

Who gets what?



COLLECTIVE
FAMILY LAW GROUP



THE **ULTIMATE** GUIDE FOR THE
FAMILY LAW PROCESS & THE DIVISION
OF PROPERTY AND PARENTING.

Introduction

Following separation, either from your marriage or your de facto relationship, it can be difficult to know where to start with the legal process that lies ahead. At Collective Family Law Group we focus on giving you the clarity that you require regarding your legal issues so you can move forward with certainty.

This information brochure has been put together by our skilled lawyers, to help you gather information in the early stages of your separation or divorce.

You may or may not require a lawyer, but it is advisable and beneficial to know where you stand legally, right from the beginning. We are proud to offer a free initial consultation, providing you with an opportunity to receive the correct legal information from the outset of your matter.

When you are going through a separation or divorce there are many aspects of your life that you will need to think about. Your legal position relating to finances and parenting are two areas that you may need to consider.

In this guide, we have given you an overview of both property division and parenting after separation for your convenience.



Property Division

The procedure undertaken by family law Courts in determining what, if any, property adjustment is required between parties following separation is referred to as a "four-step process". Put simply, the "four-step process" steps through the following:

1. THE PROPERTY POOL – What assets, liabilities and financial resources exist for each party, joint or separate (the “net property pool”)?;

2. THE CONTRIBUTIONS – What each party has contributed to those assets, liabilities and financial resources before the commencement of cohabitation, during the relationship and post separation. These contributions can be financial or non-financial (e.g as a parent or homemaker)(this is represented as a percentage);

3. THE FUTURE NEEDS – What the ‘needs’ of each party will be moving forward post separation (resulting in a percentage adjustment from point 2 above); and

4. THE JUSTICE & EQUITY – Whether the assessment at points 2 and 3 above, and the transactions that will allow for that assessment to be implemented, are just and equitable for both parties.

Even if you are not yet in Court proceedings, you need to be guided by the above principles. It will enable you to appropriately conduct negotiations and it will ensure that if you wish to formalise an agreement by way of Consent Orders, the Court will be likely to approve the Orders you are seeking.

The above steps are unpacked and explained in our further resources.

STEP ONE OF THE FOUR-STEP PROCESS EXPLAINED

The starting point in any property settlement process is to assess the property pool that is available for distribution between the parties. It is not until the true property pool is known that any consideration can be given to the remaining three (3) steps of a property settlement. More importantly, if the true property pool is not known it is impossible to properly assess whether an outcome is just and equitable for the parties.

As a basic explanation, the property pool is all of the assets, interests and liabilities held by both parties, individually or jointly, at the time of the property settlement.

A property pool can be determined on a global approach. Where either everything is included in one 'pool' and a net value is determined, or through an asset by asset 'piecemeal' approach. The vast majority of matters are determined using the global approach, and family law Courts tend to adopt the asset by asset approach only in very short relationships or in other circumstances where there has been a significantly large contribution or gain by one party late in the relationship or post separation. If you think your matter might require an asset by asset approach you should seek legal advice from a family law solicitor, otherwise, proceed on the basis of a global approach

STEP TWO OF THE FOUR-STEP PROCESS EXPLAINED

Once step one of the four-step process has been completed, and there is a known property pool value following disclosure and valuations, step two can commence.

The second step in determining each parties' entitlements in a final property settlement is to assess the contributions that each party has made to the current property pool (regardless of whether a global approach or piece meal approach is being adopted). This is pursuant to section 79(4) of the Family Law Act 1975 (Cth) ("the Act") for married parties, and section 90SM(4) of the Act for de facto parties.

There are three broad categories of contributions that are recognised by the family law Courts according to the Act:

1. Financial contributions;
2. Non-financial contributions; and
3. Parenting and homemaker contributions.





Remember the following important points when assessing the property pool in step one:

- 1.** The property pool now might be different to what was held at the time of separation. Regardless of how long it has been since separation, the property pool is taken at the time of effecting the property settlement – this is the main reason why it is so important to effect a legally binding property settlement;
- 2.** Regardless of whether an asset, interest or liability was held before the relationship, acquired during the relationship or gained post separation, the rule of thumb is that everything is included in the property settlement;
- 3.** Disclosure may be needed to verify things such as the value of each parties' superannuation, bank accounts, and loan balances; and
- 4.** Independent valuations may be needed to verify the true current value of assets, or to resolve any disputes as to estimate values. At a practical level, the easiest way to complete step one of the four-step process is to prepare a balance sheet, or schedule, that lists out in one document all of the assets, interests and liabilities held by each party.

STEP 3 OF THE FOUR STEP PROCESS

Step three is all about the parties' future needs. It can be explained by asking this question: 'Is there one person in the relationship who has greater future financial needs than the other party?' Or, 'Is it going to be more financially difficult for one of the parties in the future?'

