



Please see disclaimer on the final page of this document

## **DIVIDING UP THE PROPERTY - IT'S AS SIMPLE AS 1, 2, 3**

<u><b>SUMMARY</b></u>	3
<u>What is 'property'</u>	4
<u>Time limits</u>	6
<u>The Three Steps of property distribution</u>	7
<u>Step 1 - Assess the assets and liabilities</u>	8
<u>When do you value the assets and liabilities?</u>	10
<u>How do you value the property?</u>	11
<u>Step 2 - Assess the contributions</u>	13
<u>A note about the percentages</u>	14
<u>Contributions Prior to the Relationship</u>	15
<u>Post-Separation Contributions</u>	15
<u>Step 3 - Assess any further adjustments: the 'Section 75(2) Factors'</u>	15
<u>Length of the relationship</u>	17
<u>A possible Fourth Step – who keeps what?</u>	18
<u>A word about 'spousal maintenance'</u>	18
<u>Family Law - a discretionary jurisdiction</u>	19
<u>An Example of the Property Distribution Process</u>	20
<u>Step 1 – Determine the asset &amp; liability pool</u>	21
<u>Step 2 – What are the contributions?</u>	22
<u>Step 3 – Are there any factors warranting an adjustment?</u>	23
<u>The final distribution</u>	23
<u>Disclosure of financial information</u>	26
<u>Failing to disclose assets</u>	28
<u>Possible impact on Court Orders or Financial Agreements</u>	29
<u>Some specific issues to consider regarding property settlement</u>	30
<u>Legal costs in family matters</u>	30
<u>Disposing of Property and the concept of 'Add-back'</u>	31
<u>Deliberately reducing the value of property</u>	33
<u>Setting aside transactions</u>	34
<u>Capital Gains Tax (CGT) can be a trap</u>	34
<u>Superannuation and pension entitlements</u>	35
<u>How is Superannuation Adjusted?</u>	36

---

<a href="#"><u>Types of superannuation interests</u></a>	37
<a href="#"><u>Get legal and financial advice about superannuation</u></a>	38
<a href="#"><u>A last word about finalising property distribution by agreement</u></a>	38
<a href="#"><u>Settle sooner, rather than later</u></a>	39
<a href="#"><u>Legal fees</u></a>	39
<a href="#"><u>Using lawyers to draft Agreements and Consent Orders</u></a>	39

---

## DIVIDING UP THE PROPERTY - IT'S AS SIMPLE AS 1, 2, 3

---

### ***SUMMARY***

- 'Property matters' in family law refer to matters related to the division of your assets and liabilities after separation. They are also referred to as 'financial matters' or 'financial settlement'.
- Under the family law the term 'property' includes many things - it is not just cash and houses. If you have a family business, a trust, investments, an entitlement to be paid, superannuation or even a pension entitlement it is likely to be included as property.
- It also includes money you owe and other liabilities of the relationship (or entities in which either or both of you have an interest).
- All property will be included in "the pool" for consideration of the financial distribution after separation.
- Make sure you divide your property legally. You might divide property by informal agreement, but if you don't do this according to the *Family Law Act* and your ex later wants another slice of the property, you could be in for a nasty surprise.
- It's not just about what you own and owe; it's about what you've contributed. Your respective roles during your relationship and who has made what contributions are factors that will be considered when dividing up your property.
- What each of you is likely to need in the future will also be taken into account (often referred to as 'future needs').
- You will not receive less in a property distribution simply because you earned fewer dollars during the relationship or because you were a homemaker.
- It is very important that you tell the truth about what you own, to each other and, if necessary, to the Court. This is "full and frank disclosure". If you don't

disclose fully and properly, you could end up transferring a lot more to your ex than you thought you might save by not disclosing all the information.

- Don't go off and spend money or destroy property to try to minimise the amount your ex will get. This is likely to backfire and may be deducted from the property that you receive in the distribution.
  - Superannuation is included in property distribution but is not necessarily treated the same way as other property.
- 

### ***What is 'property'***

When a couple separates, they have to decide how their property will be divided between them (and how to settle the debts).

The definition of 'property' for family law purposes is:

*"property to which parties (to a marriage or de facto relationship) are, or that party is, as the case may be, entitled, whether in possession or reversion".*

This definition may not seem to be very helpful but, in every-day language, 'property' means virtually anything– whether it is an asset or a liability (a debt of some kind).

'Property' does not just include real estate (homes, farms, apartments, office blocks, vacant land). It will probably also include:

- personal items (furniture, kitchenware, white goods);
- money (cash, bank accounts);
- debts owed to you or by you (to the bank as mortgages or personal loans, credit cards, loans to/from family, friends or business associates);
- investments (shares, interests in a business or company, timeshares);
- a family business;
- a trust over which a party has control;

- an entitlement to be paid or a liability to pay in the event of some future happening;
- intellectual property;
- lottery winnings; and
- gifts from parents and relatives and, where already received, inheritances.

'Property' even includes redundancy entitlements or long service payments, leave entitlements and pensions. And entitlements to shares in an employee share scheme with one's employer.

Whatever you can think of, it is almost certainly 'property' in a family law sense.

And that means **all of the property** – whether it's in your name, your partner's name, joint names, a company name in which you may have an interest or even in someone else's name but you have some entitlement to it. In effect,

*"What's yours is ours, what's mine is ours and what's ours is ours".*

It's all in the pot and available for distribution between you, even if one party has never shown any interest in it, did not want it and tried to get rid of it. If it's still there, it's included in the pot. And if it's not property, it will usually be regarded as a 'financial resource' (more on that later).

Sometimes, especially in a short relationship, dividing up the property can be pretty easy as there may not be much to split between you. In these cases, you probably would not worry about getting a formal agreement drafted up and registered in the Courts (but, beware, this may come back to bite you later as the cautionary tale below demonstrates - *'Losing the Lottery after you have won it'*).

It can get to be quite complicated where a lot of property has been accumulated over the years or where there are complex financial arrangements and structures. This is when you almost certainly need some good legal advice and assistance from people who know about these things and how they work.

Whether easy or complicated, remember that the arrangements you make with your ex-partner will not be legally binding (that is, you cannot make the other party abide

by the agreement) unless it is registered in the Courts as Consent Orders or is prepared according to the law as a Financial Agreement.

You can settle your property distribution by mutual agreement (e.g. after a successful mediation) or you can go to Court to ask for a decision from a Judge. The principles which should guide you in arriving at a private settlement and the law that the Court will use are the same. Just follow 'The Three Steps of property distribution' later in this chapter.

### ***Losing the Lottery after you have won it***

*A married couple had very little property when they separated. So they made no agreement and just went their separate ways. Their one child stayed with the wife and the husband had little to do with either of them in the following years (and didn't provide much financial support either).*

*Neither party bothered to apply for a divorce so they remained legally married. Therefore, each of them retained the right to commence proceedings for a property distribution. (a right which continues for 12 months after a divorce).*

*In a stroke of fortune, the husband won first prize of \$5 million in a lottery.*

*The wife brought a claim in the Family Court for a share of the winnings.*

*The Court decided that she had a right to a share of the lottery winnings. It said that the money was part of the 'property' of the parties and its value was "to be determined at the date of the determination, not the date of separation or some other time".*

*The Court awarded the wife \$1.5 million of the \$5 million the husband had won.*

*Moral of the story – if you want certainty, finalise arrangements by a properly executed legal agreement as soon as practicable.*

### ***Time limits***

According to family law, there are a couple of statutory limitations (legal time limits), that you should be aware of. A statutory limitation prevents you starting proceedings in Court after a period of time expires following a defined event. If you don't commence your action before the time limit expires, you lose the right to take the issues to Court.

