Property Division when Couples Separate

CHAPTER CONTENTS

Introduction

Property has a very broad meaning at law and includes everything that is capable of being owned. Assets, such as the family home, blocks of land, bank accounts, furniture, cars, shares and interests in business are all property.

Ordinarily, property is owned by the party in whose name the property is registered. The *Family Law Act 1975* (Cth) provides the Family Court of Australia and the Federal Circuit Court of Australia (combined referred to as the family law courts) with wide powers to make orders in relation to the property of the parties to a relationship, including altering existing property rights and also to issue injunctions to protect property until a final order is made.

The family law courts draw a distinction between property and financial resources. Property is capable of being distributed between the parties by way of property settlement on the breakdown of a relationship, while financial resources are not.

Property Orders for Separating Couples

The distinction between property and financial resources is important because if the court determines the person's interest is:

- property, then the value of the property will be included in the assets and liabilities of the parties to be distributed between them, usually described as the 'property pool'
- a financial resource (e.g. interest in family trust, if the party does not control the trust), then the value of the financial resource will not be included in the pool, but may be considered in another way such as by making an adjustment in favour of the other spouse under s 75(2) of the Family Law Act
- neither property nor a financial resource but a mere expectancy (e.g. an interest under a will where the person who made the will is still alive) or the person has no interest at all, then the value of that item or thing will be excluded from the pool and will ordinarily have no bearing upon the outcome of the property settlement.

When orders can be made for married couples

The family law courts have power to make orders concerning the property of married people either:

- before a divorce, as long as the proceedings arise out of the marital relationship. It is rare for the court to make property settlement orders where the parties have not separated. Such orders may be made, however, in some circumstances such as where one of the parties is incapacitated (see *Stanford and Stanford* (2012) FLC 93-518 and *Jennings v Jennings* (1997) FLC 92–773)
- following a divorce. An application for a property settlement must be made within 12 months of the date on which the certificate of divorce is issued (s 44(3) Family Law Act). After this time, a person who wishes to apply for an order in relation to property settlement must obtain the leave of the court, which will only be given if the court is satisfied that hardship would be caused to the party to the marriage or to a child of the marriage if leave was not granted.

A party to a former marriage should seek legal advice well before 12 months after their divorce.

When orders can be made for de facto couples

The Family Law Act also applies to de facto couples who separated after 1 March 2009 or those who separated prior to that date (and have sought leave to commence proceedings) but agree to opt in to the Family Law Act.

A de facto relationship for the purposes of the Family Law Act is one between two adults (whether heterosexual or same sex) who are not legally married to each other, not related by family (s 4AA(6) Family Law Act) and live together on a genuine domestic basis. The Family Law Act contains guidance for the court in determining whether a de facto relationship exists by having regard to (s 4AA(2)):

- the duration of the relationship
- the nature and extent of their common residence
- whether a sexual relationship exists
- the degree of financial dependence or interdependence and any arrangements for financial support between them
- the ownership, use and acquisition of their property
- the degree of mutual commitment to a shared life
- whether the relationship was registered under a prescribed law of a state or territory (e.g. under the *Civil Partnerships Act 2011*(Qld))
- the care and support of children
- the reputation and public aspects of the relationship.

In addition, for the Family Law Act to apply:

- one or both members of the couple must be ordinarily resident in a participating jurisdiction, including Queensland, and all other states and territories of Australia other than Western Australia, at the time that the application is commenced
- the relationship must have lasted for at least two years (or periods which total two years), or there must be a child of the relationship or the applicant must have made substantial contributions to property to an extent sufficient to cause a serious injustice if the case was not permitted to proceed
- the couple must have been ordinarily resident in a participating jurisdiction for at least one-third of the relationship or the applicant must have made substantial contributions in at least one participating jurisdiction
- the application must be brought within two years of separation, subject to leave based on whether or not the applicant would suffer hardship.

Declaration of Interests in Property of Separating Couples

The family law courts may make a declaration as to the existing rights of the parties in property (s 78 Family Law Act). As existing rights may be altered by seeking orders for property settlement, a declaration of interests in property is not used as often in property disputes. However, it can be useful in some circumstances.

An example of the use of a declaration is when property is registered in the name of a third party to the marriage, but it is asserted by one or both of the parties to the marriage that they are the beneficial owners of the property.

