



## Property Settlement and other Financial Matters

*Some of the most commonly asked questions about Property Settlement and other Financial Matters are discussed on this page.*

### 1. What will the Court consider when looking at dividing property?

The Court will, essentially, take a three-step process in determining how to distribute marital assets:-

- (a) It will consider the value of the assets and any liabilities, and determine what assets there are to distribute after the payment of liabilities.
- (b) The Court will consider the contributions that each of the parties have made towards acquiring and maintaining the marital assets. There are three considerations to such contributions, being:-
  - (i) Direct financial contributions.
  - (ii) Contributions other than financial contributions made directly or indirectly on behalf of the party to the marriage or a child of the marriage.
  - (iii) A contribution made by a party to the marriage to the welfare of the family, which shall include any contribution made in the capacity of a home-maker.
- (c) The effect of any proposed Order upon the earning capacity of either party.
- (d) Those items referred to in Section 75(2) of the Family Law Act, which looks at the needs of the parties, such as whether or not one of the parties will have the full-time care and control of children under the age of eighteen years, the health and mental capacity of each of the parties and their ability to obtain employment.

### 2. What are the assets of the marriage?

Generally, this will be property arising out of the marital relationship. This will include, for example, the matrimonial home, investment properties, motor vehicles, savings accounts, shares and other items, and now includes superannuation.

### 3. How will the Court determine a distribution of the marital assets?

After considering what assets there are to distribute, the Court will consider the contributions made by each of the parties towards the acquisition, maintenance and conservation of those assets and also the Section 75(2) factors, mentioned above. The Family Court of Australia or the Federal Magistrates Court has a discretion to attach as much weight to those factors as it considers appropriate. Ultimately, the Court must make an Order that is fair and reasonable.



#### 4. Will my Superannuation be considered in a distribution of the marital assets?

Yes. Since December 2003, Superannuation has, essentially, been considered property and therefore thrown into the pool of assets.

#### 5. How will Superannuation be distributed?

There are, essentially, three ways that Superannuation can be taken into account in relation to a distribution of the marital assets;

- (a) A Court may order that the person who has the benefit of the Superannuation scheme retains the entirety of that scheme and that the amount applicable to the non-member spouse is provided by giving the non-member spouse more of the other assets, for example, a greater share in the former matrimonial home;
- (b) The Court may provide what is known as a 'Splitting Order', by which the Superannuation fund of the member's spouse is split at an agreed percentage or amount;
- (c) If a member spouse is close to retirement, then the Court may provide a 'Flagging Order', distributing the agreed amount to the non-member spouse when the Superannuation is called in.

Please note that, in the case of Splitting Orders or Flagging Orders, the trustee of the Superannuation fund must approve the proposed Orders. A Court must be satisfied that the trustee of the Superannuation fund has approved such an Order.

#### 6. If I reach an agreement with my ex-spouse can we make orders by consent?

Yes. To have orders made by the Court you will need to file an application which will include details about each of the parties, details of any previous orders, details about the children of the relationship (if any) and financial details.

#### 7. Who will make consent orders?

You may file an Application for Consent Orders with the Family Court of Australia. Currently, there is no fee to file such an application. Both of the parties need to sign an Affidavit in support of the application and you will also need to file Terms of Settlement, which is signed by each of the parties.

The Application for Consent Orders and the Terms of Settlement are filed with the Family Court of Australia and determined by a Deputy Registrar of the Family Court of Australia in Chambers. There is no need for anyone to attend Court, other than for filing of the documents.

#### 8. What if there is no agreement reached?

Firstly, there is now a pre-action procedure in the Family Court of Australia, by which mediation should be used to attempt to resolve your differences, whether they be in relation to property or in relation to children's issues.

If there is an outstanding issue, you may need to file an Application for Final Orders, either in the Family Court of Australia or the Federal Magistrates Court.

#### 9. What will happen after I file an application?

This will depend upon in which Court you file the application.



Generally, if you file your application in the Family Court of Australia, you may be asked to attend an information session and also a Case Assessment Conference. The Case Assessment Conference will be the first opportunity to attempt to resolve the outstanding issues between you and your ex-spouse. If there is a dispute about property distribution, normally your case conference will be dealt with by a Deputy Registrar of the Family Court of Australia. If there is an issue about children, then you may be seen by a Court Counsellor of the Family Court of Australia. If there is an issue about both children and property, then you may be seen by both a Court Counsellor and Deputy Registry of the Family Court of Australia.

If you reach an agreement at the Case Assessment Conference, then terms may be made on that day and filed in Court. If there is no agreement, you may then need to proceed to a Conciliation Conference (in relation to property issues) or counselling (in relation to children's issues).

Normally, in the Federal Magistrates Court, an application is filed with the Affidavit in support of the application. You will be given a first return date at the Court and then an Order may be made for counselling in relation to children's issues or a Conciliation Conference in relation to property issues. Generally, before such counselling or Conciliation Conference is ordered, the Respondent to an application will need to file their Response and Affidavit in Support.

## **10. What if no settlement is reached?**

Ultimately, if no agreement is reached, then a judicial officer, either a Federal Magistrate or a Justice of the Family Court of Australia, will determine your outstanding issues. This can involve much time and can be an expensive process as evidence under the Family Law Act is generally provided by way of Affidavits (that is, sworn written documents).

## **11. How can Bateman Battersby assist me with my property settlement?**

Oliver Hagen and his team have vast experience in handling property settlements. We can advise you on the likely distribution of the assets and liabilities of the relationship. We can also obtain all relevant information pertaining to the assets and liabilities. We can also negotiate with your partner or their legal representative and if the matter does not settle, can appear for you in Court. We can also attend to the transfer of your assets as part of a property settlement.

*If you would like further information, or require assistance, please contact us on (02) 4731 5899 or send us an email by clicking on the 'Contact Us' page on our website.*