

Property Settlements in the Family Court and the Federal Magistrates Court

This information is based on the law as at July 2010. It is written 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.

What is a property settlement?

A property settlement is an order, made in the Family Court or the Federal Magistrates Court, which details who is to receive the parties' assets and liabilities when parties separate.

Which Court do I go to?

You go to the Family Court or the Federal Magistrates Court if you:

- are still married, but separated
- were married, but divorced
- were in a de facto relationship which ended on or after 1 March 2009 and:
 - a) the relationship was for at least two years; or
 - b) there is a child of the relationship under the age of 18.

Both same sex and heterosexual couples can apply to these Courts for a property division and spousal or de facto maintenance.

If your relationship broke down before March 2009 and you are applying for orders only about your property you go to either the ACT Magistrates Court or the Supreme Court - see the Centre's tip sheet *Domestic Relationships and Property Settlements*.

Which Act covers property settlements?

The Family Law Act (1975) is the relevant piece of legislation when dealing with property settlements for married people and people whose de facto relationship broke down after March 2009. Under that Act the Court has a duty to "finally determine the financial relationships between the parties ... and avoid further proceedings".

What does 'separate' mean?

Parties separate when one party tells the other that the marriage is over and there has been a breakdown in the marital relationship. It does not have to be by consent and very few separations are in fact mutual decisions. This communication is normally followed very shortly afterwards by one of you leaving the home, but it is possible to have a 'separation under the one roof'.

What is a separation under the one roof?

This means that you start to live completely separate lives from each other, but both continue to live in the home. This is becoming more common as rental prices rise, but will usually only work if you and your partner continue to have a good relationship with each other, even though you have acknowledged that the relationship is over.

In most cases, however, there are usually far too many tensions existing between the two of you for such an arrangement to continue for long. If you have children then they will undoubtedly suffer if there is conflict in the household.

The test for whether or not you have in fact separated in these circumstances is quite a tough one. It is not, for example, sufficient to say that you sleep in separate bedrooms.

There needs to be a complete breakdown in all the usual things that couples do for each other. There also needs to be a comparison done of your lives both before and after the alleged date of separation, to prove that a separation has in fact occurred. In some cases where there is a dispute as to the date of separation, your family and friends might also be required to give evidence comparing the pre and post separation situations.

As the date of separation is vital in determining what assets are available for division in your property settlement, you should consult a solicitor to discuss your date of separation if it is unclear.

What if my ex-partner won't leave the home?

If you have separated and your former partner refuses to leave the home (and you want them to leave), then you might be able to bring an application for:

1. A **domestic violence order** - This is an application brought in the ACT Magistrates Court (as opposed to the *Federal* Magistrates Court) if there is domestic violence.
2. An **exclusive occupation order** - This is an application brought in the Family Court or the Federal Magistrates Court whether or not there is domestic violence. These orders can be difficult to get. The mere existence of tension and disagreement in the home will not in itself be sufficient to justify the order being made. There needs to be 'unacceptable' conduct on behalf of the party you are seeking to evict from the household, or a clear detriment to the welfare of your child should the situation continue.

The Court will also look at a variety of other issues, for example, the respective financial capacities of each of you to find alternative accommodation, the location of the home as far as schools and other facilities are concerned, the need for one or both of you to remain in the home for work or health reasons.

What 'property' is to be included?

The property to be included in your property settlement is all of the property brought into the relationship by either you or your ex-partner and everything acquired by either or both of you throughout the time you were together. Sometimes even property bought after you separate can be regarded as matrimonial property, if it is bought with money that was acquired during the relationship, or from the sale of a matrimonial asset.

It does not matter whose name the property is in. Sometimes even a third party (for example, your parents) could have a share in what is regarded, at least in part, as a matrimonial asset.

The same thing can be said in relation to debts. Even if a particular debt is incurred in your or your former partner's sole name, it could still be regarded as a joint debt as far as the Court is concerned. The Court has powers to make orders which are binding upon third parties (like banks

and other lending institutions) and which can change the name(s) in which a debt is registered.

How do you do a property settlement?

Irrespective of how large your property pool is, the steps in working out what you should each receive are the same in all cases. There are four steps involved.

Step 1: The Property Pool

The first thing you do when working out your property settlement is to add up all of your assets (for example, the home and motor vehicles) then take away all of your debts (for example, the mortgage on the home), leaving you with a *net asset pool*.

You then have to consider what an appropriate percentage split of that net asset pool is. It may not be a 50/50 split. Most often it is not. The two issues to be considered are 'contributions' and 'future needs'.

Step 2: Assess Contributions

These can be financial or non-financial and the law says that both are important. Non-financial contributions cover things like looking after your home and your children.

If your ex-partner has earned more income than you throughout the relationship, but you have had time out of the workforce to have children and care for them, and you have contributed more than him in a non-financial way, then the contributions might be assessed as being equal.

You would usually only get a percentage weighting in your favour under this heading of 'contributions' if you owned more at the start of the relationship, received an inheritance, a cash gift from your side of the family, or made some other significant financial contribution towards the assets. Contributions are from when you started living together, whether or not that was the date of marriage.

In most long relationships the parties' contributions will be 50/50 unless there has been some significant financial contribution other than simply by way of income earned throughout the marriage.

Step 3: Assess Future Needs

It is usually because of this heading that the overall percentage division of your assets will become something greater than 50% in your favour. This is because two of the main issues to be dealt with here are "Who has the children?" and "Who has the greater income-earning capacity?"

If, for example, you have two or three children in your care and you are only working part-time or in a low-paying job, whereas your ex-partner is on a high income, you could receive approximately a 15 - 20% weighting in your favour because of these two issues. Assuming that your contributions were in fact equal, this would therefore give you 65 - 70% of the net assets.

