



## **FAMILY LAW & PROPERTY SETTLEMENT: WHAT YOU NEED TO KNOW**

### **Abstract**

This brochure provides information about the legal issues involved in property settlement. The information contained here, is based on the Family Law Act 1975 (Cth).

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## Introduction:

This brochure provides information about the legal issues involved in property settlement. The information contained here, is based on the *Family Law Act 1975* (Cth).

Most people who separate often agree on how to divide their relationship property without the need for court involvement. Agreeing on a property split saves time, money and emotional distress that is often present when the parties are in dispute, needing contested hearings. Arriving at a negotiated outcome without going through the courts, often results in a better post-separation relationship for the parties and their children, if there are children from the relationship.

Matthews Lawyers encourages people who are considering separating to do all they can, to reach agreement on property settlement issues, to work out for themselves how the relationship property will be split. Agreement allows the parties autonomy to work out what they think is best. If the parties cannot agree, the Court will make orders that one or both parties, will not be happy with. It negates the need to expensive litigation.

Once you have reached agreement with your spouse/partner, call our office for assistance in turning your agreement into Consent Orders.

## ORDERS RELATING TO CHILDREN NOT COVERED IN THIS BROCHURE

This guide does not deal with child support, or with consent orders relating to children. Matthews Lawyers is preparing a separate brochure in relation to children's issues. Please contact our office for information on this topic.

**Disclaimer:** **Matthews Lawyers** has prepared the information contained in this booklet is general advice only and not a substitute to legal advice.

## **FAMILY LAW & PROPERTY SETTLEMENT: What you need to know**

### **Available Property Settlement Options:**

1. Non-legal Agreement between the parties.

This is not recommended. They do not provide the certainty and finalisation that parties want. There may also be tax and stamp duty implications. Either party can go to court for a formal property settlement.

2. Binding financial agreement between the parties.

Matthews Lawyers does not recommend binding financial agreements. These can be entered into at any time, before, during or after a marriage or de facto relationship. They have some measure of finality as well as being enforceable, but can be challenged in court. They can be set aside by a court and different orders can be made.

3. Consent orders.

This is recommended as they give certainty and finality to the parties. Whilst it is possible to challenge them, a successful challenge to consent orders is unlikely due to the rule in *Rice v Asplund*: our Fact Sheet on Rice v Asplund is available by request. The parties can make their own consent orders, but it is better to seek some legal advice to ensure that the orders sought are ones that the court can make and that there is compliance with the legislation.

4. Litigation.

If the parties cannot agree and the matter goes to court, the court will determine how the relationship assets are split after separation. The court will decline to make the orders agreed to by the parties, if it considers them to be unjust and unfair.

### **What is property?**

The parties' property interests may include cash, shares, real property (land, houses, or other buildings) and personal property (jewellery, furniture, cars etc). It also includes debts owed to other parties, along with superannuation and interests in businesses and trusts, and includes property located in Australia or overseas.

#### Requirements

There are a number of threshold requirements that must be met before parties can obtain property consent orders from the family courts. These include the following:

- An application for consent orders must be made within 12 months of a divorce or two years of the breakdown of a de facto relationship (leave of the court will be required to file for consent orders beyond this timeframe).
- For de facto couples the court must be satisfied that the parties were in a de facto relationship for at least two years, or there was/is a child of the de facto relationship.
- One of the parties to the relationship must be living in Australia or have a significant connection to Australia. A significant connection to Australia may include children who are living in Australia.

## **Disclosure**

Parties have a duty to provide full information - 'disclosure' - about their income and assets. A failure to give full and frank disclosure has serious consequences. These consequences may include:

- any consent orders being set aside
- the court adjusting a property settlement in favour of the party who has provided full disclosure
- having to pay the other party's legal costs
- being fined, and
- being charged with contempt of court (which can result in imprisonment).

## **WARNING:**

A failure to give full and frank disclosure to the other party of your financial position, has serious consequences. They may include you:

- Having to file further documents;
- Having to pay the legal costs of the other party – your ex-husband/partner;
- Being fined by the Court;
- Being charged with contempt of Court. This is a serious charge. Imprisonment may occur.

