# 7. Separation, your home and property division

This chapter provides information about your rights and options when it comes to your home and living situation when you separate, whether you rent or own your home.

This chapter also provides information about dividing up the property of your relationship – called property settlement. **It is important to note that 'property' means more than just your house.**

## I've separated. What are my rights and options about my home?

## 7.1 I want to leave my home to stay safe

### Where can I go?

If you need to leave your home to be safe from violence, there are organisations that can support you. Women's refuges provide a safe place to stay while you work out future plans. They can give you referrals for financial help. They may offer counselling services that can help you emotionally and give you a chance to talk over your options. The Domestic Violence Line can provide information and referrals to women's refuges in your area.

See ➤ *Chapter 9: Referrals and Resources* for details.

### Do I lose interest in the home I own?

If you decide to leave a home you own, you do not lose interest in your home. You can come and go from the property, but we recommend you only do this if it is safe.

### I rent. How to do I end my tenancy?

If you are experiencing domestic violence by someone you have, or have had, a domestic relationship with, you can end your tenancy immediately, without penalty, by giving the landlord and any other co-tenants a Domestic Violence Termination Notice. A sample Domestic Violence Termination Notice is available from the Tenant's Union NSW website.

The notice you give the landlord must attach one of the following:

- an **Apprehended Domestic Violence Order** (**ADVO**); or
- a personal protection injunction under the Family Law Act; or
- a certificate of conviction which shows the perpetrator was found guilty of a domestic violence offence; or
- a declaration by a 'competent person'.

See ➤ *Chapter 5: Protection against Violence and Harassment* for more information on ADVOs.

A 'competent person' is a:

- health practitioner registered under the Health Practitioner Regulation National Law (NSW);
- a social worker who is a member of the Australian Association of Social Workers;
- an employee of a NSW government agency that works in child protection;
- an employee of a non-government agency that receives government funding to provide services relating to domestic or sexual violence or refuge or emergency accommodation; or
- a Victims Services' approved counsellor.

The declaration form is available on the Fair Trading NSW website.

### Tenant databases

It is common for victims of domestic violence to be listed on bad tenant databases because they owed money after they had to abandon a rental

property or because the perpetrator damaged the rental property. If you terminate your tenancy by giving your landlord a Domestic Violence Termination Notice, you cannot be listed on a bad tenant database.

### Damage to property

You will not be responsible for damage to a rental property if you can show that the damage was caused by a perpetrator of domestic violence during a domestic violence offence. If your landlord says you are responsible for the damage, contact your local tenancy service for advice.

## 7.2 I want to stay safe at home

### I want the perpetrator of violence to leave

If you are a victim of domestic violence, you may want the perpetrator removed from your home.

You or a police officer can make an application for an ADVO and ask for an exclusion order preventing the defendant from entering the property.

See ➤ *Chapter 5: Protection against Violence and Harassment* for more information on ADVOs.

If you are renting and the perpetrator is named on the lease, and you have a final ADVO with an exclusion order that prevents the perpetrator from entering the property, the perpetrator's tenancy will end automatically.

An interim ADVO, with an exclusion order preventing the perpetrator from having access to your rental property will mean that you can continue to live safely in the property while the interim ADVO is in place. However, an interim ADVO will not end the defendant's tenancy.

If you do not have an ADVO, or you have an ADVO, but the ADVO does not contain an exclusion order, you can apply to the NSW Civil and Administrative Tribunal for an order ending the perpetrator's tenancy in the 'special circumstances' of the case (s 102 *Residential Tenancies Act 2010*).

### Can I change the locks?

If you own the property, you can change the locks. However, it is important to know that if the perpetrator is a co-owner, they can also change the locks, so this might not be a practical solution.

If you are a tenant, you can change the locks of your rental property without the landlord's consent if you have an ADVO with exclusion order (provisional, interim, or final). You can also withhold copies of the new keys from the excluded person.

