

How does the Family Court determine property settlement matters?

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Following the breakdown of a de facto relationship or marriage, it may be necessary to determine how assets, liabilities and even superannuation entitlements are divided between the parties; in other words, how property settlement will be calculated.

In some circumstances, property settlement orders are a practical necessity due to jointly owned assets or liabilities. Alternatively, orders may be necessary to achieve a just and equitable division of the property.

What does ‘just and equitable’ mean in a family law context?

‘Just and equitable’ does not mean that assets, liabilities and superannuation entitlements are divided equally between the parties to a relationship or marriage. That is, they are not simply split 50:50.

The *Family Law Act 1975* sets out a process for determining the appropriate property division of any net assets of the relationship.

It is important to note that this process is governed by the same principles, regardless of whether the parties were married or in a de facto relationship.

So what is this process?

To begin, the assets, liabilities and superannuation available for division between the parties must be identified.

This is often referred to as the ‘asset pool’. The asset pool includes assets, liabilities and superannuation entitlements held in the party’s sole names, jointly or in the names of other entities (such as trusts, businesses or companies) under their effective control.

What is critically relevant is that the asset pool is determined at the time of trial (or agreement), not at separation. So, if you have a windfall between separation and property settlement, that could form part of the property pool.

In determining what is "just and equitable", the court will review each party's contributions. This includes financial contributions, non-financial contributions and parent and homemaker contributions.

Financial contributions can come in many different shapes and forms, including:

- income from employment;
- business income;
- investment income;
- gifts received; and
- inheritance received.

An example of a non-financial contribution is where a party increases the value of the asset pool by renovating, repairing and maintaining real estate. This contribution must be something greater than the ordinary person would do to be given any weight by the court.

The contributions made by a party who was primarily responsible for parenting and homemaking duties should not be underestimated. They can be given the same weight as a party who worked in paid employment full-time throughout the relationship.

Contributions will be assessed:

- at the commencement of the relationship (referred to as 'initial contributions') – these include the assets, liabilities and superannuation each party bought into the relationship;
- during the relationship; and
- post-separation, being the period from the date of separation until a property settlement is finalised.

Together with contributions, the court also considers a range of legislatively prescribed factors relating to future needs and adjusts the division accordingly.

Section 75(2) of the *Family Law Act 1975* (Cth) sets out the future needs factors which may warrant an adjustment being made in favour of one party. They include:

age;

health;

earning capacity;

care of children;

whether either party has re-partnered;

financial resources; and

standard of living.

The Court must finally be satisfied that the property settlement as a whole is just and equitable in all the circumstances.

This means not only considering the percentage division of assets but also the *actual* assets that each party would receive because different assets, even those having the same “dollar value”, may have a different *attributable* value. For example, cash paid to a party as part of any settlement will generally have a greater immediate “value” over that of superannuation held in an accumulation fund, usually not available until retirement.

No "one size fits all" for property settlement

Of course, what is ‘just and equitable’ in all the circumstances is unique to each relationship. There is certainly no ‘one size fits all’ when it comes to property settlement.

Sometimes you reach an agreement with your partner, and there is a concern as to whether the agreement is ‘just and equitable’. Often, parties just need some assistance in articulating to the court why their agreement is "just and equitable", and legal representation can assist in this drafting process.

If you are unsure what property settlement relief you may be entitled to under the *Family Law Act* or if you'd like to discuss your family law matter with a lawyer or arrange an initial consultation, feel free to get in touch.

The information contained in this article is of general nature and should not be construed as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.