It's not always an absolute disaster if you miss a statutory deadline as, under the family law, you can still apply to the Court for an exemption to allow you to

commence your action 'out of time'. This approach (and the risk involved) is not recommended – the Court might simply say “no” and that would be the end of that.

Important time limits include:

- you may apply for a divorce after you have been separated for 12 months (but you don't have to – there is no compulsion to get a divorce);
- for a period of 12 months after a divorce has been granted you may apply to the Family Courts for Orders for property settlement. After that time you will have to seek the Court's permission to apply for financial orders (which include spousal maintenance and/or financial support issues);
- if you are in a de facto relationship, you can bring an application in the Family Court for financial distribution for up to 24 months after your separation. If you do not apply within this time, you will have to seek the Court's permission to apply for financial orders.

If you fail to meet these deadlines (and the Court refuses you permission to extend), property will remain in the legal ownership in which it is held, i.e. in the name of the party in whom it is registered or held.

### ***The Three Steps of property distribution***

Lawyers are often criticised for complicating the law and making it almost impossible to understand. We are going to attempt the opposite – even at the risk of being accused of being simplistic – and explain the principles of property or financial distribution in a very straight forward way.

You only have to answer three questions to decide who is entitled to what property:

1. what are the assets and liabilities and what is their value ('the asset pool' available for distribution)?
2. who made what contribution to those assets and liabilities (at the commencement, during and after the relationship) and should there be an adjustment in either party's favour for additional contributions?

3. are there any 'future needs' factors which would support an adjustment of the allocation of property in favour of one person or the other?

Although some lawyers may complicate this process, this is how it works.

In Step 1 you determine what is the net pool available for distribution (which will then be expressed as a dollar figure).

The processes in Steps 2 and 3 are usually expressed as percentages of the net pool from the Stage 1 assessment, for instance a 10% additional contribution (stage 2) or a 5% adjustment in one party's favour (stage 3). But the actual dollar figures are very important as it is the dollar distribution rather than a percentage distribution which will be relevant. Describing the distributions/adjustments in percentage terms is a really just a convenience.

The steps are described in more detail below.

### ***Step 1 - Assess the assets and liabilities***

Every item of property has a value. If in doubt, there is always someone who will be able to provide a professional valuation. This could be a real estate agent, a motor vehicle dealer, a jewellery valuer, a business expert, etc.

Family law is interested only in the monetary value of property. Sentimental value is not relevant (although it may be material to how you personally 'value' a particular item of property). You may regard granny's necklace as priceless, but an expert will put a dollar value on it. A value can also be made for any business or investment and, under relevant laws and regulations, the precise value of a superannuation or pension entitlement.

Holiday pay, redundancy and long-service leave entitlements also have a value and go into the asset pool. Even life insurance policies and wills are sometimes included. You may need an accountant or financial adviser to help you with this.

#### ***Asset and Liability Calculations***

*A good way to tackle negotiations for financial distribution is to prepare a spreadsheet which includes all of the assets and liabilities.*



*This gives you a good picture of where you stand and also identifies what assets and liabilities have to be included in any agreement or Orders (if you leave something out you may end up in Court to tie up the loose ends)*

*A schedule like this also enables you to work out the percentage distribution.*

*Put the assets and liabilities into columns and see what each totals. Then take the total liabilities away from the total assets. The result is the net asset pool.*

*In the example below, the assets appear first at the top (total \$1,000,000) and the liabilities below (total \$300,000). Subtract the liabilities from the assets to get the net asset figure (\$700,000).*

*Then add in the superannuation (\$300,000) to arrive at the total asset figure of \$1,000,000 (we will explain later why it is best to total superannuation separately).*

*There is also a column showing the legal ownership of each item of property – as 'joint', 'husband' and 'wife'. This will help when you have to work out transfers of property that might have to take place.*

	Owner	Value
<b>Assets</b>		
<u>Real Estate</u>		
Home	Joint	\$500,000
Investment property	Husband	\$300,000
<u>Personal Property</u>		
Furniture	Joint	\$35,000
Other	Husband	\$15,000
<u>Motor vehicles</u>		
Car 1	Husband	\$30,000
Car 2	Wife	\$20,000
<u>Other Assets</u>		
1	Joint	\$50,000
2	Husband	\$25,000
3	Wife	\$25,000
<b>Sub-total Assets</b>		<b>\$1,000,000</b>
<b>Liabilities</b>		
<u>Mortgages</u>		
Home	Husband	-\$150,000
Investment property	Joint	-\$100,000
<u>Personal Loans</u>		
Car	Husband	-\$20,000
Whitegoods	Joint	-\$10,000
<u>Credit Cards</u>		
Card 1	Husband	-\$15,000
Card 2	Wife	-\$5,000
<b>Sub-total Liabilities</b>		<b>-\$300,000</b>
<b>NET ASSETS</b>		<b>\$700,000</b>
<b>Superannuation</b>		
<u>Husband</u>		
ABC Fund	Husband	\$200,000
XYZ Fund	Husband	\$50,000
<u>Wife</u>		
XYZ Fund	Wife	\$50,000
<b>Sub-total Superannuation</b>		<b>\$300,000</b>
<b>TOTAL NET ASSETS</b>		<b>\$1,000,000</b>

When do you value the assets and liabilities?

The value of your assets and liabilities will be made at the date on which the property is divided between you, that is at the time of settlement, not at separation or any other time.

If the matter goes to Court, the value for distribution purposes will be what things are worth at the time of the Trial.

---

*How do you value the property?*

If you are settling matters between yourselves (for instance, through a mediation), there is some flexibility as to the value. You may agree the values between yourselves, but they should still reflect approximate values at the date of your agreement.

If you cannot agree on values and are going to Court, experts may have to be engaged. This can be a costly exercise, especially if you have businesses to value and specialist accountants are involved as valuers. Evaluation of real estate may involve registered valuers if the parties are unable to agree a realistic figure. Those costs are significant. An argument over jewellery, antiques and other valuables might also involve professional valuers. Or you may seek valuation of your furniture and household effects – which, under family law, will be at second hand auction value (i.e. what the market would pay if offered for sale by public auction without reserve prices).

The alternative – and a very much cheaper one – is to agree on values wherever you can.

Obtain several appraisals from real estate agents for your properties (these are free) and agree to take an average of, say, three appraisals. Get your accountant to place a value on your business interests and see if you can agree on that too. Try splitting your personal effects and furniture by mutual agreement. There are several ways of achieving a fair split without getting expensive valuations done. Compromise is the key. Seek the assistance of a neutral party - like a professional and experienced mediator - to assist you get these matters resolved in a way that does not break the bank.

