



Separation and property

One of the most difficult issues to resolve when separating is the fair division of property. This usually begins around the time of separation and, in some cases, can unfortunately go on for years.

It makes no difference whether you are married or living in a de facto or same sex relationship, all women are legally entitled to a fair share of the property when a relationship ends. Some women forgo their entitlements to avoid a lengthy and bitter dispute and to choose freedom over money—however they often end up worse-off financially. This financial inequity may also become particularly obvious in later life.

Working out what you are entitled to can be a complicated and drawn-out process, particularly if you are unable to come to an agreement with your partner. Even if you are agreeing and getting on well with your partner, it is still important to seek legal advice so that you understand what your entitlements are. You'll then be in a better position to realistically plan for the future.

COMMONLY HELD MYTHS

These are some of the most common myths about property settlement and separation.

- *Because it's in his name, he owns the house.*
- *We're not divorced, so we can't settle our property yet.*
- *The courts usually give women everything.*
- *It's his job and his superannuation—I have no claim on that.*
- *Women are out to get as much as they can.*
- *If I leave then I lose my entitlement to a share of the property.*
- *Non-married or de facto couples have no legal rights.*
- *The only way property can be settled is through the courts, which is complex, long-winded and expensive.*

AND THE REALITY...

- Property includes all assets that are owned individually, jointly or by a family trust. If the house is in your partner's name it will still be considered part of the settlement between both of you.
- Married couples can apply for property settlement before they are divorced. Timing is important as there are some legal hurdles to a property division that come up a year after a divorce or two years after the separation of a non-married couple—make sure you get legal advice as soon as possible.
- The Family Court will weigh up the contributions made during the relationship (including non-financial contributions such as homemaking and parenting duties) and the future needs of both people when considering a fair division of property. Women do not automatically get everything.
- Superannuation is included as part of the overall property assets. Since December 2002, separating married couples have been able to split their superannuation in the same way as other assets. Since March 2009, separating de facto couples are treated the same way as married couples in this regard.
- If you leave the house, you will not lose your entitlement to a share of the house or other property.
- Over 95% of property disputes are settled out of court. It is important to know that you must document your agreement properly or there will be problems with enforcing it legally.

WHAT IS PROPERTY?

Property can include anything of value like houses, land, cars, household items, jewellery, savings and investments, superannuation, stocks and bonds, life insurance policies, businesses, family trusts and any other assets or debts. Property can be owned individually, jointly or by a family trust or family company.

Other entitlements such as long service leave, and personal injury claims are also now considered in a property settlement.

SORTING IT OUT WITHOUT GOING TO COURT

You don't have to go to court if you can work out an agreement with your partner that gives you a share of the property that you are happy with. By reaching agreement you can save time and money and avoid having to engage in a stressful and often upsetting legal process. However, no matter how good things are with your partner, make sure you obtain independent, knowledgeable advice from an experienced family lawyer or community legal service before you sign anything. Many women chose to compromise on the property they are entitled to in order to avoid further conflict or the perceived cost of getting legal advice. This decision will often significantly disadvantage them later in life. Getting legal advice does not mean that you have to 'get nasty' or go to court, it just means being properly informed about your rights and entitlements.

If you reach an agreement, it's important that it is in the correct form and registered with the relevant court so that it is legally binding and therefore enforceable.

GETTING HELP TO REACH AN AGREEMENT

If you are finding it difficult to work out an agreement with your partner it may be worth considering using a Family Dispute Resolution Service (such as Relationships Australia, LifeWorks or a Family Mediation Centre). Family dispute resolution or mediation is where an independent third party ensures that everyone's views are heard and options for agreement are explored. Mediators do not take sides; they just try and help people to resolve disputes without going to court. Mediation is conducted in a more relaxed environment and can be quicker and cheaper than going to court. You do not need a legal representative, however it is a good idea to seek legal advice before using a mediator.

If your partner has been violent or aggressive, or you feel that you will not be able to say what you really want, it is important to discuss your concerns with the mediation service and see what they can do to create a safe and appropriate process. For more information see the Domestic Violence Resource Centre Victoria (DVRCV) information sheet *Preparing for mediation: tips for women who have experienced domestic violence*. If mediation is not for you, you could try employing a solicitor to negotiate with your partner's solicitor on your behalf.

HOW IS PROPERTY DIVIDED?

In Victoria, the Family Law Act now applies to married, de facto and same sex couples alike **if they have separated after March 2009**.

The Family Court takes into account a number of factors when deciding your share of the property. It considers what financial and non-financial contributions you and your partner have made during your relationship.