Pathway to Property Settlement for Separating Couples

Approximately 95% of property settlements are obtained without going to trial before the Family Court. Of this percentage, many parties are able to reach agreement as to how their property should be divided, without having to file an application for property settlement in the courts.

Under the *Family Law Rules 2004* (Cth) (Family Law Rules), before the parties can commence proceedings in the Family Court, except in certain cases, for example where there are issues of domestic violence, the parties must engage in the following process known as the pre-action procedures (sch 1 pt 1 Family Law Rules):

- participate in primary dispute resolution (e.g. negotiation, mediation or counselling)
- exchange, by correspondence with the other party, a notice of intention to claim and explore options for settlement
- comply with the duty of disclosure (pt 13.1 Family Law Rules) and provide relevant financial documents to the other party.

The pre-action procedures do not apply to proceedings commenced in the Federal Circuit Court of Australia (FCC) in relation to property settlement. However, it is always recommended that parties try to resolve their matter by primary dispute resolution before instituting proceedings in either of the family law courts. Parties need to consider the costs, delays to a final hearing, emotional drain on themselves and opportunities lost while the proceedings are underway. Before making an application to the family law courts, parties can:

- reach an agreement by themselves
- agree with the help of a mediator
- engage solicitors to provide them with advice, write letters setting out offers and attend round table conferences (similar to a negotiation but with solicitors present) with a view to reaching an agreement; where an agreement has still not been reached, the parties can agree to proceed to arbitration rather than to start proceedings in court.

If an agreement is reached during negotiation or other primary dispute resolution process, then it should be either:

- documented and submitted to the Family Court for the making of orders (or the FCC if there are proceedings on foot in that court) or
- the parties may enter a financial agreement under pt VIIIA (for married couples) or pt VIIIAB (for de facto couples) of the Family Law Act (or a superannuation agreement under pt VIIIB) to finalise all claims for property settlement .

The Federal Circuit Court

The FCC deals with the bulk of property settlement matters, and only complex property settlement matters should be filed in the Family Court. The FCC adopts a docket system, which ensures that wherever possible the same judge will be involved in the matter from the first return date through to the trial.

The Family Court

The Family Court, either by a judge or registrar, manages the progress of a case from the time it is filed through to the trial.

The court treats each case individually, and the speed with which the case progresses largely depends on the needs of the case. There are time standards between each event that the court aims to follow. However, the time frame for matters varies substantially from matter to matter.

Alteration of Property Interests of Separating Couples

The Family Court has a wide discretion to make such orders about property it considers just and equitable in the circumstances. The court undertakes a five-step process:

1. The court will consider whether it is just and equitable to make any order for property settlement, or whether the court should not adjust the existing legal ownership structure (see *Stanford and Stanford* (2012) FLC 93-518 (applied for example in *Watson & Ling* [2013] FamCA 57).
2. The court will identify and value the property pool.
3. The court will assess the contributions of the parties (ss 79(4)(a)–(c) Family Law Act).
4. The court will evaluate the future needs of the parties involving matters referred to in ss 79(4)(d) to (g) and 75(2) of the Family Law Act.
5. The court will consider the distribution of property between the parties in light of the above and the further consideration whether the order proposed is just and equitable (s 79(2) Family Law Act).

Determining the property pool

After determining on the given facts that it is just and equitable to make an order for property settlement, the court will then determine the extent of the property (assets and liabilities) of the parties. In most cases, this will be calculated as at the date of the hearing. Therefore, the court may take property acquired after separation into account (*Farmer v Bramley* (2000) FLC 93–060).

The court will require information about the assets, liabilities, resources, income and expenses of the parties.

Each party has an obligation to provide complete details of their financial circumstances and any property in which they have an interest (*Black & Kellner* (1992) FLC 92–287). The court has the power to make an order going beyond the identified property if there is sufficient evidence to support a finding that a party has not made full disclosure of their assets (*Chang v Su* (2002) FLC 93–117). Also, if full and frank disclosure (complete information) is not made by a party, then the court may order that party to pay the legal costs associated with that non-disclosure.