In some cases it will not be possible to agree on values, especially where the stakes are high and the consequences of the distribution may be unfair to one party – for example, where the separating couple own a business which one of them will keep after the distribution of property. The business may have provided the sole source of income for the parties during their relationship and, therefore, its value will be very important for the party who is not keeping that interest. A professional valuation by

an agreed valuer may be the only way to produce a fair result and, in such cases, the parties will simply have to wear the costs and move on – ideally as quickly as possible because protracted arguments over values are rarely of benefit to anyone but the professionals who charge fees for preparing the valuation reports.

Beware of values that may be volatile or change quickly, such as the price of shares and other financial investments. Make sure that the value you are agreeing to is the value at the date of implementation of your agreement, or you may find yourself short-changed.

The value you place on bank accounts and credit cards is also a potential trap. Make sure you are very clear about what is included and what is not. For example,

- is a tax refund coming in soon? How much is it likely to be and who is entitled to it?
- is one party cranking up a credit card for which the other has to pay a proportion?

Make sure the rules are agreed between you, as this leaves far less possibility for argument down the track.

### ***What is it worth?***

*The task of valuing assets can often be simple – but this is not always the case.*

#### *The family home and real estate*

*Often it will be sufficient to obtain a written opinion as to value from a local estate agent at no cost (an appraisal).*

*However, where there is no agreement as to the real value, it may be necessary to engage a professional valuer to conduct an inspection and write a report. This is usually done on behalf of both parties and, in most cases, the parties will share the cost of the report equally. The cost will depend on the size, nature and value of the property and is generally around \$1,000.*

#### *Vehicles*

*Usually it will be enough to provide an estimate as to value or an internet print out from a car sales website such as the RedBook (<http://www.redbook.com.au/>). Vintage and luxury cars are an exception. Remember to include any loans taken out to purchase the car.*

#### *Furniture, artwork and jewellery*

*Furniture and other belongings are often not valued because, in most cases, it would and not be commercial - given that re-sale value is often extremely low. Second-hand auction value is the standard for personal property in family law, which is always very low and only a fraction of replacement value.*

*The most common approach is to estimate the value of this property or to disregard it altogether. and divide by agreement*

*If furniture and belongings are an important part of your settlement, prepare a list of items which you would like to keep so that these matters can be raised and agreed early in the negotiations.*

*Of course, if there are expensive items like artwork or antique furniture, it may be worthwhile to have these items valued.*

*Jewellery is not always valued unless there are especially valuable pieces and will usually be kept by the person in possession. It is common for, engagement and wedding rings to not be included in a property pool and simply kept by the wearer.*

#### *Companies, Businesses and Trusts*

*Valuing companies, business and trust assets can be a difficult task and experts will often have to be engaged to provide a valuation.*

*If it is clear that a business or a company is not very profitable, it may not be cost effective to obtain a valuation. Often it will be enough to rely on an accountant's report.*

*The valuation of these types of assets or resources requires ongoing cooperation by both parties. If you are not willing to cooperate, it can be expensive to obtain a valuation or to identify whether the company or business is even profitable.*

## ***Step 2 - Assess the contributions***

Having worked out what the pool of assets comprises and arriving at values the next step is to assess the parties' respective contributions to those assets.

Under the *Family Law Act* there are three different types of contribution:

- financial contributions (direct and indirect): these contributions include property that was owned by a party at the start of the relationship and gifts or inheritances received during the relationship (or after separation but before settlement). 'Windfalls' received during the relationship, such as a lottery win, will probably be considered as a joint contribution – no matter who bought the ticket; the incomes of the parties during the relationship,

- non-financial contributions: these are contributions which are not measured directly in dollar terms ('contributions in kind'), for instance if one of you worked nights and weekends on an investment property to help increase its value, or one supported the other by attending business functions and general assistance to enable them to carry on a business; and
- contributions to the welfare of the family: these include looking after the children and domestic duties generally, for instance, washing, ironing, cleaning and shopping. Under the family law these 'welfare contributions' are not treated as inferior to financial contributions.

It is usual to express a party's greater contributions at this stage in percentage terms, such as an additional 10% contribution over the other party's contributions (resulting in an overall 60% distribution to the greater contributing party and 40% to the lesser).

*A note about the percentages*

The distribution of property in most family law cases that go to Court will be determined on a 'global basis' by using a percentage assessment of each party's total entitlement, for example 60:40 or 50:50 (that is, of the totality of the net asset pool – all of the assets and all of the liabilities lumped together).

In a limited number of cases, the Court may assess contributions by using what is called an 'asset-by-asset' approach, where the contribution of a party to a specific item of property is taken into account (for example, one party may have made the overwhelming contribution to a house inherited from their parent). In this case, that particular asset may be considered separately (not 'globally') and the Court may decide that the particular asset should be retained by that party.

Whatever the percentage distribution, Family Law requires that it be fair and reasonable.

---

### Contributions Prior to the Relationship

Contributions to the asset pool are not restricted to the period of the relationship. A contribution will also be taken into account if it was made prior to commencing the relationship or after the couple separated.

Contributions made prior to the relationship can be important, especially in shorter relationships. For example, if the asset pool in a five-year relationship is \$500,000 and \$300,000 was brought in by one party at the beginning, this substantially greater contribution to the property pool would entitle that party to a greater share of the asset pool when it is divided up. It is not simply a case of giving them back what they brought in.

### Post-Separation Contributions

Contributions might also be made after separation. This is most common when one party is:

- looking after the children (making a welfare contribution);
- paying the mortgage and maintaining the home after separation (making direct and indirect financial contributions); or
- when improvements have been made to an asset by one party after separation but before the date of settlement.

Post-separation contributions may not generally carry a lot of weight, unless they are very substantial (like an inheritance or a gift received after separation) or there has been a long period of time between separation and the property settlement.

### ***Step 3 – Future needs - assess any further adjustments: the ‘Section 75(2) Factors’***

The third step in the property process is to look at other circumstances that might justify a party receiving a further adjustment of or additional entitlement in the available asset pool.

These factors, often referred to as “future needs”, are set out in Section 75(2) of the *Family Law Act*. They take into account each partner’s situation and include the following:

- age and health;
- income earning capacity;
- responsibilities for children of the relationship (after the separation);
- 'financial resources';
- a reasonable standard of living in the circumstances after separation;
- the financial circumstances as a result of another relationship;
- how long you lived together;
- whether child support is being paid.

It also includes

*“any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.”*

In simple language, this last factor means that the law permits a Judge to take into account virtually anything. In practice, however, the Courts have been quite restrictive about the matters they are prepared to take into account. For example, the Courts have not considered a party's moral behaviour to be material to the financial outcome.

Violence by one party against another is generally regarded as relevant to financial distribution only if the violence has had an impact on the other person's contributions, for example by making it difficult for a party to carry out domestic tasks.

