

Property Matters: A Fact Sheet

When you and your partner separate, you're likely to have a lot of questions. One of those is likely to be what will happen to the property that both of you own. Every month Citizens Advice Bureau helps hundreds of people from all over WA access the information and advice they need so they know what to do with their property when they separate.

What is property?

The law defines property as anything that can be owned and has monetary value. Some examples of property are:

- houses
- land
- motor vehicles
- furniture
- artworks
- jewellery
- valuable collections, for example of stamps or coins
- household goods
- bank accounts
- shares
- businesses (partnerships or companies)
- superannuation (property for family law purposes)
- insurance
- business equity
- frequent flyer points
- unused annual leave or long service leave
- trade tools and equipment

What is considered a de facto relationship?

The Family Court determines de facto relationships according to the following factors:

- the length of your relationship – typically, you and your partner were together for at least two years;
- whether you've lived in the same residence;
- whether there is or has been a sexual relationship between you;
- financial reliance on each other or any arrangements for financial support you've made between you;
- ownership, use, or purchase of property (including property one of you owns individually);
- your degree of mutual commitment to a shared life;
- whether you've cared for or supported children; and
- whether other people in your everyday life such as family, friends, neighbours, and employers perceive you as a couple.

It doesn't matter whether you and your former partner are of different sexes or the same sex, or if either of you is legally married to someone else or in another de facto relationship.

I've been in a de facto relationship for less than two years. Can I still make an application for property settlement in the Family Court?

You may be able to apply if the Court believes it's fair and just for you to make such an application, if you've made significant financial contributions in the short period of your relationship **and/or** there's a child of the relationship. If this applies to you, it's a good idea to get legal advice.

Do I have to be divorced to divide the property and assets of my marriage?

No, you don't have to be divorced. As soon as you've separated, you can start making arrangements to divide property and debts between you and your former spouse.

Do we have to go to court?

If both of you have already agreed on how to divide your property, you don't have to go to court. Instead you can apply for something known as Consent Orders from the Family Court of Western Australia by completing Form 11 – Application for Consent Orders.

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My partner and I have reached an agreement about dividing the assets of our relationship. What do we do next?

- Both of you must complete Form 11, providing detailed information of your financial circumstances.
- Draft Minute of Consent Orders to inform the Court of the property orders you want made.
- You and your former partner need to swear these documents in front of a Justice of the Peace.
- You should then make two copies of Form 11 and five copies of the Minute of Consent Orders. These need to be filed in the Court, along with the filing fee. If you are married, include a copy of your marriage certificate; if you're in a de facto relationship, include an Affidavit of Jurisdiction from you or your former partner. (This is a complicated process, so it's a good idea to get legal advice when going through it).

What if we can't agree on how to divide our property and assets?

If you and your partner can't agree about how to divide your property then there's a set process to follow. The Court needs to be satisfied that you've tried to reach an agreement by negotiating between yourselves and in mediation. If you've tried both of these and haven't been able to agree, then you can apply for property orders to be filed in the Family Court. To do this:

- You need to complete Forms 1, 13, and an affidavit.
- Swear the documents before a Justice of the Peace and make two copies of each before filing them in the Court.
- When you receive the stamped copies of the documents from the Family Court, you need to serve them on the other party and provide proof to the Court that you've done that.

Sometimes it might not be safe for you to negotiate directly with the other person, for example if there's been family violence. In this situation you don't have to negotiate with the other party. If this applies to you, you should talk to a lawyer about your options.

What are the benefits of getting Family Court orders to finalise property settlement?

Court orders formally end the financial relationship between you and your former partner so that neither of you can make a claim to the other's assets in future. With Family Court orders, when one party transfers property to the other they only pay the nominal stamp duty of \$20. Transferring property without court orders may incur high stamp duty.

Is there a time limit for filing an application in the Family Court?

Yes, there is. If you were married but have divorced, you have 12 months from the date of your divorce to either file Consent Orders or file documents in the Court to start proceedings for property settlement. If you're married and have separated but not divorced, there is no time limit for finalising property settlement. But it's a good idea to finalise property settlement sooner rather than later because you have to disclose all the assets and liabilities you have (things you own and owe) at the date of your application, not at the date of separation.

If you're ending a de facto relationship, you have two years from the date of your separation to finalise property settlement by consent or apply to start proceedings in the Family Court.

Can I file an application after the limitation period has passed?

Yes, you can file an application out of time (late), but you need to apply for permission and convince the Court you have a good reason for applying after the time limit. The Court has the discretion to accept or reject your application.

