

Information Guide
Married Couple Property Settlements
Provided by milburn guttridge lawyers

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The *Family Law Act 1975* deals with all property matters including financial entitlements, shares and superannuation.

Part A: Purpose of the Act

The Act has the following main purposes:-

1. To facilitate the resolution of financial matters at the end of a relationship;
 2. To recognise spouses should be allowed to plan their financial future;
 3. To facilitate a just and equitable property distribution at the end of a relationship in relation to the parties and any child of the marriage;
- In this regard, a *child of a marriage* includes:
- 3.1. A child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
 - 3.2. A child of the husband and wife born before the marriage; and
 - 3.3. A child of either the husband or wife (including an ex-nuptial child of either of them and a child adopted by either of them) if, at the relevant time, the child was ordinarily a member of the household of the husband.
4. To provide declarative relief to help determine interests in property of spouses;

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5. To provide injunctive relief to help persons protect their interests in property;

Matters involving disputes concerning a marriage relationship can be dealt with by the Family Court, the Federal Magistrates Court or a Magistrates Court.

Part B: Financial Matters and Financial Resources

Courts have jurisdiction to deal with spouses' "*financial matters*" which are matters about property or financial resources of either or both of them.

A person's "*financial resources*" include the following:

1. A prospective claim or entitlement under a superannuation scheme termination or retirement package or similar benefits;
2. Property that under a discretionary trust may become vested in or applied to the benefit of the person;
3. Property which is wholly or partly under the control of the person; and
4. Any other valuable benefit of the person.

Part C: Applications to the Court

Whilst the Courts' involvement in dealing with the distribution of financial assets at the end of a relationship is limited where a pre nuptial agreement has been entered into, the Court has considerably greater powers where no such agreement has been entered into.

In this regard, after a relationship has ended, a spouse may apply to the Court for an Order adjusting interests in the property of either or both of the spouses.

The application may be made for the benefit of either or both of the spouses or a child of the spouses.

A Court may make an order it considers just and equitable about the property of either or both of the spouses adjusting the interests of the spouses or a child of the spouses in the property.

Prerequisites

A Court may make a *property adjustment order* only if it is satisfied:-

1. The spouses were married; **or**
2. There is a child of de facto spouses who is under eighteen years.

Time Limits for Making Application

A Court may make a *property adjustment order* only if the application was made within one year after the day on which the decree absolute for the dissolution of the marriage, unless special circumstances exist and 'leave of the Court' is obtained.

Factors to be Considered by a Court in Making an Adjustment Order

The Court must consider the following:-

1. Financial contributions made directly or indirectly towards the acquisition, conservation or improvement of any of the property of the parties;
2. Contributions (other than financial) made directly or indirectly towards the conservation or improvement of any property of the parties;
3. Contributions made towards the welfare of the family;
4. The effect of any proposed order on the earning capacity of the spouses;
5. Any child support provided or to be provided by a spouse for a child of the spouses;
6. Any other order affecting a spouse or a child of the spouse;
7. Any of the following to the extent that they are relevant in deciding on what order adjusting interests in property is just and equitable:-
 - 7.1. The age and state of health of each of the spouses;

- 7.2. The income property and financial resources of each of the spouses and the capacity of each to obtain appropriate employment;
- 7.3. Whether either has the care of a child of the spouses who is under eighteen years;
- 7.4. The commitments of each of the spouses necessary to enable the spouse to support him or herself and a child whom the spouse has a duty to maintain;
- 7.5. The responsibility of either spouse to support another person;
- 7.6. The eligibility of either spouse for an Australian pension that is not income tested or a foreign pension (but must disregard the eligibility of either spouse for an Australian pension that is income tested);
- 7.7. What standard of living is reasonable for each of the spouses in all the circumstances;
- 7.8. The contributions made by either of the spouses to the income and earning capacity of the other spouse;
- 7.9. The length of the relationship;
- 7.10. The extent to which the relationship has affected the earning capacity of each of the spouses;
- 7.11. Any payments provided for the maintenance of the child in the care of either spouse;
- 7.12. Any fact or circumstance that the court considers it is just in the circumstances of the case to take into account.