Examples of relevant factors include:

- if you have been at home looking after the children for many years and you have little prospect of getting a reasonably paid job - financial adjustment might be made to offset the fact that you may struggle to re-enter the workforce and have no capacity to support yourself as a result of your responsibilities for the children during and after, the relationship;



- if one party had been the breadwinner throughout the relationship that enabled them to engage in an ongoing well-paid career with solid ongoing promotional prospects, bonuses, share participation and benefits and significant superannuation entitlements while the other stayed at home and looked after the welfare of the family – significant financial adjustment would almost certainly be made for the non-income earning party.;
- if one of you is elderly and/or has health problems, while the other is in good health with a greater capacity to gainful employment - an adjustment may be made in the favour of the less able person;
- if you have not worked for some time but intend to undertake a training course or studies that would help you to re-enter the workforce - an adjustment might be made (or spousal maintenance paid) to assist the financial costs of reasonably necessary retraining to enable that party to improve their income earning capacity;
- if you are still responsible for the care and welfare of your children and you wish and it is appropriate that you continue that role; - it may be appropriate for an adjustment to be made to support that responsibility.

At the end of the day, each case will depend entirely on its own facts. Family law is discretionary and different cases will produce different results. You won't get an answer by feeding the information in to a computer! It may be wise to get some legal advice to how adjustments might work in your particular situation.

### *Length of the relationship*

How long parties have lived together is important. The longer you have been together, the more likely it is that your assets will be more equally shared after separation (and the less important the initial contributions, even if they were substantial).

The length of a relationship is taken from the time the parties start living together in a domestic relationship ('co-habitation'). If you are married, the beginning of your relationship will not necessarily be the date of your marriage; it will start when you

began to live together. This will be important where parties have lived together for a long time before getting married. The whole of their time together is taken to assess the length of the relationship (and determine whether one party might be entitled to an adjustment as a result of this longevity).

### ***A possible Fourth Step – who keeps what?***

A fourth step may be appropriate but it's not one you will find in the *Family Law Act*. That step is to work out who ends up with each item of property – be it asset or liability.

For instance,

- who will keep the Holden and who gets the Ford?
- who will have the home transferred to them and be responsible for the ongoing mortgage payments?
- after the other property has been split up, what cash adjustment needs to be made to 'get the percentages right'?

This requires you to assess what proposals are realistic and which ones simply are not possible. For instance, it is pointless agreeing that one partner will keep the house and the mortgage if that person is unable to meet the mortgage payments from their income.

### ***A word about 'spousal maintenance'***

'Spousal maintenance' is the financial support one party provides to the other after the relationship has ended (whether married or de facto) to assist or enable the party receiving the maintenance to meet their financial commitments. Spousal maintenance is included in the property section of the *Family Law Act* and the time limits discussed above will apply.

Generally, spousal maintenance is payable where:

- one party can demonstrate a need for ongoing financial support;

- it can be shown that the other party has the capacity to provide that support; and
- it would be proper in all the circumstances that the support be provided.

Typically, this would occur where one person is the income earner and the other has inadequate means of support as a consequence of the separation. Ongoing income payments may be required if there are insufficient assets to distribute, which would give the needy party some other means of support.

There is no automatic entitlement to spousal maintenance and, generally, it is looked at only after the overall property distribution has been agreed or determined. At that point, a party's actual needs can be assessed in the light of their financial position after they have received their proposed financial distribution.

Spousal maintenance may be payable for a short period of time or may be payable indefinitely. The same factors as set out in Section 75(2) of the Family Law Act are relevant when considering a party's entitlement to spousal maintenance.

Spousal maintenance can be paid under a Court Order or by agreement between the parties.

Sometimes spousal maintenance is included as a lump sum in a property settlement - or part of the overall percentage distribution - as a substitute for ongoing regular spousal maintenance payments. This can be done by specifying a lump sum amount in a settlement and/or in Orders and/or by adjusting the percentage distribution.

You should seek legal advice if you are on either side of the spousal maintenance equation. This will give you some pointers about entitlements or obligations and about the proper way to give legal effect to lump sum payments.

### ***Family Law - a discretionary jurisdiction***

Remember, Family Law is discretionary and Judges have a broad range in which to make their final decisions. No one can predict exactly what the result will be.

Lawyers can only give you a range in which the matter is likely to be decided - something like "you will receive somewhere between 45% and 55% of the net

assets". So, if you launch into Family Court proceedings to resolve your property dispute, make sure that what you are seeking is well within the probable range (and take the probable legal costs into account in your cost-benefit analysis).

***How simple is it to assess a property distribution?***

*Some years ago a survey of around 500 experienced family lawyers (including Judges and Magistrates) was undertaken over several years by a university law school.*

*Each participant was given exactly the same fact scenario and asked to assess what would be a proper distribution under the family law.*

*The assessments varied by +/- 40%. That is a huge variation, especially among those who are supposed to know!*

*Keep this in mind if you decide that you want the issues decided in Court or when your lawyer tells you that you will definitely get 60% or 70% of the pool. It might only be 40%!*

You may be spending a lot of money in legal fees for the privilege of having your dispute dealt with by the Courts. For example, if you are 5% apart overall and your lawyer tells you that your legal fees are likely to be around \$50,000 (more likely \$100,000), the money you spend on those fees may be more than the percentage difference you are arguing about. In other words, if you are arguing over +/-10% and the legal fees are going to be \$75,000, your total net property would have to be worth well over \$1 million to make the argument anywhere near worthwhile (assuming you are totally successful).

Always make this calculation in your decision-making process, whether the legal fees are fixed by your lawyer or estimates of what it might cost (in which case, take the top end of the estimate).

The benefits of trying to get matters resolved by agreement and staying out of the Courts – and the value of compromise – are obvious.

***An Example of the Property Distribution Process***

Here we set out a hypothetical situation to show how the processes described above might work in practice.

- Mick and Michelle have decided to separate;

- they are both in their mid 40s, have been married for 10 years (but living together for 15) and have two children aged 11 and 13. Mick works full time and earns \$75,000 a year. The kids are at school and Michelle works part time earning \$20,000;
- Mick's parents gave him \$100,000 towards the purchase of a \$350,000 home ten years ago. The house is now worth \$500,000 with a mortgage of \$150,000;
- their other assets are cars valued at \$25,000 (Mick's) and \$10,000 (Michelle's), some personal property (furniture and personal effects) valued at \$15,000 and Mick has a share portfolio worth \$25,000, which he hoped would be an investment for the children;
- there is a car loan in Mick's name with \$10,000 outstanding and a consumer loan in joint names for \$5,000;
- Mick has superannuation with a present value of \$100,000. If he remains in this job, he can expect to have super of about \$500,000 by the time he retires in 15-20 years (which he can convert to a pension or take a lump sum);
- Mick and Michelle have agreed that the children will spend roughly equal amounts of time with each of them, although Mick's work commitments mean he will be unable to look after the children during school holidays;
- Mick and Michelle have agreed that child support will be paid in accordance with whatever the Child Support Agency determines.

They do not want to go to Court and are looking for a fair and reasonable property settlement.

Do the 1, 2 and 3. Put these facts into the three-step process.