Add backs

When a party disposes of an asset after separation but prior to trial, the court may bring the proceeds of the disposal into the pool of assets on a notional basis and make a distribution taking the asset disposed of into account. The extent to which the court will add back property will depend upon how the party used the funds. For example:

- where the proceeds of sale have been applied to the acquisition of new property, the court will ordinarily not add back the proceeds but will take the value of the new property acquired into account
- if a party has used the funds for reasonable living expenses, the court may find that it is not appropriate to add back the funds (*Omacini v Omacini* (2005) FLC 93–218).
- where funds have been expended on legal fees, they will most commonly be added back to the property pool (*Milankov & Milankov* (2002) FLC 93–095; see also for contrast *Chorn v Hopkins* (2004) FLC 93–024).

The legal fees are more likely to be added back if they have been spent from joint funds or a capital asset that existed at separation. They may not, however, be added back if derived from post-separation income.

While usually the court will take the assets and liabilities as it finds them at the date of hearing, add backs are now a very common argument in proceedings before the court. However, while add backs in relation to expenditure after separation are a matter for the court's discretion, that discretion is very unlikely to be exercised to add notional assets into the pool except in the instances of:

- legal fees paid (usually out of capital)
- assets or money given to third parties
- where one party has acted recklessly, negligently or wantonly (e.g. by expenditure on gambling, prostitutes or improbable scams)
- where the court is not satisfied that the asset has been expended or disposed of.

Superannuation

Both married and de facto couples (who separated on or after 1 March 2009 or prior but elect to have their property settlement determined under the Family Law Act) may now seek the following orders pursuant to pt VIIIB of the Family Law Act in relation to eligible superannuation entitlements:

- a splitting order—the court can make a property settlement order, which may include the allocation of superannuation between the parties, called superannuation splitting
- a flagging order—similar to an injunction, the court may prevent dealings with a superannuation interest pending determination of the property proceedings or pending a party becoming entitled to receive their superannuation.

The following principles are fundamental to the scheme in pt VIIIB of the Family Law Act:

- It applies to eligible superannuation plans (as defined in the Family Law Act, which would typically include interests in commonly used public superannuation funds as well as self-managed superannuation funds).
- Superannuation may be treated as if it is property.
- Separating couples may split superannuation by agreement, whether included in a financial agreement or dealt with alone or by order.
- Trustees of superannuation schemes will be bound by that agreement or order where basic conditions are met.
- When a court is splitting superannuation, it should be properly valued.

The parties should obtain up-to-date superannuation information forms in respect of each superannuation interest as well as obtain a valuation of the interest if a valuation is not provided by the trustee of the fund. Prior to obtaining any splitting order, the parties need to submit the draft order to the superannuation fund to ensure that they have afforded procedural fairness to the trustee of the fund. Otherwise, the court will not make the order until it is satisfied that the trustee of the fund has been given procedural fairness.

When confronted with a property settlement involving a superannuation interest, expert assistance should be obtained from a family lawyer and superannuation specialist.

Quantifications of Assets and Liabilities of Separating Couples

The court will assess the net value of the parties' assets after deduction of all debts. In general, the court will do this by deducting from the value of all of the property all liabilities owing by the parties, whether secured or unsecured.

Where liabilities:

- are vague or uncertain
- are unlikely to be enforced

- were unreasonably incurred by one party
- were incurred after the separation

the court may not take into account unsecured liabilities (*Biltoft & Biltoft* (1995) FLC 92–614). This is because an unsecured debt does not diminish the property available until it is paid or execution is levied on the property. However, such debts would ordinarily be taken into account in calculating the property pool, unless there were reasons for the court to exercise its discretion to exclude them. The fact that an order in such circumstances might reduce the chances of the third party recovering their debt does not prevent the court making such an order. There is no requirement that the rights of an unsecured creditor or a claim by a third party must be considered and dealt with prior to the court making a property settlement order. Similarly, no rule determines priority between a creditor and a spouse.

Family loan arrangements

The most common instance when the court is called upon to determine the existence of a liability arises with family loan arrangements. Often, funds are advanced on a non-commercial basis including no requirement to pay interest and a deferring of repayment until the disposal of the property to which the loan relates. Questions arise as to the nature of the payment (i.e. whether it is a loan or a gift and, if it is a loan, whether it is ever intended to be repaid). Often, parties to such arrangements are unaware of the time limits within which such loans may be enforced, which may also be an issue.

