

Property settlement and property owned before a marriage

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If you and your partner are considering separation or are in the process of separating, you may be concerned about how your pre-marital assets will be treated in any property settlement proceedings. A common question family lawyers are asked is: *"Will I be able to keep property bought by me before the marriage?"*

How is property divided after separation?

Before we can dive into the treatment of pre-marital assets, it's important to understand how property is divided during a separation.

The Family Law Act (the Act) provides a lot of discretion when working through a property settlement. This allows parties to negotiate what they believe to be fair in their circumstances. There are, however, a number of things that the Family Court will take into consideration:

> The financial contributions made directly or indirectly by a party for the acquisition, conservation or improvement of any property of either party;
>
> Any non-financial contributions;
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> Contributions by a party to the welfare of the family in the capacity of homemaker, parent or otherwise;

The effect of any proposed Order upon the earning capacity of a party;

Any other relevant factors under Section 75(2) of the Family Law Act or Section 90SF(3) – related to spousal maintenance;

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 provide or might be liable to provide in the future.

The definition of property in the Act is very broad, and it involves everything each person has, regardless of the name the asset is registered in.

What is the four-step process for property settlement?

There are four steps that the court generally considers when looking at or determining a property dispute:

Identify and value the property liabilities and financial resources of the parties.

Assess their financial, non-financial and welfare contributions.

Assess any relevant Section 75(2) or 90SF(3) (spousal maintenance) factors, such as disparity of income and earning capacity and (the capital cost of) having the care of the children.

Consider the effect of these findings and specify what property order should be made considering all of the circumstances above and whether this is a just and equitable outcome.

You can read more about this in our earlier blog, "How does the Family Court determine property settlement matters?"

How are premarital assets treated in property settlement?

Pre-martial assets are any assets brought into a relationship by one party to the marriage or de facto relationship. The assets may be in the form of real estate, personal properties, money in bank accounts, stocks, or superannuation.

An asset purchased before a marriage is considered separate property as opposed to marital property. Importantly, however, it is still factored into the asset pool and considered a contribution of the person who brought the asset into the marriage.

What is the ‘erosion principle’ in family law?

In Australian family law, the value of a pre-martial asset decreases over time because it can be offset against the contributions of the other party. This is known as the ‘erosion principle’.

The degree of ‘erosion’ will depend on the length of the relationship and if the other party has made any contributions to the value of the asset itself; for example, if the pre-marital asset was a house and the other party contributed to it with maintenance, landscaping or renovation work.

It’s important to remember that you and your former partner can agree that you retain your initial contribution. However, if you wish to get your agreement formalised into Consent Orders, you may find the Court won’t sign off on it. The Court needs to ensure that the agreement is fair and just in the circumstances.

Get help from a family lawyer

At Meillon and Bright, we can provide tailored advice to your unique situation. If you have any questions about separation, property division, or any other family law matter, please contact us.

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