Step 1 – Determine the asset & liability pool

Mick and Michelle's schedule of assets and liabilities would look like this:

Assets

---

Home (Joint)	\$500,000
Car (Mick)	\$15,000
Car (Michelle)	\$10,000
Personal property	\$15,000
Share portfolio (Mick)	<u>\$25,000</u>
<b>Sub Total of Assets</b>	<b>\$565,000</b>
<u>Liabilities</u>	
Home (Joint)	\$150,000
Car loan (Mick)	\$10,000
Consumer loan (Joint)	<u>\$5,000</u>
<b>Sub Total of Liabilities</b>	<b><u>\$165,000</u></b>
<b>Net Property (Assets less Liabilities)</b>	<b>\$400,000</b>
Superannuation (Mick)	<u>\$100,000</u>
Total	\$500,000

Step 2 – What are the contributions?

Mick

- made the major direct financial contribution;
- made an additional substantial financial contribution through his parents' gift of \$100,000; and
- made a welfare contribution through his care of the children.

Michelle

- also contributed financially with her income; and
- made the major contribution to the welfare of the family in caring for the children and looking after the domestic responsibilities.

Mick might be entitled to an additional 10-15% for the money brought in from his parents, giving him 60-65% of the net assets after Stage 2.

Step 3 – Are there any factors warranting an adjustment?

Mick

- we assume that he will be retaining the whole of his super (which he cannot access until retires); and
- is paying child support in accordance with CSA assessment.

Michelle

- earns far less than Mick and this is unlikely to change;
- may have more responsibilities for caring for the children; and
- is receiving child support in accordance with the assessment.

Michelle may be entitled to an adjustment of 15-20% in her favour as a result of the Stage 3 process.

The maths on these ranges results in 55-60% to Michelle of the overall pool:

- Michelle's +15% to +20% in Step 3  
less
- Mick's +10% to +15% in Stage 2;  
equals
- +5% to +10% for Michelle.

This means Michelle is entitled to a distribution of between \$275,000 and \$300,000 of the net assets (55% to 60% of \$500,000).

The final distribution

Mick and Michelle agree that they will settle by distributing 60% of their net property to Michelle (\$300,000) with a further agreement that Mick (who will receive \$200,000) will not have to pay any ongoing spousal maintenance to support Michelle. A fair and reasonable distribution in these circumstances might be:

Michelle

Home & mortgage (net value)	\$500,000
Personal effects	\$5,000
Car	<u>\$10,000</u>
	\$515,000
<u>Less</u>	
Mortgage	\$150,000
Loan	\$5,000
	<u>\$155,000</u>
<b>Total to Michelle</b>	<b>\$360,000</b>

Mick

Share portfolio	\$15,000
Personal property	\$10,000
Car	\$25,000
Superannuation	<u>\$100,000</u>
	\$150,000
<u>Less</u>	
Car loan	<u>\$10,000</u>
<b>Total to Mick</b>	<b>\$140,000</b>

Michelle is receiving \$60,000 more than the agreed 60% so, under the terms of their settlement agreement, she has to find this money to pay Mick his agreed 40% (\$200,000). She may be in a position to increase the mortgage or, maybe, borrow from her parents. If she is unable to do that, they may have to re-arrange the settlement so that Mick keeps the home and pays to Michelle the amount needed to bring her up to 60% - or the home might have to be sold.

Another alternative might be for them to have an agreement that allows Michelle to stay in the home until the youngest child turns 18, when the house will be sold and the proceeds divided in agreed proportions between them.



There are endless possibilities to consider in arriving at a result that works best. Don't stop searching for a solution just because the first proposal does not seem to stack up.

The couple in our example could have spent tens of thousands of dollars on legal costs, each trying to get the absolute best outcome for themselves. They would have done so without any guarantee about the result and, after deducting the legal costs from the assets, both could have been worse off. If they each spent \$80,000 on legal costs (certainly a possibility if the matter went to trial), the asset pool available to divide would have been reduced by \$160,000 (more than 30%).

#### ***A UNIQUE WAY OF DIVIDING PROPERTY***

*A wealthy couple agreed to divide all of their assets equally, including their many art works.*

*However, hostilities broke out during negotiations as the wife believed the husband was trying to get the best art works under their real values. She wanted a valuable painting by celebrated Australian artist Clifton Pugh. So too did the husband, at a valuation which she thought was too low. The painting was in the former matrimonial home where the husband continued to live.*

*To 'resolve' the situation, the wife returned to the home, took the painting from the wall and broke it into two pieces – taking one half with her. She considered this to be an 'equal distribution' of the property.*

*Unfortunately for her, the Judge did not see it that way. The fact that the artwork was effectively destroyed by the wife's actions resulted in her being allocated the whole of the value of the painting in the property distribution (luckily for her, at the low valuation provided by the husband).*

### ***Disclosure of financial information***

An issue that often causes problems in financial matters is **full and complete disclosure** of all the relevant financial information.

Failure to provide adequate information is a significant reason why many cases end up going to Court, rather than getting settled.

All parties have a duty under the family law to make a full and unqualified disclosure of your financial position to your ex-partner. This includes not just bank statements and title deeds but any information that is even remotely relevant to your financial position, including interest in trusts and companies, direct or indirectly (through other parties and/or entities).

The Family Courts are very strict in their interpretation of this duty.

Just so this is really clear, this is what 13.04 of Family Law Rules states regarding your duty to disclose:

- 1) *A party to a financial case must make full and frank disclosure of the party's financial circumstances, including:*
  - a) *the party's earnings, including income that is paid or assigned to another party, person or legal entity;*
  - b) *any vested or contingent interest in property;*
  - c) *any vested or contingent interest in property owned by a legal entity that is fully or partially owned or controlled by a party;*
  - d) *any income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;*
  - e) *the party's other financial resources;*
  - f) *any trust:*
    - i) *of which the party is the appointor or trustee;*
    - ii) *of which the party, the party's child, spouse or de facto spouse is an eligible beneficiary as to capital or income;*
    - iii) *of which a corporation is an eligible beneficiary as to capital or income if the party, or the party's child, spouse or de facto spouse is a shareholder or director of the corporation;*
    - iv) *over which the party has any direct or indirect power or control;*

- 
- v) *of which the party has the direct or indirect power to remove or appoint a trustee;*
  - vi) *of which the party has the power (whether subject to the concurrence of another person or not) to amend the terms;*
  - vii) *of which the party has the power to disapprove a proposed amendment of the terms or the appointment or removal of a trustee; or*
  - viii) *over which a corporation has a power mentioned in any of subparagraphs (iv) to (vii), if the party, the party's child, spouse or de facto spouse is a director or shareholder of the corporation;*
  - g) *any disposal of property (whether by sale, transfer, assignment or gift) made by the party, a legal entity mentioned in paragraph (c), a corporation or a trust mentioned in paragraph (f) that may affect, defeat or deplete a claim:*
    - i) *in the 12 months immediately before the separation of the parties; or*
    - ii) *since the final separation of the parties; and*
  - h) *liabilities and contingent liabilities.*

One of the tips in an earlier chapter of this book—*'When it's over, it's over'* - is that you should copy (or scan) as many of the financial documents as possible before you or the other party leaves home. If your partner does not 'play ball' and give a full disclosure of documents they have access to (e.g. bank accounts, investments, interests in companies or trusts), they put themselves at considerable risk (e.g. that a Court will penalise them for failing to make an appropriate disclosure or that any settlement may later be set aside because of this failure to disclose). It is important for all parties to have access to appropriate financial information.

