



Who gets what when a marriage breaks up?

Working out which marital assets are to be distributed at the end of a relationship can be a confusing and emotional process. How do you know “who gets what?”

What will the family Court consider when looking at dividing marital assets?

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

1. It will consider the value of all assets and any liabilities, and determine what assets there are to distribute after the payment of liabilities.
2. The Court will also consider the contributions that each of the parties have made towards acquiring and maintaining the marital assets. There are three considerations to these contributions, being:-
 - Direct financial contributions.
 - Contributions other than financial contributions made directly or indirectly on behalf of the party to the marriage or a child of the marriage. For example: repairs and maintenance of the home.
 - A contribution made by a party to the marriage to the welfare of the family, which includes any contribution made in the capacity of a parent and/or home-maker.
3. Finally the Court considers 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 and the effect of any proposed Order upon the earning capacity of either party.

What is the pool of assets of the marriage?

The pool will be the assets arising out of the marital relationship. It will include assets in either party's name or both names and all assets under either party's control. Generally it will be assets that exist at the date of separation unless those assets are used by one party to create a new asset after separation in which case that new asset will also be included in the pool of assets. The pool includes, for example, the matrimonial home, investment properties, motor vehicles, savings accounts, shares and other items such as superannuation as noted below.

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 Court has the 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.



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

Since 2003, Superannuation has been considered property arising out of the marital relationship and therefore will be part of the pool of assets considered in the distribution even though it may not be able to be accessed until age 55. This is because Superannuation contributions are monies that would otherwise have been available for the parties to use.

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:-

1. The Court may order that the person who has the benefit of the Superannuation scheme retains the entirety of that scheme and the amount that may be payable to the non-member spouse is “paid” by giving the non-member spouse more of the other assets, for example, a greater share in the former matrimonial home; or
2. The Court may provide what is known as a ‘Splitting Order’, by which the Superannuation fund of the member is split between the parties at an agreed percentage or amount; or
3. If the member of the fund is close to retirement then the Court may provide a ‘Flagging Order’, under which the agreed amount is distributed to the non-member spouse when the Superannuation Fund is realised.

If I reach an agreement with my ex-spouse can Orders be made by consent?

Yes. To have orders made by the Court we can file an application on your behalf which will include details about each of the parties, any previous orders, any information about the children of the relationship (if any) and financial details. In addition, Terms of Settlement will be filed and, if approved by the Court, will become Orders of the Court.

What if no agreement is reached and the matter goes to court?

It is important to bear in mind that the Court requires that the parties have made a real attempt to resolve their differences before any proceedings can be commenced in the Court. Provided this has been done, we will then file an application in the Court on your behalf seeking orders for the distribution of the marital assets. You will be required to make a full and frank disclosure of financial matters at this time. This duty of disclosure requires all parties to a family law dispute to provide to each other all information relevant to the issues of the case. The disclosure must be for the party’s total direct and non-direct financial circumstances, disclosing all sources of earning, interest, income, property and other financial resources and the duty of disclosure of financial matters continues until the case is finalised. Failure to disclose could result in the Court Orders being set aside because of the non-disclosure of information.

How long will a disputed Court case take?

This will depend upon the Court’s current list of matters and the complexity of the issues involved in the case. Generally it may take up to 12 months or even longer to reach a final Hearing from the date an Application is filed in the Court.

At Bateman Battersby we have a number of experienced Lawyers who specialise in Family Law matters. If you need help sorting out the confusion about who gets what when a marriage breaks up or if you wish to discuss any of the matters addressed above, please feel free to contact Oliver Hagen or Ken Gray on (02) 4731 5899 or email us at familylaw@batemanbattersby.com.au if you require further information or assistance.