Ultimately, this is an issue that turns on the individual facts of each case, and evidence ought to be led from all relevant parties to the transaction. Similarly, loans may exist between a party to a marriage and a related entity, and the court will consider the reliability of accounting evidence in relation to the debt and whether it is likely to be repaid before determining whether it should be deducted from the pool of property available for division between the parties (*Foda & Foda* (1997) FLC 92–753).

Either party to a property dispute is obliged to disclose any significant creditors or any significant claim against either of them by a third party. Notice of the property proceedings may be given to a creditor or claimant to enable them to have an opportunity to join in the proceedings (*Biltoft & Biltoft* (1995) FLC 92–614).

The value of assets

The court will require the parties to place a value on each of their assets. The parties may either agree on a value or obtain a valuation of an asset. Where the parties disagree, the preferred practice is for the parties' solicitors to jointly appoint a valuer. If the parties do not do this before they litigate, the family law courts will generally order the appointment of an expert.

When the process of valuation is hazardous or uncertain because wide differences exist between legitimate valuations due to a volatile market or peculiarities relating to the specific property, the court may prefer to order the sale of the property so the real value can be revealed by market forces (*Smith & Smith* (1991) FLC 92–261).

Assessment of contributions

In deciding what each party has contributed to the total asset pool of the parties, the court will assess:

- the direct or indirect, financial or non-financial contributions made by, or on behalf of, the party to the marriage or a child of the marriage
- the contribution made by each party to the acquisition, conservation or improvement of any property, including property which has, since the contribution, ceased to be the property of the parties or of either party
- the contribution made by each party to the welfare of the family constituted by the marriage, including any contribution made as homemaker or parent.

The court has developed two principal methods of assessing contributions:

- the global approach—the pooling of all assets and liabilities and assessing the contributions as a whole
- the asset-by-asset approach—where the contributions made to each asset by each party are assessed (*Norbis v Norbis* (1986) FLC 91–712).

When determining the contributions of the parties, the court looks to all of the contributions over the entire relationship of the parties, including contributions before, during or after the formal tie of marriage was entered into or dissolved.

Non-financial and financial contributions

In a relationship where one party has exclusively been the breadwinner and the other exclusively the homemaker, the task of evaluating and comparing the parties' respective contributions is difficult. It often involves value judgments about the worth of fundamentally different activities and assessments of the value of contributions to property and to the welfare of the family.

The court has the power to evaluate how well each party performed the task associated with their role of breadwinner or homemaker. After the initial assessment is made, the court must then compare the worth of the respective contributions.

Generally, the court does not adopt a strict mathematical approach or undertake a detailed qualitative assessment of contributions but takes a more holistic approach. The parties are usually considered to have performed their roles and made contributions within the normal range.

In a long marriage, where one partner is a homemaker and one partner is a breadwinner, the court tends to assess each partner's contribution as equal.

In some cases, the court might find that one party has made a particularly significant contribution. Significant contributions by a party can be an initial large contribution of property. The court will often find that a substantial initial contribution by one spouse may be eroded to some extent by being offset against the later contributions of the other spouse, even though such contributions do not at any point exceed the initial contribution (*Pierce & Pierce* (1999) FLC 92–844). The rate of erosion of the value of an original contribution of property, and therefore the weight attached to it as an initial contribution, will depend on the quality and extent of the contributions made by both parties since the initial contribution, having regard to all the circumstances. For example, the ownership by one party

of a house and land prior to marriage will be less significant after a thirty-year marriage than after a five-year marriage.

If an initial contribution by one party has increased rapidly in value during the marriage, the question is whether that increase is a fruit of the marriage or a fruit of the initial contribution (e.g. the decision of *Coleman v Coleman* (2007) FMCAfam 604 involved a marriage of three and a half years where the trial judge held that the increase in the value of the house held by the husband at the commencement of the relationship was not a fruit of the marriage).

Other significant contributions by one party could be:

- gifts or inheritance received by one party
- contributions by third parties of a non-financial nature (e.g. a grandmother's care of the children) (*Aleksovski v Aleksovski* (1996) FLC 92–705)
- a damages award received by one party on account of an injury, particularly if that award relates to the future loss of earnings of that party
- contributions a spouse has made to the maintenance of stepchildren during the course of a marriage when no legal duty required the spouse to make that contribution (*Robb & Robb* (1995) FLC 92–555).

