

Family Law

Property Settlement Guide



Family Law & Property Settlement Guide

Family separation can be hard enough emotionally without the ongoing difficulties that arise with dividing up joint property.

The intention of this guide is to give you information and advice to consider when deciding how to divide property after de facto or marriage separation.



Property settlement guide

This guide contains general advice relevant to family law property settlement matters. We strongly recommend you seek legal advice as this is a general guide only and can not be relied upon in the absence of legal advice.

If you would like legal advice tailored to your circumstances, please do not hesitate to contact our office and we will be happy to discuss your situation with you at a free initial consultation.

The law:

Property settlement entitlements are based on the principles set out in the Family Law Act 1975 (Cth) ("the Act").

The Court has a wide discretionary power based on the facts of each case, meaning that there will be a range of results that are possible if your matter was to be decided by a Court.

There are five steps which are followed to determine a party's entitlement to property as a result of the breakdown of a relationship:-

- 1. The Court determines whether or not it is "just and equitable" to make any adjustment to the parties' interests in the property available for division (e.g. where there was a previous agreement or very short relationship, etc);**
- 2. To identify and value all the property that is available for division. This usually includes all assets, liabilities and superannuation of each spouse;**

- 3. To consider the contributions of the parties, including:-**
 - a. Wage/salary income;**
 - b. Business income/drawings**
 - c. Homemaking and parenting contributions;**
 - d. Unpaid work to improve property, e.g. labour for renovations/ landscaping;**
 - e. Each parties' initial contributions;**
 - f. Any lump sums received (e.g. inheritances, personal injuries compensation, lottery wins, etc;)**
 - g. Caring for the other party's child**
 - h. Contributions by a third party.**
- 4. To consider the future needs of each party, including:**
 - a. Whether either party has the care of a child of the relationship;**
 - b. The age and state of health of each party;**
 - c. The income, property and financial resources of each party;**
 - d. The physical and mental capacity of each party for appropriate gainful employment;**
 - e. Any disparity in the income earning capacities of each party;**
 - f. Instances of family and/or domestic violence;**
 - g. Commitments that are necessary for each party to support yourself or any other person;**
 - h. If one party has greater future needs than the other, the court will generally make an adjustment in their favour to the percentage division nominated at step 3, for example to 55% / 45%;**
- 5. The last step is to consider whether, in all the circumstances of the case, the proposed Order is “just and equitable”. The Court looks at the overall result and the practical effect of the Orders upon the living arrangements of the parties.**

Spousal Maintenance:

Entitlements to pursue financial support (known as “spousal maintenance”) are also governed by the provisions of the Act.

The Act provides that if there is an income disparity between separated parties, then the party with nil or lower income may seek spousal maintenance from the higher income earner.

To be eligible for spouse maintenance, the lower income earner must be unable to support themselves by reason of either:

- 6. Having the care or control of children of the marriage who are under 18 years of age; or**
- 7. By reason of age or physical or mental incapacity for appropriate gainful employment; or**
- 8. For any other adequate reason (with the adequacy of the reason to be decided by the Court).**

There is no strict formula to apply in determining the amount of spousal maintenance payable. This is a matter for the discretion of the Court, but is broadly calculated using a two step test. In summary, the low income earner must demonstrate both that:

- 1. They have a shortfall from their income (excluding any government benefits) to meet their reasonable financial needs (step 1); and**
- 2. The high income earner has a capacity to meet that need from their income by way of a surplus of income over their reasonable financial needs (step 2).**

The Court also takes into account the “future needs” factors referred to above, which include matters such as the lifestyle the parties enjoyed during their relationship and whether either party is meeting their child support liabilities. The Court will determine in each case what “reasonable financial needs” are based on the circumstances of the case.

Spousal maintenance can either be paid on a periodic (e.g. weekly, monthly) basis or it can be calculated as a lump sum payment. It can also be paid by transferring an asset as opposed to a cash payment.

Property Settlement Process: Identifying Assets/Liabilities

It is important to ascertain what assets and liabilities form the property pool.

A table of both parties' assets and liabilities should be prepared to show a joint or overall property pool. All assets and liabilities of the parties, whether in sole or joint names, will in most cases become part of the overall property pool.

There can be complex legal arguments about whether certain assets of each party should be included in the overall property pool. It is beyond the scope of this general guide to advise on the circumstances of when an asset or debt should be left aside from the joint pool; we suggest you obtain legal advice on such an issue.

Third Party Property

If any party has any interest in any Trust/Company, this should also be considered when calculating the pool of assets.

Sometimes property which is held by a related third party, such as a parent, child or sibling, can also be included in the pool of assets if there is a degree of control by a party of the relationship.

