

# Property and Settlement Basics



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Alira Morey, Senior Solicitor, Women's Legal Services NSW on 1 October 2013. This webinar can be downloaded for free at [www.asklois.org.au/webinars/past-webinars](http://www.asklois.org.au/webinars/past-webinars).

## This fact sheet covers:

- What happens after separation?
- What law applies?
- What are the time limits for property settlement?
- Can your client go to court?
- Agreements made out of court
- How is property divided?
- Spousal maintenance
- Referrals

## What happens to property after separation?

When your client's **marriage** or **de facto relationship** ends, all the **property** owned by her and her partner needs to be divided in a way that is fair to both parties.

Property includes a house, land, superannuation, a business or company, trusts, cars, bank accounts, insurance policies as well as furniture and household items. Personal things like clothing are unlikely to be included.

Property can be in **joint names** (your client and her partner own the property) or in **sole name** (only one person owns the property). It **does not matter if all the property is only in one person's name** as the title to property can be changed from one spouse or partner to the other to make sure that both parties are treated fairly.

## What law applies?

The **Family Law Act 1975 (Cth)** applies to:

- Married couples
- De facto couples including same sex couples who separated after 1 March 2009

## Types of matters

- Division of property
- Spousal maintenance

## What are the time limits for property settlement in Court?

- Married couples:
  - Within 12 months of divorce becoming final
  - You do not need a divorce to do a property settlement!
- De facto couples:
  - Within 2 years of separation
  - Under the *Family Law Act* the definition of de facto relationship includes same sex couples

## When the court will make property orders for a de facto relationship

- The Court must be satisfied that:
  - The relationship lasted for two years or more; OR
  - A child was born of the relationship; OR

- One party made a substantial contribution and there would be a serious injustice if an order or declaration was not made; OR
- The relationship was or is registered under a prescribed law of a State or Territory.



### Can your client go to Court?

In most cases, the *Family Law Act* requires your client to try to reach an agreement by using dispute resolution such as mediation before they can apply to the Court for property orders. Exceptions:

- Family violence;
- One party refuses to negotiate;
- Fraud;
- Need for an urgent application, e.g., a risk one party may sell property without permission; or
- Your client is almost out of time to make her application.

### Agreements made out of court

If your client and her partner can reach an agreement about how to divide their property before commencing a court case, that agreement can only be enforced by the Court if:

- The agreement is made into consent orders by the Court, or
- It is a binding financial agreement

### How is property divided?

There is no set formula. The Court will look at the facts of each case and follow the four step process (**section 79 factors**) to decide a fair way to divide the property:

#### 1. Identify and value property of the relationship

- The property is identified **at the time of separation** and **valued at the time of the court hearing**.
- Property includes:
  - Property owned your client and her partner at the start of the relationship;
  - Property purchased by either or both during the relationship;
  - Superannuation;
  - Gifts and inheritances received by either party;
  - Goodwill in a business;
  - Compensation payments;
  - Lottery winnings;
  - Redundancy payouts; and
  - Loans.

#### 2. Consider contributions of both parties:

- The contributions your client and her partner made to the relationship are then considered
- Contributions made **after the relationship ends and up to the time the property division is finalised** may also be relevant
- **Financial contributions** include any money provided by your client or her parents or other family members, wages or a deposit paid on a house. They also include initial contributions (any property she had at the start of the relationship)
- **Non-financial contributions** include any unpaid work your client or others have done repairing, improving or maintaining property, or work done in a business owned by your client's partner
- Contributions made as a **homemaker or parent** are also considered valuable



- In **exceptional circumstances** such as **domestic violence**, or behaviour such as gambling or drug and alcohol addiction may be taken into account. The violence or other behaviour must have **significantly impacted on a person's ability to make contributions to the relationship**.

### 3. Consider present and future needs of both parties (section 75(2) factors)

Future needs are worked out by looking at the following types of things of each party:

- Age and health, including any disabilities;
- Income;
- Ability to earn an income and entitlements to any financial resources;
- Responsibility to support children or others, including how many nights children live with each parent; and
- Whether or not the relationship has affected a person's ability to get a job.

### 4. Whether it is a fair division of the property in the circumstances

- The Court then assesses whether the division is fair by looking at the overall position after the first three steps have been considered. The Court should only make an order if 'it is satisfied that, in all the circumstances, it is just and equitable to make the order'

## Spousal Maintenance

- There is a **general right** to spouse maintenance in **both married and de facto relationships**
- Applications are made to the Local Court, Family Court or Federal Circuit Court
- Subsequent marriage to another party ends entitlement
- The court will consider:
  - Does the applicant need financial support?
  - Can the respondent afford to pay?
  - How long will the applicant require maintenance?
- An application can be made on an urgent basis
- A claim must be made within 12 months of divorce or within 2 years of separation for de facto couples

## Referrals

- These organisations provide mediation on financial matters:
  - **Community Justice Centres - 1800 990 777**
  - **Relationships Australia - 8874 8010**
- The **Law Society Solicitor Referral Service** provide referrals to family lawyers in your clients area **on (02) 9926 0300 or 1800 422 713**
- **Legal Aid** is difficult to get for property matters but is available in some situations. Your client can contact Legal Aid to see if they are eligible: <http://www.legalaid.nsw.gov.au/contact-us/legal-aid-nsw-offices>