Weighing contributions

The court may also adjust the contributions of the parties where:

- the conduct of one party has caused financial loss to the parties (i.e. one of the partners has embarked upon a course of conduct designed to reduce the effective value of the assets or has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced their value) (*Kowaliw & Kowaliw* (1981) FLC 91–092)
- there is a course of violent conduct by one party towards the other during the marriage that is demonstrated to have had a significant impact upon that party's contributions to the marriage, or which made their contributions significantly more arduous than they ought to have been (*Kennon v Kennon* (1997) FLC 92–757). For instance, the court may find that, because of one spouse's conduct, the other spouse's contribution as a homemaker was increased (*Doherty & Doherty* (1996) FLC 92–652).

The future needs of the parties

Once the court has determined what the parties own and what contribution each person made to the acquisition of those assets, the court must consider the financial resources, means and needs of the parties, as well as the other matters set out in s 75(2) of the Family Law Act (see also the *Spousal & Child Maintenance and Child Support* chapter).

The court will consider any disparity between the parties' earning capacity and income (*DJM v JLM* (1998) FLC 92–816), financial resources (e.g. benefits that a party may derive from family companies or trusts) and the obligation of either to provide a home for the children. When such an adjustment is made, the entitlement of the other party to joint property is proportionally reduced.

The court is also required to consider the effect of any proposed order on the earning capacity of either party and the effect of any other order made under the Family Law Act. Section 75(2) also requires the court to take into account any child support paid by a spouse under the provisions of the *Child Support (Assessment) Act 1989* (Cth).

Spousal maintenance

The making of an adjustment under s 75(2) of the Family Law Act in a property settlement is not incompatible with a finding that a spouse is able to support themselves. A maintenance application is a separate matter and if spousal maintenance is sought, a separate application is required (*Waters & Jurek* (1995) FLC 92–635).

The court, when dealing with a final spousal maintenance application, is required to take into account any order that was made or proposed to be made in relation to the property of the parties (*Bevan & Bevan* (1995) FLC 92–600).

Just and equitable assessment

After assessing the parties' contributions and the factors outlined in s 75(2) of the Family Law Act, the court must further consider whether the result achieves a just and equitable distribution of property between the parties (*Dickson & Dickson* (1999) FLC 92–843).

Distributing Property between Separating Couples

After assessing each party's entitlement to the available property, the next step is to decide how to distribute the property between the parties.

Farming enterprises and other small businesses are not afforded any special treatment or protection in property settlements (*Way & Way* (1996) FLC 92–702). If the parties are able to reach agreement about a property settlement by themselves, they can determine the distribution of assets and the way any necessary financial adjustments will be funded. However, if the matter proceeds to a court hearing, the judge will have the final say on the distribution of the assets. In complex cases, the judge will often leave it to the parties to formulate the exact distribution of the assets in accordance with the court's decision about the percentage entitlements of each of the parties, taking into account the findings of the court in relation to the property of the parties and the appropriate percentage division between the parties.

Difficulties in distributing property

The following types of property often present problems in property settlements for the court and the parties:

- small estate versus substantial resources or earning capacity—it is sometimes the case that the parties have very little property available for immediate division between them, but one of the parties has a significant resource that will be realised in due course (e.g. an entitlement under a family trust) (*Grace & Grace* (1998) FLC 92–792). In this instance, the court may be prepared to postpone the property proceedings until the interest falls into the parties' hands (s 79(5) Family Law Act)