## Why Are The Requirements So Detailed?

The law does not allow the court to make property orders purely on the basis that it is what the parties want. Before making a property order, even where the parties agree, the court must be satisfied that the order is fair. What is fair will depend on the circumstances of each family.

The Family Law Act sets out in some detail what the court must consider in making property orders, to ensure that in all circumstances the orders are fair (the term used in the Family Law Act is 'just and equitable'). These considerations include:

- the contributions that each party has made to the relationship, including:

- direct and indirect financial contributions (for example, property brought into the relationship, money earned during the relationship, gifts and inheritances from families etc.)
- non-financial contributions (such as contributions made to the welfare of the family and contributions as a homemaker and a parent, and other contributions such as the conservation or improvement of the family home), and
- the future requirements and resources of each party. Relevant matters include:
  - the care of children living with a party
  - the age and health of the parties
  - the income, property and financial resources of each party, and the capacity of each of them to be in paid employment
  - commitments of each of the parties that are necessary to support themselves
  - the responsibilities each party must support a child or another person they have a duty to maintain
  - the duration of the relationship and the extent to which it has affected the earning capacity of both parties.

Courts are also required to consider the effect of any proposed order on the earning capacity of each party, other orders made under the Family Law Act affecting a party or a child of the relationship, and any child support that is payable for that child.

Similar requirements apply to orders for spousal or partner maintenance, in which case the court must determine that the order is fair in all the circumstances.

While not expressly referred to in the provisions of the Family Law Act that deal with property orders, impacts of family violence can be relevant. It is important to seek legal advice in such situations.

### **Tips for completing the Financial Statement**

- 1) The proposed orders should not overlap with an existing binding financial agreement.
- 2) The proposed orders should not involve third parties who are not parties to the application as they are not allowed to create obligations on parties who are not parties to the application.
- 3) The proposed orders cannot include child support. Child support is covered by the Child Support Agency pursuant to the *Child Support (Assessment) Act 1989 (Cth)*.
- 4) If required, you should specify the division of the property.
- 5) Superannuation – the parties can split their superannuation interests as part of their property settlement. If the proposed consent orders include a superannuation splitting order, the Statement of Truth of Applicant must include a

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statement to the effect that the trustee of the superannuation fund has been notified and has not objected to the splitting of the superannuation account(s). This is part of affording the trustee procedural fairness. In other words, the superannuation trustee must be provided with an opportunity to be heard, to ensure that they are able to comply with the orders.

## **APPENDIX A:**

### **The Legal Framework for Consent Property Order(s) Applications The Power of the Court to make property orders**

The Family Law Act is a federal law. The Family Court of Australia is a federal court and it can make orders about financial arrangements of parties who are married or in a de facto relationship. Under the Family Law Act, orders can only be made when there is a connection with Australia. In brief, the law requires that at least one party to the proceedings must be an Australian citizen, or present in Australia, or living in Australia. As the name of the Family Law Act suggests, the orders must also have something to do with families, whether it is the allocation of property, superannuation and spousal maintenance or orders relating to children. The law also requires that the proceedings must be between the parties to a marriage or a de facto relationship although other people, 'third parties', may also be parties to the proceedings.

In relation to married couples, the Family Law Act gives the court authority (jurisdiction) to hear and determine 'matrimonial causes'. The term matrimonial cause includes proceedings between parties to a marriage about:

- spousal maintenance
- the joint property of the parties, or
- the property of either of them, and some related matters.

The Family Law Act has similar provisions relating to financial and property matters involving de facto couples.

### **REGISTRARS HAVE AUTHORITY TO MAKE CONSENT ORDERS**

Broadly speaking, the judges of the court are the ones to make decisions, including decisions determining property and financial matters. However, the Family Law Act allows judges to delegate some of their powers to registrars.

In proceedings under the Family Law Act, registrars can make an order where the terms have been agreed upon by all the parties to the proceedings. The Family Law Act does not define the word 'order', but it has been defined by the court as a command or direction issued by a court or tribunal. In the context of the Family Law Act, the orders that a registrar could make are termed consent orders and include:

- property and financial orders
- a declaration that a lump sum payment has been made for the purposes of maintenance
- orders for divorce, or
- the exemption of a party from compliance with a provision of the rules of court.



