



## What is considered 'property'?

Property includes all assets (where an item is owned) and liabilities (where money is owed) of a relationship.

### It may include:

- Real estate including the family home or land.
- Cash or money in bank accounts.
- Cars or other vehicles.
- Superannuation.
- Investments.
- Shares.
- Insurance policies.
- Other assets like furniture and artwork.
- Debts like credit cards, mortgages, loans and/or personal debts.

Property includes assets and liabilities that are owned individually, with another person, or by a company or trust.

# What is a property settlement?

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A property settlement is the legal term for the division of property at the end of a marriage or de facto relationship.

In Australia, there are laws about how property should be divided if you separate. These laws are set out in the Family Law Act. It is important to get legal advice about your entitlements before agreeing or signing any documents. There are many factors that need to be considered when deciding how property should be divided, including when children are involved. It may not matter who owns the property, who bought the property or who incurred the debt. You may still be entitled to a property settlement even if you did not work or contribute financially to the property.

A property settlement can be achieved by reaching an agreement with your former partner. If you are unable to reach agreement, you can apply to the court seeking property settlement orders (provided you are within the time limits set out on the following page.)

# Do we have to reach an agreement or go to court by a certain date?

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There are time limits within which you must start a case in court to divide property or assets or sort out your finances.

## These time limits are:

1. If married, an application for property division or maintenance must be made within 12 months of a divorce order becoming final.
2. If de facto, an application for property division or maintenance must be made within 2 years from when the de facto relationship ends.

If the case is not started in court within the time limit, the right to pursue the claim will be lost.

In some matters the court can give permission for a person to commence a property settlement application after the time limitation has expired, however this only occurs in exceptional circumstances. It is your responsibility to ensure that court proceedings are commenced prior to the expiration of the limitation date.

# Is property settlement the same for married and de facto partners?

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Yes, the same law relating to property settlement now applies to both married and de facto couples (who separated after 1 March 2009) when they separate.

# How to divide property – the four-step process

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**While there is no set formula used to divide your property after separation, the court uses a four-step process.**

## Overview of the process

An overview of the four-step process used by the court in considering each party's entitlement is outlined below:

### **STEP 1. Work out the net value of the property**

Identify all the 'property' in the relationship which includes assets (e.g. houses, cars, boats, inheritances and shares), debts, superannuation and any other financial resources. Once those items are identified, they then need to be valued, or some agreement should be reached about their value.

### **STEP 2. Assessing contributions**

Contributions are what each party brings in, adds, or contributes to a relationship.

#### **The court looks at:**

- the initial contributions of the parties (meaning what assets and liabilities they held at the start of the relationship);
- the financial and non-financial contributions:
  - financial contributions include money contributed to the acquisition, maintenance, or improvement of assets; the income of each party; and whether any inheritances have been received.
  - non-financial contributions can include any unpaid work to improve, renovate or maintain a property. Contributions made as a homemaker or parent are also considered non-financial contributions. It is important to know that financial and non-financial contributions are considered equally important under the Family Law Act);and
- the direct and indirect contributions made.

### **STEP 3. Assessing future needs**

There are considerations the Court must take into account when looking at the future needs of the parties.

The most common factors that are taken into consideration include:

- age;
- earning capacity;
- care arrangements for any children of your relationship; and
- the health of each person.

### **STEP 4. Determining what is fair and equitable in the circumstances**

Your lawyer will help you identify the relevant issues to your situation and give you an idea of what may be a reasonable settlement for you, and what a judge would likely decide if the matter proceeds to court. The Court will not make a property order unless it is satisfied that the proposed division of property is just and equitable.

Most importantly, your lawyer should give you advice that is practical and realistic, with a view to helping you reach a resolution as quickly as possible.