- a small or modest estate, where one party has a significant earning capacity which may have been acquired and developed during the marriage. The court may transfer all of the available net property to the spouse in lesser financial circumstances, coupled with a significant spousal maintenance order (e.g. an annual lump sum payment) (*Best & Best* (1993) FLC 92–418)
- long service leave—if a party entitled to long service leave intends to retire, and their employer will provide the long service leave as a cash sum, then the court may take the entitlement into account as a financial resource (see *Tomasetti v Tomasetti* (2000) FLC 93–023). Long service leave entitlements will be treated as property if they have been received in cash at the time of the court hearing. If the person must take the leave, then it is not a capital sum and will not be taken into account
- marriages of short duration—given the asset-by-asset approach is preferable, it is usual for the parties to receive the property that they brought to the relationship. The property acquired during the marriage is divided between them in accordance with the contributions and s 75(2) of the Family Law Act factors, with emphasis on the financial contributions when there are no children of the relationship
- jewellery—the court sometimes disregards items of jewellery as property, unless it is of significant value or has been acquired for investment purposes
- interest in trusts—spouses sometimes transfer assets out of their name into a family trust. The legal owner of the trust property is the trustee (often a company). The spouses are usually beneficiaries of the trust. The court will carefully look at the circumstances of each trust, including the terms of the relevant trust deed, to determine whether the property of the trust is really the property of the parties (or one of them) or a financial resource of the parties (*Goodwin & Goodwin Alpe* (1991) FLC 92–192). If the court is satisfied that a party has control of the assets of a trust (e.g. has been applying those assets and the income for their own use), then the court may treat the assets of the trust as the assets or a financial resource of the party. A party who alienates any assets through disposing of them to a trust, even if it occurs prior to the marriage, will not necessarily avoid those assets being included in the property pool (*Kennon v Spry* [2008] HCA 56)
- gifts— the court will determine the ownership of that gift and which party made the contribution. When a gift is made by relatives solely to one spouse who uses it, the gift will be considered as a direct financial contribution of that spouse (e.g. rent-free accommodation by the wife's parents (*Pellegrino & Pellegrino* (1997) FLC 92–789)). If the property is gifted to both parties, the court will look at the person giving it and determine whether it was given to one or both parties. The gift will be treated as an asset, and the contribution will be assessed (e.g. a contribution by a parent of one party will be considered a contribution made by, or on behalf of, that party only unless evidence shows it was not the intention of the parent to benefit only their child (*Kessey & Kessey* (1994) FLC 92–495))
- windfalls—windfalls such as lotto winnings during the course of the marriage are usually assets to be distributed between the parties. The court will carefully consider who contributed to the windfall and examine the effort made to achieve it, the time it was made and other circumstances

surrounding its making. In most cases, the court will find that the windfall should not be treated differently to any other matrimonial property (*Elford v Elford* [2016] Fam CAFC 45)

- inheritances—an inheritance does not fall into a protected category and is treated the same as other matrimonial property. However, a recent inheritance may be excluded from the pool and treated as an entitlement of the party who received it, if there are ample other funds to be divided between the parties. The other party cannot be regarded as contributing significantly to an inheritance received very late in the relationship or after it has ended, except in very unusual circumstances (*Figgins v Figgins* (2002) FLC 93–122). Often the only adjustment that will occur in relation to that late or post-separation inheritance, will be due to the future needs of the other party (s 75(2) Family Law Act)
- prospective inheritance—an expectancy of inheritance by a spouse will not be relevant in many property settlement proceedings, because ultimately it will depend upon the nature of the claims and the facts of the particular case. An expectancy is not a financial resource but it may be taken into account under s 75(2)(o) of the Family Law Act, which enables the court to take into account any other relevant circumstances (*De Angelis & De Angelis* (2003) FLC 93–133)
- personal injuries damages and other awards by a court—money received as damages in a personal injuries claim will be treated as an asset of the parties if it is received during the marriage. When a personal injuries action remains undetermined, the potential personal injuries award may not be taken into account in a property settlement or the proceedings for property settlement may need to be adjourned to enable the personal injuries proceedings to be finalised.

Variation of Property Orders for Separating Couples

A property order made under s 79 of the Family Law Act may be varied or set aside if the court is satisfied that:

- there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance at the time the order was made
- in the circumstances that have arisen since the order or part of the order was made, it is impracticable for the order to be carried out
- a person has defaulted in carrying out an obligation imposed on them by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution.

Even if the court finds a ground is established, it may refuse to exercise its discretion to set aside an order.

An order may also be varied or set aside with the consent of all the parties to the proceedings in which the order was made.

Agreement about Property Division between Separating Couples

Two principal methods of documenting an agreement for property settlement may be used by parties to a dispute:

- financial agreements
- consent orders.

If an agreement is not documented as a consent order (an order of the Family Court) or documented as a financial agreement complying with pt VIIIA (for married couples) or pt VIIIAB (for de facto couples) of the Family Law Act, then the agreement is not binding and enforceable, and either party may start property settlement proceedings at any time up to 12 months from the date of their divorce or up to two years from the date of separation for de facto couples (or after that period if they obtain the leave of the court).