Registrars cannot make consent orders which are directed at third parties, or directly affect their rights, unless those parties are included as parties to the application for consent orders.

## **ORDERS THE REGISTRARS CANNOT MAKE**

Although the general rule is that registrars can make orders where the parties agree, there are some orders that they cannot make. Such orders can be made only by a judge and should not be included in an application for consent orders.

Registrars cannot make orders that relate to the marital status of the parties, including:

- a decree of nullity of marriage
- a declaration of the validity of a marriage
- a declaration of the validity of a divorce, or
- the annulment of a marriage.

Registrars are unable to make a final order about children in contested matters. But they can make final orders about children with the consent of all the parties to the proceedings. Registrars can also make interim orders, although generally people seeking consent orders want final orders rather than interim orders.

Finally, provisions of the *Family Law Rules 2004* limit the orders that can be obtained by an application for consent orders. The orders excluded are orders for:

- step-parent maintenance
- relying on a cross-vesting law
- approving a medical procedure
- a parenting order when section 65G of the Family Law Act applies, or
- an order under child support legislation.

## **PROPERTY 'ORDER' OR PROPERTY 'ORDERS'?**

The Full Court of the Family Court of Australia has held that an order for property settlement is a single order made up of various paragraphs under the Family Law Act. Accordingly, although this is not always the practice, the examples in this guide relating to property settlement are drafted as paragraphs of a single property order, rather than a set of orders. Other matters, such as injunctions or orders for maintenance, would be appropriately set out as separate orders.

## **HOW FINAL/CERTAIN ARE CONSENT ORDER?**

Consent orders are unlikely to be set aside by the Court. For this to occur the rule in *Rice v Asplund* which requires a substantial change in position/circumstances from

when the consent orders were made must be present. Matthews Lawyers has a separate factsheet about Rice v Asplund.

It might be possible to have property orders set aside if:

- there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance
- circumstances that have arisen since the order have made it 'impracticable' for the order, or part of the order, to be carried out
- a person has defaulted in carrying out an obligation imposed by the order and, in the circumstances that have arisen as a result, it is just and equitable to vary the order or set the order aside and make another order in substitution for it
- exceptional circumstances that have arisen since the making of the order mean that a child (or the applicant, if he or she has caring responsibility for a child) will suffer hardship if the court does not vary or set aside the order and make another order in substitution for it, or
- a proceeds of crime order has been made covering property of the parties to the marriage or either of them, or a proceeds of crime order has been made against a party to the marriage or relationship.

If the court is satisfied that any of these matters apply to the consent order, it may in its discretion vary the order or set the order aside and, if it considers appropriate, make another property order in substitution for it.

## **ENFORCEMENT OF CONSENT ORDERS**

consent orders are binding court orders. they can be enforced. A property order made under the Family Law Act will normally be enforced only if a party to the order brings an application to the court for some kind of enforcement or sanction against the other party.

The Family Law Act provides for various sanctions against people who fail to comply with orders. Sanctions can be imposed when the court finds that a person has contravened a court order, and the person does not satisfy the court that he or she had a reasonable excuse. The term 'contravene' means something like disobey – a person contravenes an order by intentionally failing to comply with it, or by making no reasonable attempt to comply with it. The possible sanctions include fines, bonds and imprisonment.

There are separate provisions, under the *Family Law Rules 2004*, for the enforcement of financial orders. It is enough to say that the payer's obligation to pay money can be enforced by seizing real estate or personal property and using that property to satisfy the person to whom the money should have been paid under the

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order. It can also be enforced by legally seizing a portion of the wages or earnings of the person who is ordered to pay and using that money. The court also has powers to require the payer to provide their financial information.

## APPENDIX B:

### Family Law Rules: Rule 6.06 Duty of Disclosure – Financial proceedings

The duty of disclosure applies to a financial proceeding.

