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 Australian Family Lawyers

Understanding Asset Division during Divorce or De-facto separation

Going through the divorce and separation processes is challenging for both you and your ex-partner. Once you have formalised your separation, you may think the worst is over. And for the most part, it is. But now, you need to look at dividing your assets.

This can feel overwhelming to begin with, but once you know what is involved, it will seem less daunting. In this guide, we explain the process of dividing your assets in the event of separation and divorce.

Watts McCray Lawyers has one of the country's largest teams of family law specialists. We know the law is complex, but we can help you navigate the process easily, while understanding every step.

In this guide we will cover:

- The ins and outs of asset division
- How Superannuation is treated during divorce/separation
- Fair property settlement and protecting your rights
- The importance of seeking advice early.



Who can apply for asset division (property settlement)

The process of separating your assets following a divorce or separation is often referred to as a property settlement. You can apply for property settlement when:

- You have been married and are now separated.
- You have been married, and are now divorced, or have had your marriage annulled (note that there are time limits to annulment).
- You were in a de facto relationship and have separated from your de facto spouse.
- You are separating from your de facto spouse.

Time limits apply to both married and de facto couples in relation to when you must finalise your property settlement following separation, so it is best to seek legal advice as soon as possible.

What exactly does 'property' mean?

In legal terms, 'property' refers to things that you or your spouse own (assets) and things you or your spouse owe money on (liabilities). You can own these things individually, jointly with another individual, or by a family trust, company or other entity.

Examples of property include:

- Your family home
- An investment property
- Bank accounts and cash
- Inheritances and shares
- Credit card and personal debts
- Mortgages and loans
- Superannuation
- Cars, furniture, jewellery, and other valuable assets

When seeking to divvy up your assets following a separation, it generally does not matter who is the legal owner, who purchased which item, or who incurred the original debt.

Settling out of court

You and your former spouse or de facto partner can decide on how to settle your assets outside of court. If you agree on arrangements, you can apply for a consent order or enter into a binding financial agreement.

If you and your spouse are not able to reach agreement, we can assist by advising you on your entitlements, and negotiating with your former spouse or their lawyer to try to achieve a fair, final settlement agreement.

Any mediation requirements before applying to court?

There is no need to attempt mediation before starting court proceedings on property division and financial matters, unless you live in Western Australia, or in the rest of Australia if it is a very complex or substantial asset value case.

Before you can apply to a court for orders concerning children of your marriage or de facto relationship, subject to limited exceptions, you must first try to resolve the dispute through family dispute resolution. One way of trying to resolve the dispute is through mediation with a family dispute resolution (FDR) practitioner.



Going to court

If you haven't reached an agreement through negotiations between lawyers, you'll need to apply for financial orders through the court. You can apply for orders for:

Property: To specify how your property, income, financial resources, and debts will be shared between the two parties

Maintenance: To work out if you will provide or receive financial support to or from a former spouse or de facto partner

Best of all, while talking through the financial orders, we may be able to help you reach a more favourable agreement with your ex-spouse or de facto partner.



Is Superannuation Always Split During a Property Settlement?

When a marriage or a de facto relationship breaks down and the parties to that relationship start to discuss the division of the property of their relationship, the parties' superannuation interests are considered assets that form part of that property pool. We are often asked by our clients whether superannuation has to be divided or split? Yes, in almost all cases. There are limited circumstances when superannuation will not be divided or "split" and we can assess whether you fall within one of those cases.

Superannuation is often divided equally, though that may not be if one person built up significant superannuation prior to the relationship or marriage or there are significant differences in personal/financial circumstances.

Let's take a look at a matter we recently helped a client with.

Example Case Study

Mark's marriage to Sue ended and Mark sought advice and representation about his settlement and in particular his superannuation.

Sue said to him that she is entitled to half of everything including his super. Mark was concerned about this comment as he did not think it was fair.

Before jumping to any conclusions, we needed to consider:

- *How long Sue and Mark were married including the length of their de facto relationship before their marriage?*
- *What was the nature and value of assets they each brought into the relationship – both superannuation and non-superannuation assets?*
- *What contributions they each made to the assets during the relationship?*
- *Mark and Sue's current circumstances – both financial and personal?*

Mark and Sue were married for 8 years. Mark was 54 when they married and Sue was 31. They are now 62 and 39 years old respectively.

Mark had been previously married and had 2 adult self-supporting sons.