Financial agreements

Parties can plan and document their property settlement (for more information about spousal maintenance see the *Spousal & Child Maintenance and Child Support* chapter) before cohabitation or marriage or during their relationship in advance of a separation by way of a pre-nuptial agreement or cohabitation agreement. Alternatively, parties may leave it until they separate to enter a separation agreement.

An agreement can deal with all or part of the parties' property. To the extent that the property of the parties is dealt with by the financial agreement, the court is not able to make orders for property settlement pursuant to ss 78 and 79 of the Family Law Act. For example, if an asset is covered in a financial agreement, the court cannot make an order in relation to that asset that is contrary to the terms of the agreement.

Financial agreements between de facto couples in all states and territories except Western Australia are also covered by the Family Court with the same requirements as agreements between married couples.

Requirements

To be a binding and enforceable agreement (ss 90G, 90UJ Family Law Act), the financial agreement must:

- be in writing
- be expressed to be made pursuant to the relevant section of the Family Law Act
- not be made where another agreement is in force between the parties with respect to the matters contained in the financial agreement. If there is another agreement, then it must be terminated. The parties can enter a formal termination agreement (ss 90J or 90UL Family Law Act for de facto financial agreements)

- not have been set aside by the court
- not have been terminated.

Before signing the agreement, each party must receive independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party, and the advantages and disadvantages at the time that the advice was provided.

Either before or after signing the agreement, each party must be provided with a signed statement from the legal practitioner stating that the advice set out above was provided. The certificate may be annexed to the financial agreement and signed by the legal practitioner, but this is no longer a requirement under the Family Law Act.

A copy of the statement provided to each party is given to the other party or to the legal practitioner for the other party.

If, once an agreement is signed by both parties, one or more of the requirements set out above are not met, the financial agreement may still be binding if:

- the court is satisfied that it would be unjust and inequitable if the agreement was not binding
- the court makes an order declaring the agreement is binding
- the agreement has not been terminated or set aside by the court.

Superannuation agreements

A superannuation agreement will be binding on the trustee of a superannuation fund who will be required to give effect to the agreement and divide the superannuation interest in accordance with the agreement. While the superannuation agreement is made under pt VIIIB of the Family Law Act, it can form part of a financial agreement covering other issues of property settlement (and spousal maintenance) (s 90MH for married couple and s 90MHA for de facto couples, respectively) or be a standalone agreement regarding superannuation. The superannuation agreement can deal with two issues:

- payment/interest splitting on the breakdown of the parties' marriage
- flagging of payments, which restrains a trustee of the superannuation fund from dealing with the superannuation interest until the flag has been lifted by either a flag-lifting agreement or an order of the court.

Consent order

A consent order is prepared in the form of a draft order of the court. A registrar will issue a sealed order in the terms of the draft order if satisfied that the terms of the order are just and equitable in all the circumstances.

Once issued, an order for property settlement will finalise a party's right to claim property settlement, but leaves open the party's right to make a spousal maintenance claim against the other party within

12 months of divorce. Any orders for maintenance included in the consent order are usually variable under s 83 of the Family Law Act. If parties are not engaged in any other proceedings before the court at the time the application is made, the form to use is an Application for Consent Orders which is then filed in the Family Court.

The Family Court provides a do-it-yourself kit for the preparation of consent orders, which is helpful for parties who have reached agreement.

Putting a Property Settlement into Effect

Once parties reach agreement about their property settlement or once the court makes an order, transfer documents must be prepared, executed and registered by the parties.

Transfer documentation is required to transfer a spouse's interest in any real estate, motor vehicles, shares, life policies and vessels. When assets are the subject of encumbrances, such as mortgages, it is usually necessary to remove the encumbrance or make new finance arrangements (e.g. by refinancing any mortgage liabilities).

Duty and capital gains tax

Once the transfer documentation is signed, it must be presented with certain declarations and the court order or financial agreement to the Office of State Revenue for assessment of duty. Most transfers pursuant to Family Court orders and financial agreements are exempt from duty in Queensland under ss 90 and 90L of the Family Law Act. A transfer should only be executed after the orders are made or, if executed prior to the orders being made, expressly held in escrow pending the making of the orders.

