

This article will discuss what property and financial assets can be divided between partners and how the courts will go about this process. This article will focus specifically on the separation and divorce of married couples.



A “financial settlement” is a term used to describe who gets what after the dissolution of a marriage. At the end of a marriage, decisions will need to be made as to how property, money and belongings will be divided between the parties.

Whilst divorce applications require at least 12 months of separation, property and financial settlements can be resolved between parties immediately following separation or even prior to separation.

However, once a decree absolute has been made to dissolve the marriage, the parties will only have 12 months from that time to apply for a property settlement order. If a property settlement has not been reached within one year after divorce, the Court’s permission to apply for an order “out of time” will need to be sought.

A financial / property settlement is to be inclusive of all the property that belongs to husband and wife, regardless of whose name it is in. Items included in a property settlement are:

- Houses, belongings and any other property;
- Money, shares and other investments;
- Gifts and inheritance; and
- Superannuation (discussed below).

If prior to the marriage, or during the marriage, financial agreements were signed by both parties (husband and wife), under Section 90B or Section 90C of the Family Law Act 1975, these agreements will be enforceable by the Courts. (For further information please look at Comasters’ article entitled ‘Pre-Nuptial Agreements’.)

## **A. THE PROCESS**

Upon separation, if the parties are agreeable as to how property and assets should be divided, then the only action needed is to ask the Court to formalise the agreement by applying for financial orders by consent. A consent order has the same legal force as a decision made by a judge in a courtroom.

If there is a dispute between the parties as to how to divide their property and finances, an Application for Orders can be filed at any Family Court Registry . The Family Court can make orders relating to (1) Property including income, financial resources and debts; and (2) Spousal Maintenance including the provision of financial support for a husband or wife, or former husband or wife.

Once an Application for Orders has been filed in the Family Court, a Case Assessment Conference may be ordered; followed by a Directions Hearing. In some cases, a Directions Hearing may be the first Court event that both parties need to attend.

If no agreement is made at the first Court event (either a Case Assessment Conference or Directions Hearing as mentioned above) the Court will make orders either for further mediation in a Conciliation Conference or Joint Conciliation Conference (only applicable where issues relating to children are involved).

## **B. CONSENT ORDERS–HOW THE COURT SETTLES FINANCIAL DISPUTES**

When deciding how best to make a consent order between two opposing parties, the court uses the overarching principle that the drafting and terms of the consent order must be ‘just and equitable’.

The Court will also need to work out what each party owns and owes i.e. assets and debts. Some factors that the Courts will use in deciding how to settle a financial dispute include:

- Direct financial contributions to the marriage: such as property owned at the time of marriage, contribution of money before or during the marriage, wage and earnings;
- Indirect financial contributions: such as gifts and inheritances to one party, efforts building up and running a business;



- Non-financial contributions: such as homemaking, parenting, looking after children; and
- Future requirements: such as age, health, whether the parties are supporting other people, whether the parties will be supported by a new partner or relatives, care of children, ability to earn, superannuation entitlements and other financial resources.

It should be noted that in most cases, caring for the family and home will be considered to be of equal value as income earning.

In each individual case, the final orders made by the Court will be based on the evidence presented by the parties and the judge's opinion as to what they believe will eventuate in a just and equitable outcome.

### C. "FULL AND FRANK DISCLOSURE NEEDED"

All details relating to assets, income and resources must be presented to the Court during a Hearing. If there is concern that a former partner will sell your property before a financial settlement has been finalized with the Court, Interim Orders can be sought.

### D. SPECIFIC CONSIDERATIONS IN THE GRANTING OF SPOUSAL MAINTENANCE

Under the Family Law Act 1975, the obligation to assist one's spouse does not change because of separation or divorce.

Spousal maintenance refers to the situation where one person pays to help financially support their husband or wife (or former husband or wife) in cases where they are unable to adequately support themselves.

Since spousal maintenance is not automatic, the Court will look to the need of the applicant and the respondent's capacity to pay. Some considerations of the Court in the granting of Spousal Maintenance include:

- The age and health of both parties;
- Ability to work;
- Income, property and financial resources;
- Suitable standard of living;
- Who the children (if any) live with; and
- How the marriage has affected income earning capacity.

Spousal maintenance will not be available upon entering into a new de facto relationship or remarriage. It should be noted that de facto partners are now eligible to apply for Spousal Maintenance under the Family Law Act 1975, where the de facto relationship has broken down on or after 1 March 2009.

Applications for spousal maintenance must be made within 12 months of the finalization of a divorce, or in other words, 12 months from the date of a "Decree Absolute" dissolving the marriage.

### E. FINANCIAL SUPPORT FOR CHILDREN

Both parties are responsible for the maintenance or financial support of children resulting from the relationship. The quantum and method for support can be agreed upon by the parents, resulting in a more time and cost efficient alternative than Child Support Agencies and the Courts.

If your child was born after 1 October 1989 or separation occurred after that date, the Child Support Agency administers child support arrangements. If your child was born before 1 October 1989 and separation occurred before that date, the Family Court administers child support arrangements, and an Application for Maintenance will need to be completed at any registry of the Family Court.

### F. A NOTE ON SUPERANNUATION

Prior to 28 December 2002, superannuation interest was not considered as property, and as such could not be split between separating or divorced parties. Under The Family Law Legislation Amendment (Superannuation) Act 2001, divorced or separated parties are able to make agreements about how superannuation interests that either party have, are to be split.

Superannuation agreements can be made even if the party separated prior to the commencement of the new law in 2002, provided that financial settlement orders have not already been made. It should be noted that as at 1 March 2009 de facto spouses are also now able to split superannuation interests.

### G. ENFORCEMENT OF FINANCIAL ORDERS

The Court does not automatically enforce its orders. Therefore, when a party has refused to obey a Family Court Order, an application must be made to the Court, detailing how the order has been infringed. The Court will then decide if an order is needed to enforce the original order. Under Section 106A of the Family Law Act 1975, an officer of the Court may execute deeds or instruments on behalf of a former partner who has refused or neglected to sign a deed or instrument that provides for property to be sold or transferred or that deals with the issue of maintenance. If there is an order in favour of maintenance or financial settlement, and the former partner has not made payments, Enforcement Summons accompanied with a supporting Affidavit can be completed and lodged at any registry of the Family Court.

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