

If you and your spouse separate, you need to consider what is to happen in relation to the division of any property that you own. The Family Law Act provides for property settlements between couples who are, or have been, married. Changes will soon be introduced that mean property settlements for de facto couples will be introduced. This means property settlements for de facto couples will also be governed by the Family Law Act. However, the Family Law Act will not assist same sex couples, who will continue to seek redress from state Courts for the resolution of property settlement disputes. The powers set out in the Family Law Act can be exercised by the Family Court of Australia, the Federal Magistrates Court of Australia or a Local Court, depending on the value of the property involved.

The Plain English Guide answers some of the more commonly asked questions regarding property settlement under the Family Law Act, but remember your lawyer is available to answer any other questions or provide advice when you need it.

If both parties have reached an agreement as to how the property will be divided, how can they be sure their agreement is binding and enforceable?

In many cases parties are able to reach agreement about a property settlement with the assistance of their lawyers. If they do, they can make an application for consent orders which is relatively simple and inexpensive procedure. If consent orders are made then the parties have the benefit of knowing that their agreement is binding and enforceable. There are also certain tax benefits in having orders made.

What happens when the parties are unable to reach an agreement about the division of property?

If you cannot reach agreement with your spouse as to a property settlement then you need to file an application for property settlement in the appropriate Court. The majority of property settlements are dealt with by either the Federal Magistrates Court or Family Court. There are ongoing opportunities for settlement of the proceedings after filing an application for property settlement in the Federal Magistrates Court. Most property settlement applications filed in the Federal Magistrates Court are settled without a decision being made by a judge. If a settlement is not achieved then the Court will make a decision as to how the property of the marriage should be divided after a hearing before a judge or other officer of the Court. Complex property settlement matters are dealt with by the Family Court of Australia.

What are the steps involved in an application for property settlement under the Family Law Act?

When you apply for a property settlement, the Court determines the application by way of a “4-step” process.

Step 1 – Identifying and valuing the assets, liabilities and financial resources of the parties

This first step involves identifying and valuing the assets, liabilities and financial resources of the parties. This includes all assets, liabilities and financial resources, whenever and however acquired. In many cases this is a simple part of the process. However, in some cases, particularly those involving businesses, the valuation exercise can be quite complex and require the involvement of specialist experts.

Step 2 – Assessment of the contributions made by the parties

The second step involves the assessment of the contributions made by the parties. These include:-

- direct and indirect financial contributions to the property of the parties;
- direct and indirect non-financial contributions to the property of the parties; and
- contributions to the welfare of the family including contributions in the capacity of homemaker or parent.

Under what circumstances may the Court find that the contributions of the parties are other than equal?

In many cases, particularly here there has been a long marriage, the Court will form the view that the parties have contributed equally. The Court may find that the contributions of the parties were other than equal, particularly in the following instances:-

- where the marriage is short and there are no children, in which case the Court will be principally concerned about the direct financial contributions made by each of the parties;

- where only one of the parties has entered the relationship with considerably more assets than the other party;
- where one of the parties has made a substantial contribution by way of an inheritance, gift from family or personal injury settlement;
- where one of the parties has brought to the marriage special skills or has made outstanding efforts which have resulted in the accumulation of substantial wealth; or
- where the deliberate or reckless conduct of one of the parties has resulted in a loss to the parties.

Step 3 – Assessing the future needs of each of the parties

The third step involves assessing the future needs of each of the parties. The Court must consider such things as:-

- the age and state of health of each of the parties;
- the income, property and financial resources of each of the parties and their capacity for employment;
- who has the care of any child of the marriage under the age of 18 years;
- commitments necessary to enable a party to support himself or herself or any other person that the party has a duty to maintain;
- the eligibility of either party for a pensioner superannuation;
- the standard of living that is reasonable in the circumstances;
- the extent to which the earning capacity of a party has been affected by the marriage; and
- if either party is living with somebody else, the financial circumstances of their household.

When the Court considers these factors it will then decide whether there ought to be an adjustment in favour of one or other of the parties to compensate for any difference in the future circumstances of the parties.

Step 4 – Is the proposed division of property fair to both parties?

After assessing steps 1-3 detailed above, the Court must then decide whether the proposed division of assets is fair to each of the parties. This assessment is done by holistically examining the circumstances of each case.

Is it possible to have a binding pre-nuptial agreement?

Amendments made to the Family Law Act in 2004 made provision for binding financial agreements to be made between parties to a marriage. These agreements can be made prior to the marriage, during the marriage or after a divorce. It is now possible for parties entering into a marriage to agree what will happen in the event that they separate. This option may be attractive to parties entering into a second or subsequent marriage with substantial assets.

How can Mills Oakley help you?

At Mills Oakley we have a number of family lawyers and Accredited Specialists in Family Law who practise exclusively in the area of family law. As well as our practical experience in all aspects of family law, other specialist lawyers in the firm are able to contribute their expertise in areas such as commercial, taxation and property law where such issues need to be considered in dealing with your case.

We aim to provide the service that is right for you, whether that be simply advising you as to your rights and obligations, assisting you in negotiating a resolution of issues in dispute or representing you in contested proceedings in the Family Court. Where appropriate we will work with your other advisers, such as your accountant, so as to achieve a good understanding of all aspects of your case and provide you with the best possible representation.

Examples of how we can provide expert advice on property settlement issues under the Family Law Act include:

- If you and your spouse or partner have reached an agreement as to how you will divide your property, we can assist you in formalising the agreement so as to make it legally binding and enforceable.
- If you wish to enter into negotiations with your spouse or partner with a view to arriving at a mutually acceptable property settlement, we can conduct those negotiations on your behalf with the other party or his or her lawyer.
- We can represent you in court proceedings concerning division of property and any other issues arising in relation to your financial interests that can be dealt with under the Family Law Act.

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