

# How do I apply to the Federal Magistrates 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. You apply to the Family Court if your matter is more complicated than normal. See the Centre's tip sheet *How do I apply to the Family Court for a Property Settlement ?*

## **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](http://www.familylawcourts.gov.au) as this website provides some very useful information about the Court process.

## **What documents do I file ?**

You will need to file the following documents in the Registry:

- 1) **Initiating Application**– in which you spell out the interim and final orders that you are actually applying for.
- 2) **Affidavit** setting out:
  - Details of the property owned by you and your ex-partner, individually and jointly owned, for example, the home, investment properties, shares, money in the bank, interests in any businesses or family trusts, superannuation and motor vehicles.
  - Details about your liabilities, for example, mortgages, credit card debts, loans to family members.
  - The contributions made by you and your ex-partner at the beginning of the relationship, during the relationship and after the relationship. This includes:
    - a) direct financial contributions (for example, paying the mortgage, gifts from family)
    - b) indirect financial contributions (for example, paying bills)
    - c) non-financial contributions (for example, maintaining or making improvements to the property)
  - Details about your income and earning capacity and any factors (such as your

- health) affecting your capacity to earn income.
  - Details about child support that should be paid and that is being paid.
  - Any other facts relevant to your current financial situation.
- 3) **Financial Statement** that sets out in detail your current financial situation.
- 4) the **filing fee** – which is currently \$243, unless exempt

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

You file the original and two copies of documents one to three above. Your documents will be stamped with a date known as the *first return date*. You will need to go to Court on that date.

#### **What about service of my documents?**

Once the documents have been filed you have to arrange for a copy 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 them, you can serve their solicitor by posting the documents to them, or delivering the documents to their solicitor’s 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. 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 they are applying for), an Affidavit, and a Financial Statement. These documents are supposed to be served upon you at least seven days prior to the *first return date*.

#### **What happens on the first return date?**

Your matter will be in a duty list at the Federal Magistrates Court. This means that there will usually be many matters listed on the one day: not just yours. The Magistrate will go through the list to make procedural orders. The Magistrate may

also make interim orders if there are urgent issues (for example, an order seeking to stop someone from selling an asset). A date is likely to be set for a *Conciliation Conference*.

If there are any issues about obtaining copies of relevant documents from your ex-partner, such as their superannuation documents, you should mention this to the Federal Magistrate and ask for orders that he/she produce these documents by a particular date prior to the Conciliation Conference.

Relevant financial documents that you should provide to your ex-partner and that he/she should provide to you are:

- tax returns and assessments for the last three years
- copies of market appraisals for any real estate owned
- recent pay-slips
- superannuation details – copies of your latest superannuation statements, a completed superannuation information form (which is available from [www.familylawcourts.gov.au](http://www.familylawcourts.gov.au) ) a copy of any trust deed and the last three financial statements if the superannuation fund is self-managed, and the value of the super interest (advising on the basis of any such calculation and documents in support). You may need to have a valuation done by an expert especially if the superannuation fund is a public service or military fund
- for a corporation, business, trust or partnership in which either of you has an interest: financial statements for each interest for the last three financial years (including balance sheets, profit and loss accounts, depreciation schedules and taxation returns)
- 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 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
- details of any shares
- if credit card debt is claimed as a joint liability, copies of the relevant credit card statements
- bank statements for the last 12 months (if requested)

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.

### **What do I need to do before the Conciliation Conference ?**

You need to make sure that you have:

- valuations or appraisals of the real estate, motor vehicles and any other assets
- copies of statements showing current mortgage and loan balances

- copies of superannuation statements and valuations of the superannuation where relevant
- copies of the documents listed above

You need to file at Court before the Conciliation Conference a Conciliation Conference Document. You are able to send this document by facsimile to the Court. You also need to provide a copy of this document to your ex-partner or their solicitor. They should provide you with a copy of his/her Conciliation Conference document before the Conciliation Conference.

### **What happens at the Conciliation Conference ?**

A Conciliation Conference is conducted by a Registrar (a court lawyer).

At the Conference, the Registrar will look at the case from both sides and help you explore options for settling your case without any further legal action. A Registrar cannot give legal advice, however, they can talk with you about the legal principles that are applied in deciding cases.

The settlement negotiations during the Conference may be privileged. This means that what is said cannot be used in Court later. There are some exceptions to this privilege. For example, Court staff are required by law to report a suspicion or risk of child abuse and violence or threats of violence to the relevant child welfare authority.

The Conference will usually last one and a half hours to three hours.

If you have reached agreement on all issues, you (or your solicitor) and your ex-partner or their solicitor may prepare terms of settlement for you to sign so that the Court can approve consent orders. If you have not reached final agreement, the Registrar will conduct a procedural hearing and make procedural orders about what will happen next, for example, set a hearing date.

### **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.

### **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. 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 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 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 Magistrate 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