

How are assets divided after separation or divorce?

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After separation or divorce, couples will need to finalise a property settlement. For married couples, this can be done any time after separation and must be done within 12 months of a divorce order being issued. For de facto couples, this must be completed within 2 years of the date of separation. In this blog, we will look at what is considered in negotiating a fair and equitable property settlement.

The ‘steps’ to property settlement

Contrary to some myth in the community, property is not automatically divided 50:50 upon separation. The following approach is commonly adopted when looking at how property should be divided.

1. First, the law looks at whether it is just and equitable to make any property adjustment orders. The answer here is usually yes.
2. Second, we need to determine the value of the assets, liabilities, and financial resources.
3. Next, we assess each party’s contributions to the property pool.
4. Then we look at whether either party might be entitled to an adjustment in their favour as a result of ‘future needs’ factors.
5. Finally, we assess who should receive what and look at whether the overall settlement is fair.

Identifying the asset pool early

It is important to identify the assets and liabilities early for two reasons.

First, it will be difficult to properly advise you if we do not know what the size and nature of the property pool is.

Second, we cannot properly negotiate on your behalf without a clear understanding of the pool of assets available for division. Therefore, it is crucial that you provide detailed and thorough instructions about your assets and liabilities, and if possible, provide the documents requested by your lawyer as soon as possible.

Property which can be considered part of the property pool for distribution includes:

- real estate;
- cars and other vehicles or machinery;
- shares and other investments;
- money in bank accounts;
- superannuation;
- companies;
- trusts;
- furniture; and
- other belongings.

Liabilities are also assessed in property settlement negotiations. Liabilities are any debts incurred during the relationship. Importantly, most liabilities are considered ‘joint’ – that is, belonging equally to both parties.

The most common liabilities for consideration include credit card debts, mortgages, personal loans and tax debts.

How are assets valued?

The task of valuing assets can often be simple but this is not always the case, especially when it comes to companies.

The most common asset valued is the family home. Sometimes it will be sufficient to obtain a written opinion of value from a local estate agent at no cost. However, in many cases agreement cannot be reached about the value and it will be necessary to engage a professional valuer to conduct an inspection and write a report.

This is usually done on behalf of both parties and in most cases, the parties will share the cost of the report equally. The cost of the report will depend on the size, nature and value of the property. Generally, the cost of a valuation report ranges between $700 and $1500.

Is it the value of assets and liabilities at the time of separation?

Assets requiring valuation should be valued as close to a settlement as possible. The value of assets or debts at final separation may only be relevant where there has been a long period between a separation and a property settlement.

How is the ‘net’ asset pool calculated?

The net asset pool is calculated by deducting the total debts (provided they are legitimate debts) from the value of the total property pool (the value of all the property/assets).

How is superannuation treated in property settlements?

In Australia, there is generally considerable inequity in the balances of super funds between male and female workers. This is primarily due to:

- the gender pay gap;
- more women being in casual employment than men; and
- many women take time out of the workforce to have and care for children.

In family law, superannuation is property. There will be different approaches to consider when dividing superannuation depending on the type of superannuation interest.

The interesting thing about superannuation is that under the law, ’splitting orders’ can be made. This means that an agreement can be made for an amount of super to (either lump sum or percentage) to be transferred from one fund to another fund. In Victoria, the net result is that usually, both parties receive equal entitlements. You still cannot access or touch that superannuation until such time as you qualify.

A second option is to adjust the other assets in the property pool to take into account the difference in the superannuation entitlements. Under this approach, both parties’ superannuation entitlements remain untouched.

If there is to be an adjustment, however, one party may receive more of the nonsuperannuation assets to take that superannuation disparity into account. If such an approach is used, a ‘discount’ is sometimes applied as you would be receiving your entitlements to superannuation now as opposed to waiting until the superannuation vests.

You can negotiate using any of these approaches although the ‘splitting approach’ is more common, especially for parties who are not close to retirement age.

What are considered contributions?

Relevant contributions are those made in relation to the acquisition, conservation or improvement of the assets. Contributions can be:

- direct and indirect financial contributions;
- direct and indirect non-financial contributions (like renovations to a property); and
- contributions as homemaker and parent.

These types of contributions are self-explanatory. The contributions discussed below can often be harder to determine and quantify.

Contributions before and after the relationship

Contributions made prior to the relationship can be very important, especially in shorter relationships.

For example, if the net asset pool after a five-year relationship is $800,000 and $400,000 was brought into the relationship by one party, then that party will be deemed to have made a much more substantial financial contribution to the property pool. If there are no other relevant factors, then that party will generally receive a greater share of the assets.

Contributions can also be made after separation. More weight will be given to post-separation contributions where parties have been separated for quite some time.

Assessing these contributions can sometimes be tricky, especially in longer relationships where the value of the original contribution is unknown or in longer separation periods.

The key point to remember is that each case is different and there is no one right answer.

Inheritances, gifts, compensations payments and windfalls

These types of contributions are often referred to as ‘special contributions’ because they are treated differently to contributions from income and housework for example.

These contributions will generally be attributed solely to the person who received the money (or asset). Although such funds will not generally be excluded from the asset pool, the recipient will get extra credit. The timing of when it was received is relevant.

What future needs are considered?

Under the law, it is important to consider whether an adjustment should be made to one party for future needs. ‘Future needs’ is not the legal term but rather the term generally accepted and used for ease of reference.

Some of the relevant considerations include:

- the age and health of the parties;

- the income, property and financial resources of each of the parties;
- the physical and mental capacity of each of the parties for appropriate gainful employment;
- whether either party has the care of the children of the relationship who are under 18;
- the duration of the relationship and the extent to which it has affected the income earning capabilities of the parties.

In most cases, the most important factors will be the income and income earning capacity of each party and who is looking after any children of the relationship. If one party has the capacity to earn significantly more than the other party (and that other party is caring for the children) then he or she will generally receive less property assuming they have not made significantly greater contributions.

The general idea is that the party who will be financially disadvantaged in the future due to any of the above factors should receive a greater share of the assets. The future needs consideration is much less significant in short relationships where there are no children.

Every case is different

It is important to remember that there is a broad legal discretion in these matters, and as such, there is no one right answer for every case. Therefore, it is important to get advice rather than taking the word of family or friends who may have been through the process before you.

It is also worth noting that only a very small percentage of property division cases are decided by Courts. The overwhelming majority of people negotiate an agreed property division. That is certainly the most cost-effective way of finalising your property settlement.

Get help

We recommend that you seek legal advice early to ensure we can work with you to maximise your entitlements. We are experienced in property settlement negotiations and ensuring all assets, liabilities and contributions are appropriately and fairly accounted for. We are settlement focused and skilled at achieving out of court settlements.

Get in touch with one of our family lawyers for a free initial discussion to find out where you stand and what your options are.

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.