In many relationships, one partner handles the major financial transactions while the other manages money for shopping, personal spending and day-to-day costs. In these situations, the 'non-finance' partner often knows very little about the property of the parties – who owns what, where the money is coming from, what are the debts and how are they being paid off? This is a pretty common arrangement in many Australian families today.

The situation provides an opportunity for one person to hide, or simply fail to disclose all of the assets when the discussion gets around to the financial settlement after

separation. It also leaves one of the parties vulnerable to liabilities or debts which they were entirely unaware of (known sometimes as 'sexually transmitted debt').

The Court has taken a consistently tough line on the obligation to make a full and frank disclosure of all assets, liabilities and other financial resources. In fact, if you are asking the Court to make any kind of property Orders, you must swear that you have made a full disclosure in the documents that you file in the Court.

Additionally, the Family Court has wide-ranging and effective powers to enforce disclosure – including the power to compel production of documents (anything that has been 'published' – paper, soft-copy, electronic, disks etc). It can issue an Order which enables the compulsory seizure of documents to ensure that they are preserved. Orders can be made against third parties, such as banks, financial institutions, employers, trustees and the like, requiring them to produce relevant financial information. Virtually any document which is not covered by 'legal privilege' can be requested and it must be produced for inspection.

#### ***WHAT IS LEGAL PRIVILEGE?***

*'Legal Professional Privilege' or 'Client Legal Privilege' are terms that refer to the protection of communications (both written and spoken) between you and your lawyer.*

*It includes confidential communications between you and your lawyer in which you are seeking or being provided with legal advice, as well as communications that relate to potential court proceedings. In short, this covers everything you and your lawyer talk about that relates to your case.*

*However, be warned – the privilege is not absolute, and you can waive it (give it up) without meaning to.*

*If you act like you no longer intend to keep the communication confidential then the Court may say that you have given up your right to keep that information private. The most common way that this can happen is if you tell a third party what has been said or just make it public to the world generally (e.g. on Facebook).*

*So be careful who you talk to and what medium you use! You might think that talking to your friends or work colleagues about what your lawyer has told you is just having a chat but a Court may see it differently.*

#### **Failing to disclose assets**

The Courts are particularly harsh in dealing with anyone who is found to have failed to make full and frank disclosure of their financial circumstances. Often, as a penalty,

there will be a significant reduction in what that person might otherwise have received in a property distribution.

If you have not disclosed the details of property owned overseas, the Court can also take that into account, make its own assumptions as to the value of the property (be it real estate, valuables, investments, bank accounts or any other form of property) and deal with it in whatever way it considers appropriate in determining your final distribution.

### Possible impact on Court Orders or Financial Agreements

The Court has the power to overturn Orders (even Consent Orders) or a Financial Agreement and make new orders if you have not made a full and frank disclosure.

For example, if you fail to disclose an interest in a property in the name of a company in which you have a controlling interest (such as through a trust controlled by a friend or relative) and the non-disclosure comes to the notice of your former partner after Orders had been made, he or she could apply to have those Orders overturned.

There is no time limit when the Court might exercise this power. In other words, if your non-disclosure is found out decades after you thought you had finalised everything, the Court may still change the original Orders.

#### ***BEWARE OF NON-DISCLOSURE***

*Disclosure of your financial assets, in **EVERY** detail, is one of the most important things you have to do in financial matters in the Family Courts.*

*In a case known as **Weir**, the husband had been pocketing cash profits from the family business towards the end of the marriage. As a result, the value of the business was significantly reduced. The husband did not tell the Court about the extra money and, when questioned about the value of the business, he lied. Initially, the assets were split 50/50 but, when the wife appealed the decision with information about the husband's deceitful conduct, the Court decided that she should get an adjustment in her favour – i.e. some of the money back. She received an extra \$50,000, plus half of her legal costs.*

*In the case of **Suiker**, the husband and wife had come to an agreement on how to divide their property. After the agreement (but before it was lodged in Court) the husband was told by his employer that his superannuation would increase from \$27,000 to \$162,000 if he accepted redundancy. He failed to tell the wife and the Consent Orders were made by the Court. Six months later the husband was duly*

*made redundant and received \$162,000. When the wife found out she went back to the Court and asked for new Orders. The Judge awarded the wife an extra \$45,000. Moral of the stories – tell the truth and the whole truth about your financial circumstances.*

The consequences of non-disclosure may be dire and, given the enormous power of the Family Courts to examine your financial affairs, the chances of being caught are high. Don't take the risk. Disclose all of your financial information and get matters resolved and settled properly.

### ***Some specific issues to consider regarding property settlement***

The laws around property issues are extensive. Below, we discuss a few things you may want to know when you are considering how to deal with your finances after separation.

#### **Legal costs in family matters**

The standard rule in family law matters is that each person, or party, pays their own legal costs.

However, in certain circumstances the Court may order one party to pay the other party's legal costs. These are known as party-party costs.

The amount of party-party costs which must be paid is determined either by a fixed schedule of costs (the Scale) or by another method chosen by the Court. Generally, where costs matters are in issue, the Court takes into account the following:

- the financial circumstances of each party;
- the conduct of the parties in the proceedings;
- whether either party has failed to comply with previous Court Orders;
- whether any settlement offer has been made;
- any false allegation or statement in the proceedings; and
- any other fact relevant to the case.

If the conduct of one person is particularly obstructive or is such that it warrants a harsher penalty, the Court may order you to pay all of the other person's costs 'reasonably and properly incurred'. These are known as indemnity costs.

The treatment of legal expenses can be quite complex and you should obtain legal advice as to how money you spend on your lawyer will be treated in the property distribution.

### *Disposing of Property and the concept of 'Add-back'*

A Court may 'add-back' to the asset pool any amount which has been disposed of by a party which should have formed part of the property pool.

You should not sell or dispose of any asset before a property settlement has taken place without agreement from the other party or from the Court, even though the asset may be in your name alone. Remember, until the property has been legally distributed between you, "what is mine is ours, what is yours is ours and what is ours is ours"!

If you do dispose of property without prior approval, the value of that property may be 'added back' to your share of the proceeds on distribution. In other words, you will be regarded as having already received the value of that property as part of your final entitlement. Take, for example, a situation where you may be entitled to a 50/50 share and the total assets are worth \$500,000. If you remove \$50,000 from a bank account and fail to account for it, your property distribution may be reduced by that \$50,000.

This situation might arise where one party deals with property for their own benefit – that is, removes or disposes of property which would otherwise be part of the assets available for division between both of you. The general rule is that assets which were dealt with unfairly or spent for one person's benefit should be considered as already received in the property settlement by the party who received the benefit (and 'added back'). This may apply even where the assets were dealt with in such a way before separation.

A Court will not automatically 'add-back' an amount just because it has been spent. Each case will be considered on its own facts and the Court will look at the circumstances of how the money was spent. One party may have savings at separation but no income with which to pay day-to-day living expenses. It is most unlikely that a Court would consider the spending of this money as an improper reduction of the assets and 'added back' as part of your share. The Court is unlikely to add back where the assets are used to meet reasonable daily needs.