How does the Court decide how our property will be divided?

The Court will consider:

- All of the property involved – this includes property you own, property your former partner owns, property you jointly own, and even property owned by someone else if the Court thinks either of you have a claim to it. It doesn't matter to the Court whose name property is in or when it was obtained.
- The contributions you both have made – these can be financial (for example wages, inheritances, or savings), non-financial (for example maintaining the house), or to family welfare (for example as a parent or homemaker). Contributions may have been made before, during, or after the relationship has ended (for example continuing to look after children following separation).
- The future needs of each party – this includes whether each person works or has the capacity to work, whether there are children involved and who's looking after them, and each person's age and state of health. The Court may adjust each party's property entitlements based on your future needs.
- If the final division of property is "fair and just" to you and your former partner in your particular circumstances.

Is property divided 50/50 after separation?

No, it isn't. The property percentage split is only based on the factors considered by the Court, mentioned on the previous page.

Under what circumstances might the Court find that our contributions aren't equal?

In many cases the Court will rule that you and your former partner have contributed equally, especially if you had a long relationship. However it could also find that your contributions aren't equal, especially if:

- your relationship was short and you don't have any children – in this situation the Court will mainly be concerned with your direct financial contributions;
- one of you owned a lot more than the other when you started the relationship;
- one of you recently made a substantial contribution to your relationship with an inheritance, gift from a family member, or personal injury settlement; or
- one partner's deliberate or reckless actions have reduced the parties' assets.

Is superannuation included in property settlement?

Superannuation can be included in a property settlement for parties who are married but are separating or divorcing. It's possible for superannuation to be:

- split and transferred from one of you to the other (a splitting order);
- given to one of you when the other person retires and is about to be paid their superannuation (a flagging order);
- used as an offset, meaning that if one of you keeps your superannuation the other will receive more of the other available property; or
- valued as property.

If you were in a de facto relationship, then your superannuation can't be split or flagged. Instead superannuation is considered the financial asset of the person who has it.

My former partner is refusing to provide me with the details of their financial circumstances. What can I do?

Negotiating a property settlement between yourselves or in the Family Court requires "full and frank disclosure" of all financial details from both of you. If your former partner is withholding information, you can make an application for orders that they provide full and frank disclosure.

Everything is in my former partner's name. Can I still get property settlement?

Yes, you can, because it doesn't make a difference to the Court whose name the property is in. The Court takes into account all property in either party's name, regardless of how or when they got it. There are some limited circumstances where an item of property may not be available for division and we recommend you get legal advice to discuss when this might apply.

If I buy a house after our separation, will the other person get a share in it?

Usually all the property that either of you own is taken into account when the Court determines property settlement. However this doesn't mean that if you buy a house the other party will automatically get a share in it or receive a larger property settlement than they would have otherwise. If you're planning to buy a house, talk to a lawyer first.

What if my former partner wants to sell our house and I don't?

If your house is in joint names, then your former partner needs your agreement before they can sell it. If the house is in your former partner's name only, they might be able to sell without your agreement. In this situation you should get urgent legal advice about getting an injunction to prevent them from selling until the Court finalises property settlement. An injunction is a court order that prevents someone from doing certain things.

I'm worried my former partner will get rid of our assets. What can I do?

If you're worried about your former partner getting rid of assets before you finalise a property settlement, you need to provide the Court with evidence of their intention to do that and ask for an injunction to prevent them from selling the property until settlement is finalised.

Can I get spousal maintenance?

The Court will only give spousal maintenance when one party can't maintain themselves **and** the other party can afford to financially maintain them. The Court will take into account factors such as:

- age
- mental or physical incapacity
- if they have a child in their care
- any other reason

What is the difference between interim and final orders?

While Family Court proceedings are going on, you may need some order to be made before trial. This is called an interim or temporary order. Some examples of interim orders in property cases are to:

- allow one of you to live in your former home;
- prevent one or both of you from dealing with certain items of property; or
- require one of you to pay money to the other on a one-off or ongoing basis until the case is finalised.

Final orders are orders made after a trial or after you and your partner have reached an agreement about how your property will be divided. Both interim and final orders are court orders and must be followed.

Need Legal Advice?

Contact Citizens Advice Bureau to make a low-cost appointment at our Perth office, or for details of how to make an appointment at your nearest branch or by telephone.

(08) 9221 5711

(Lines open Mon-Fri 9:30am-4:00pm)

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