At the time of the marriage, Mark had two superannuation funds. One was a defined benefit scheme and the other an industry fund. Mark worked fulltime during the relationship as did Susan. Since separation Mark's health has deteriorated and he has been diagnosed with a chronic health condition requiring regular treatment and monitoring. Mark will medically retire at 62 years of age.

When they married, Sue's superannuation was less than Mark's because she had taken time out of paid employment to travel.

During the marriage, Sue worked as a teacher in a private school. Sue was promoted to head of her department during the relationship. At 39 years of age her career is progressing, and her good income means her superannuation guarantee contributions are higher. Sue's current superannuation balance is less than Mark's.

Mark and Sue did not have any children together. Sue is in good health and has a further 2.5 decades to work in paid employment. Mark does not.

In this type of matter, we can adopt a two-pool approach and separate the superannuation and non-superannuation assets and look at each of them.

We need to carefully assess the nature of the superannuation assets when they were acquired and what contributions (if any) Sue has made towards Mark's superannuation and vice versa.

In this matter, each party was ordered to retain their own superannuation assets and the remaining assets divided between them.

This result was because there was no evidence from Sue that she contributed to Mark's super or vice versa. It was also relevant that at no point in time was Sue a full-time home maker or parent with Mark or supported Mark in caring for his children.

Mark did not salary sacrifice to make additional contributions to his superannuation meaning that Sue and Mark's household did not have less money available for their mutual benefit.

Had these factors been present then Sue could have argued she made indirect contributions towards Mark's super and that she has an entitlement to it.

However, in this case, it was clear that she had made no direct or indirect contributions to Mark's superannuation.

REMEMBER EVERY SITUATION IS UNIQUE AND IT'S IMPORTANT TO SEEK LEGAL ADVICE:

It is important to remember that all relationships are different and consequently your family law outcome will vary depending on the facts in your matter.

Our family lawyers are experienced and accredited specialists in family law and can provide expert and tailored advice relevant to your circumstances to guide you through these issues and many others after divorce or separation.

Fair Property Settlement and your Property Settlement Rights

If you are going through separation or divorce and have reached agreement on how all your assets are to be divided, it is vital that your property settlement agreement is legally binding.

If you are leaving a de facto relationship or your marriage has broken down, and you do not have a legally enforceable property settlement agreement in place, you are exposed to the possibility that at some stage in the future there will be a change of circumstances or change of heart. That could see you involved in expensive and uncertain Court proceedings for a decision on how assets are divided.

- Documenting your family law property division agreement
- Property settlement after separation documents

There are only two ways of documenting your family law property division agreement, to prevent future court claims:

- Having final consent orders made by a Registrar of the Family Court, or
- With a properly prepared Binding Financial Agreement.

Any assets you get after this, you keep and are safe from claims.

Sure, there are time limits for someone to make a claim in Court for property division, and those time limits vary depending on whether you are leaving a de facto relationship or have been married and divorced. But the Courts have shown flexibility in often allowing claims years outside the time limits. Also, if you are married and not yet divorced, there is no time limit for property settlement Court claims, except for the death of either spouse.

Property settlement and superannuation

You cannot have division of superannuation entitlements without either a Court approved superannuation splitting consent order, or superannuation splitting requirements in a Binding Financial Agreement. This is another important reason to have your agreement done properly.

And if you're looking to get your property settlement after separation underway? We can assist you in negotiating a fair, overall final property division and also in making sure that your property settlement agreement is in fact final and legally binding, and your rights are protected.

The importance of seeking advice early

If you get advice early on dividing assets during divorce or separation, it can help you avoid any pitfalls and place you well for the best outcome.

At Watts McCray Lawyers, we can help you understand your legal rights and responsibilities, and we can explain how the law applies to your unique circumstances.

Best of all, while talking through the financial orders, we may be able to help you reach a more favourable agreement with your ex-spouse or de facto partner.

We have a team of lawyers located throughout Australia, who are highly experienced in property settlement cases and other asset matters. We can give you detailed advice about what you are entitled to, and how to make a legal arrangement when assets are divided in a divorce or de facto separation in Australia.

Watts McCray Lawyers operates solely in divorce and separation, property settlement, and children's matters. Our team of lawyers have more than 40 years of experience and specialised knowledge in dealing with family matters.

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ABOUT WATTS MCCRAY LAWYERS

As a specialist and leading provider of Family Law services in Australia, Watts McCray Lawyers understand Family Law and the way the various Courts function. Our Family Lawyers, many of whom are Accredited Specialists, are well placed to provide clients with the best possible representation in all manner of Family Law cases.