

How do I apply to the Family Court for a Property Settlement?

This information is based on the law as at July 2010. It is intended for the use and benefit of women who contact the Women's Legal Centre (ACT) and is to be read in conjunction with the specific advice given to those women when they contact the Centre.

In most cases if you want a property settlement you apply to the Federal Magistrates Court. See the Centre's tip sheet *How do I apply to the Federal Magistrates Court for a Property Settlement ?* You apply to the Family Court if your matter is more complicated than normal, for example, you have family trusts, property owned with third parties or bankruptcy issues.

Do I need to have a solicitor?

You don't have to have a solicitor if your matter goes to Court but it is better if you do. Some solicitors will do the work on the basis that they will wait until you have actually received your share of the property settlement before getting paid, although not many solicitors act on this basis anymore.

If you are acting in person (without a lawyer) you should go to www.familylawcourts.gov.au as this website provides some very useful information about the Court process.

What do I have to do before I can file an application in the Family Court?

Before filing an application you have to comply with certain pre-action procedures. There may be serious penalties, including costs orders, if you do not comply.

The Court *may* excuse you from following the pre-action procedures in property cases, if, for example:

- a time limitation period is close to expiring
- you are alleging issues of fraud
- there is a genuinely intractable dispute
- you would be unduly prejudiced or adversely affected if notice is given to your ex-partner

In all other cases, before filing your application, you must:

1. Provide a copy of the pre-action procedures to your ex-partner. See the *Pre-action Procedure for Financial Cases* prescribed brochure at the above website.
2. Make inquiries about the dispute resolution (DR) services which are available and invite your ex-partner to attend with you. You will then both be expected to

attend the DR service and make a genuine effort to resolve the dispute. DR services offer counselling, mediation, conciliation and arbitration. For details of some of these services see the Centre's tip sheet on *Family Dispute Resolution*.

3. Give your ex-partner written notice of:
 - your intention to file an application if the DR service, for whatever reason, fails
 - the issues in dispute
 - a list of assets, liabilities and resources
 - a list of relevant financial documents in your possession or control*
 - the orders to be sought
 - copies of documents required from him/her
 - a genuine offer to resolve the issues, and
 - a time (of at least 14 days) by which he/she is required to respond

Your ex-partner must then provide to you (within the set time) a notice in writing stating whether or not he/she accepts your offer. If he/she does then the two of you can enter into consent orders.

If he/she doesn't accept your offer then his/her reply must state:

- the issues in dispute
- a list of assets, liabilities and resources
- a list of the relevant financial documents in his/her possession or control
- the orders he/she is seeking
- a genuine counter-offer to resolve the issues
- a nominated time (of at least 14 days) within which you must reply

*4. Exchange relevant financial documents with your ex-partner. In property matters it would be appropriate to exchange, for example:

- tax returns and assessments for the last three years
- bank statements for the last 12 months
- recent pay-slips
- superannuation details - a completed superannuation information form (which is available from the Family Court website). You may need to have a valuation done by an expert, especially if the superannuation fund is a public service or military fund. If the superannuation fund is self-managed you will need to provide or receive a copy of any trust deed and the last three financial statements, and the value of the super interest (advising on the basis of any such calculation and documents in support).

If there is a large number of documents, you and your ex-partner might then want to organise a time and place for each other's documents to be inspected and photocopied. You will have to pay for photocopying of the documents in your ex-partner's possession. He/she will have to pay for photocopying of the documents in your possession.

You can then file an application if:

- your ex-partner does not respond to your notice; or
- an agreement cannot be reached after a reasonable attempt has been made to settle the matter by mediation, negotiation or correspondence.

What documents do I file if applying in the Family Court?

You will need to file an original and two copies of the following first three documents in the Family Court Registry:

- 1) **Initiating Application**– in that document you will need to spell out the interim and final orders that you are actually applying for.
- 2) **Affidavit** - if you are applying for *interim* property settlement orders, or procedural orders (an interim order might, for example, be an order preventing your ex-partner from selling or mortgaging the real estate or other property in his/her name.)
- 3) **Financial statement** that sets out in detail your current financial situation.
- 4) a good photocopy of your **marriage certificate**, and
- 5) the **filing fee** – which is currently \$243, unless exempt

If you are including a “flagging” or “splitting” superannuation order, you should send the superannuation trustee a copy of the orders being sought, asking them to comment on whether they are acceptable and inviting them to be heard in relation to the making of the orders. The orders cannot be made by the Court or by consent until the superannuation trustee has confirmed that the orders are acceptable to them.

What about service of my documents?

Once the above documents have been filed at the Court Registry, two stamped copies will be returned to you, and you have to arrange for copies of each to be served upon your ex-partner. The Court will not do this for you.

If your ex-partner already has a solicitor acting for him/her you can serve their solicitor by posting the documents to them, or delivering the documents to their office.

If your ex-partner does not have a solicitor acting for them then you will have to arrange for him/her to be served personally with the documents. You cannot serve him/her yourself. An adult friend or relative can do this for you or you can pay a process server to do it. You can find a process server through the Yellow Pages. The person serving the documents must then swear or affirm an affidavit of service (which can be obtained at the Court). This is so you can later prove to the Court that your ex-partner has received the material if he/she does not then turn up to Court.

It is also possible to serve your ex-partner by post or electronic means provided that he/she acknowledges receipt of the documents served.