As a general rule, when you have a small asset pool the percentage adjustments for the "future needs" factors are much higher than when you have a large asset pool.

Step 4: Are the orders just and equitable ?

After the first three steps have been completed the final step is to look at your matter as a whole and decide whether or not any further adjustment needs to be made to produce an overall “just and equitable” result.

What if we were together for only a very short time?

When working out the percentage adjustment of your property, another important issue (as well as the size of your asset pool) is the length of time you have lived together.

If you have only been together for a very short time (up to two years), there is a lot more emphasis on the ‘contributions’ made by each of you towards your assets as opposed to your ‘future needs’.

Things would be different, however, if despite it being a very short cohabitation you were pregnant at the date of separation. This is because of the future needs issues of children and your capacity to earn income.

What about superannuation?

Your superannuation is regarded as an asset just like your house or any other asset.

If the superannuation interest is to be split or flagged (see below) the Court requires the superannuation interest to be valued (see below). The method of valuing the interest varies depending upon the specific super scheme.

If the super is ‘split’ then part of your former partner’s super is actually taken out of his or her account and ‘rolled-over’ and put into your own super fund. You cannot access it until your retirement, rather than your ex-partner’s.

If the super is ‘flagged’ (which will normally be in cases where there is a short period of time before payment is due) then the superannuation trustee cannot pay-out the entitlement until the flag is lifted, at which time the known value can be ‘split’.

Although superannuation entitlements *can be* divided by consent or Court order, they do not *have* to be

In some cases it may, however, be good for you not to claim any of your ex-partner’s superannuation entitlements and get an increased percentage of the available assets now instead. To do this might enable you to get the home straightaway.

How do I get a valuation of my, or ex-partner’s superannuation interest?

The first thing you do is obtain a copy of the superannuation information kit from the Family Court website (<http://www.familycourt.gov.au>) or from the Women’s Legal Centre. This contains a form 6 declaration and a superannuation information form. You can complete and lodge the form 6 in relation to your own super fund, or your former partner’s super fund. If you are seeking information in relation to his or her super fund, the fund cannot advise him or her that you have made the application.

You should always check with the fund about the amount of the fee, if any, they are going to charge you for providing you with this information. You need to consider the date of valuation. Once the superannuation information form has been completed by the super fund if it is a defined benefit scheme, you then need to obtain an actual valuation of the super interest, pursuant to the Family Law Regulations. This is a difficult process and one which many solicitors will probably instruct someone with specialised skills in this area, to carry out. The fee charged by most experts to do the valuation is usually a few hundred dollars.

Do I have to have a property settlement?

You do not *have* to have a property settlement made in the Court, but it is highly recommended that you do.

If you simply have an informal agreement with your ex-partner then this may lead to problems in the future should he or she not abide by it. If the Court makes the order, then you can apply to the Court in the future to enforce the order if there is a problem.

It is also a good idea to have the peace of mind that having a Court order brings, including the knowledge that your ex-partner cannot make a claim in the future against your assets, including your superannuation entitlements.

Also, if you have a transfer of title pursuant to a Court order, then no stamp duties are payable on the transfer. If, for example, the home is to be transferred from joint names into your sole name, then no stamp duties are payable if you lodge a copy of your property settlement at the Land Titles Office, together with your transfer documents.

If you are seeking a superannuation splitting order you must have a Court order to action the split (unless you enter into a binding financial agreement).

How do I get a Property Settlement order made?

You get your property settlement registered in the Court by either:

- a) applying for a consent order, if there is agreement between the two of you as to how your property should be divided, or
- b) applying to the Court to make orders for you if there is no agreement.

When can I do my property settlement?

If you were married, you can either have consent orders made or begin Court action in relation to your property settlement at any time up until 12 months after your divorce becomes final. Your divorce becomes final (takes effect) a month after the actual hearing of your divorce.

If you were in a de facto relationship, you must begin Court action within two years of the date of separation.

If you don't do this, then you have to ask for (and have given to you) the leave, or permission, of the Court before you can bring your application for property orders. This can sometimes be an expensive and complicated procedure (as it involves making a separate application to the Court) and one best avoided.

Can I apply for different property settlement orders ‘down the track?’

As there is a requirement for financial relationships between parties to be brought to an end, it is very difficult to set aside or vary an existing property settlement order. The main way to get your property settlement order set aside is to establish that a ‘miscarriage of justice’ has occurred. For this you will have to prove:

- fraud
- duress
- the suppression of evidence (including the failure to disclose relevant information) or
- the giving of false evidence

Applications of this sort are quite rare as the above things are often difficult to prove. It is therefore very important that you make every effort to get a property settlement correct the first time around. This means not signing a consent order unless you are satisfied that your ex-partner has made full and frank disclosure about the values of your assets and debts. It also means that you must not be pressured into signing something that you are unhappy about.

What is a binding financial agreement?

It is possible to file in the Family Court an agreement which states what you and your partner are each to receive *if* you separate at some stage in the future. This can be entered into:

- a) before you begin your relationship or marry (much like the pre-nuptial agreements found in other countries); or
- b) during the de facto relationship or marriage; or
- c) after the breakdown of the de facto relationship or marriage.

These agreements are known as *binding financial agreements*. They are usually only entered into by people with significant assets, or by people marrying for a second time. They should not be entered into lightly as they have the effect of ‘contracting out’ of the Family Law Act (1975). This means that they are legally binding and may result in a lesser settlement than the one you would receive if the Act applied. In order for the financial agreement to be binding, you must be legally represented. The agreements are complex and detailed documents and are therefore quite expensive to prepare.

About the Women’s Legal Centre (ACT)

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 62574499
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.