If you do not have an ADVO with an exclusion order, you should seek the landlord's permission before changing the locks.

## I've separated. How do we divide all our property?

### 7.3 What is considered 'property' of a relationship?

Property of the relationship includes all assets (things you own) and liabilities (money owing) that are held in your sole name, your former partner's sole name, or by you and your former partner jointly. For example, this means that if a house or a car is only in your former partner's name, it is still considered property of the relationship. Sometimes it can also include assets or liabilities held by you or your former partner with a third party.

Assets can include a house, apartment, land, a business, a company, trusts, shares, cryptocurrency, bank accounts, cars, caravans, boats, household contents and superannuation.

Liabilities can include home loans, credit card debts, personal loans, tax liabilities and motor vehicle leases.

The value of the property of your relationship is calculated by adding up the total value of the assets and subtracting the total value of the liabilities at the time you and your former partner finalise the property settlement. This is known as the 'property pool'.

### 7.4 How long after we separate do I have to sort out our property?

If you need or want a court to help you sort out your property, time limits apply. It's important to keep these time limits in mind in case you can't reach an agreement with your former partner about how to divide the property.

The *Family Law Act* 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:

**Married:** If you were *married* and you later divorce, you must apply to court **within 12 months** of your divorce order becoming final.

**De facto:** If you were in a *de facto relationship* you must apply to court **within two years** from the date you separated.

See ➤ *section 7.6* for more information on *de facto relationships*.

The same time limits apply to applications for spousal **maintenance** by married and de facto couples. See ➤ *Chapter 6* for more information 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, but this is only given in exceptional circumstances.

## 7.5 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, it's important to know whether an informal agreement is the right option for your circumstances.

- An informal agreement is not legally binding, which means it cannot be enforced if one of you doesn't follow the agreement. It might also mean that your former partner can come back in the future and ask for a formal property settlement. Finally, if you and your former partner have agreed to transfer ownership of an asset (for example, ownership of a house, apartment, or motor vehicle), then stamp duty will be payable upon the transfer of ownership of the asset. The payment of stamp duty is only waived if you and your former partner formalise your agreement by way of consent orders or a financial agreement (see ➤ below). This means it is better to make formal orders in these circumstances, so you don't have to pay stamp duty. For all of 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 of the relationship. 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 *financial agreement*.

- You do not need the court to approve the financial agreement however, the financial agreement must comply with legal requirements for it to be valid and enforceable. Both you and your former partner must each get your own independent legal advice before signing a financial agreement and each solicitor must sign a certificate which confirms that they have provided independent legal advice about the advantages and disadvantages to you of entering into the agreement. 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 financial agreement would suit you best.

## 7.6 When can the court make a decision about our property division?

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

If you were 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; and
- you and your partner were in a de facto relationship for at least two years; or
- you and your partner have a child together; or
- you or your partner made a significant contribution to the relationship which would mean that it would be really unfair not to consider your application for property orders.

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 consider whether you were a couple living together on a genuine domestic basis by looking at things like:

- 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 children 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 a decision about how to divide your property.

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

### Can I go straight to court?

The general rule is that before a person can apply to the court for property orders, you must comply with the court's pre-action procedures. This includes trying to reach an agreement by participating in dispute resolution (mediation) with the other person, giving the other person written notice of your intention to apply to the court and exchanging information about your finances with your former partner (providing financial documents to one another, also known as providing full and frank disclosure). The financial documents you and your former partner need to provide to one another are listed in ➤ *chapter 2.4*.

In some cases, you may not have to comply with the court's pre-action procedures before going to court, such as when:

- you have experienced family violence;
- your former 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 former 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 mathematical formula used by the court to divide the property of your relationship. 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 Determine whether it is just and equitable to make property orders*

This involves a judge considering whether all the circumstances of the case mean that it should make orders about how to divide the property of the relationship. For example, when a relationship is very short and there have been no significant contributions made by one party and no children involved, the court might decide it is not just and equitable to make property orders.

