

## Property Settlement upon marriage breakdown

Property settlement upon marriage breakdown is governed by the provisions of the *Family Law Act* and, where separated spouses cannot agree on their property settlement, disputes are determined by either the Family Court of Australia or the Federal Magistrates Court.

Both Courts have broad powers to make orders for the adjustment of matrimonial property interests (including with respect to the sale of real estate and personal estate (e.g. cars, shares etc), the division of superannuation and the apportionment of debts).

### ***How are Matrimonial Property Settlements determined?***

In determining Matrimonial Property Settlements, the Family Law Courts, and legal representatives advising separated spouses as to what is an appropriate property settlement, are required to engage in a four-step process, namely:

1. Identifying and valuing the pool of matrimonial property available for division between the parties. This is usually a matter of valuing the gross assets and deducting any legitimate debts, e.g. Bank loans, income tax debts, Capital Gains Tax etc, and arriving at the net property available for division between the parties;
2. Identifying and analysing the financial contributions made by each spouse to the acquisition, conservation and improvement of the matrimonial property, and contributions made to the welfare of the family and any children of the marriage, including any contribution made in the capacity of homemaker or parent.
3. Identifying and assessing the “future needs” of the parties by considering things such as:
  - a) The age and state of health of each of the parties;
  - b) The income, property and financial resources of each of the parties;
  - c) The capacity each spouse has for gaining employment;
  - d) Who has the care of any children under the age of 18 years;
  - e) The duration of the marriage and the extent to which it has affected the earning the capacity of any particular party;
  - f) Any child support that may be payable.
4. Finally, the Court is not to make an order for a Property Settlement unless that order is just and equitable (that is, fair).

### ***What sort of Contributions are taken into account?***

Generally the contributions made by a spouse prior to and throughout a marriage that are relevant from the point of view of Matrimonial Property Settlement take two forms:

1. Financial Contributions (e.g. earnings from employment and investments, inheritances, redundancy payments and gifts of money etc);
2. Contributions made to the welfare to the family (that is, the parties to the marriage and any children of the marriage), including any contribution made in the capacity of homemaker or parent. These contributions are Non-Financial Contributions.

There is **no** presumption of “equality” in assessing the respective contributions of spouses.

However, the High Court of Australia has said that “homemaker type” contributions are to be given as much weight as contributions made throughout a marriage made by the primary breadwinner.

Accordingly, in long marriages, in particular, a court is likely to conclude the homemaker and parent type contributions are approximately equal to the financial contributions made by the other spouse.

In circumstances where there has been the application of special skills (e.g. entrepreneurial skills or great business acumen) that have led to the acquisition of significant wealth, the financial and non-financial contributions may not be regarded as equal.

Similarly, where there has been substantial wastage of assets (e.g. through gambling losses or hazardous and reckless behaviour), or a spouse has laboured under very difficult circumstances of domestic violence in making contributions throughout a marriage, this may also lead to a conclusion that the spouses’ contributions are not equal.

### ***Superannuation Splitting in Matrimonial Settlements***

Since 28 December 2001, separated spouses have been able to split their superannuation entitlements in favour of the other spouse as a means of facilitating a Matrimonial Property Settlement.

This provides separated spouses with significantly greater flexibility than used to be the case when dividing their assets. This is particularly so where one or both spouses have substantial superannuation entitlements (whether contained in an industry fund or a self-managed Superannuation Fund.)

Before the spouses enter into any agreement to split their Superannuation entitlements, and before the Family Court can make orders for a split of Superannuation, it is usually necessary for the Superannuation entitlements to be valued in accordance with a complex formula set out in the *Family Law Act* and for the trustee of the Superannuation Fund to be given notice of the proposed Superannuation Splitting Orders by having the proposed agreement orders served on the trustee of the fund.

This is a complex area of property settlements and requires specialist legal and financial advice and for further information contact one of our Family Law Partners for further guidance

### ***Documenting your family law settlement***

Once you have reached agreement on a Matrimonial Property Settlement (either in direct negotiation with your spouse, or by other settlement avenues such as Mediation or Collaborative law), it is critical to ensure that your Family Law Settlement is properly documented to avoid problems in the future and to assist with enforcement of any obligations imposed by the Agreement.

A failure to properly document your Family Law Settlement may lead to significant legal complications and substantial financial loss.

In documenting your Family Law Settlement, there are a number of available options namely:

1. Family Court Orders which can be made administratively ie. Without a court appearance, and can be approved by a Registrar or Judge of the Court or following a defended hearing.
2. A binding Financial Agreement, which can be entered into before, during or after a marriage.
3. A Parenting Plan.
4. A Child Support Agreement (either "Limited" or "Binding")

Each of these options has a number of benefits but you need to carefully consider which option is best suited to your circumstances.

Many of the documents have strict formal requirements imposed by the provisions of the *Family Law Act* and other relevant legislation (e.g. The *Child Support (Assessment) Act 1989*). To ensure compliance with those formal requirements, please contact one of our Family Law Partners for further guidance and advice.

For further advice on property settlement after a marriage breakdown and any other family law issues, please contact our Family Law partners:

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