

Can I finalise a property settlement without getting divorced?

Author: Mona Emera
Email: mona@emerafamilylaw.com.au
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We are regularly told by our clients that the reason they have not had a property settlement is because they aren't yet divorced. There appears to be a common misconception that you need to be divorced to commence or finalise your property settlement or that property settlement and divorce are both part of the same process. This is incorrect and likely an urban myth.

This article will look at the difference between separation and divorce, how they each operate, and explore the right time to negotiate your property settlement.

Primary differences between separation and divorce

What is separation?

Put simply, separation occurs when one or both parties decide that they no longer wish to continue in the relationship. With a separation, there are no documents to complete, and no signatures required. It is enough for one party to communicate to the other party that the relationship (de facto or marriage) has ended.

Often, one party will move out of the family home, but that's not always the case. Parties can be separated while still living together. You can read more about this in our earlier article, "Separated under one roof; your guide".

Important factors to consider before you decide to separate:

1. Do it safely. If your safety is an issue, get as much advice and support as you can before you separate. A family lawyer can give you advice and provide the appropriate referrals if required.
2. Record the date you separated from your partner. This is important if you are married and seeking to divorce, as you must be separated for at least 12 months before you can apply for divorce. You can be separated but still living under the one roof.
3. Try to keep things civil – especially if there are children involved. There are significant benefits of a civil separation, which you can read about in our earlier article, "The advantages of an amicable separation from your partner".
4. Make sure you have adequate support from family and friends.
5. If privacy is an issue, change passwords for your personal accounts; for example, online banking accounts, your email account and social media accounts.
6. Gather all of your personal paperwork and valuables and keep them safe. These include things like your birth certificate and your passport.
7. Get family law advice and do your research about where you stand. The advice may influence your decision about timing, and you may avoid doing things that could unnecessarily inflame the situation.

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What is divorce?

Obtaining a divorce is the legal end to a marriage. This means that you can legally remarry.c

The divorce process is relatively straightforward, and in fact, many people don't engage lawyers to do their divorce unless there's some complexity to their matter.

An application for divorce can be made by either party individually, or it can be made jointly. There is a filing fee that needs to be paid to the Court at the time of lodging the application.

When can I get divorced?

Unlike a property settlement (see below), parties must be separated for at least 12 months before they can make an application for a divorce.

When can I have a property settlement?

There is no requirement to wait for one year after separation before commencing or finalising property settlement. This is a myth! In fact, a property settlement can happen at **any time after separation** and the law is almost the same whether you're married or separating from your de facto partner.

There may be some good reasons to wait before commencing property settlement, including mental health reasons. Ending a relationship can be a painful and traumatic time for many people, and it's often too overwhelming to jump straight into dividing assets. However, often there are some pressing or urgent issues that need to be addressed, such as mortgage and bill payments, securing property interests and accounts or sale of assets, to name a few.

Every case is different, and it's important to get tailored family law advice early so that you can make appropriate decisions, including decisions about timing of property settlement. We see a lot of people who are too afraid to get legal advice and end up agreeing to unjust settlements.

It's important to remember that getting legal advice does not have to mean that you will spend thousands of dollars or end up in a Court battle with your former partner. It's about being prepared, making sure your interests (including your financial interests) are protected and giving yourself the best chance to reach a legally appropriate out of Court property settlement.

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You may find some of our earlier articles useful when considering property settlement after separation or divorce:

- How are assets divided after separation or divorce?
- How to negotiate a fair property settlement
- Valuations for family law property settlement

Make your financial agreement after separation or divorce legal!

Once you have reached a property settlement agreement (financial agreement), it is crucial to make sure the agreement is made legal. This is even the case where the relationship is amicable. Apart from protection from future claims, there are other reasons why formal financial agreements are necessary, such as bank requirements and stamp duty exemptions.

There are two ways to make your property settlement legal and binding:

1. Application for consent orders; or
1. Financial Agreement.

You can read more about this in our earlier article, "Property settlement Consent Orders or a financial agreement".

If the agreement is not formalised in the right way, then it remains open for either party to make a claim for property settlement against the other in the future, even after a time limit has expired. A statutory declaration is not legally enforceable and therefore, does not provide the required protection.

Property settlement time limits

Time limits for married couples

Although a party to a marriage can seek a financial settlement at any time after separation, once a divorce order has been issued, you will only have 12 months to make an application to the Court. After that time, any application for a property settlement or spousal maintenance can only be made if:

- your ex-partner agrees; or
- with permission from the Court if certain grounds are satisfied.

That's why we tend to encourage resolving all financial matters **before** applying for a divorce unless there's a strategic reason to divorce first.

Time limits for de facto couples

A party to a de facto relationship must make an application for a financial settlement within two years after separation. After that time, an application for a financial settlement can only be made with the consent of the parties or with permission from the Court if certain grounds are satisfied.

Need an experienced family lawyer?

Finalising your property settlement after separation is an important step in securing your financial future. Whichever option you choose, getting advice from an experienced family lawyer can make all the difference. At Emera Family Law, we offer a free first meeting, so it costs you nothing to find out where you stand.

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.