*2 Identify what property you have and how much it is worth*

Identify and calculate the property of the relationship (see ➤ *section 7.3* of this chapter). You and your former partner must disclose to one another all the assets and liabilities in which you have an interest. You or your solicitor can make the relevant enquiries to check whether your former partner owns real estate or land in their name through the NSW Land Registry Services and whether your former partner has an interest in a company through the Australia Securities and Investment Commission. If court proceedings are commenced and you do not know whether your former partner has disclosed all their relevant financial information to you (for example, all bank accounts in which they have an interest), you can ask the court to issue a subpoena to a bank or an organisation to obtain the information you need. A subpoena requires banks, employers, or other organisations to send the information you ask for to the court for you or your lawyer to look at. See ➤ *section 7.9* for information about how to find out about your partner's superannuation.

*3 Work out what contributions you both made to the relationship*

The court considers the contributions you and your former partner made to the relationship. These contributions include:

- The contributions you and your former partner each made at the time the two of you started living together (that is, the assets and liabilities you each brought into the relationship).
- The contributions you each made during the relationship. These include financial contributions, non-financial contributions, parenting contributions, and homemaker contributions.
- The financial contributions, non-financial contributions, parenting contributions, and homemaker contributions you each made after you separated.

*Financial contributions* can include income earned, redundancies, windfalls, and gifts or inheritances provided by parents or other family members. *Non-financial contributions* can include any unpaid work you or others have done repairing, improving, or maintaining property, or work done in a business owned by your partner. Parenting and homemaker contributions include caring for the children and performing household chores.

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

significantly greater than those of the other partner. The court will weigh up all the contributions against the others to decide how the property pool should be divided between you and your former partner on a percentage out of 100%. For example, at this step, the court might decide that the property pool be divided 60% to you and 40% to your former partner. This is called your entitlements to the property pool. There is no hard and fast rule as to how the court weighs each of your contributions and decides each of your entitlements to the property pool. The court might determine that the weight of financial gifts, inheritances and redundancies received early in the relationship have diminished over the time and are offset by the other party's contributions, while financial gifts, inheritances and redundancies received shortly before separation are given greater weight.

Domestic violence can be taken into account in property cases. The violence 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 entitlements to the property pool.

Where one party has wasted a significant sum of money on gambling, drugs or other addictions, the court might take this into account.

You should speak to a solicitor about whether domestic violence and/or addiction is relevant to your property settlement.

*4 Work out your future needs*

The court might then decide to adjust entitlements to the property pool based on each of your future needs. For example, if the court decides that each of your entitlements to the property pool are equal (50/50) based on each of your contributions, the court might decide that your future needs are greater than your former partner's because you have two young children who live with you most of the time and your partner makes more money than you do or can. The court will then increase your entitlements to the property pool, so that you receive, for example, 55% and your former partner receives 45% of the property pool.

Future needs factors for you and your former partner can include:

- age and health, including any disabilities;
- income;
- income earning capacity;

- entitlements to any financial resources, for example expected employment bonuses, long service leave entitlements or distributions from a trust;
- 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.

Again, there is no formula or rule as to how the court decides this and you should get legal advice about your likely entitlements to the property pool.

### What do I need to file in court?

To start most property cases under the *Family Law Act*, you need to electronically file (called eFiling) the following documents on the Commonwealth Courts Portal (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 any assets or liabilities;
- a Financial Statement;
- an Affidavit in support;
- a Financial Questionnaire; and
- a Genuine Steps Certificate. This shows you have complied with the court's pre-action procedures or that you cannot comply with the procedures (as discussed above).

If you want the court to make interim or urgent orders you must submit a request (usually in the form of a letter) with your application, which outlines the reasons for urgency and asks the court to hear your case quickly.

