

PROPERTY SETTLEMENT – HOW THE COURT DETERMINES PROPERTY SETTLEMENT

It is important to remember that the notion of fault is irrelevant when the Court makes an Order for property settlement. The conduct of one party who is to blame for the breakdown of a relationship is not important in the course of determination of a just and equitable property settlement. There are some limited circumstances (for example, family violence) where conduct has some relevance, but in general, notions of blame and fault are not relevant to a determination of property settlement.

The Federal Circuit and Family Court of Australia has a wide discretion in making Orders that may alter the interest of parties in property. The Court will not make an Order for property settlement, unless in all circumstances the Order is just and equitable.

In determining what is a just and equitable property settlement, the Court adopts a four (4) steps process as follows:

Step One – Identifying all property of the parties:

- Ascertain and value all property. The Court must firstly identify all property currently owned not only jointly by yourself and your partner but also owned separately (property includes such items as real estate, cash, investments, Shares, furniture, motor vehicles, interests in any Company, Trust, Partnership, etc);
- After identifying all of the property a value must then be placed on each item of property;
- The value of the property can be agreed upon by you and your partner or valuations can be obtained by independent experts;
- The end result of Step One is that the Court is able to identify all property and the net value of all items of property;
- After determining the net value of the matrimonial property (or estate) the Court then examines certain other matters in Steps Two and Three to determine how that property should be divided between you and your partner.

Step Two – Assessing contributions of the parties:

Under this step, the Court examines and assesses the following matters:

- Financial contributions made directly or indirectly by yourself or your partner towards the acquisition, conservation or improvement of any matrimonial property. An example of a direct financial contribution is income earned through employment. An example of an indirect financial contribution may be a gift of monies to you by your parents to contribute towards the purchase of the matrimonial home;
- Non-financial contributions made directly or indirectly by yourself or your partner towards the acquisition, conservation or improvement of any matrimonial property. An example of a direct non-financial contribution may be the maintenance and repair work that you performed on the matrimonial home during the marriage. An example of an indirect non-financial contribution may be the fact that you cared for the children full-time when they were young, which enabled your partner to further his/her career and improve their skills in the work force;

- Contributions made by either yourself or your partner to the welfare of the family, including any contributions made in the capacity of homemaker or parent. For example, contributions made to the day-to-day care and nurturing of the children are relevant.
- In most cases, the Court takes a very general look at these contributions made by yourself and your partner. For example, the Court does not go into specific detail as to who washed the dishes or who mowed the lawn.
- In a normal relationship of a reasonable duration the Court will (unless the facts are peculiar) usually find that the contributions made by each party have been equal.
- However, there is no presumption of this and each case is different, depending upon its facts.
- The Court usually regards the contribution of one party as the primary “breadwinner” to be equivalent to the contributions as the primary parent and homemaker for children.

Step Three – Assessment of current and future needs:

In this third step, the Court must examine a number of other matters relating to current and future circumstances set out in the *Family Law Act*.

We like to refer to these factors as matters relating to the future circumstances of both yourself and your partner.

The Court has a very wide discretion in making adjustments as to how much property your partner or yourself should receive based upon these “future circumstance” factors.

The factors that the Court must look at include:

- The age and state of health of yourself and your partner;
- Income, property and financial resources of yourself and your partner and your physical and mental capacity for appropriate gainful employment;
- Whether yourself or your partner has the care and control of a child of the marriage who has not yet attained 18 years of age;
- Commitments of each of you that are necessary to enable you to support yourself or a child or another person that you have a duty to maintain;
- Responsibilities of either of you to support any other person.
- The eligibility of either of you for a pension, allowance or benefit under any Commonwealth or State law or under any Superannuation Fund or scheme.
- The standard of living and whether in all the circumstances this standard is reasonable.
- The duration of the marriage and the extent to which it has affected the earning capacity of yourself or your partner.
- The need to protect the party who wishes to continue the role as a parent.
- If either party is cohabiting with another person, the financial circumstances relating to that cohabitation.

- The terms of any Order made or proposed to be made for property settlement of the parties.
- Any child support that a party to the marriage has provided, is to provide or might be liable to provide in the future for a child of the marriage.
- Any facts or circumstances which the justice of the case, in the opinion of the Court, requires to be taken into account.

Step Four – Making a just and equitable distribution of property between parties:

After the Court has considered all matters under the first three steps in determining a property settlement, the Court cannot make an Order unless it is satisfied that, in all the circumstances, it is just and equitable to make the Order.

In determining the alteration of the interests of the parties in the property, the Court has no formula to apply, rather the Court exercises its “discretion” by considering the contributions and making adjustments in regard to future needs.

It is important to remember that there are no set rules or presumptions about adjustments that should be made in favour of one party. The Court must look at each case on its individual facts and decide how much weight to place on each factor and what adjustments should be made (if any) in a party’s favour. The Court has a wide discretion as to what Order in the particular circumstances of the case is just and equitable.

There are no hard and fast rules for percentage divisions on property settlement, but we will be able to guide you and advise you as to the likely Orders that the Court will make in your particular matter.

It is also important to remember that a property settlement Order is not automatic as the Court only has power to alter interests in property.

There are cases where the Court may consider it is just and equitable to not make any Order for the alteration of property settlement. Typically, this will occur in cases where parties have kept their assets separate during their relationship, but doing this alone, does not guarantee that the Court will not alter interest in property and in all matters you should seek advice from a family law specialist about your individual circumstances and what the possible outcomes may be.