- 1) Subrules (3) to (9) do not apply to a party to a property proceeding who is not a party to the marriage or de facto relationship to which the application relates, except to the extent that the party's financial circumstances are relevant to the issues that are in dispute.
- 2) Without limiting subrule (1), a party to a financial proceeding must make full and frank disclosure of the party's financial circumstances, including the following:
  - (a) the party's earnings, including income that is paid or assigned to another party, person or legal entity;
  - (b) any vested or contingent interest in property;
  - (c) any vested or contingent interest in property owned by a legal entity that is fully or partially owned or controlled by a party;
  - (d) any income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;
  - (e) the party's other financial resources;
  - (f) any trust:
    - (i) of which the party is the appointor or trustee; or
    - (ii) of which the party, the party's child, spouse, or de facto spouse is an eligible beneficiary as to capital or income; or
    - (iii) of which a corporation is an eligible beneficiary as to capital or income if the party, or the party's child, spouse or de facto spouse is a shareholder or director of the corporation; or
    - (iv) over which the party has any direct or indirect power or control; or
    - (v) of which the party has the direct or indirect power to remove or appoint a trustee; or
    - (vi) of which the party has the power (whether subject to the concurrence of another person or not) to amend the terms; or
    - (vii) of which the party has the power to disapprove a proposed amendment of the terms or the appointment or removal of a trustee; or
    - (viii) over which a corporation has a power referred to in any of subparagraphs (iv) to (vii), if the party, the party's child, spouse, or de facto spouse is a director or shareholder of the corporation;
  - (g) any disposal of property (whether by sale, transfer, assignment, or gift) made by the party, a legal entity referred to in paragraph (c), a

- corporation or a trust referred to in paragraph (f) that may affect, defeat or deplete a claim;
- (i) in the 12 months immediately before the separation of the parties; or
  - (ii) since the final separation of the parties;
  - (h) liabilities and contingent liabilities.
- 3) Paragraph (3)(g) does not apply to a disposal of property made:
- (a) With the consent or knowledge of the other party; or
  - (b) In the ordinary course of business.
- 4) A party starting, or filing a response or reply to a financial proceeding (other than by an Application for Consent Orders) must file, at the same time:
- (a) a Financial Statement; and
  - (b) a financial questionnaire in the form approved by the Chief Executive Officer.
- 5) If a party is aware that the completion of a Financial Statement will not fully discharge the duty to make full and frank disclosure, the party must also file an affidavit giving further particulars.
- 6) If a party's financial circumstances have changed significantly from the information set out in the Financial Statement or an affidavit filed under subrule (6), the party must, within 21 days after the change of circumstances, file:
- (a) a new Financial Statement, or
  - (b) if the changes can be set out clearly in 300 words or less – an affidavit containing details about the party's changed financial circumstances.
- 7) Without limiting subrule (1), unless the court otherwise orders, a party (the **first party**) who is required by this rule to file a Financial Statement (other than a respondent to an application for maintenance only) must, before the first court date, serve on each other party who has an address for service in the proceeding the following documents:
- (a) a copy of the party's 3 most recent taxation returns;
  - (b) a copy of the party's 3 most recent taxation assessments;
  - (c) if the first party is a member of a superannuation plan:
    - (i) the completed superannuation information form for any superannuation interest of the party (unless it has already been filed or exchanged); and
    - (ii) for a self-managed superannuation fund – the trust deed and a copy of the 3 most recent financial statement for the fund;
    - (iii) if the party has an Australian Business Number – a copy of the last 4 business activity statements lodged;
    - (iv) if there is a partnership, trust, or company (other than a public company) in which the party has an interest – a copy of the 3

most recent financial statements and the last 4 business activity statements lodged by the partnership, trust, or company.

- 8) Without limiting subrule(1), a respondent to an application for maintenance only must bring to the court on the first court date the following documents:
  - (a) a copy of the respondent's taxation return for the most recent financial year;
  - (b) a copy of the respondent's taxation assessment for the most recent financial year;
  - (c) copies of the respondent's bank records for the 12 months immediately before the date when the application was filed;
  - (d) the respondent's most recent pay slip;
  - (e) if the respondent has an Australian Business Number – a copy of the last 4 business activity statement lodged;
  - (f) any documents in the respondent's possession, custody or control that may assist the court in determining the income, needs and financial resources of the respondent.
- 9) This rule does not require a party to be served with a document that has already been provided to the party.