In this third step, the Court considers various future factors which may justify an adjustment to the percentage division arrived at in step two. This is because the third step is outlined in section 75(2) of the Family Law Act. It is here that the Court considers whether there is one person in the relationship who is going to be disadvantaged financially in the future more than the other person, now that the relationship is at an end.

In other words, are there any disparities between the parties and their circumstances financially? These disparities could be, but are not limited to, the following questions.

- Does one person earn a significant amount more than the other?
- Does one person have care of the children more than the other?
- Does one of the parties have a higher earning capacity than the other?
- Is one person injured and can't work?
- Is one person much older than the other and therefore does not have as much working life ahead?
- Is one person a carer and cannot earn what the other can earn?

Essentially, the law provides a percentage uplift in the division of the property pool for any party that is disadvantaged.

POST SEPARATION

Property settlements can take some time to resolve, especially when they're greatly disputed. For various reasons, there may be a significant delay between formal separation and the parties effecting a legally binding property settlement. Because the property pool available for distribution in a property settlement is the pool that exists at the time of effecting settlement, the Act recognises it is necessary to assess what each party has, or has not, contributed to the property pool post separation. Common examples of this include one party maintaining real properties, engaging in further investments or further increasing their wealth post separation.

It is normal for parties to disagree about their respective contributions. It should be possible for some disputes, such as the value of a real property at the commencement of cohabitation or mortgage repayments post separation to be settled by further disclosure or valuations (current or retrospective). However, other facts may remain disputed long after a matter has settled, such as how the parenting or housework duties were handled throughout the relationship.

An assessment of the contributions as outlined above will provide a percentage range of what each party has contributed to the relationship (i.e. if the parties have made equal contributions over a long relationship they might be at 50-50% at the end of step two, whilst in a short relationship where one party entered the relationship with significant assets, that parties' initial contribution might put them at a greater percentage than 50%).

CATEGORY 1:

FINANCIAL CONTRIBUTIONS

Financial contributions are the most commonly recognised category once people separate. These are direct or indirect financial contributions to the acquisition or maintenance of assets within the property pool. Areas to assess here are the employment and income history of each party, how respective incomes were applied to enhance the properties of the parties, how funds were obtained to purchase assets and how funds were applied upon sale of assets. Inheritances, redundancy payments, personal injury awards, gifts and windfalls are all to be considered as direct or indirect contributions.

CATEGORY 2:

NON-FINANCIAL CONTRIBUTIONS

Non-financial contributions are direct or indirect contributions that are not financial contributions towards the acquisition or maintenance of assets within the property pool. Areas to assess here include acts such as renovations (completed by both parties or by one of them) to properties or extraordinary and particular skills of a party that have enabled greater financial contributions.

CATEGORY 3:

PARENTING AND HOMEMAKER CONTRIBUTIONS

Parenting and homemaker contributions are recognised under the Act as equally as important as financial contributions. This is on the basis that one party should not be disadvantaged upon separation if they have taken on the role of primary carer to children, and homemaker, thus enabling the other party to maintain their employment, advance their career, and increase their superannuation.



Of the above three contributions categories, there are three stages that must to be assessed:

- The commencement of cohabitation;
- During the relationship; and
- Post separation.

THE COMMENCEMENT OF COHABITATION

What did each party 'bring' to the relationship? By asking this, the Act allows recognition of situations where parties enter a relationship on unequal financial platforms. Assessing what each party held when the parties started living together, and analysing the trajectory of those assets throughout the relationship, enables each party to be given due consideration for their position prior to the relationship. However, in long relationships initial contributions can be offset by other contributions made by the other party.

DURING THE RELATIONSHIP

It will obviously be important to assess what each party has or has not done in terms of contributing to the relationship during the relationship itself. The time frame for this is from when the parties started living together until formal separation, which may not be the same date as when the parties' ceased living together.



STEP FOUR OF THE FOUR STEP PROCESS

Is it just and equitable?

Finally, the Court must consider whether the Orders (Consent Orders that the parties have agreed on or Orders of the Court) it proposes to make after completion of the previous steps are just and equitable. Essentially, given all the facts and circumstances, is the outcome fair for both parties in accordance with the Family Law Act?

If the outcome of the property division isn't considered fair and equitable, then the agreement cannot be finalised by way of Orders of the Court. However, the parties can choose to enter into a Binding Financial Agreement to finalise their agreement.

Parenting

EQUAL SHARED PARENTAL RESPONSIBILITY

The Family Law Act 1975 (Cth) (as amended) (“the Act”), at section 61B, states that parental responsibility in relation to a child means ‘all the duties, powers, responsibilities and authority which, by law, parents have in relation to children’. Under the Act each of the parents of a child under 18 has parental responsibility for that child. Importantly, the allocation of parental responsibility does not determine the amount of time a child is to spend with either parent.