There will be a filing fee unless you are eligible for an exemption or a waiver of court fees. See ➤ *Chapter 9: Referrals and Resources* for where to find 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 Court 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 serve (give) a copy of all your documents on your former partner after you have eFiled them. This can be done by asking someone who is aged over 18 to hand them to your former partner. You cannot serve your former partner yourself. Alternatively, you can pay a process server to serve them for you. The person who serves the documents must sign an affidavit of service, which you eFile with the court to show you have served the court documents on your former partner. If your former partner has a solicitor, you can serve your documents on the solicitor by post or email and ask that they accept service on your former partner's behalf.

Your former partner must file and serve you with a Response to Initiating Application, Financial Statement, Affidavit, Financial Questionnaire, and a response to your Genuine Steps Certificate within 28 days of your documents being served on them. Your former partner can oppose all or part of your application and ask for different orders to be made.

### What will happen at court?

Once an Initiating Application is filed, the application will be given what is called a 'first return date'. This is the first listing of the application before a Judicial Registrar. If there are no urgent issues, the first listing is usually about compliance with the court's processes and procedures.

The Judicial Registrar will check that you and your former partner have each filed the required documents and have each complied with your duty of disclosure. If not, the Judicial Registrar will make orders about how and when this is to be done.

If you and your former partner cannot agree on the value of an asset, for example the value of the home, the Judicial Registrar might order that you and your former partner jointly appoint a single expert to value the home.

The Judicial Registrar might also order that you and your former partner attend mediation with a private mediator (if the value if the property pool is significant) or a Conciliation Conference with a Registrar of the Court to attempt to reach an agreement.

There are a number of court of events which may take place after the first court event. These might include:

- An interim hearing – to determine whether to make the interim orders either you or your former partner have asked the court to make.

- Further directions hearings – to make sure the court processes and procedures are followed and to get your matter ready for trial (this is also called a final hearing).

Once court proceedings have commenced, you and your former partner can still try and negotiate an agreement and apply for Consent Orders (see ➤ below).

If you cannot reach an agreement, your matter will eventually be listed for a final hearing and a Judge will decide how to divide your property. At a final hearing, both you and your partner will give oral evidence and be cross examined. 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 and your former partner reach an agreement about how to divide the net property after your court case has started, you can formalise your agreement by Consent Orders, sometimes called 'Terms of Settlement' and ask the court to approve the orders. If the court approves the orders, the Consent Orders are binding and enforceable.

For more about consent orders, see ➤ *Chapter 2.2: 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. If you lose your appeal, you may have to pay your former partner's legal costs.

## 7.8 Can we make an agreement about our property before we separate?

Yes. You and your partner can enter into a financial agreement before your relationship, during your relationship, after your relationship has ended, or after your divorce.

A financial agreement sets out the terms you and your former partner have agreed to about how the assets, liabilities and financial resources are to be divided upon the breakdown of your relationship. The financial agreement can also include terms about the payment of spouse maintenance.

The court is not required to approve a financial agreement, but the court can make decisions about the validity and enforceability of the agreement if a dispute arises between you and your former partner about these issues.

The requirements for a valid financial agreement include:

- The agreement must be signed by both you and your partner.
- You and your partner must each obtain independent legal advice from a solicitor before entering into a financial agreement and the solicitor must sign a certificate of independent legal advice, confirming that you were given advice about the advantages and disadvantages of entering into the financial agreement at the time that you signed the agreement.
- At least one of you must sign a separation declaration (once you have separated and want to enforce the agreement).

You will need a solicitor to prepare your financial agreement as they are complex and must satisfy many legal requirements. Financial agreements can be expensive to prepare, particularly those entered into before a relationship. A financial agreement, or some terms of the financial agreement, can only be set aside by the court in limited circumstances.

If you are in a de facto relationship and have entered into a financial agreement with your partner, you will need to enter into a new financial agreement if you and your partner marry.