If the Court is asked to make Orders that will effect the rights of a third party, the third party must have been given notice of what is proposed and an adequate period to respond.

Disclosure and documents:

To enable an accurate assessment regarding your prospects for property settlement it is necessary to view documents to clarify the assets and liabilities.

If all assets are not identified or properly valued, there is a risk of you receiving less than your entitlements or that the property settlement could be set aside in the future.

Duty of disclosure:

Parties have an obligation to give full and frank disclosure of all information and documents relevant to property settlement matters to their former spouse.

Should either spouse fail to inform the other of an accurate view of their assets, liabilities, circumstances, or the value of any property, the Court may set aside or invalidate any agreement reached by the parties.

Valuation of property:

It may be possible to reach agreement with your former spouse as to the value of an asset, liability or superannuation forming part of the property pool through the process of disclosure. If you agree on the value of an asset then no valuation is required, it is however strongly recommended that a valuation be obtained for large assets (e.g. house and land) for certainty.

If you are unsure of the value of a house or land you may wish to seek three real estate appraisals (no cost) to gauge an average value. It is however recommended that a valuation be obtained.

Where the value of an asset, liability or superannuation cannot be agreed, the Court will require the item to be valued by a registered valuer. If you are unsure in relation to the value of any asset, liability or superannuation, you should have it valued by a registered valuer.

Commonly valued assets are: real property (house and land), superannuation, businesses, motor vehicles and chattels.

If valuations are needed, it is preferable to obtain a jointly agreed valuation with the other party so that there will not be future argument about whether the valuation is accepted.

Securing Assets:

If real property (house/land) is held in the sole name of the other party we recommend you urgently seek legal advice regarding filing a Caveat to prevent the property being sold or transferred without your knowledge.

You should limit the ability of the other party to draw down upon loans or credit cards by contacting your financial institution.

If there are joint funds, you are entitled to transfer them to an account for safe keeping. Expenditure of joint funds, and the reasons for expenditure, is taken into account in the final overall division of property settlement.

Be mindful not to prevent the other party from being able to pay their reasonable expenses.

If there are significant assets in the sole control of the other party that otherwise can not be secured, you may consider making an urgent Application to the Court for an injunction or other protective Order as necessary.

Searches:

Prior to finalising property settlement you should conduct a range of searches including:-

- 1. Property (house and land) searches;**
- 2. Company searches; and**
- 3. Personal Property Securities Register searches.**

Without conducting independent searches you are unable to confirm the extent and accuracy of the assets, liabilities and superannuation forming the property pool.

If an agreement is reached without the extent and accuracy of the property pool being confirmed by independent searches there is a risk that you may be agreeing to less than what you might otherwise be entitled or that there may be some practical difficulty putting into effect the agreement reached. We note that these risks may be avoided by the conducting of the searches referred to above.

Should your property settlement include the transfer of real property you need to conduct a property search to effect the property transfer.

If you are aware of any potential issues or liabilities in respect of any item of property there may be additional searches; legal advice on this aspect is recommended.

Transfer/Stamp Duty:

If a property is transferred in Queensland pursuant to a family law Court Order or Financial Agreement the transfer will be exempt of stamp duty, if the transfer happens after the Court Order or Financial Agreement.

Taxation:

You should obtain advice from an accountant in relation to potential tax liabilities that may be triggered in the event of certain outcomes in property or superannuation matters including Capital Gains Tax, Transfer Duty, Goods and Services Tax, Income Tax and Division 7A Tax issues.

Unfortunately we are unable to provide you with taxation advice in this guide and as such prior to resolving your property settlement you should seek advice from your accountant/tax advisor as to the tax consequences of your settlement.

Company/Trust property:

If property is owned by a company or a trust and is to be transferred or effected by a family law property settlement, (e.g. if a motor vehicle is transferred from a company to the wife/husband) there may be income and other tax obligations that need to be advised by your accountant.

Similarly if a business loan is forgiven then tax liabilities may arise.

Capital Gains Tax (CGT):

If an investment property (or other asset which may be liable to CGT) is transferred under a property settlement then generally the party taking on the property will also take on the entire capital gains tax (CGT) for the property.

You should seek advice from your accountant as to whether CGT applies in your situation.

Business structuring:

In property settlements where there are complex business structures involving trusts or companies there is an opportunity to restructure.

There may be taxation or other advantages available to you by restructuring as part of a family law property settlement.

If you would like commercial advice in respect of possible business restructuring please contact our office.

Financial advice:

Unfortunately in this guide we are unable to provide you with financial advice on your possible future needs and as such it is recommended that you seek financial advice where appropriate.

