

Property Settlement

If you have recently separated, you may need to undertake a formal property settlement to finalise your financial relationship with your former spouse.

Given the financial and emotional sensitivity often associated with separation, we recommend commencing the process of completing a property settlement sooner rather than later. It is also crucial to be aware of the specific time limitations that exist which impact your ability to file a court application for property settlement or spousal maintenance matters. These time limitations are as follows:

- **If you are married but not yet divorced:** there is almost an indefinite time period in which to complete your property settlement.
- **If you are divorced:** you have 12 months from the date of your divorce order becoming final to finalise your property settlement through an application to the court.
- **If you were in a de facto relationship and have separated:** you have two years from the date of final separation to finalise your property settlement through an application to the court.

If you are divorced and your divorce order was finalised longer than 12 months ago, or you were in a de facto relationship and the date of your final separation was longer than 2 years ago, you will have to seek an exemption the court to file an application for property settlement matters. Such applications are not always guaranteed and can be costly. As such, we strongly recommend completing a property settlement as soon as possible after you have separated, or to at least seek legal advice as to your rights and options.

How can I complete a property settlement?

Property settlements are commercial in nature and quite often come down to negotiation.

The terms of a property settlement can be made into a financial agreement or an order of a court.

Financial agreements and consent orders are generally used when parties are amicable and an outcome can be, and has been, negotiated. Such an agreement or orders will document the terms of your property settlement and, once signed by both parties, will finalise the financial relationship.

Where parties are not amicable and an agreement cannot be reached through negotiation, a court may be called upon to make an order it deems appropriate for a property settlement between parties to a relationship. A court does this by having regard to the facts and evidence of the case.

The format of your property settlement is dependent on your circumstances and can be tailored to your budget and needs. It is important that you seek independent legal advice as to any agreement you and your former spouse have reached and what your options may be for formalising that agreement.

What if we don't own any property?

Couples with modest property, or who are income rich and asset poor, often think that there is nothing to settle upon separation. However, there are often other financial interests that should be considered. For example, superannuation accounts can be divided between couples. You may also be entitled to receive spousal maintenance or be obliged to pay spousal maintenance. In some cases, couples have not shared all of their financial information with each other as one may take care of the family's finances, or sometimes because one party has kept their information private from the other.

Property Settlement

What is involved in a property settlement?

There is a four step process in determining a property settlement.

Step 1: What interests in property do you or your partner have, and what is the net value of these interests?

At this step, it is important to determine:

- the value of each asset or interest;
- any debt associated with each asset or property interest; and
- the net value of what we refer to as the "property pool".

If you have commenced a property settlement, then you and your former partner are required to disclose to one another your respective financial circumstances. This is known as your duty of full and frank disclosure, and is an ongoing requirement you and your former partner need to meet until a final resolution is reached.

Step 2: Is it necessary for there to be some legal intervention to equitably distribute property?

In some cases, it may not be necessary to transfer property or require other intervention to finalise your property settlement. However, more often than not, it will be necessary to have some type of intervention to assist in dividing property and to take advantage of benefits under legislation, including stamp duty exemptions or capital gains tax (CGT) roll-over relief.

Step 3: Analyse the contributions and needs factors that are relevant to your relationship.

These contributions and factors include:

- financial and non-financial contributions at the commencement of the relationship, during the relationship, and after separation;
- parenting and homemaker contributions;
- gifts, inheritances, or financial assistance from family members; and
- adjusting factors under the legislation that may change any contribution factors.

Step 4: Are other adjustments needed to ensure that there is justice and equity between the parties?

There may be other factors that also need to be taken into account, such as the length of the relationship and whether there have been any financial agreements entered into which may override the normal legislative pathway.

Getting advice

It is important that you get legal advice as soon as possible after separating so you are aware of your rights and options for a property settlement. The time limitations that exist between the date of final separation or the date of your divorce order becoming final also make it crucial to obtain this advice as soon as possible.

Still have questions? Contact our team of expert family lawyers on 1300 045 750.

bestwilsonbuckley
FAMILY LAW