As a general rule, if you lose (or gain) money or assets during the relationship, the losses (or gains) will be shared between you. Under some circumstances one of you may be held responsible for losses (but it will be rare for one party only to benefit from the wins). For instance, if the losses were caused because one of you acted deliberately to reduce the value of an asset, or acted 'recklessly, negligently or wantonly' resulting in a reduction in value.

The same may apply to any assets which are disposed between separation and final settlement. If you dispose an asset for your own benefit, the value of that asset might be 'added back' to the asset pool.

There are many different situations in which the Court has decided to 'add back' the value of assets; for example, giving an asset to a friend for no charge, gambling joint money away or losses from failed business ventures.

Even using joint money to buy property that may decline in value, such as vehicles, boats or electronic goods may be 'added back'.

After separation, you may be entitled to apply joint money to pay legal costs. Legal fees are considered a reasonable expense and they generally will not be 'added back' into the asset pool. However, each case is decided on its own facts and there may be an adjustment where one party spends significantly more than the other on their lawyers.

***DRINK YOUR WINE, DON'T COLLECT IT***

*In a case some years ago, the husband used joint funds after separation to buy a \$1.8 million wine collection. At the time of trial, the wine was valued at \$1.2 million.*



*The husband explained that he was aware of the short-term losses involved with the investment, but felt they were outweighed by the long-term gain.*

*The wife argued that despite the long-term investment, the purchase of the wine unfairly removed \$600,000 from the asset pool and should therefore be 'added back'.*

*The Court agreed with the wife and determined that his conduct had denied the wife her proper share of the assets. \$600,000 was 'added back' and treated as property already distributed to the husband.*

### Deliberately reducing the value of property

Separation usually places people under stress and they often behave accordingly. Activities that have the effect of reducing the value (or existence) of assets may have serious consequences. It may attract the 'add back' principle.

The Family Court will take into account the conduct of a person who deliberately reduces the value or wastes property. Selling the husband's boat or the new Honda for \$1 is not recommended, nor is slashing the leather furniture with a razor or throwing your hard-earned cash across the tables at the casino. In a celebrated case, an aggrieved wife threw all of her husband's antique furniture and tapestries into the swimming pool and topped it up with several cans of black paint. The Family Court thought this was 'waste' and deducted the value of those assets (and the costs of cleaning up the pool) from her final property settlement.

### ***DON'T THROW IT AWAY***

*The Family Court concluded in a Court case known as **Kowaliw** that financial losses in the course of a marriage should be shared by the parties (although not necessarily equally) except:*

- *where one of them behaved in a way that was designed to reduce or minimise the value of assets, or*
- *where one of them has acted recklessly, negligently or wantonly in a way that has reduced the value of assets.*

*In other words, if by your own conduct you throw assets of value away, you will be responsible for any losses and the value of the loss will be deducted from your final entitlement.*

Where one person deliberately incurs business losses, the value of those losses may be 'added back' to the asset pool.

Gambling losses can be a little more complicated and, again, each case will depend on its own facts. It can be difficult to maintain an argument that gambling losses should be added back, especially if both enjoyed gambling as a form of entertainment or if gambling was generally accepted by them as a form of entertainment during the relationship, even if it was only done by one of them.

### *Setting aside transactions*

Just because you have transferred or got rid of some assets does not necessarily mean you have put them beyond the reach of the other partner or the jurisdiction of the Family Courts.

The Courts have very wide powers over financial transactions. This includes the power to reverse transactions that have already been made where those transactions may have an impact on the property distribution between the parties.

For example, the sale of a property to a relative might be cancelled by the Court and the original owner reinstated, even though the transfer may have been registered and money changed hands. Transfers out of a bank account might be reversed and an Order made for the bank to reinstate the money back to the original account.

This applies also to the sale of shares, the appointment of a director in a company and the distribution of profits from a trust. There is no limit to what transactions might be affected, so long as they have had an impact on the possible distribution of the assets between ex partners.

### ***Capital Gains Tax (CGT) can be a trap***

In most circumstances, Capital Gains Tax is not payable on the transfer of property if the transfer is done by a property distribution under the *Family Law Act*. Any CGT payable is assessed at the time of the future disposal of the property and is payable solely by the party who retains it after distribution.

Be careful. You may end up with an investment property or some other asset in a property distribution that has increased in value since it was bought. You will be responsible for the payment of all of the CGT (if and) when the property is sold by

you. CGT is simply deferred at the time the property was transferred under the financial distribution.

Tax implications should be taken into account when negotiating a property distribution which involves assets to which CGT may apply – and that's not just real estate.

If neither party is willing to assume the CGT risk, you should seek to have the relevant asset sold and CGT taken into account as a liability of both parties in the financial settlement. The family home will not usually have CGT implications and it may be advantageous to seek to retain this asset.

Tax liabilities are a potential minefield and need to be carefully thought out. Therefore, you should get sound advice on these issues.

### ***Superannuation and pension entitlements***

Since 2002 superannuation has been included as property under the family law. Super is considered as part of the property distribution process for separated married parties (and, since 2009, this includes de facto couples in all States except Western Australia, where superannuation remains a factor under "future needs").

Either partner's superannuation and/or pension entitlements can be divided up ('split') and transferred to the other partner as part of a financial distribution.

Pensions are treated as an asset in much the same way as superannuation, even pensions which you are entitled to before, during or since the relationship ended. And this includes not just lump-sum pension entitlements, but pensions paid as income in periodic instalments.

A superannuation interest (or a pension) is valued using formulas set out in the relevant laws and regulations.

Under the family law you are entitled to receive details of the current value of your former partner's entitlements.

Superannuation division, or 'super splitting' can only be achieved:

- by way of a Court Order (for example, as part of an Application for Consent Orders; or
- by private agreement through a Superannuation Agreement (which forms part of a Financial Agreement).

You can also 'quarantine' or protect superannuation for a defined time (called a 'Flagging Order'. 'Flagging' has the effect of freezing the distribution or payment of superannuation entitlements until a split has been done.

There may be times when it is not a good idea to split a superannuation entitlement and where you want to protect your interest for a future split. You can 'flag' your interest by a Court Order which would then be provided to the trustee of the fund. The trustee will then be legally prohibited from distributing any funds under that policy until the Court lifts the Order (or it is discharged by the appropriate split).

#### *How is Superannuation Adjusted?*

When a party has superannuation entitlements, the Court (or the parties) can make an Order to split or quarantine any amount of the super for the other party.

Alternatively, non-superannuation assets may be adjusted to compensate one party for the fact that the other party has greater superannuation entitlements.

The options are:

#### 1. Making a Splitting Order

Superannuation is split from (taken out of) one fund and transferred to another fund nominated by the other partner – either an existing fund or a new one created for that distribution. When superannuation is split from a fund, the person who used to have the super loses all interest and entitlement in the amount that is split off.

#### 2. Making a Flagging Order

An Order is made preventing the trustee of the superannuation fund from dealing with a specified entitlement until some event (usually retirement, when a party becomes entitled to access their superannuation). At that date, the trustee will have to comply with whatever is in the Order – usually a payment made to the other

person based on a percentage of the value of the superannuation when that event occurs. This option may be appropriate where someone is close to retirement or there are difficulties in valuing the superannuation before the relevant date or where the superannuation is expected to increase at a faster rate as retirement nears.

