



Money – Part 1: The Property Settlement

How often do you hear people say “she will take him for everything he is worth” or that “the Family Court will simply divide everything in half after a breakdown in the marriage”?

The reality is however, that neither of these approaches is followed by the Australian Family Court or Federal Magistrates Court. Every case will be treated on the basis of its own facts.

In calculating a property settlement the court will not consider whose decision it was to end the relationship or their reasons for doing so when splitting the property. What the Court will consider is:

1. What is the nett property pool;
2. The contributions each party made to the property pool; and
3. How the future needs of the parties will be met for example, who will be caring for the children and what is the earning capacity of each of the parties.

Stage One – What is the property pool?

The Court will look at all the assets of the parties. At this stage, it is not relevant who purchased which items or if they were gifts. The matrimonial property pool will generally include all assets at the date of the settlement or trial, of each of the parties or companies and trust under their control and ownership, regardless of when they were acquired.

Since the amendments to the Family Law Act in 2002 it is now possible to split or divide superannuation in the same way as other assets.

The property pool also includes all the marital debts such as the mortgage on a house, credit card debt and any Capital Gains Tax involved in selling the property. One party may have wasted or spent money on their own pursuits such as gambling or the purchase of extravagant gifts for another person. For there to be just and equitable orders this money may be notionally added back into the pool of assets. The “notional assets” the Court will add back to the asset pool even though they no longer exist have been clearly defined in a series of cases.

Townsend and Townsend—premature distribution of matrimonial asset

Shortly following separation, the husband sold the taxi license and cab he had previously operated as a business. He used the proceeds to cover his legal fees and other unspecified expenses. The Court said that in using the proceeds of the sale of an asset from the marital asset pool, the husband had prematurely distributed part of the pool to himself. This should be taken into account in the distribution of the property settlement. The value of the asset – in this case, the taxi license and the cab – would be notionally added back into the asset pool and distributed to the husband as though it were still available for distribution.

Chorn and Hopkins—matrimonial money expended on legal fees in a Family Law case

Eight months after he had separated from his wife, the husband purchased an engagement ring for his new partner (who contributed towards the cost). He purchased the ring on credit and paid for it with funds which had not existed when he and his former wife had separated. Therefore, the Court decided that this was not an expense which should be notionally added back.

This matter also established that if the amount a party had expended on legal fees was to be notionally added back and any portion of that amount had been borrowed, then the debt on that loan should also be included in the asset pool as a liability. If one or both of the parties had paid for their legal fees from funds sourced from outside of the asset pool then neither the amount sourced nor any liability for borrowing it should be added back.

Kowaliw and Kowaliw—reckless and wanton action to reduce value of matrimonial asset pool

This case established that any financial losses incurred by the parties (either together or in individual ventures) during the marriage should be shared equally except when:

1. “One of the parties embarked on a course of conduct designed to reduce...the value or worth of matrimonial assets”; or
2. “Where one of the parties had acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value.”

In one case, a wife had expended some \$140,000 of the marital funds on gambling. However, she was eventually diagnosed and medicated for an actual medical condition which made her gambling habit at least partly involuntary. For this reason, the Court found that she lacked “the degree of wantonness, negligence or recklessness” that the *Kowaliw* case had established was necessary for monies to be notionally added back into a marital asset pool.

Finally, the first stage of a Family Law property settlement requires a value to be attributed to assets. If the parties cannot agree on the valuation of an asset then, under the *Family Law Rules*, a valuation should be done by a single expert valuer and the costs split equally between the parties.

Stage Two - Contributions

After the value of the nett asset pool is ascertained, the court will then look at all financial, non-financial and homemaker and parenting contributions of the parties both during the marriage and post separation.

At this stage it becomes relevant who purchased which asset, the parties’ wages and living arrangements. For example, while the husband may have purchased a house and made all the mortgage repayments (a financial contribution) the wife may have forgone her career to perform domestic duties and care for children (a non-financial and homemaker parenting contribution) which enabled the husband to undertake the remunerative work.

Stage Three - Future Needs

Next the Court will consider a list of factors concerning the needs of each party into the future. Included in this list is consideration of who has care of any children, the health and age of the parties, if the marriage has damaged one party’s ability to support themselves and the financial resources of each of the parties.

The percentage contribution at the end of stage two will be adjusted to accommodate for these needs. For example, if one party is considerably older or in ill health an adjustment may be made to increase their share to take account of the fact they have less capacity to support themselves in the future. Similarly, if a person's earning capacity has been diminished by the marriage by having to care for children, an adjustment may be made for this fact.

Essentially, the Court will be looking to provide the most fair and equitable split of the assets that are possible in the circumstances so that both parties may move on independent of each other.

The division of assets following a marriage breakdown is a complicated process that aims at taking into account the contributions of both the parties to the marriage and ensuring that each of the parties and any children involved have the ability to be independent of the other party into the future. There are many other factors which are outside the scope of this article which may be relevant to your particular case and so early advice from a family lawyer may be important to address certain issues and determine a fairer distribution of assets.

For more information

See the Family Court Website at:

<http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Property+and+Money+Matters/Property+and+money+after+separation/>

Townsend v Townsend [1995] FLC ¶92-569

Chorn & Hopkins [2004] FLC ¶93-204

Kowaliw and Kowaliw [1981] FLC ¶91-092

WARNING

These articles reflected the state of the law at the time of publication. But the law is a living creation which is constantly changing and adapting. These articles should be treated as an information resource only and not as a substitute for specific legal advice in respect to your particular problems and circumstances.