

PROPERTY SETTLEMENTS



Property settlement is the division of property between couples, whether married or de facto, which usually follows a separation. The process can include the division of superannuation, interests in companies, trusts and responsibility for debts or liabilities. There is no presumption that matrimonial property must be divided equally between couples. Instead, the Family Court and the Federal Circuit Court have broad powers to make orders that provide for a just and equitable division of assets.

While a brief summary of the types of matters considered in this process are below, calculating a property settlement entitlement involves an assessment of a wide range of factors and obtaining experienced advice is essential. That advice should not only be in respect of existing rights and potential claims, but also cover options and strategies to achieve an effective resolution of the matter, as well as structuring and family planning advice, if required. An informed decision can then be made as to whether a particular settlement outcome can be realistically pursued, or whether litigation is likely or necessary.

Out of Court Settlement

Reaching a settlement out of court usually saves time, stress and cost. Cost savings are not just in a financial sense, in that the saving of emotional costs (associated with contesting the matter) and lost opportunity costs are also significant factors to consider.

There are two ways that an out of court settlement can be formalised (to be binding):

- a Financial Agreement;
- Consent Orders.

Financial Agreements

Financial Agreements can be signed before, during or after a marriage or de facto relationship. For financial agreements to be legally binding, both parties must have signed the agreement and have received independent legal and financial advice before signing.

Consent Orders

Consent orders are a formal written agreement that are approved by the Court. The Court must be satisfied that the orders are properly drafted and that the terms of the agreement are "just and equitable" before it will approve them.

Importantly, an informal agreement, or a signed deed or contract between spouses will usually be insufficient to prevent a future claim by either spouse. In which case, it is important that if/when an agreement is reached with respect to an out of court settlement, it be documented via one of the ways described above.

Court Litigation

If no agreement can be reached, then an application for property adjustment orders can be filed in either the Family Court or the Federal Circuit Court.

The Court will ultimately consider a number of steps in determining a litigant's property settlement entitlement.



1. Is it just and equitable to alter the property interests of the parties?

This step involves an assessment of what legal and equitable interests each party has in or to property and whether in the circumstances, those interests should be adjusted.

While the answer to this question is usually “yes” (as couples rarely plan for or consider a potential separation when acquiring or contributing to property during their relationship), the Court has declined to adjust property interests if it is not satisfied that there is a need.

2. What is the composition of the asset pool?

This step involves the identification of all property, liabilities and financial resources of each party and an assessment of its value. It is common for valuations to be obtained to assist the Court with this step. The composition of the pool is considered as at the date of trial (not the date of separation).

3. What were the parties’ contributions to the relationship?

This step involves the Court giving weight to financial, non-financial contributions, together with contributions made to the welfare of the family. Contributions to be considered include initial contributions (ie. property or resources owned at the beginning of the relationship), windfalls, inheritances, gifts, homemaking and caring for children.

Once contributions are weighed, the Court will make a finding as to what percentage (of the asset pool) is appropriate for each spouse.

4. Does the contributions finding require an adjustment, based upon particular factors?

The legislation requires the Court to consider making an adjustment, usually to the financially weaker party, based on factors including:

- Their respective age and state of health;
- Whether either has the care and control of children of the relationship;
- Their respective standards of living (being reasonable);
- Their respective incomes, property and financial resources – and each of their physical and mental capacity for employment;
- The duration of the marriage and the extent to which it has affected the earning capacity of either party.

5. Is the overall result just and equitable?

This step involves the Court ensuring that the total outcome is not unjust in the overall circumstances of the case.

How can Small Myers Hughes help?

We have a team of family lawyers who practise exclusively in the area of family law. As well as our experience in all aspects of family law, other specialist lawyers in the firm are able to contribute their expertise in areas such as commercial, taxation and property law where such issues need to be considered in dealing with your case. Our goal is to provide the service that is right for you, whether that be simply advising you as to your rights and obligations, assisting you in negotiating a resolution of issues in dispute or representing you in contested proceedings in the Family Court or Federal Circuit Court.

Where to next?

The first step would be to arrange an appointment with one of our Family Law team members, which can be arranged via contacting our Client Relationship Manager, Michelle Silipo on (07) 5552 6601. A confidential, initial consultation can then be arranged to discuss your circumstances and any queries that you may have.