Settling without going to Court:

Before you embark upon costly, time-consuming and often bitter Court proceedings, we recommend you make all attempts to resolve your matter by agreement.

Once your asset and liabilities pool is understood and you have had some legal advice on your entitlements you should make a written proposal of settlement to the other party.

Once how property division will occur is agreed you may formalise your property settlement by:-

- 1. Court Consent Orders; or**
- 2. Financial Agreement.**

For Court Consent Orders the Court must be satisfied the property division is just and equitable.

Consent Orders can be sent to the Court, avoiding the need for the parties to attend Court.

A Financial Agreement does not involve a Court and requires each party to have a lawyer to give written advice and sign an advice certificate.

The benefit of a Financial Agreement can be that it does not have to satisfy the requirement of the Court to be just and equitable, and it can contain a prohibition of future spousal maintenance if needed.

The intention behind Financial Agreements is to replace all rights under the Family Law Act with the contents of the Financial Agreement.

The law surrounding Financial Agreements is complex and if you are considering a Financial Agreement it is not only recommended, but required by law, that you be given written legal advice prior to entering into a Financial Agreement.

In most cases Consent Orders are preferred as legal costs are usually less and a sealed Court Order is easier to enforce. A separate Financial Agreement with Consent Orders can be done to prohibit future spousal maintenance if necessary.

Additional Dispute Resolution Options:

The alternative dispute resolution processes available to you are:

- 1. Negotiation;**
- 2. Mediation;**
- 3. Collaboration; and**
- 4. Arbitration.**

If your property settlement is not agreed by exchanging offers we recommend that a mediation or informal conference be convened before Court proceedings are commenced.

The Court process

If you are unable to resolve your matter by agreement you can seek the assistance of the Federal Circuit Court or the Family Court to resolve your matter.

Court process in both the Family Court and the Federal Circuit Court of Australia follow the basic procedures below:-

- 1. An Application is filed with Affidavits and a Financial Statement;**
- 2. The matter comes before the Court for the first time for a case assessment conference or for an interim hearing;**
- 3. The Court may order that the parties attend a conciliation conference or a private mediation or make any Orders necessary on disclosure or to progress the matter;**
- 4. If the matter does not resolve at the conciliation conference or private mediation, the matter is returned to Court for Trial directions;**
- 5. The matter is prepared for a Trial;**
- 6. The Trial is heard by a Judge for a final decision.**

If there are any urgent matters which need to be determined by the Court, either party can bring an interim or urgent application in which case the matter will be dealt with depending on the urgency of the matter.

At an Interim Hearing, the Court will make a determination of any issue that can not wait until Trial on the affidavit material filed and the submissions of both parties. Normally oral evidence is not given at an Interim Hearing.

The time from filing Court documents for property settlement to the end of a Trial can take from 6 months up to 2 years to complete.

As soon as agreement is reached during the Court process the agreement can be made into Court Consent Orders and the Court process ends.

Divorce

Divorce may be applied for 12 months after separation in most cases. If you had periods of living under the same roof or if you have been married for less than a year then different considerations apply and please contact our office to discuss.

Divorce may be applied for solely or jointly by the parties.

If there are children under the age of 18 then the Applicant must appear before the Court to detail the arrangements for the children unless the Divorce is applied for jointly.

Until you are Divorced your spouse may challenge your Will.

A family law property settlement can be done before or after a Divorce.

The 12 month time limits to apply to the Court for property settlement and spousal maintenance commence running from the date of Divorce.

If you have the assets you seek in your name and control you may wish to seek Divorce as soon as possible. If however, you do not have all of the assets you seek in your name and control you should complete your property settlement prior to a Divorce.

Time limits

- 1. The Family Law Act 1975 (Cth) imposes a limitation period for parties seeking orders (contested or by consent) for a property division or spousal maintenance. This limitation is one year from the date of a divorce order taking effect or two years from the date of separation in the case of de facto couples.**
- 2. If you have been married and divorced you must file proceedings in the Court in relation to property settlement or spousal maintenance**

within one (1) year of the date of divorce to protect your interests. We recommend you enter this date into your diary.

