the exclusion of the other person, until the property settlement is finalised. The Court looks at the needs of both parties and the needs of the children. This is called a sole occupation order or an exclusion order.

If you are living in a rental property there are different options if you want to stay or leave the property. See ► *Chapter 5: Protection against violence and harassment* for further information.

If you have experienced domestic violence you can also apply for an exclusion order as part of an application for an apprehended domestic violence order (**ADVO**). See ► *Chapter 5: Protection against violence and harassment* for further information.

What if my partner is bankrupt?

If your partner is bankrupt at the time of your property settlement, you are still entitled to make a claim on the property remaining after the bankruptcy. Your financial and non-financial contributions will be recognised equally with the rights of any other creditors making a claim to the property. If your partner is bankrupt or looks like they might go bankrupt, you should get urgent legal advice.

What about stamp duty and capital gains tax?

Stamp duty and/or capital gains tax usually needs to be paid when property is sold or transferred. However, in most cases you will not have to pay stamp duty or capital gains tax if you transfer the title of your property from one partner to the other under a court order. This includes consent orders and orders made by a judge.

You should get legal and accounting advice about any capital gains tax you might have to pay on property you keep after the property is divided and then later sell.

What happens to our debts?

The only debts that you must pay are debts that are in your name, joint debts or debts guaranteed by you. Just because you are married or in a relationship does not mean that you take on all your partner's debts.

Under the *Family Law Act* the Court can order that the responsibility for a debt be altered. The debt can be transferred into your name or your partner's name or altered so that both of you pay part of the debt. To do this, the Court can order third parties (e.g. banks) connected to the debt to alter it accordingly.

This means that any third parties involved with your debt must be told about the court application so they can tell the Court what they think about the proposed change.

What if we have a large amount of debt / multiple debts and can't afford to pay them now we are separated?

It can be complicated where you and your former partner both have a large amount of debt and no ability to pay. It is good to see a financial counsellor to discuss your debts and your options for dealing with those debts. You need to be realistic about what you can afford. Legal Aid might be available in some very limited cases to make an application to the Court for orders about your property and/or debts.

Can I get spousal maintenance from my partner?

In some circumstances, a Court might order that your former partner pay you spousal maintenance. For more information on this, see ► *Chapter 6: Spousal Maintenance*.

What if my partner forced me to take on debt in my name?

If your partner has forced you to sign loan documents, credit card applications, cheques, withdraw money or put your name on debts you need to seek legal advice as soon as possible.

You will usually be responsible for any debts in your name or joint names even if the debt really isn't yours.

See ► *Chapter 9: Referrals and Resources*.

Will a property agreement affect my Centrelink payments?

If you are getting a pension or benefit from Centrelink, or if you are likely to apply in the future, any agreement you make to take a larger share of the property instead of maintenance for you or the children may affect your payments. Get advice from Centrelink or a **solicitor** to find out how you may be affected before you sign any agreement or apply for court orders.

Can I get legal aid?

It is difficult to get legal aid in property matters, particularly if you have a house. However, in some situations legal aid may be available. This may include where you are trying to keep the family home for the children and will not receive any other money in the property settlement or when the only property of any value is superannuation. Sometimes you will get legal aid but may have to pay back some or all of the legal costs from your property settlement after the case is finished. Contact Legal Aid NSW to find out if you might be eligible. See ► *Chapter 9: Referrals and Resources*.

If you feel that you have exceptional circumstances and have been refused legal aid for your property matter then you should lodge an **appeal with legal aid within 28 days** of receiving that refusal.

Handy Tip

Make lists of as much of the following information that you can. You will need this information if you are negotiating a property settlement with your partner or if you are going to see a lawyer. You can use the 'Information Sheet' in Chapter 2 to record this information:

- ▶ dates – when your relationship began and/or when you married, when it ended, the dates of birth of yourself, your partner and of any children;
- ▶ valuations of assets – current valuations for your home, cars, furniture, shares, life insurance and superannuation policies and any other assets. Estimates are good enough at this stage. If you must go to a full hearing you will need to get proper valuations. Real estate agents will often give you a 'market assessment' or appraisal which is an estimate of the value of your home for free;

- ▶ liabilities – outstanding mortgages, personal loans, credit card statements and any other debts;
- ▶ family business – any family business liabilities and current trading statements;
- ▶ financial contributions – any money or other assets brought into the relationship at the beginning and during the relationship, and any money or other assets, such as cash savings, investments, gifts from parents, compensation payments or any other source;
- ▶ non-financial contributions – if you have mainly been a homemaker it is essential that you document your contribution to the relationship in terms of home decoration, renovation or maintenance, attendance at school functions, supervising homework, entertaining business clients, etc;
- ▶ salaries – for both you and your partner; and
- ▶ superannuation entitlements – current statements for both your funds.

If you are planning on leaving your home, it will make things easier later on if you take the original or photocopies of all documents relating to your property, such as title deeds, bank statements, superannuation fund statements and receipts.