

DIVIDING PROPERTY AFTER SEPARATION: *Information Sheet*

Throughout the year we assist dozens of clients who have recently separated and want to know what they are entitled to financially.

Whilst the *Family Law Act 1975* makes provisions for both child support and spousal maintenance (or what they call 'alimony' on American TV shows), the main thing people want to know about is how to divide up all the property that was either owned by one person or owned jointly by the couple.

This Information Sheet is designed to address some of the more common questions seen in practice to better assist you in deciding how to go about dividing up your property after separation.

Is there a time limit for a property split?

For married couples

Once a divorce is granted by the *Federal Circuit and Family Court of Australia* ("Family Court"), either party has 12-months to apply to the Family Court for orders about property division.

There is however nothing to stop you from making an agreement about dividing up property before you divorce.

For de facto couples

Those in a former de facto relationship have 2 years from the date of separation to apply to the Family Court for orders about property division.

Does the length of a marriage/de facto relationship count?

Yes, but it is not the only factor a court will consider.

Generally, the longer a relationship, the more likely it is that your contributions to the household (both financial and non-financial) will be roughly equal.

For example, while the husband might have always worked full time and earned more money, the wife may have given up some years in the workforce (and opportunity to earn more money) to look after the children and take care of the domestic chores.

Do I need to engage a lawyer for a property settlement?

Not necessarily.

You might first consider other options like:

- negotiating with the other party directly – perhaps by email or having a meeting face to face.
- using the www.amica.gov.au website to assist in formulating an agreement.

- attending a mediation service – such as *Relationships Australia*.

If you are able to reach an agreement with your former spouse, when it comes to drawing up a formal agreement, it is a good idea to get legal advice about your options.

What are the options when it comes to making a formal agreement?

Typically, an agreement regarding a property split can be formalised by one of two methods:

1. **Consent Orders** – which are signed by both parties to the former relationship and filed with the Family Court to create Orders; or
2. **A Binding Financial Agreement** – which is essentially a signed contract between the two parties as to the property split which is in accordance with the relevant provisions of the *Family Law Act 1975*. Whilst it does not need to be registered through the Family Court, to be ‘binding’, both parties must have received independent legal advice and each party having received a signed statement by a legal practitioner confirming certain advice has been provided to that party.

What is the cost of a formal agreement?

If you make an Application for Consent Orders to the *Family Court*, the current filing fee is \$170.00.

Issues can arise in terms of the drafting of the orders sought, whereby it might be a good idea to pay a lawyer to draft the orders to attach to your application to ensure that the orders correctly confirm what you both want and are in a form likely to be accepted by the *Family Court*.

If you elect to formalise the agreement by way of a Binding Financial Agreement, then both yourself and your former spouse will need to engage separate lawyers to undertake this task.

We don't agree on anything, can I just apply straight to the Court?

No.

The *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* require people who want to make an application to the Family Court to genuinely try to resolve their dispute before starting a case. Therefore, unless an exception applies, you must:

- Participate in *dispute resolution services*, such as Family Dispute Resolution counselling, negotiation, or mediation; and
- If these means are not successful, write to the other party setting out what you are claiming and exploring ways to settle your matter; and
- Comply, as far as you can, with the *duty of disclosure*.

What is Disclosure?

Disclosure must be 'full and frank' – that is, you must give the other party copies/access to all documents relevant to your current and recent financial circumstances.

Each person must *disclose* items such as their:

- Three most recent Tax Returns and Notices of Assessment.
- Documents about any superannuation, such as recent superannuation statements.
- the last four BAS statements lodged if you have an ABN.
- Three most recent financial statements of any business, partnership that you own or part own.
- A market appraisal of any item of property which you own or part own unless you both agree on its current value.

How do you work out what's fair?

If the Family Court is going to decide for you, it will generally take a 'property pool' approach and in doing so consider the following factors under the *Family Law Act 1975*:

1. Determining the 'Property Pool', which is:
 - everything that each person owns, plus what is jointly owned and includes things like a house, superannuation, vehicles, savings, and investments.
 - You may need to get some items, such as real estate or vehicles, appraised or valued to work out what they are worth.
 - Then you take off any debts: mortgages, personal loans, credit cards, Centrelink etc.
 - This gives you a final (Net) figure that is available to divide up.
2. Assessment of 'Contributions', which include:
 - Both direct and indirect and financial and non-financial contributions.
 - Who brought what into the relationship at the beginning of the relationship e.g. car, house, superannuation?
 - Money contributed (including inheritances, windfalls) during the relationship.
 - Any contributions made after separation.
 - Upkeep, maintenance, or improvements to property.
 - Parenting duties.
 - Homemaker/domestic duties.
3. Future needs/Adjustment Factors – including age and health of each of you, who has more of the parenting duties now that you are separated, income discrepancies and earning capacity of each party moving forward.
4. The Overall Fairness – what the Court calls 'just and equitable'. Any further adjustments the court deems necessary to achieve a just and equitable outcome.

You will need to consider the above before you make an application to the Court.

Note: In shorter relationships the Court may choose to take an ‘asset by asset’ approach rather than a ‘property pool’ approach as per the above. In doing so, the Court will necessarily give more weight to financial contributions of the parties.

Is my superannuation exempt?

No.

Superannuation forms part of the overall ‘property pool’. Some types of pensions may be treated differently. You should get legal advice when considering pensions in a property split.

If your former spouse will not show you what they have in their superannuation account(s), you may make a ‘Superannuation Information Request’ to the Family Court to obtain that information.

Who pays for the court filing fee and who pays the legal fees?

The party who makes an application to the Family Court is required to pay the filing fee at the time of lodgement.

There is no legal requirement for the filing fee to be shared between the parties, however you may make an agreement between yourselves.

The same applies to legal fees - there is no legal requirement to share such fees, but in the circumstance where you have agreed on Consent Orders, the parties may wish to agree on sharing the costs of the lawyer’s fees in drafting and filing the relevant documents.

If you cannot agree on a property split and therefore the matter is required to be litigated via the Family Court, then each party typically bears their own legal costs.

What happens after we make an agreement and formalise it?

That will depend on the type of agreement and particularly how you have agreed to divide up property.

If a lawyer is assisting you, they will advise what steps you need to take to finalise your matter.

You might need to consider things such as:

- Getting a mortgage so that you can pay the other person their share for the house.
- Getting a lawyer to assist in discharging any existing mortgage and transferring real estate.
- Contacting your superannuation company to organise payment of some of your superannuation into the other person’s superannuation account.

How can the *North West Community Legal Centre* help?

We can assist any person who wants to know about the process of dividing up their property after separation, with advice or information about:

- Your rights and responsibilities.
- The steps you might need to take next.
- The sort of property split you may reasonably expect the Family Court to make in your situation.
- Other professionals who can help you advance your matter.

If you have any queries, please make an appointment to speak with one of our lawyers.

Published: June, 2022

North West Community Legal Centre Inc.

56 Formby Road

DEVONPORT, TAS, 7310

Ph: (03) 6424 8720

Email: office@nwclc.org.au

Website: www.nwclc.org.au

Disclaimer: This document is provided for informational purposes only. The information contained in this document may not be appropriate to your specific circumstances and whilst all endeavours have been made to ensure its accuracy at the time of publication, it may not be accurate at the time of reading. You should seek independent legal advice with respect to your individual circumstances.

The financial assistance provided to the NWCLC from both the State and Commonwealth Governments via the National Legal Assistance Partnership (NLAP) is gratefully acknowledged