As covered in our other resources, Family Law Courts in Australia are required to make decisions based upon what is in the child best interests. If parenting proceedings are before the Court, the Court must apply a presumption that it is in the best interests of the child for both parents to have equal shared parental responsibility for the child. This presumption applies unless there are reasonable grounds to believe a parent of the child, or a person who lives with a parent of the child, has engaged in abuse of the child, or another child in the family, or family violence.

The presumption of equal shared parental responsibility is a rebuttable presumption (section 61DA(3)). That means the Court does not have to apply the presumption if there is evidence that satisfies the Court it would not be in the best interests of the child for the child’s parents to have equal shared parental responsibility (section 61DA(3)).

In practical terms, separation of parents (de facto or married) does not alter the parents holding equal shared parental responsibility. This means that post separation both parents need to continue to co-parent any child of the relationship, making joint decisions for the child. This includes major decisions such as where the child lives, what time the child spends with each parent, and decisions with respect to the child's health, education and religion. Parents with parental responsibility are expected to consult each other in relation to major decisions to be made, and are to make a genuine effort to reach a joint decision (section 65DAC(2)-(3)). This does not extend to issues that are not major long-term issues (section 65DAE(1)).

The only legal way to alter the allocation of parental responsibility for a child is to have an Order of the Court that does so. The Order won't have an effect on parental responsibility unless the Order expressly alters parental responsibility, such as conferring sole parental responsibility for a child to one parent (section 61D(2)).

See our further resources for more information on parental responsibility including altering parental responsibility and the effect of the presumption of equal shared parental responsibility on the time a child spends with either parent.





WHAT ARE 60CC FACTORS?

Under the Family Law Act 1975 (Cth) (as amended) (“the Act”), Family Law Courts in Australia must, when making any decision in respect of children, regard the best interests of the child as the paramount consideration (section 60CA). In determining the best interests of each child, the Courts are to have regard to defined factors further outlined in the Act (section 60CC).

The primary considerations for the Court are (section 60CC(2)):

- The benefit to the child of having a meaningful relationship with both of the child’s parents; and
- The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect of family violence.

Of the above two primary considerations, Courts are required to give greater weight to the need to protect the child from physical or psychological harm (section 60CC(2A)).

The additional considerations for the Court are (section 60CC(3)):

- Any views expressed by the child (and any factors relevant to the weight to be given to those views i.e. maturity of the child);
- The nature of the child's relationship with each parent;
- The nature of the child's relationship with other persons (such as grandparents and other relatives);
- The extent to which each of the child's parents have taken the opportunity to, or failed to take the opportunity to, participate in making major long term decisions for the child;
- The extent to which each of the child's parents have taken the opportunity to, or failed to take the opportunity to, spend time and communicate with the child;
- The extent to which each of the child's parents have fulfilled, or failed to fulfil, the parent's obligations to maintain the child;
- The likely effect of any changes in the child's circumstances, including the effect on the child of any separation from either parent, siblings or other persons (such as grandparents) the child has been living with;
- The practical difficulty and expense of a child spending time and communicating with either parent (and whether that will substantially affect the child's right to maintain personal relations and direct contact with the parents on a regular basis);
- The capacity of each parent, and any other person (including grandparents and other relatives), to provide for the needs of the child, including the child's emotional and intellectual needs;
- The maturity, sex, lifestyle and background (including culture and traditions) of the child and of either parent, and any other characteristics of the child the Court considers relevant;
- If the child is an Aboriginal or Torres Strait Islander child – the child's right to enjoy their culture (including enjoying that culture with other people who share that culture) and the likely impact any proposed outcome will have on that right;

- The attitude to the child, and to the responsibilities of parenthood, demonstrated by each parent;
- Any family violence involving the child or a member of the child's family;
- If a family violence Order applies, or has applied, to the child or a member of the child's family – any relevant inferences that can be drawn from the Order taking in to account the nature of the Order, the circumstances in which the Order was made, any evidence admitted in the proceedings for the Order, any findings made by the Court in, or in proceedings for, the Order and any other relevant matter;
- Whether it would be preferable to make the Order that would be least likely to lead to the institution of further proceedings in relation to the child; and
- Any other fact or circumstance the Court thinks is relevant.

Of the additional considerations there is no Order of priority and the Court takes a broad approach in matters it considers relevant to determining the child's best interests.

Please see our further resources for additional information on the considerations and approach of the Court in parenting proceedings.



FREE INITIAL APPOINTMENT

At Collective Family Law Group, we offer a free one-hour initial appointment with one of our experienced lawyers. This gives you the opportunity to learn about your legal position and what your options are moving forward. We have a Brisbane, Southport, and Cleveland Office, we also offer consultations via Zoom.

To secure an appointment please phone our office on 5574 0971, email us at admin@cflg.com.au. or scan the QR below.

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