- 3. If you are a de facto spouse and were not married you must file proceedings in the Court in relation to property settlement or spousal maintenance within two (2) years of the date of separation. We recommend you enter this date into your diary.**
- 4. Failure to file your Court proceedings within your time limit may mean that any proceedings in the Court relating to property settlement become statute barred and you may lose your rights to a property settlement being determined by the Court.**

Protecting yourself in property proceedings

- 1. Please carefully consider the access that third parties may have to your personal affairs. It may be necessary and appropriate for you to change various passwords including, for example, your banking, email or social media passwords. Also, it may be necessary for you to have your mail redirected to a more secure location.**
- 2. Please consider statements made by you and others on social media to ensure that no inappropriate statements are made in relation to these proceedings. Statements made on social media are made in a public forum and can be placed before the Court at a later date as evidence.**
- 3. There may be joint liabilities, such as credit cards, that should be closed to avoid further liability being incurred on your behalf. Similarly, there may be accounts in your name where your former spouse is authorised to operate. Consider revoking any such authority.**

Estate Planning

Estate planning documents such as your Will, Power of Attorney, beneficiary nominations on superannuation and life insurance policies and powers of appointment may be affected once a divorce order has been made by a Court.

Unless you take active steps to update your estate planning arrangements to reflect your current wishes, your estate planning documents remain unchanged. This may result in unintended consequences. For example, if your current Will gifts your estate to your former spouse, if you do not update your Will and a divorce order has not been made, then upon your death your spouse may still receive the gifted estate even though you have separated.

We recommend that you review your succession planning arrangements as soon as possible.

We are able to assist you with succession/estate planning; if you would like assistance please contact our office.

Severing Joint Tenancy of property

In Queensland, where real property is owned jointly with another person, it is possible to own the property as either joint tenants or as tenants in common, which affects what happens to that property in the event of your death. If the property is held as joint tenants, then, irrespective of your wishes as expressed in your Will, in the event of death, the title to the property shall pass to the remaining joint owner via survivorship. If the property is held as tenants in common, then in the event of your death, your share of the property will pass in accordance with your Will or in accordance with the laws of intestacy if you do not have a valid Will.

In the event that your former partner and you own property as joint tenants, this joint tenancy is not severed automatically by separation. It is possible to alter your interests in real property (to change your interest from joint tenants to tenants in common in equal shares) without your former spouse's consent.

Severing the joint tenancy prevents your share in the property passing to your former spouse by way of survivorship in the event that you die prior to property settlement being effected. Likewise, in the event that your former spouse dies prior to effecting property settlement their share in the property would not pass to you by way of survivorship either.

If a joint tenancy of property is not severed prior to the date of death of a party to property settlement proceedings (proceedings having been commenced in a Court prior to death of the party) the Court may nonetheless consider each of your interests in joint property in the making of orders for the division of property between the parties.

Summary

- 1. We recommend you seek legal advice on the content of this guide as it includes basis advice and is not adapted to your circumstances.**
- 2. You should draw up a table of assets and liabilities to the best of your ability.**
- 3. You should consider what documents are relevant to your property settlement for disclosure to and from the other party.**
- 4. You should obtain valuations of assets.**

Summary (cont)

- 5. You should instruct a lawyer to conduct searches on your behalf.**
- 6. You should seek advice from your accountant/tax advisor as to the tax consequences of your settlement.**
- 7. We recommend you review your succession planning arrangements as soon as possible.**
- 8. You should take action to secure your assets and consider and seek advice regarding severing any property held as joint tenants.**

As this is a general guide only, you should obtain legal advice on your entitlements. Legal advice depends upon the information it is based on and should be tailored to your family circumstances.

Please do not hesitate to contact one of our family lawyers on 13 58 28 to discuss your matter at an initial free consultation.

Our Family Lawyers are available to see you in our Ipswich, Springfield and Gatton offices at your convenience.

Our Offices:

IPSWICH

88 Limestone Street
PO Box 359
IPSWICH QLD 4305
T: 07 3816 9555
F: 07 3816 9500

SPRINGFIELD

GE Building Level 1, 6 Yoga Way
Springfield Qld 4300
PO Box 4629
T: 07 3470 3600
F: 07 3470 1300

GATTON

11 William Street
PO Box 116
GATTON QLD 4343
T: 07 5462 1566
F: 07 5462 3087

Our Family Lawyers:

Emario Welgampola | Special Counsel
Ipswich
E: emario.welgampola@mcna.com.au

Brock Harm | Associate
Gatton
E: brock.harm@mcna.com.au

Charmagne Haidley | Associate
Ipswich
E: charmagne.haidley@mcna.com.au

Daniel Brownlie | Associate
Gatton
E: daniel.brownlie@mcna.com.au



Each situation in family law work is usually different to every other to some degree. Most families are different to each other and children are individuals, and therefore this brief overview is intended only as a basic introduction and not to be relied on in place of legal advice.

The Family Law Act, previous family law cases, and other associated practice directions of the Court contain procedural rules and legal principles that are quite complicated and for this reason it is recommended that the advice of a lawyer is obtained prior to taking your matter to Court.

