



# FAQ

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## Property Settlement

*This document summarises some of the more commonly asked questions regarding property settlement. If your question is not answered on this page or you need further advice on any family law related matter please phone us on 02 6651 8440 or email [info@bryantmckinnon.com.au](mailto:info@bryantmckinnon.com.au).*

### What is a property or financial settlement?

We use the term “property settlement” to refer to the division of assets and liabilities after the dissolution of a marriage or de facto relationship.

Assets are property such as real estate, vehicles and cash bank accounts, while liabilities are debts including credit cards and mortgages. “Financial resources” include entitlements such as long service leave or potential inheritances that you or your partner expect in the future but can’t access yet.

You can [refer to our Glossary](#) whenever you see a term you aren’t sure about.

### How does the law determine a property settlement?

The Family Law Act specifies how to distribute property when a marriage



or de facto relationship dissolves, although the Court also has wide discretion in determining what is just and equitable (i.e. fair).

This is the typical process:

**STEP 1:** What is the value of you and your partner’s assets, liabilities and financial resources?

**STEP 2:** What were each of you and your partner’s contributions to the property pool? This includes financial and non-financial, direct and indirect contributions, as well as contributions as home-maker or parent.

**STEP 3:** Should you or your partner receive any adjustments in your favour based on a future-needs assessment? There is a long list of factors that may justify an adjustment, including health, capacity for work, dependents and new living arrangements.

**STEP 4:** Based on the results of steps 1, 2 and 3, who should receive what property?

### Can property settlements be dealt with out of court?

Yes. You and your partner can finalise your property settlement matter without needing to go to Court. Your agreement can be made into Consent Orders or be included in a contract called a Binding Financial Agreement. However, Binding Financial Agreements are generally easier to dispute than Court orders and as such Consent Orders are preferred in most circumstances.

### Do I need to formalise my agreement?

Yes, you should. You can do this either by way of a Consent order from the

Court or a contract between you and your partner called a Binding Financial Agreement.

The Court expects you and your partner to obtain independent legal advice before presenting orders, and the judge will check that the agreement is just and equitable (i.e. fair). If you opt for a Binding Financial Agreement, you must both still get independent legal advice to ensure it will be binding in the future.

## Is property divided equally after a divorce?

Not necessarily. How property is divided depends on several considerations, including you and your partner's relative contributions to the property pool and whether either of you merit any adjustments in your favour. Adjustments may be made for a wide range of reasons, including health, capacity for work, dependents and new living arrangements. That said, you and

*You can reach an agreement on property settlement before or after you are formally divorced.*

your partner's contributions would generally be seen as equal, especially if you have had a long relationship.

## Do I get to keep the property I brought into the marriage?

Not necessarily. Almost all property, including that brought into the marriage, will be considered part of the property pool. This is particularly true in the case of a lengthy marriage, where it is assumed that both parties have benefited from the property over a long period of time.

## Am I entitled to a share of the property even if I never worked outside the home?

The Family Law Act recognises that relationships are often structured so that one party takes time out of the paid workforce for the benefit of the partnership. If you have made non-financial contributions to the marriage by staying at home to raise children, or taking care of the family home, this is considered just as important as evidence of financial contributions.

## Do I have to reveal everything I own and how much money I make?

Yes. You must disclose all of your assets, liabilities and financial resources. You also need to keep that disclosure up to date throughout the settlement process.

## I don't know what assets my partner has. Can I find out?

Your partner must disclose their assets, liabilities and financial resources. If you are concerned that your partner may be hiding certain assets, we will usually be able to trace them. In some circumstances, we can obtain information about your partner's financial position without them being made aware. There are serious consequences for hiding or failing to disclose assets.



## My spouse has accumulated assets post separation. Can I claim any of it?

Sometimes. If your partner accumulated the assets using assets of the relationship, or you have otherwise contributed to your partner's accumulation of the assets, then there is a greater chance of those assets being included in the property pool.

## When should we reach agreement about our property settlement?

You can reach an agreement on property settlement before or after you are formally divorced. Quite commonly property settlement is reached well before the actual divorce papers are finalised.

You must reach agreement within 12 months from the date of divorce, or two years from separation in a de facto relationship. If you cannot agree, you will need to take your property settlement to Court within the same time limits. There are some

exceptions to this rule and you may contact us to discuss your particular circumstances.

## How does the law treat superannuation?

Superannuation is treated separately from other assets or financial resources, and can be quite a complex issue. [You can read more about the Superannuation Splitting Laws here.](#)

You will need to reach a valuation of any defined benefit or self-managed superannuation funds. You will also need to decide whether to transfer or quarantine superannuation funds, or alternatively to adjust the division of non-superannuation assets.

*If you cannot agree, you will need to take your property settlement to Court...*

## Will future inheritances be included in the property settlement?

Any inheritances that you or your partner expect in the future may be considered as “financial resources”. Although they cannot always be distributed, they form part of the property pool and so affect the way assets and liabilities are distributed.

## Will any tax liabilities (such as capital gains tax) be included in the property settlement?

Tax debts are generally considered liabilities as part of the property pool. They will usually be seen as joint liabilities.



However, the law defers capital gains tax liability on property that is transferred as part of the property settlement until that property is sold. This means that the partner who received the property will be liable for any capital gains tax if and when they sell it.

## What can I do if my ex-partner and I cannot come to an agreement?

If you cannot agree, you will need to take your property settlement to Court within 12 months from the date of divorce, or two years from separation in a de facto relationship. However, it is preferable to try to agree out of Court.

## When can I bring an application for a property or financial settlement?

Any time up to 12 months from the date of divorce, or two years from separation in a de facto relationship. There are some exceptions to this rule and you may contact us to discuss your particular circumstances.

## Is there a “no win no fee” option?

The Family Law Act prohibits “no win no fee” arrangements in property settlement cases.

## What is a prenuptial agreement and how does it affect property settlement?

In Australia, we use the term “binding financial agreement” to refer to a legal agreement that you and your partner enter into to govern what will happen to your property in the event that your relationship ends. You and your partner can make this type of contract before or during your relationship, or it can form part of the property settlement process after separation. The law sets out strict requirements for Financial Agreements to be considered binding, and the Court may decide not to enforce the agreement if it does not meet those requirements.

*This is general information only. We are here to advise you on your specific circumstances; please get in touch to set up an initial consultation.*