Once your ex-partner has received your documents, he/she will then have to file a *Response* (in which he/she states the orders that he/she is applying for), an affidavit

if he/she is seeking interim or procedural orders, and a financial statement. These documents are supposed to be served upon you at least seven days prior to the procedural hearing (see below). Further financial documents are required to be exchanged two days prior to this date (see below). A lot of the material should already have been exchanged under the pre-action procedures, but may include extra documents such as market appraisals of the former matrimonial home, unless the value is agreed upon.

What are the steps involved in the Family Court process?

You and your ex-partner must appear at the Family Court about 28 days after your application is filed, for a *case assessment conference* and a *procedural hearing* (what used to be called a *directions* hearing).

At least two days before the case assessment conference and/or procedural hearing, if you have not already done so, you must exchange with your ex-partner the following documents:

- your three most recent taxation returns and assessments
- any superannuation documents (for each superannuation interest), including:
 - the completed Superannuation Information Form
 - for a self-managed superannuation fund, the trust deed and the last three financial statements
- for a corporation (business), trust or partnership where the party has a duty of disclosure:
 - financial statements for each (including balance sheets, profit and loss accounts, depreciation schedules and taxation returns) for the three last financial years
- for the party or a corporation (business), trust or partnership where the party has a duty of disclosure:
 - any Business Activity Statements for the 12 months ending immediately before the first court date
- for any corporation, its most recent annual return, listing directors and shareholders and the corporation's constitution
- for any trust, the trust deed
- for any partnership, the partnership agreement,
- a market appraisal of any item of property in which a party has an interest.

The case assessment conference provides an opportunity for you and your ex-partner to reach an agreement with the aid of a Registrar. If you or the other party has a lawyer, they will participate in the conference.

If you cannot agree, the Registrar will assess the main issues to clarify areas of disagreement and the facts of the case, where appropriate recommend other services that might help settle the dispute (for example, further family dispute resolution or progression to a hearing), and explain what will happen next.

A procedural hearing will be held on the same day as the case assessment conference, either immediately afterwards, or later in the day. In some rare cases, there may be no case assessment conference, and the matter will proceed straight to a procedural hearing. A procedural hearing is a short hearing by a Registrar in a courtroom. At the procedural hearing, the Registrar will make directions about what should happen next, and when.

You will need to file a *Financial Questionnaire* within 21 days of the case assessment conference, listing your claim, setting out the different types of contributions you rely on to support your claim, and stating the adjustment you claim for 'future needs'. This is a form which can be downloaded from the Family Court website.

You will also need to complete a *Balance Sheet* within 28 days of the case assessment conference, listing your assets, liabilities, superannuation entitlements and resources. You then send it to your ex-partner for their input, adjust it, and subsequently file it with the Court. The Balance Sheet is also a new form which can be downloaded from the Family Court website.

The next Court event will be a *conciliation conference* before a Registrar, who will have read your Financial Questionnaire, and who will make every effort to try and resolve your matter. A conciliation conference is compulsory and provides an opportunity for you to settle your dispute. The Registrar should be able to give you their opinion as to what they see as a likely result should your matter proceed to a trial before a Judge. A lot of matters are settled at the conciliation conference stage.

What if my matter does not settle at the conciliation conference?

If your matter does not settle at the conciliation conference, you are required to make an offer of settlement 28 days after the conference. If your matter remains unresolved, it is likely that your matter will be set down for trial approximately one year later.

Property applications can now be heard more informally as a "Less Adversarial Trial" (LAT), along with parenting matters, if both parties give their consent. See the brochure "Less Adversarial Trials" on the Family Law Courts website.

Do I have to go to trial?

You should remember that you can make an agreement and file consent orders at any stage in the proceedings in either the Family Court or the Federal Magistrates Court. Most matters do in fact settle and never actually get to the trial stage.

If your matter does not settle, then expect to wait at least a year from the date of filing your application before getting to trial in the Family Court, perhaps less in the Federal Magistrates Court. If you are legally represented throughout the whole process, then you should also be expecting to have legal costs of many thousands of dollars. Even if you have a grant of Legal Aid, in most cases you will have to pay back the costs of the proceedings,

You should be prepared to compromise a little when it comes to trying to avoid financially expensive and emotionally draining Court proceedings. However, this is probably your one opportunity to get yourself financially established for your future and you owe it to yourself to seek a resolution that is fair in all of the circumstances.

Can I appeal the Court's decision?

If your matter has been determined by a Judge or a Federal Magistrate, and you believe that the decision is wrong, then you can lodge an appeal. You cannot simply lodge an appeal because you do not like the decision: you have to prove that the decision-maker made a mistake in a matter of law or fact. Appeals are very expensive and there are also strict time limitations (usually 28 days) to be followed. If you think that you would have grounds for an appeal, you need to seek urgent legal advice.

About the Women's Legal Centre

The Women's Legal Centre (ACT & Region) Inc. is a community legal centre for women in Canberra and the surrounding area. The Centre is run by women and aims to improve women's access to justice. The Centre offers free, confidential telephone advice Monday to Friday from 9.30am to 12.00 noon, and face to face appointments, when appropriate.

The numbers for legal advice (weekdays 9.30am to 12 noon) are:

Local	6257 4499
Outside Canberra	1800 634 669

The Women's Legal Centre is funded by the Indigenous Justice and Legal Assistance Division, Commonwealth Attorney-General's Department