## 7.9 Superannuation

### How is superannuation dealt with under the Family Law Act?

Your superannuation and your former partner's superannuation entitlements are included in the property pool. You and your former partner can agree to transfer some of one person's superannuation entitlements to the other person as part of your property settlement. The court can also order that this be done if your property settlement is decided by a Judge at a final hearing. Under the *Family Law Act* this is called a 'superannuation split'. Superannuation can be taken from your partner's fund and put into a superannuation fund in your name (or the other way around). In some cases, the superannuation will be put in an account in your name in the same fund as your partner because of the legal requirements of the fund.

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

Your partner must disclose the current value of their superannuation entitlements. Otherwise, you can ask your partner's superannuation fund/s to tell you the value of their superannuation.

The Family Law Court 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**

If you can, you should keep a record of the name of your and your partner's superannuation funds and membership numbers.

### How do I divide superannuation?

If you and your former partner agree to a superannuation split, you can:

- Enter into a Financial Agreement that includes terms that about a superannuation split. You and your partner must each obtain independent legal advice from a solicitor before entering into a financial agreement and the solicitor must sign a certificate of independent legal advice confirming that you were given advice about

the advantages and disadvantages of entering into the financial agreement at the time that you signed the agreement. Prior to signing the agreement, you should give the relevant superannuation fund notice of the terms of the superannuation split and ask the fund to confirm whether the terms meet their requirements.

- Set out the terms of the superannuation split in the form of consent orders to be approved by the court (see ➤ previous section about consent orders). Before submitting the consent orders to the court, you must give the relevant superannuation fund sufficient notice of the proposed superannuation split orders and ask the fund to confirm whether the terms meet their requirements. Before the court approves the proposed superannuation split orders, the court will want to see evidence that the fund has approved the orders (this is usually in the form of a letter from the fund).

If you and your former partner cannot agree about a superannuation split and you want to ask the court to make orders that you receive some (or all) of your partner's superannuation, you can apply to the court to make superannuation split orders regarding your partner's superannuation. You should give the relevant superannuation fund notice of the proposed superannuation split orders and ask the fund to approve the orders before filing your court application.

If your property settlement includes a superannuation split of your partner's superannuation entitlements that will be paid to you, you will not be able to access the superannuation entitlements until you reach retirement age. 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.

## 7.10 What else should I think about?

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

Yes. If you are worried that your former partner may sell or give away assets or take out a loan without telling you, the court can make an urgent order (injunction) to stop this happening until a final decision is made about how to divide the net property. The court can make urgent orders in relation to assets held only in your former partner's name.

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

If you do not have any money to pay your legal fees or personal expenses, you can ask the court to make an order that you receive some of the property (for example some money from a joint bank account or your former partner's bank account) prior to a final decision being made about your property settlement.

To make such an order the court must be satisfied that the amount of money you receive upfront is money you will receive out of your settlement and that your former partner has enough money available to them to pay their own expenses.

Any money you get in advance may be included in the entitlements you receive from the property pool once a final decision is made about your property settlement. This will depend on how you spent the money you received.

The court does not make these orders often. These orders are usually only made in circumstances where your partner has a very high income compared to you, or there are assets which can be sold to provide you with money to pay your legal fees and/or personal expenses.

### Can I live in the house after separation?

If you are both named on the title or the lease, you and your former partner are entitled to live in the family home unless there is a court order that says either you or your former 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 court 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 exclusive occupation order.

If you are living in a rental property, there are different options if you want to stay or leave the property. See ➤ *section 7.1* and *7.2* above.

If you have experienced domestic violence, you can also apply for an exclusion order as part of an application for an ADVO. For information on this see ➤ *Chapter 5: Protection against Violence and Harassment*.

### What if my former partner is bankrupt?

If your former partner is bankrupt at the time of your property settlement, you are still entitled to make a claim on any property remaining after the bankruptcy. Your partner's trustee in bankruptcy is required to join as a party to the court proceedings and can make decisions for your former partner without your former partner's input, such as negotiating a property settlement with you. Your financial and non-financial contributions will be recognised equally with the rights of any other creditors making a claim to your former partner's assets. 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 needs to be paid when the ownership of assets such as a house, land or motor vehicle are transferred.

