

Dividing Your Property

You can attend to the division of your property immediately upon separation. You do not need to be divorced in order to divide your assets.

Separation is an extremely stressful time and it is best to come to an agreement about the division of assets as soon as possible.

Reaching an Agreement

If both parties can reach an agreement, that agreement can be submitted to the court by way of Consent Orders. The Courts will review the Consent Orders and if satisfied that they are just and equitable, they will approve same.

It is important to have the division of your assets finalised by way of Consent Orders as the orders may, pending the facts of the matter, allow the parties to sell and or transfer property without attracting stamp duty and capital gains tax.

Legal Advice

It is extremely important to get legal advice pertaining to the division of your assets and liabilities.

Even if you adamant that you don't wish to engage a lawyer to reach an agreement and to finalise same, it is essential that you ensure that you know your rights and what you are entitled to.

Too many times parties come for advice after entering into consent orders realising that such decision was to their detriment. Unless there are extenuating circumstances such as fraud or misrepresentation, a party may find it difficult to have their property orders varied and thus re-litigated upon.

When to commence negotiations

It is advisable to commence negotiations straightaway as whilst you wait, future income, assets and liabilities become entangled with the previous matrimonial property pool and the longer you wait the more complicated the matter becomes.

Time Limits

You must attempt to negotiate and settle distribution of your property within 12 months of being divorced and within 2 years from the date of separation if you were in a defacto relationship. If you are unable to reach an agreement, an application to the court for property orders must be made within the previous said time frames.

What property am I entitled to?

Each matter is determined upon their own set of facts, especially if there are children involved in the relationship that are under the age of 18 or one of the party's future needs are higher than the other, ie wage disparity or ill health.

What if the property is in my partner name?

It does not matter if assets are solely in the name of one party and not the other, the property is considered to be joint property and is included in the net property pool for disbursement.

What if my partner was the main financial provider?

It does not matter that one party was the main financial provider and the other party was not working, each party has a right to property acquired during the relationship pending upon the facts of the matter.

What is property?

- Real Estate including the family home and investments;
- Money held as cash or in bank accounts;
- Shares;
- Investments;
- Insurance Policies;
- Furniture
- Vehicles;
- Boats;
- Inheritances;
- Jewellery;
- Financial gains, ie the lotto;
- Superannuation; and
- Any other assets; and
- Debts including mortgages, loans, credit cards, tax debts, HECS debts and personal debts.

Property includes assets and liabilities owned individually, jointly or with a third party or by way of family trust or company.

Parties' Duty of Disclosure

Parties have a duty to the court and to each other to make full and continuing disclosure of their financial circumstances.

In usual circumstances, financial disclosure includes

1. Statements in relation to all bank accounts, (including loan accounts and credit cards) which the parties have operated, or in which they have or have had an interest in, for the previous 24 months.
2. Details of current income, including employment contracts and their three most recent pay slips.
3. Any other documentation relevant to determining income, expenses, assets, liabilities and financial resources.
4. Three most recent taxation returns and assessments.

5. For any corporation (business), trust or partnership in which the parties have an interest (including overseas):
 1. a) financial statements for each (including balance sheets, profit and loss accounts, depreciation schedules and taxation returns) for the last three financial years;
 2. b) any Business Activity Statements for the last 12 months.
6. For any corporation, its most recent annual return, listing directors and shareholders and the corporation's constitution.
7. For any trust in which the parties have a beneficial interest or of which they are the trustee or appointor, the trust deed and the taxation returns for that entity for the last three financial years.
8. For any partnership, the partnership agreement, including amendments, and unless the value is agreed, a market appraisal of any item of property in which a party has an interest.
9. Details and evidence of values of interests in any superannuation funds.
10. Estimates of values of chattels including motor vehicles, boats, jewellery, antiques and furniture that is in their possession or have disposed of since separation.
11. Details/records of any investments including stocks and shares.
12. Social security pension or payment details.
13. Details/records of long service leave accrued.
14. Details/records of overtime worked in the previous 12 months.
15. Details/records of any life insurance or disability insurance.

Partial Property Settlements

During the time of separation, financial resources can be stretched as parties are now paying twice as much to maintain their status of separation. It is for this reason, that parties may reach an agreement to a partial property settlement. For example, the sale of an asset and early disbursement of that asset whilst the parties continue to negotiate the balance of the remaining property.

