

Property Settlement

As we don't know whether you are or were married, or if you are or were in a de facto relationship we refer to your husband or partner as "your partner" in this legal information fact sheet.

What is property?

The term "property" includes the family home, any other real estate, cash in bank accounts, cars and other vehicles, investments and superannuation entitlements. It includes household items, jewellery and tools. Property also may include the value of a business.

All the property owned by you and your partner, either in your joint names or in your individual names, is known as the "matrimonial asset pool".

The term "property settlement" describes the division of property between a husband and wife, or de facto partners, when they separate.

What do we do about our debts?

Your debts are also part of the asset pool. These have to be taken into account, whether they are in your joint names, or in separate names. As well as working out who gets what property, you will also need to work out who is going to pay off what debts.

Does it make a difference if we are married or in a de facto relationship?

No. The same law relating to property settlement now applies to married or de facto couples (including lesbian couples) when they separate. This only applies to de facto couples who separated after 1 March 2009.

When can I get a property settlement?

You can start working out the details of a property settlement as soon as you have separated. Married couples do not have to be divorced to get a property settlement worked out. De facto couples have two years from the date of separation to work out their property settlement.

Do I have to be divorced first?

It is usually best to get a property settlement agreed, or an application made to court, before you apply for a divorce as there is a strict time limit after divorce. Once you are divorced you only have 12 months to resolve your property settlement or to start court proceedings for property orders.

Do we split everything 50:50?

No. There is a four step process for working out what percentage of the property each of you should get. This process is used by lawyers and by the court.

The four steps are:

1. working out the matrimonial asset pool (described above)
2. assessing and allowing for the contributions to the asset pool (contributions are discussed below)
3. looking at and allowing for the future financial needs of each partner
4. evaluating the fairness of a proposed property settlement.

At the end of this process, you may each get 50% but there is no rule that 50:50 is a starting point or the end result of the property settlement process.

Who gets to keep the house?

The family home is one part of the whole asset pool. Whether you or your partner gets to keep the house will depend on what other assets you own, and who is going to keep what.

There are also other factors to be taken into account. You may have to consider who can continue to pay the mortgage, whether one partner can pay out the other partner, and which parent the children are going to live with for most of the time. Sometimes the family home will have to be sold so that each partner gets their share of the property.

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I owned property and he owned nothing when we married. Is this taken into account?

This may be taken into account, depending how long you have been married (or in a de facto relationship). If it has been a short marriage the fact that you brought property into the marriage, and your partner did not, is likely to be relevant when trying to decide how to divide up the matrimonial assets. If it has been a long marriage, during which both of you have made various contributions, then your 'initial contribution' of bringing property into the marriage may be less relevant.

My partner has worked and paid the mortgage while I stayed at home. Can I get anything?

Yes.

The law looks at the contributions both you and your partner have made during your marriage or de facto relationship. These contributions can be financial (such as paying the mortgage and the bills) or non-financial. The law takes into account the contributions that you have made as a homemaker, and (if you have children) as a parent. If you were studying, while your partner has been earning, you may still have made non-financial contributions by doing the household work (such as cleaning, washing clothes, shopping and cooking).

I've got no income now that we have separated and can't make ends meet. What can I do?

If you have no income, and your partner is not giving you any money or paying the bills, then you may be able to apply to court for an order for spousal maintenance.

Your partner has a responsibility to provide you with financial support if you are unable to pay your own expenses. You have to show the court that you have a need for income, and that your partner has an ability to pay some money to you on a regular basis.

An application for spousal maintenance has to be made to court within 12 months of your divorce becoming final. In reality, you are likely to make an application before then, if you can't make financial ends meet.

I bought a car after we separated. Can my partner get it?

The car you bought after separation is still part of the matrimonial asset pool before you have finalised a property settlement. Whether your partner has a claim on it may depend on what money you used to buy the car.

None of the property is in my name. My partner tells me that I am not entitled to anything. Is this right?

No, this is not right. Even if all the property is in your partner's sole name, you may be entitled to something. The amount of your entitlement will depend on the contributions (financial and non-financial) you have both made during the marriage/relationship, and other factors such as your income and earning capacity, your age and health and the length of the marriage/relationship.

If the house you are living in is in your partner's sole name, you may need to lodge a caveat on the title of the property. This will prevent him from selling or re-mortgaging the house before you have worked out a property settlement. You should contact the Land Titles Office on 136 186 or consult a lawyer as soon as possible.

I am worried that my partner is going to spend our money and get rid of our property. What should I do?

You may be able to get a court order to stop him using bank accounts and/or selling property. You should get legal advice as soon as possible.

I am thinking of separating. Is there anything I should do to protect my financial position?

It is useful to collect together documents relevant to both partners' finances and property. If you are planning to leave the home, get copies of statements, which show bank account numbers, superannuation figures, membership numbers etc for both of you.

You may also want to direct your salary into

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a separate bank account in your sole name, and change the nominated beneficiary of any superannuation policy you may have.

If possible, try to see a lawyer before you separate to get advice about your particular circumstances. If it is not safe for you to delay leaving the home, see a lawyer once you have left.

I am planning to see a lawyer about property matters. What should I take with me?

You should write out a history of your relationship. This helps the lawyer work out what your contributions have been during the relationship. You should include important dates (when you started to live together, when you married, when your children were born, when you separated), what property you had at the start of the relationship and details of when you bought/sold property. Include details of when you and your partner worked, periods of unemployment, periods of study or maternity leave.

If you can, you should also prepare a list of the property you and your partner own. See above "What is property?". It helps to give a rough value of each asset, and include details of any debts such as money owed on credit cards, a mortgage or personal loans.

My partner and I have reached agreement about how to split our property. What do we have to do to make this agreement legal?

You should apply to the Family Court of Australia to make court orders by consent (agreement). This makes the agreement final and binding on each of you, which means that neither you nor your partner can make a further property claim from the other in the future.

You will need to complete forms setting out the details of your agreement and providing financial details of who is going to get what. The court has to be satisfied that the agreement you have reached is fair in your particular case. You do not have to go to court if you apply for consent orders in this way.

You can get a Consent Orders Kit, which contains the necessary forms and instructions on how to complete them, from the Family Law Courts website.

You can also get a copy of this Kit from the Family Court registry at the Owen Dixon Commonwealth Law Courts Building, 305 William Street, Melbourne VIC 3000 or by writing to the Registrar, Family Court of Australia, GPO Box 9991 Melbourne 3001 and asking for the Consent Orders Kit and supplement.

Before you sign your documents, you should both get independent legal advice about whether it is a fair agreement in your particular case.

What do we do if we can't reach agreement about how to split our property?

You should each get independent legal advice, and ask your lawyer to help you negotiate an agreement with your partner. If negotiations don't result in an agreement, you may have to make an application to court for property adjustment orders.

Remember that once your divorce is final you only have 12 months to finalise an agreement (by applying for consent orders, see above) or to apply to court for property adjustment orders. Do not delay in seeing a lawyer if you have been divorced in the last 12 months.