## **We agree about property arrangements – What is next?**

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If you can reach an agreement with your former spouse about the division of property, you can make either an informal or formal agreement. **There are two ways to formalise an agreement to make it legally binding (enforceable by a court):**

- Consent Orders; or
- A Financial Agreement

### **Can the agreement reached be informal?**

You can reach an informal agreement about how to divide your property. However, an informal agreement is not legally binding or enforceable by a court. You can make your agreement binding by entering into consent orders or a Financial Agreement.

### **What is a consent order?**

Consent Orders are an agreement between two parties that is approved by the court with the court orders then made in the agreed terms. A Consent Order is just as enforceable as if it were an order made by a Judge at a final hearing. Consent Orders have the same legal effect as any other court order and are typically the recommended approach for formalising a property settlement. Consent orders can be difficult to change or set aside once they are made. Legal advice should be obtained before signing consent orders.

### **What is a Financial Agreement?**

A Financial Agreement is a document that sets out the agreement reached between the parties. Each party must obtain independent legal advice as to the effect, advantages and disadvantages of the Financial Agreement. For a Financial Agreement to be binding, it needs to comply with specific sections of the Family Law Act 1975.

Financial Agreements can be made before, during or at the end of a relationship. Financial Agreements made before marriage are often referred to as “pre-nuptial agreements” or “pre-nups”.

# We don't agree about property arrangements – What is next?

If you don't agree about property arrangements, you may want to start court proceedings.

Before commencing any proceedings, it is essential to make a genuine attempt to resolve your property dispute without going to court.

Each party to the proceeding must comply with the pre-action procedures, which include:

- Participating in a family dispute resolution (mediation)
- Making a genuine offer to resolve the dispute
- Giving written notice to the other party that you intend to apply to the court for an order.

The court will expect the parties to have complied with the pre-action procedures and there may be consequences if they have not been complied with, including costs orders (having to pay the other party's legal expenses).

**Your SAFETY is the most important consideration. You do not need to have to comply with the pre-action procedures if:**

- The problem is **urgent**
- There has been **domestic violence**
- There is a **risk of domestic violence**

Not all matters are appropriate for Family Dispute Resolution. If you feel intimidated, scared or think that you could feel intimidated during the process, it is important to tell the Family Dispute Resolution Practitioner, and tell them about any history of domestic violence between yourself and the other party.

You should not feel pressured to agree to any property settlement. If you are uncertain, do not agree or sign anything until you have received legal advice.

If you are the Respondent to a Domestic Violence Protection Order or a Temporary Protection Order and there is a condition that prohibits you from contacting the other person, you should also obtain legal advice before any agreement is reached.

# What if I don't know what the assets and liabilities are?

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Prior to commencing proceedings (and during proceedings) parties are expected to comply with a "duty of disclosure". There are specific rules in property cases providing what documents must be exchanged between the parties to ascertain the extent of the property available for distribution.

Disclosure documents include providing evidence of each party's sources of income, interest they receive on investments, the value of property, and other financial resources, even if they have been disposed of.

The court will expect the parties to have complied with their duty of disclosure and there may be consequences if they have not been complied with, including costs orders (having to pay the other party's legal expenses). There are exceptions to complying with the duty of disclosure (for example, if it is not safe to do so).

# What is maintenance?

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If you are married or were in a de facto relationship, you may be able to seek maintenance from your former spouse. Maintenance is financial support paid by one party to the other, in circumstances where they are unable to adequately support themselves. Maintenance is different from child support. It is money paid to you to assist with supporting you rather than for the support of the children.

If a maintenance order is made it means your former spouse will pay maintenance to you in addition to child support or child maintenance. It is not possible to make a maintenance application if you have remarried or entered into a stable and continuing de facto relationship.

If you remarry or enter into a stable and continuing de facto relationship after an order is made you have an obligation to notify your former spouse immediately so that any maintenance order can be finalised/discharged. If your former spouse will not agree to pay you maintenance, you can make a court application seeking an order for maintenance payments.