Adjournment of Cases

A Court may adjourn an application to adjust interests in property if the Court considers that there is a likely significant change in the financial circumstances and that it is reasonable to adjourn having regard to when the change is anticipated to occur. The Court must be satisfied that the adjournment will result in a just order which may not occur if the Court were to proceed with its determination immediately.

Court's Powers Generally

In exercising its powers a Court may do one or more of the following:

1. Order the transfer of property;
2. Order the sale of property and the distribution of the proceeds of the sale;
3. Order a document be executed;
4. Order payment of a lump sum (either by single amount or by instalments);
5. Order the payment of a weekly, monthly or other periodic sum;
6. Order the payment of an amount be made wholly or partly secured in a way the court directs;
7. Appoint or remove a receiver or trustee;
8. Grant an injunction for the protection of property or to aid enforcement of another order;
9. Make an order about the use or occupancy of a de facto spouses home;
10. Order that the lease of a rented property be assigned from the lessee to the other spouse;
11. Order that payments be made direct to a spouse;
12. Impose conditions;
13. Make an order by consent; and
14. Make any other orders or grant any injunctions it considers necessary to do justice.

Variation and Setting Aside of Orders

On the application of a person in relation to whom an order has been made, a Court may vary the order if it is satisfied:-

1. There has been a miscarriage of justice because a fraud, suppression of evidence the giving of false evidence, failing to disclose matters as required; or
2. Because of circumstances that have arisen since the order was made it is impracticable for the order to be carried out; or
3. A person has defaulted in carrying out an obligation and it is just and equitable to vary or set aside the order; or
4. A child will suffer hardship if the court does not make a variation; or
5. A proceeds of crime order has been made:
 - 5.1. Covering the property of the marriage or either party, or
 - 5.2. Against a party to the marriage.

Transactions to Defeat Claims

The Court can make a variety of Orders to stop people from dealing with property if it is likely to disadvantage the other party in the property settlement.

Effect of Spouses Death

If a spouse dies before the provisions of a financial agreement or Family Court Order can be carried out, the provisions may be enforced on behalf of or against the estate of the deceased spouse unless an agreement relied upon expressly provides otherwise.

Legal Costs

A party to a proceeding involving property disputes will generally have to pay their own costs. However if the Court is satisfied that there are circumstances justifying the making of an order, it may make any order for costs or security for costs it considers appropriate.

Part D: Duties Act

The law allows for transfers of property interests between spouses to be free of duty if it is part of a property settlement under the *Family Law Act* 1974.

Part E: Means of Documenting an Agreement

In terms of self regulation of litigation by the parties, there are effectively four (4) ways in which married couples may regulate their financial relationships:-

- By Consent Orders for property and/or maintenance;
- By registered agreement under Section 86 of the *Family Law Act*;
- By approved agreement under Section 87 of the *Family Law Act*; or
- By registered financial agreement under Section 90C of the *Family Law Act*.

You are at liberty to choose from the four alternatives. By far the most common approach taken is the use of Consent Orders.

We outline below a brief summary of the position in relation to the four (4) alternatives:

Consent Orders

Where an agreement can be reached, financial arrangements between yourself and your former partner can be embodied in the terms of a Consent Order under the Act. This is a relatively cost effective method of formalising property settlement proceedings. Once formally made, consent orders have the same legal force as if they had been made after a court hearing.

Normally, you will not be required to attend Court in order to obtain a Consent Order. However, If the orders you seek are inconsistent with a family violence order between you and your partner or any of your children, then your application must be heard in open court.

Section 86 Maintenance Agreements

Section 86 Maintenance Agreements are similar in content to Section 87 Maintenance Agreements in that the terms of your financial arrangements are quite detailed (unlike perhaps a simple Consent Order).

The major difference between Section 86 and Section 87 Maintenance Agreements is that the former is not scrutinized by a Judge, but is merely registered in the Family Court. However, only maintenance agreements made before 5 January 1975 may be registered in such way.

As with a Consent Order, it would be possible for a former partner to initiate an application for final property settlement, but again, such an application is often unsuccessful without good reason or new information. The Court may feel that the Agreement was entered into by both parties with an intention of making it final.