When the matter is finalised, this partial property settlement is added back into the property pool and any amount received by a party, as an early payment, will be taken into account in the final figures.

Declaration about the existence of De Facto Relationship

It is often the respondent who disputes the existence of a de facto relationship and thus disagrees that a property settlement should be effected.

A de facto relationship includes same sex partners and can exist if a partner is married to someone else or is in another de facto relationship.

Factors that are taken into account when determining a de facto relationship includes, but is not limited to:

- Length of relationship
- Nature and extent of their common residence

- Whether a sexual relationship exists
- Degree of financial dependence and support
- Ownership, use and acquisition of property
- Degree of mutual commitment to a shared life
- Care and support of children
- Reputation and public aspects of the relationship

Interim Injunctions to Preserve Property

Where property is solely owned by one party and there is a risk that the party will try and dispose of that property and retain or hide the assets, you can seek orders from the court preventing that person from dealing with the property.

In certain circumstances, you can place a caveat over the subject property.

You can also seek orders from the court to inspect and seize documents thus prevent the other party from dealing with the documents would be detriment to your interest in the property.

The power of the court to grant injunctions are limited to real danger that a property claim may be defeated or prejudiced unless an injunction is granted.

How does the Court decide who gets what?

There is a four-step approach under the Family Law Act.

Step 1

Identify and value all property of the relationship including debts. This property can include property you attained prior to or after the relationship.

Step 2

Take into account each party's:

- Financial contribution made directly or indirectly by or on behalf of a party or child of the marriage to the acquisition, conservation or improvement of any of the property of either party (whether or not the property has ceased to be the property of that party);
- Any non-financial contribution (made directly or indirectly, as above);
- The contribution by a party to the welfare of the family (the parties and any children) in the capacity of homemaker, parent or otherwise;
- The effect of any proposed order upon the earning capacity of either party;
- Any relevant matters under s 75 (2) 9 or s 90SF (3));
- Any other order made under the Act affecting a party or a child; and
- Any child support that a party has provided or is to or might be liable to provide in the future.
- Whether a party has wantonly or recklessly caused the deterioration of an asset

Step 3

Other factors to be taken into consideration are:

- The age and state of health of each party;
- The income, property and financial resources for each party and the physical and mental capacity of each for appropriate gainful employment;
- Whether either party has care or control of a child of the marriage;
- The commitments of each party that are necessary to enable the party to support;
 - Himself or herself; and
 - A child or another person that the party has a duty to maintain.
- The responsibilities of either party to support any other person;
- The eligibility of either party for a pension, allowance, benefit or superannuation;
- A standard of living that in all the circumstances is reasonable;
- Extent to which payment of maintenance would increase the earning capacity of an applicant by enabling them to undertake a course of education or training or establish themselves in a business or otherwise to obtain an adequate income;
- The effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant;
- The extent to which the applicant has contributed to the income, earning capacity, property and financial resources of the respondent;
- The extent to which the duration of the marriage affected the applicant's earning capacity;
- The need to protect a party who wishes to continue their role as a parent;
- Financial circumstances relating to cohabitation with another person;
- The terms of any property order;
- Any child support that a party has provided, is to provide, or might be liable to provide in the future for a child of the marriage;
- Any fact or circumstances which, in the opinion of the court, the justice of the case requires to be taken into account;
- Any terms of any financial agreement that is binding on the parties

Step 4

Once the court has considered the first three steps, it must decide exactly as to how the property is to be divided, that is, who gets what.

It must then consider whether the way the property is divided is fair and reasonable in all the circumstances.

What if I leave the house, do I lose my rights to the property?

No. If you leave the house you do not lose your rights or share of the property.

Disclaimer: The above information is not to be taken as advice as each matter is unique to its own set of circumstances. We highly recommend that you seek legal advice before you commence any action regarding your matter.

**For clarification, please contact us on 0431 336 999
or amanda@skenelawyers.com for a free 15 minute consultation.**

Our Principal, Amanda Skene, is experienced in the issues surrounding family law and can help navigate you through this delicate and emotional path.

Contact Skene Lawyers now to obtain the advice you need.