

5 Things You Need To Know About Separation & Property Settlement

If you are separating from your spouse, you will likely need to negotiate a **property settlement**. Our latest article explains the top 5 questions that we receive regarding separation and property settlements.

How soon after separation should I apply for a divorce?

A **Divorce** Application may only be filed once you and your spouse have been separated for a period of no less than 12 months. The following criteria must also be satisfied:

1. You or your spouse are an Australian citizen; or
2. You or your spouse live in Australia and intend to live indefinitely in Australia; or

3. You or your spouse ordinarily live in Australia and have done so for 12 months immediately prior to filing any Divorce Application.

In 1975, the concept of 'no fault' divorce was introduced in Australia. This means that parties to a marriage no longer need to explain why the marriage ended to qualify for a divorce. Parties must simply satisfy the Court that their marriage has 'irretrievably broken down' and there is no likelihood that they will ever get back together.

It is worth noting that, if you and your spouse have been married for a period of less than two years at the time of filing an Application for Divorce, you must also attend counselling and file a counselling certificate.

Even if you are eligible to apply for a divorce, we recommend that you obtain legal advice from an experienced Family Lawyer before you apply. Once your divorce is finalised, you only have 12 months to obtain a Family Law property settlement. If you do not obtain a Family Law property settlement within this time-limit, you may forever lose your right to make a claim against your ex-spouse's assets.

If you are thinking about applying for a divorce, we recommend speaking to a family lawyer to ensure that your interests are protected.

My ex-spouse and I were married for 15 years, and we have two children together. Am I entitled to half of our house?

One of the most common misconceptions is that, after a long relationship, one spouse is automatically entitled to 50% of the property pool. Unfortunately, dividing assets (or debts) between parties to a marriage or de facto relationship is not always a simple task.

Before altering parties' rights to, or interests in, property, the court must first be satisfied that it is appropriate to do so. If the court considers that a division of property is appropriate, the court must then adhere to the following 4-step process to quantify the parties' respective entitlements:

Step 1 – identifying and valuing the property available for distribution between the parties.

Step 2 – assessing the parties' respective contributions including any financial contributions, non-financial contributions and contributions to the welfare of the family as a homemaker and parent.

Step 3 – assessing each party's future needs in contemplation of their age, health, income earning capacity, and the care of any children.

Step 4 – considering whether the proposed division is 'just and equitable' in all of the circumstances.

Given the discretionary nature of the Family Law jurisdiction, each matter is considered on a case-by-case basis and there is no "one size fits all" approach.

Given the complexities of determining a party's entitlements, if you have recently separated from your partner or spouse or are planning a separation, we strongly recommend that you obtain legal advice to discuss your options.

Our team of experienced **Family Law solicitors** can guide you through the 4-step process and assist you to understand your likely entitlements.

How long after separation should I get a property settlement?

The short answer… as soon as possible after the date of separation!

It is important to understand that the asset pool does not 'freeze' at separation meaning that assets acquired post-separation are not automatically excluded from the property pool available for division. In other words, your ex-partner or spouse is entitled to make a claim against any assets acquired by you after the date of separation. This includes your post-separation savings, any lump sum of money received by you after the date of separation (including any inheritances, lottery wins or employment payouts), and any additional assets or income that are accumulated after separation.

Likewise, it is also possible that you may be liable for any debts incurred by your ex-partner or spouse post-separation. The same concept applies if your ex-partner or spouse reduces or wastes the value of the assets post-separation. For example, if they were to start selling assets or incur significant credit card debts, it is unlikely that your ex-partner or spouse will be required to bear the full responsibility for any such loss.
If you have recently separated from your partner or spouse, we strongly encourage you to contact us to discuss your options in terms of obtaining a Family Law property settlement and the risks of delay as soon as possible.

My fiancé and I are getting married soon. Do I need a prenup?

In Australia, a 'prenuptial agreement' or 'prenup' is known as a Binding Financial Agreement ('BFA'). Most people enter into a BFA in anticipation of marriage; however, couples may enter into a BFA at any stage of a relationship, including after separation. The form and content of a BFA will differ from couple-to-couple and is largely dependent on the nature and type of assets of the relationship and the ways in which it is intended that property will be dealt with in the event of a relationship breakdown.

BFAs typically appeal to couples of differing financial circumstances who wish to have greater control and transparency in relation to their finances, including in the event of a separation.

When prepared correctly and in accordance with the statutory requirements, BFAs can provide parties with a clear plan moving forward thereby reducing conflict and saving the parties time, money, and emotional distress which often follows a relationship breakdown.

Unfortunately, however, BFAs can be set aside (i.e., found to be legally unenforceable) in a range of circumstances including where:

1. The terms of the BFA are deemed to be unfair.
2. It is found that one or both solicitors failed to discharge their obligations pursuant to the Family Law Act 1975.
3. One party failed to discharge their obligation to provide full and frank disclosure of their property, assets and liabilities.
4. One party engaged in unconscionable conduct by way of undue influence, pressure or unfair tactics.
5. The parties' circumstances have changed so significantly that enforcement of the BFA becomes impracticable, including after the parties have a child or children.

As such, Binding Financial Agreements are notoriously precarious to prepare and can be difficult to enforce. If you are considering a Binding Financial Agreement, we strongly suggest that you contact us so that we can discuss with you the appropriateness of a BFA in your individual circumstances.

What is spousal maintenance and am I eligible to receive it?

Spousal or de facto maintenance, which is separate from **child support** or child maintenance, is financial support paid by one spouse or de facto partner to their former spouse or de facto partner on the basis that they are unable to adequately support themselves.

A party may be eligible to receive spousal or de facto maintenance if, in contemplation of their age, health, income earning capacity and care of any dependents, they are unable to meet their reasonable expenses from their personal income. The extent of the support varies depending on what the other party can reasonably afford to pay. A party's obligation to pay spousal or de facto maintenance may be short-term or long-term and can continue even after a divorce is obtained.

Accordingly, whether you are eligible to receive or pay spousal or de facto maintenance is largely dependent on your individual financial circumstances and those of your ex-partner or spouse. Once we have a greater understanding of your financial needs, we can provide you with advice in relation to your likely entitlements including how much you may be able to claim.

It is important to note that there are very strict time-limits for applying for spousal and de facto maintenance. As such, if you have recently separated from your partner or spouse and would like more information about maintenance or if you are concerned that you may be liable to pay maintenance to your ex-partner or spouse, we strongly encourage you to **contact us** as soon as possible to discuss your options.

The information in this article is general in nature and was accurate at the time of publication. Laws and circumstances can change. For advice specific to your situation, please seek professional legal advice.