This can include the following:

- Income from salary or wages
- Unpaid work in the home caring for children and your partner
- Work done to improve your home or business
- Assets bought or used during the relationship
- Financial contributions from savings, gifts and inheritances

It also takes into consideration the future needs of both parties, including:

- Where the children will live
- Income and financial resources, including savings, gifts and inheritances
- New living arrangements
- Respective superannuation entitlements
- Duration of marriage
- Age and state of health
- Ability to work
- Eligibility for a pension

In the end, you may receive an added share of the property if the court believes your income and financial resources are relatively low compared to your partner's. Women's income capacity is often less than their partner's as they have taken time out of the workforce to have children and have limited working capacity because of primary care-giving responsibilities. Lawyers who help couples sort out their property settlements outside the court system are guided by these general factors.

Before seeking legal advice make sure you have everything you need to avoid unnecessary delays and expense. Prepare a list of your sole and joint property, debts, income and contributions, and get any relevant paperwork together.

COMPLICATIONS TO LOOK OUT FOR

• DEBTS

If you and your partner have joint debts, these should ideally be worked out at the time of settlement. It is important to know that even if you haven't benefited from borrowing the money, you may still be liable for half or even all of the debt. If, however, the loan was contracted unfairly there may be something you can do.

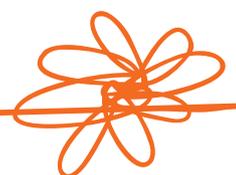
• SPOUSAL MAINTENANCE

If you can prove that you are unable to support yourself and your partner has the capacity to meet your needs, you may be able to claim spousal maintenance. Spousal maintenance may be paid out in a lump sum, or through ongoing periodic payments. This can be negotiated at the time of property settlement or, if you are unable to agree, the Family Court can make a maintenance order.

As many women receive a lump sum payment as part of their property settlement, it is a good idea to make sure this will not affect your right to a pension or benefit. It is a good idea to see a financial advisor at this time.

• WHOSE NAME IS ON THE TITLE OF THE HOUSE?

Whether your name is on the title or not, you may still be entitled to a percentage of the home. However there is a danger that the house may be sold without your knowledge if your name is not on the title. If you think your partner may try to sell the house before you have agreed on a property settlement, you should apply for an urgent property order from the court or ask a solicitor to place a caveat on the title. A caveat ensures that property is not dealt with without your prior knowledge and consent.



AVOIDING DIFFICULTIES

Dividing up property can be a complex and difficult process particularly if you are unable to come to an agreement outside the court system. However there are some practical things you can do to minimise potential difficulties while at the same time ensuring you receive a fair share of the property.

- Seek legal advice as early as possible so that you know exactly what your rights and entitlements are
- Make sure you have copies of all your financial records
- Make sure debts are not in your name only
- Ensure that debts which only benefit your partner are not in your name
- Buy assets in both names, particularly your family home and cars

GETTING LEGAL ADVICE

Because these laws are complex and quite confusing for most of us, it is important to get as much information as soon as possible about your rights and entitlements, even if you and your partner are getting on well and agreeing. For tips on seeking legal advice see the WIRE information sheet *Getting legal advice*.



REFERENCES

You and family law: a short guide, Victorian Legal Aid 2009

Preparing for mediation: tips for women who have experienced domestic violence, DVRCV information sheet, available at www.dvrcv.org.au

Divorce and division of property, Law Institute of Victoria public information brochure, available at www.liv.asn.au

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DISCLAIMER

Every effort has been made to ensure the information contained in this sheet is accurate and current at the time of printing—March 2011. However, no responsibility will be taken for the accuracy or reliability of the information, or for any loss that may arise from errors, omissions, or changes to government policy or the law.

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WHERE DO I GO FOR HELP?

- WIRE **1300 134 130** www.wire.org.au
- Community legal centres **03 9652 1500** www.communitylaw.org.au
- Counselling and financial services referrals (call WIRE **1300 134 130** for contact listings in your area)
- Family Law Courts **1300 352 000** www.familylawcourts.gov.au
- Law Handbook Online www.lawhandbook.org.au
- Law Institute of Victoria Legal Referral Service **03 9607 9550** www.liv.asn.au
- Legal Online www.legalonline.vic.gov.au
- Online Application for Divorce and Information www.divorce.gov.au
- Relationships Victoria **1300 364 277** relationships victoria.com.au
- Victoria Law website—plain English resource about Victoria's legal system and issues with directory of legal sector agencies and links to resources in other languages. www.victorialaw.org.au
- Victorian Legal Aid **03 9269 0120**/country toll free **1800 677 402** www.legalaid.vic.gov.au
- Women's Legal Service Victoria **03 9642 0877**/toll free **1800 133 302**

CONTACT WIRE

We will listen to you and put you in touch with the right services.

Phone 1300 134 130

for the cost of a local call anywhere in Victoria, mobiles excepted. (Telephone Interpreter Service available or call **13 36 77** TTY National Relay Service for hearing impaired women)



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