Capital gains tax (CGT) may not be payable on the transfer of some assets if the transfer is made to a spouse pursuant to a court order or financial agreement (provided any transfer under a financial agreement is after 12 December 2006). However, while the spouse who is transferring the asset will not be liable for CGT, the spouse who receives the asset may have to pay CGT when they eventually sell it.

The parties' latent taxation liabilities should be considered as part of the process of determining the division of the parties' property. These matters should be considered before an agreement is reached and accounting or legal advice should be sought.

Enforcement of court orders

If a spouse refuses to sign a transfer document or other document that gives effect to the parties' agreement, the other party can apply to give evidence of the default to the family law courts.

The family law courts may then order that a registrar sign the transfer or other document in place of the defaulting party.

Depending on the nature of the agreement between the parties (financial agreement or an order of the court), other means of enforcement are available (see the *Spousal & Child Maintenance and Child Support* chapter).

When the parties have settled their property by entering into a financial agreement, the family law courts can use the remedies employed in relation to contracts (e.g. awarding damages or ordering

specific performance) to enforce the agreement. Alternatively, a party who is not in default may ask the Family Court to treat the agreement as if it was an order of the court, which can then be enforced in the same way as other orders of the court.

Pursuant to s 117B of the Family Law Act, where the court orders a person to make payment of money by way of property settlement, interest is payable under r 17.03 of the *Family Law Rules 2004* (Cth) from the date of the order or as specified in the order.

Protecting Property before a Final Court Decision

Before an agreement about a property settlement is reached, an injunction may be obtained (if the court thinks it is necessary) to freeze bank accounts, to prevent furniture and other moveables being removed, to prevent property (e.g. the matrimonial home) from being sold or, where companies or trusts are involved, to prevent a party from retiring from office or entering transactions to reduce their assets.

Injunctions will usually be granted to restrain a spouse from dealing with certain assets if:

- the party can establish they have a prima facie case (i.e. they have an arguable claim to a property settlement)
- on a balance of convenience, the party claiming the injunction will suffer greater harm if the injunction is not granted than the other party will if the injunction is granted
- the assets represent a substantial portion of the worth of the parties
- in the absence of an injunction, the innocent spouse would be prejudiced and unable to obtain their entitlement to property from the balance of the assets
- there is a risk of disposal or loss of the property in order to defeat a property settlement claim or judgment.

After separation, parties to a marriage should also give consideration to a number of other matters, particularly prior to a property settlement being effected. These include:

- whether the joint tenancy in any asset (e.g. the former matrimonial home) should be severed to convert the ownership to tenants in common
- making a new will, particularly if their former partner is the executor or major beneficiary of their estate
- the nomination of beneficiaries under life insurance policies or superannuation funds to ensure that, in the event of that party's death, the proceeds of those policies are paid to their intended beneficiary
- the operation of any joint accounts (including mortgage accounts, particularly if they have a redraw facility), including a consideration of whether any joint accounts should be closed or whether a joint signatory requirement should be placed on the account.

It is important for separating couples to consider these issues after separation, particularly to cover the circumstance of an unexpected death of either party. Failure to do so could be significant if such an event occurred.

These matters apply equally to de facto couples.

Setting aside transactions

In some circumstances, the court may make orders setting aside transactions that have already been entered into by a spouse who is trying to defeat possible claims by the other spouse to property. For example, if a husband transferred property to his new de facto wife, to try to stop his former wife obtaining a share of it, that transfer might be set aside by the court (s 106B Family Law Act).

The family home

In the absence of a court order to the contrary (e.g. a protection order issued pursuant to the *Domestic and Family Violence Protection Act 2012* (Qld)), the right to enter and occupy a matrimonial home rests with the person or people having title to the property. If the family home is registered in joint names, both parties have the right to enter the property. In such a case, a husband cannot force his wife to leave or stay out of the former family home and vice versa.

If the home is registered in the name of one party, they may have the right to refuse to allow the other party to enter or occupy the home. However, if this happened, the excluded spouse could seek an order from the family law courts to protect their situation. Such an order, which may be an injunction or an order altering property interests, may grant the applicant the exclusive right to occupy the matrimonial home.

Legal Notices

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