### 3. Adjusting non-superannuation property as “compensation”.

The other assets are adjusted to take into account the difference in superannuation entitlements. For instance, giving one party a greater percentage distribution in the financial settlement than they would be entitled to (under the 1, 2 and 3 principle) and not dividing up the superannuation.

You can negotiate with your ex-partner with any of these approaches. The approach that suits you may depend upon the difference between your superannuation entitlements and your ex’s – the greater the difference, the more challenging the negotiation may be. Often, especially in longer relationships, parties will agree to ‘equalise’ their superannuation entitlements by splitting off an amount from the party with the greater amount of super to bring the other party up to the same level. For instance, if John has super worth \$200,000 and Jane’s is worth \$100,000, John splits \$50,000 out of his super to Jane and they both end up with \$150,000 in super entitlements.

#### Types of superannuation interests

There are three main types of superannuation interest (or entitlement):

- an accumulation entitlement is a super interest where you put money into a fund controlled by an independent trustee. Your contributions (and any by your employer) is invested and has capital and income growth. You receive a payout (as a lump sum or as a periodic pension) when you retire. With this type of superannuation, it is fairly easy to find out the value by reference to your most recent superannuation statement;
- a defined benefit interest is where your entitlements are controlled by an independent trustee and the value is determined on your retirement. That value will be based on such things as the number of years of employment,

your level of seniority and salary at retirement and contributions you may have made. It is often difficult to know the value of these super entitlements until they 'vest' (mature or are paid out) but there are methods of valuation required for Family Law purposes;

- a self-managed superannuation fund is quite different from the above types of funds as the trustees are normally the persons who are entitled to receive the superannuation when it becomes available. The value of the fund will be determined by valuing the assets in the fund at the date of distribution of property under Family Law. It is important that accurate details of these assets are obtained if you or your partner to enable that distribution to be fair and reasonable.

The valuation of accumulation and defined benefit funds can usually be obtained directly from your fund by sending what is a 'Form 6 Superannuation Information Request'. These forms are available on most superannuation trustee websites and the Family Court website. Most funds charge a processing fee, which is usually between \$50 and \$100. The funds must comply with a request for information.

#### *Get legal and financial advice about superannuation*

Unless you have a working knowledge of superannuation and this area of family law, you should get advice before attempting to divide superannuation. It is complex and requires professional financial advice. It also demands specialised legal expertise to draft Orders or an agreement because there are complicated and specific procedures to be followed.

When splitting superannuation, you might be dealing with quite substantial amounts. It would be worth the expense of engaging your accountant or financial adviser to get it right.

#### ***A last word about finalising property distribution by agreement***

With financial matters – whether you are married or in a de facto relationship – you have the freedom to make an arrangement between yourselves without going to Court. You don't have to use lawyers.

You can work through qualified and experienced mediators who work only in family law matters and have considerable expertise regarding family law. Usually, this is financially sensible and can save you a considerable amount of time and money, let alone the ongoing stress of unfinished business.

### *Settle sooner, rather than later*

You can start negotiating a property settlement from the moment that you separate.

Consider the following:

- the sooner you start, the more likely you are to reach an agreement with your former partner;
- discussions between the two of you are a lot cheaper than an argument conducted by lawyers;
- the more than you spend on lawyers, the less you will have to divide between yourselves;
- it is better to compromise early – sometimes even settling for less than what you thought was the worst possible case – rather than see even more of your assets being frittered away in legal fees and Court costs.

### *Legal fees*

It is very important to realise that it is normal for you to pay your own legal expenses in the Family Courts – there are usually no winners.

So you must consider the costs you will incur in running a legal case. Also, remember that legal fees for family law matters are not tax deductible.

### *Using lawyers to draft Agreements*

It may be worth your while to have lawyers involved in finalising agreements you are able to reach – either on your own or with the assistance of professional facilitators such as mediators - and preparing your Application for Consent Orders to file in the Family Court to make it legal and enforceable.

If you shop around, you should be able to get a fixed fee quote for this work.

Litigation might cost you tens (if not hundreds) of thousands of dollars and, even at

the end of the case, you might not get anywhere near what you wanted because the Court did not see things your way.

An agreement reached between you will:

- slash your legal bills to a fraction of the cost of Court actions;
- reduce the time that your life is placed on hold; and
- immediately ease the stress and tensions on you and your family (without such an agreement, you may have to wait several years for a final outcome in Court).

Whatever happens, do not let your lawyer commence Court action without telling you about the costs and the likely results. If you can identify the issues early on, you can probably discuss them and negotiate a reasonable settlement – especially through mediation - which can then be documented as Consent Orders.

On the other hand, if you have millions of dollars in assets and you and your ex-partner are 10% apart in terms of what each of you is seeking, you may think it is worthwhile to battle it out in Court.

In some cases, particularly where the issues are extremely complex (for instance, the value of complicated involvement in business ventures is in question) you may have to involve the Courts to sort them out.

#### ***Tips about Property Issues***

- *Keep as much of the personal property as you can. The cost of replacing personal property will always vastly exceed its 'value' in Family Law calculations (which is second-hand auction value – a brand new fridge which cost you \$1,500 might be worth \$500 if you auction it).*
- *It is usually advantageous to get matters settled as soon as possible after a separation – especially if the other person is feeling responsible for what happened. Conversely, be careful of making a settlement when you feel guilty or responsible for the breakdown of a relationship.*
- *There are lots of ways of splitting personal property (furniture, paintings, cookware etc). My favourite is the 'Mexican standoff' where one party submits two lists of the property and the other selects which list comprises the property they want to keep. Another is by 'coloured spot' where each party has a box of coloured sticky spots and you take turns to put a spot on an item*



*of property until every item has your or their colour on it (which you then get to keep in the settlement).*

- *Get financial advice about how realistic proposals are. You may really want to keep the family home, but if you don't have the income to pay off the mortgage, it may not be practical for you to do so. Even if you can pay off the house with your income after the split, how much will be left over for you to live on?*
- *You may want to stay in the home but can't afford it now. See if you can agree that the property will be sold at some time in the future with you receiving a lower percentage of that sale than you might be entitled to if it took place straight away. For example, you might agree with your ex that you will keep the house until the youngest child turns 18 and then sell it, but instead of getting 50% of the net value now, you might get 40% in 5 years, to offset your use of the property over that time.*
- *Make sure you get sensible advice quickly if there is a danger that your ex partner might dispose of an asset you might not be able to get back. Although some things can be "added back" into the pool (as discussed in this chapter), specific items might be personally irreplaceable to you.*
- *Don't think you can remove property from a distribution by transferring it out of your name or 'giving' it to another person. The Court has the power to slice right through these sorts of maneuvers and, even if the property is not 'added back', the transaction might simply be reversed.*

**This document has been adapted from a Chapter in the book "Know Where You Stand – A Guide to the Family Law", written by Ian Shann as Family Law Practice Group Leader at Slater & Gordon in 2011.**

**It is not intended as legal advice and the contents should not be used as a substitute for independent legal advice which all parties involved in family law matters are entitled to seek at any time.**