Your right to maintenance is not automatic and it will be necessary to prove that you are unable to support yourself adequately and that your former partner has the capacity to pay maintenance after the payment of their own reasonable expenses.

You will also need to declare any maintenance you receive to the taxation office and Centrelink. It is important to seek legal advice regarding any maintenance agreements or applications.

# What should I do when I separate?

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## Updating your Will and other things

After you separate you should immediately make a new Will. You should not wait until you are divorced or until you have divided the property.

- If you die without a Will, your spouse will automatically be entitled to a large share of your assets/property.
- If you still have a Will that leaves assets/property to your spouse, that provision is not changed because of separation, a new Will is needed to change this.

You can locate a specialist lawyer who practices in Wills and Estates through the [Queensland Law Society](#). You can also have a Will prepared (for free) through the [Public Trustee of Queensland](#) who can be contacted to request an appointment.

- a. You may wish to change any binding death benefit nominations that you have previously made on your insurance or superannuation. Contact your insurer/super fund to change these.
- b. If you have previously given your partner a General Power of Attorney, you can revoke it by using a prescribed form, and sending a copy to them. If you have previously given your partner an Enduring Power of Attorney, you can revoke it using a prescribed form and sending a copy to them. It is important you obtain legal advice regarding changes to any Power of Attorney.
- c. If you own any property in Queensland (a house/land/unit/townhouse etc) with your former partner, you may want to speak with a private lawyer about severing the tenancy on the house, which means changing the ownership from 'joint tenants' to 'tenants in common'. If you own the property as 'joint tenants', it means that if you die, your interest in the property will automatically go to your partner (even if your Will says something different). To change that, you can sever the tenancy so that the property is instead owned as 'tenants in common'. This means you still own the property together, however if you die, your partner will not automatically get your share. It will cost you money to do this. You do not need your former partner's approval to sever the tenancy, however they will be notified.

## Do I need legal advice?

### You may need legal advice if:

- You need help to understand the property division process.
- You're considering entering or signing an agreement about how to divide your property.
- You and your former spouse are unable to reach an agreement.
- You're negotiating with your former-spouse or attending a family dispute resolution.
- You are thinking about applying to the court for an order about how property should be divided.
- You are worried that your former spouse may transfer or sell an asset or has already gotten rid of property that you may be entitled to.

## What other steps should I take?

### Keep a diary

It is a good idea to write down the important dates (marriage, separation, dates of birth), and keep records of things that are happening and any incidents of concern.

### Write a chronology

**(list of events in the order they happened)**

List when assets were acquired and each parties' contributions throughout the relationship.

### Gather relevant documents

If it is safe to do so, you should gather the following documents:

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| Obtain a written market appraisal of any real estate.   | Bank statements (for the past three years).  |
| Tax assessments and returns (for the past three years).   | Social security pension records.   |
| Records of long service leave, overtime worked, payslips.   | Life insurance policies.   |
| Copies of statements for current home loans, personal loans, car loans.   | Compile a list of your household furniture /collectables and their estimated worth.  |
| Value of vehicles (refer to <a href="http://www.RedBook.com.au">www.RedBook.com.au</a> or <a href="http://www.carsales.com.au">www.carsales.com.au</a> which may assist to estimate the value of any motor vehicles). | Copies of any superannuation statements. You can also complete and lodge a Superannuation Information Form with your Superannuation fund and your former spouse's fund for updated values. Obtain legal advice about how to do this. |
| Shares (collect copies of holdings, dividend payments, distributions, check ASX for current share price).   | Gifts/loans (collect any loan documents, or documents [such as cards] that came with gifts to show intention at the time the funds were received).   |
| Trust records (copies of deeds and estimate the value of Trust assets/debts).   | Business records (family, trustee/director/ shareholder). Request copy of Business Activity Statements from ex-partner or from the accountant if you have the authority.   |
| Collect evidence of future needs (medical or psychiatrist reports which indicate whether there are factors which prevent you from maintaining gainful employment).  |  |