Section 87 Maintenance Agreements

Section 87 Agreements may be entered into with a view to finally defining the financial obligations between yourself and your former partner. An application to the Family Court of Australia must be filed and accompanied by:

- Detailed affidavits by both parties;
- Detailed statements of financial affairs by both parties; and
- The draft maintenance agreement (i.e. as agreed between the parties).

The application is then heard by a Judge of the Family Court must be satisfied that the agreement is "proper". The determination of whether an agreement is "proper" depends upon whether:

- Full disclosure of all material facts concerning finances has been made by both parties;
- It is a fair agreement with regard to the financial history of the marriage;
- Both parties understand what the agreement means (i.e. Both parties have had legal advice);
- The marriage has broken down irretrievably and there is no prospect of reconciliation; and
- The interests of any children of the marriage have been properly protected.

The maintenance agreement is not enforceable in any way unless it has been approved by the Court. Should the Agreement be approved, it is enforceable as though it were an Order of the Court and is operative to the exclusion of any future rights either of you may have to institute property proceedings. Should, however, the Court refuse to accept the Agreement, you are not precluded from then applying to the Court for a Consent Order, Section 86 Maintenance Agreement or Financial Agreement as specified below.

Financial Agreements

Financial agreements are in essence "marriage contracts", most commonly used now as a prenuptial agreement. It is however possible to enter into a financial agreement during the course of the marriage, or even upon dissolution of marriage (provided that there is not already a Financial Agreement in force). However, commentators in relation to the introduction of the legislation which accommodates financial agreements, do discuss the use of such documentation by married couples in circumstances where:-

- An alteration of a pre-existing prenuptial agreement is sought; or
- There has been a "material change in circumstances" in relation to the marriage (eg:- the birth of a child, the disablement of one of the parties; or other events which would have a serious effect on the ability of a person to maintain his or her present commitments and standard of living).

A financial agreement must:-

- Be an agreement in writing to be signed by both parties;

- Have annexed to it, certificates of independent advice and financial advice.

A Court has power to enforce the provisions of a binding financial agreement, but also may set it aside where it is satisfied that the agreement:-

1. Was obtained by fraud; or
2. Attempts to defeat or disregard the creditors of either party; or
3. Is voidable or unenforceable; or
4. Is impracticable for it to be carried out due to circumstances arising since the agreement was entered into; or
5. Was made prior to a material change in circumstance.

A Court may, upon application, terminate a financial agreement and make such order it considers to be just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to the agreement and any other interested person.

Under the Family Law Act you must institute proceedings for a determination by the court of property and financial matters within one year of your divorce if you intend to do so. If you do not apply within that time limit then you may be prohibited from applying to the Court for relief. You should diarise that time limit, and a date at least one month before the time limit, to ensure that you comply with the rules of the Court and do not risk losing your opportunity to bring an application to the Court. It is important to bear this time limit in mind during the course of your negotiations.

Waiver:

The information contained in this *milburn guttridge lawyers Information Guide* is intended only as a guide and does not constitute legal, financial, tax or duty advice. You should obtain your own advice on the subject of the *Information Guide*. *milburn guttridge lawyers* cannot, and does not, guarantee the accuracy of the contents of the *Information Guide*. Nor does the firm attempt to provide information specific to your individual circumstances.

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Your Will and Power of Attorney

It may be an appropriate time for you to consider the contents of your Will (if you have one or if not, to have one prepared).

We believe that it is also an appropriate time for you to consider having an Enduring Power of Attorney prepared. An Enduring Power of Attorney appoints someone to act on your behalf (i.e. as Attorney) should you suffer any disability rendering you mentally incapable of looking after your own affairs.

*milburn guttridge lawyers has had a long standing relationship with **Cancer Council Queensland** regarding the making of Wills and many clients have left bequests to the Cancer Council in their Wills. If you are thinking of doing so please let us know as you may be eligible for a **free Will**. Please ask for details.*

If you have any questions at all regarding the above please do not hesitate to contact our office.

What if my Power of Attorney was signed before 1998?

The enduring power of attorney introduced in 1990 was limited to dealing with a person's financial affairs and did not empower the attorney to deal with other aspects of the principal's life such as personal and health care decisions. Since 1998, the law allows us to draft the power of attorney much wider to cater for a much greater range of contingencies.

If you have an 'old' power of attorney, we suggest you update it.