If assets are transferred from one party to another in your property settlement, stamp duty is waived (not payable) if the transfer occurs under a court order (including consent orders) or a financial agreement.

Capital gains tax (**CGT**) is triggered by the sale of assets such as investment properties or shares. If, for example, an investment property is to be sold under the court orders or the terms of the financial agreement, the CGT payable can be included as a liability in the net property.

If an asset where CGT is payable is transferred from one party to another pursuant to court orders or a financial agreement, the CGT will 'roll over' to the party that is receiving the asset and that party will have to pay the CGT when (or if) the asset is sold in the future.

Prior to entering into consent orders or a financial agreement, it is important to get both legal and accounting advice about any CGT you might have to pay on assets you receive in your property settlement if you sell the asset/s in the future.

### What if my parents or my former partner's parents loaned us money to purchase our home?

These days it is common for parents to provide money to an adult child to assist in the purchase of a home. When couples separate, parents often want the money they have provided to be repaid to them.

If there is a dispute between you and your former partner about whether to repay the money to the parents who provided it, the court might be asked to decide whether the money was a gift or a loan. The court will make its decision based on your evidence and your former partner's evidence. In some cases, parents will join the court proceedings and ask the court to make an order that the money be repaid to them. This can be an expensive process and parents should get independent legal advice about this issue.

To determine whether the money provided was a non-repayable gift or a repayable loan, the court will look at several factors, which might include:

- Is there a signed loan agreement?
- Is there any written evidence which supports that the money provided was a non-repayable gift or a repayable loan? For example, emails, text messages or letters from financial advisors/accountants?
- Have you and/or your former partner made repayments to the parents who provided the money? Are there documents such as bank statements which provide evidence of the repayments?
- How long ago was the money provided?
- Have the parents asked for the money to be repaid at any time during the relationship? Is there written evidence of the request?

If the court determines that the money provided is a repayable loan, the court is likely to include the balance of the loan as a liability in the property pool and make an order that the balance of the loan be repaid to the parents from, for example, the sale of the home. This will reduce the total value of the property pool to be divided between you and your former partner.

If the court determines that the money provided is a non-repayable gift, the court will not make an order that the money be repaid to the parents. However, the court might regard the gift as a contribution from the party who received it and take this into consideration when assessing you and your former partner's contributions at Step 3 of the 4-Step process discussed above. For example, if your parents gave you $100,000 to assist you and your former partner to buy a home, unless there is evidence to

the contrary, the $100,000 might be considered as a financial contribution from you to the relationship which might result in the court deciding that you receive more of the property pool (or vice versa if it was your former partner's parents who provided the $100,000).

It is important to get legal advice about this issue as it can be complex.

### 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. However, all debts, regardless of whose name they are in, are included in the property pool unless the court agrees that there is a good reason to exclude them.

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 former 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 changes. The third party will usually be joined as a party to your court proceedings to bind them to any orders that are made.

If you want to keep the family home in your property settlement and there is a mortgage on the family home in your former partner's sole name or in joint names, you will need to refinance the home loan into your sole name. It is important to get pre-approval for refinance before entering into Consent Orders or a financial agreement.

### 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. You should get legal advice about this issue. Legal Aid NSW 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 6.12: 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.

For more information on this, 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 to find out how you may be affected before you sign any agreement or apply for court orders.

### Can I get legal aid?

It can be 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. For more information on this see ➤ *Chapter 9: Referrals and Resources*.

If your application for legal aid is refused and you feel that you have exceptional circumstances, 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 as 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, started living together and/or when you married, when it ended, the dates of birth of yourself, your partner, and 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 – you don't need to get a proper valuation at this stage. 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/income – 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.