

Do I have to divide our assets?

If so, who gets what?

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PRINCIPAL



Guideline

For general information purposes only

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Property Division

There is a misconception that long relationships will entitle parties to a 50/50 split or that this is the starting point when working out property division. The Court adopts a step-by-step approach when determining what property order it should make by looking to the facts of each individual case, and the starting point is firstly whether it is just and equitable to make an order altering the existing property interests of the parties.

There is no presumption that parties are automatically entitled to an adjustment of property interests just because they were in a de facto relationship and have separated. If the Court finds that it is just and equitable to make a property order, then it decides what order (if any) should be made and that order must be considered appropriate.

In deciding what order could be made, the Court will ask the preliminary question: is it just and equitable to make property adjustments or should the parties simply walk away with what they currently own?

The court adopts the following steps when determining property division:

1. Identify and value, as at the date of the hearing, the parties' property, liabilities and financial resources;
2. Identify and assess the parties' contributions pursuant to Section 79(4) or 90SM(4) of the Family Law Act 1975;
3. Identify and assess the parties' ongoing needs taking into account the relevant factors relevant under s75(2) or s90SF(3); and
4. Consider the effect of the above and resolve what order is just and equitable in all the circumstances of the case.

The judicial officer has wide discretion when working out that decision, which can sometimes result in a range of possible outcomes.

Do I have to divide our finances?

The Family Court will only alter the ownership of assets and debts if it is just and equitable to do so. Whether it is just and equitable to alter property interests between parties depends on the circumstances of each particular case and there is no hard and fast rule. However, as a general rule, we firstly look at what are the items that comprise the existing property pool and what orders are each party seeking.

For example, if both parties seek to alter the interests of each other party's property ownership, the Court will likely find that it is just and equitable to make orders. This is also the case if the parties had property they both resided in and which they can no longer mutually use following separation. Conversely, if you have been in a very short relationship and there has been very little intermingling of finances, the Court is likely to find that there are no grounds for making property adjustments.

Consider a hypothetical couple, Laura and Robert, who have been living together for approximately 2 years before they separated. They have no children together, do not have a joint bank account, live in a rental apartment, and each contributes equally to all living expenses. Lisa owns an investment property she purchased in her own name a few months before she began living with Robert. The rental income from the property is applied towards the mortgage repayments and Lisa pays the gap of \$150 per week. The property is managed by a professional Lisa has engaged. Robert has not been involved in any way with that investment property and he doesn't own any properties in his name. He has been saving his income in a bank account in his sole name. Lisa and Robert both have superannuation interests. There are no other exceptional circumstances.

Robert wants to make an application to the Court seeking Lisa sell her investment property and that he receive 25% of the sale proceeds. What would the Court do? Based on these limited facts, it is likely the Court would find it is not just and equitable to make a property adjustment.

Deadlines

One of the key things to note when you separate is the date that you separated. There are deadlines by which you should settle your property division as the Family Court will not accept an application for proceedings requesting a property adjustment after the following deadlines:

- If you were married, 12 months after a divorce order has taken effect
- If you were in a de facto relationship, 2 years after the end of the relationship or 12 months after a financial agreement is set aside or found to be invalid

Proceedings can be instituted after the deadlines with consent of both parties, or by special leave of the Court.

It should be noted that binding financial agreements do not take effect until the last party has signed the agreement, and court orders do not take effect until the order is sealed by the court. Parties can change their mind at any point up until the agreement or orders take effect.



Informal agreements

Can I just draft my own informal agreement for property settlement?

This is not recommended.

If you do not obtain a legally binding agreement or court orders you may face the following risks:

- Either party can make an application to the court in the future for an adjustment of property and the property which will be considered for division will be at the time that the Court considers the property pool and not the date of separation, so property accumulated by one party may end up being considered the joint property of both parties
- There is nothing forcing the other party to comply with the terms of an informal agreement
- You will likely not have the benefit of stamp duty exemptions or capital gains tax benefits for any property transfer
- You may be liable for your former spouses debts
- Your former spouse may be able to make a claim on your deceased estate



Disclosing assets and liabilities

Parties have a mandatory obligation of full and frank disclosure of relevant information and documents. Save yourself thousands of dollars and do the preliminary work of drafting the majority of the asset and liabilities table and collating all the paperwork to back up your items and estimates of value before filing an application in Court. Invite the other party to do the same and exchange financial documents.

If your former spouse wants to avoid a costly, acrimonious divorce, they should be agreeable to completing this step before getting the Court involved. You do not have to agree on all the items at this stage, or the history of the financial contributions. Just work to get a draft assets and liabilities table completed, note the items for which there is a dispute and then

If, however, the other side is being evasive about disclosure of assets, you may have no choice but to commence proceedings in order to be able to use court-assisted processes to unearth assets. Mediation will not be suitable because a mediator has no powers to make the parties to provide financial disclosure and does not have any investigatory powers. If you attend mediation without a complete picture of the asset pool, you will be at a serious disadvantage. It is only once the property is accurately identified that parties can negotiate from an informed position and on an equal playing field.

Non-disclosure is sometimes used as a tactic by wealthier parties where there is an imbalance in wealth to drain the less-wealthy party financially and emotionally. However, the Judge will typically be able to see where there are unexplainable gaps in information provided and can order costs against that party and give a much greater slice of the property that has been identified to the other party. Court orders may be set aside on the grounds of fraud if a party discovers their former spouse was not completely frank about their financial positions.

Debt

What if all we have is debts to divide?

If you have assets then the Family Court can also divide up or transfer liabilities between parties. This means that if one party has, for example, a tax debt the Family Court can make an order that the other party bear some responsibility to pay off this tax debt. An important factor the Court will consider is whether the debt benefited both parties.

Typically, any debts or liabilities that are accrued during a relationship will form part of the property pool for division. In some cases debts accrued post-separation will also be included in the property pool because assets and liabilities are identified as at the date of final court orders or property settlement. If, however, a debt is accrued by one party for their sole benefit the court may be convinced to exclude this.

If when you separate all you have is a debt between the two of you and there are no assets, the Family Court will not be able to make an order dividing debt. The circumstance where there is no property or assets however is to be distinguished from the existence of property or assets, but the debt outweighs the assets.

Keep in mind that superannuation interests are an asset that can be divided in the Family Court.





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