PROPERTY SETTLEMENT

You can apply to the Family Court or the Federal Magistrates Service for Orders for a property settlement and this may be done at any time. However, the Family Law Act sets a time restriction of 12 months after your divorce for you to apply for a property settlement.

If you can both agree on how to divide your assets, you can ask the Family Court or Federal Magistrates Service to make Orders by consent. This does not require either of you to attend Court but merely to submit your agreement to the Court for the Court's approval.

In addition you can enter into what is called a Binding Financial Agreement. This is a document where parties have reached agreement as to the division of their assets and specify that division in a legal agreement. An agreement of this nature is not forwarded to the Court for the Court's approval but it does require both parties to have independent legal advice for it to be recognized. For more information on Binding Financial Agreements, please see the information brochure included.

The Family Court of Australia or Federal Magistrates Court of Australia when considering an Application for Consent Orders is obliged to take into account a number of matters to determine whether the proposed Orders are "just and equitable". It is not simply a "rubber stamping" exercise. They must review all of your financial details in light of your agreement to determine if the division is just and equitable.

Whether you agree or not, the rules governing the division of assets are complex, and it is important that you and your partner seek legal advice before making a final decision about any property division.

There are four steps the Court will take in deciding what property Orders to make.

Step 1 – Ascertaining the net asset pool:

The first step is to identify and value the marital assets. The general rule is that all assets must be taken into account, whether they are acquired before or during the marriage (irrespective of whose name they are in) or after the separation.

The definition of "property" is very wide. It includes almost everything of value. Property includes assets of either or both of the parties such as real estate, shares, cars, jewellery, savings, furniture and superannuation.

The Court must also consider the parties' financial resources. These are funds or assets over which a party has influence or control such as any entitlement under a Trust, future job prospects, long service leave entitlements and personal injury

claims. Some times these are quantified and treated as if they are assets and in other cases they are "taken into account" in a less tangible way.

In ascertaining the net asset pool, in some cases valuations need to be obtained on any real estate that is held, or any superannuation interest. The valuations of these assets can sometimes be contentious or complex. There are a number of different approaches to the valuation of assets, which we may need to discuss with you at a later point when we have identified the assets. Liabilities and debts also have to be identified and valued.

Step 2 – Contribution as to the net asset pool:

The second step is to consider the contributions of each party to the marriage, both financial and non-financial and also assessing the contribution made as a homemaker or parent. Initial contributions such as what you bring into the marriage are relevant as are gifts and inheritances received during the marriage. It is important to identify where money came from to buy or improve property. The source of funds for direct contributions can be funds or property owned prior to the marriage or acquired after the marriage, including monies acquired by way of earnings, profits on sale, gift, inheritances, redundancy's and windfalls. Where property was owned prior to marriage, the other spouse would not have made any contribution to its acquisition. However, the longer the marriage lasts the less significance is given to pre-marriage asset ownership.

Non-financial contribution must also be considered and evaluated. This is contribution of a type, which may be described as being made by effort eg. the building of a home, gardening, starting a business, caring for the stock on a country property, attention to customers at a small business, or bookwork in a family enterprise. It can also be indirect, for example, if one spouse's father who is a carpenter builds a new kitchen in the family home.

Step 3 – Future needs:

When the Court has made its preliminary decision as to the division of property based on these contributions, it is then necessary for it to consider a number of secondary aspects, which may be relevant. The Court will assess both parties future needs, taking into account a range of things including age, health, income, earning capacity, the property each person has, whether they have the care or support of children from the marriage under the age of 18 and the financial circumstances of any new relationship. The Court can make a further financial adjustment as a result of weighing these matters.

In addressing the future needs the Court considers whether a spouse could be trained or retrained for employment or to start a business and how long that training would take, the extent to which a spouse may have contributed to the income and earning capacity of property of the other and the duration of the marriage and the extent to which it has effected the parties' earning capacity. This might include any

particular course or skill which either of the parties gave up or passed up to devote him or herself to the needs of the marriage.

Step 4- Just and Equitable

Following steps 1,2 and 3 the final step is to stand back and consider whether the orders arrived at by the process are just and equitable.

In looking at these three steps, the Judge or Judicial Registrar hearing the case has a wide discretion to put weight or importance on some items but not others. Obviously there is a subjective assessment in the valuation of the respective contributions of the parties by the Judge.

It is said that each case has to be looked at on its own facts. There are 60 or so Judges and Judicial Registrars in Australia. They come from all types of backgrounds, male and female ranging from “feminist views” to “male chauvinist views”, from different racial backgrounds and representing a broad range of different philosophical approaches. In the Family Court you rarely know in advance who will hear your case and therefore the result is unpredictable. There is a similar level of unpredictability in respect of contested hearings in the Federal Magistrates Court, even though your lawyer will generally know who the Judge is going to be at an earlier stage of the proceedings. Normally lawyers can only give a range of figures between which a judgment is likely. In many cases the range may vary by up to 10%.

Because of this uncertainty of outcome and the additional stress, inconvenience and legal costs associated with a defended hearing, we generally attempt to negotiate a settlement of cases at the earliest opportunity.

Mediation

In appropriate cases, we suggest that parties use Mediation as a method of trying to settle their disputes. We regularly try and obtain agreement with the other solicitor to the appointment of a neutral third party who is skilled in mediation. We are now required under the Pre-action Procedure as issued by the Family Court to ensure that this is a step parties take prior to filing an Application in the Family Court.

The function of the mediator is not to give legal advice but to be a neutral impartial third party who facilitates the negotiations between you and your spouse. It is best that you both have independent legal advice as to your legal position before you go to Mediation.

It is our approach at Willis & Bowring that no marital dispute should go to a defended hearing and that all effort should be made to resolve a matter either by mediation, or at the initial stages of the Court process. However, in some instances some matters

do proceed to Court, because your partner will not take a sensible approach to negotiation and as such your case will go to trial. This will involve you and your spouse having your day in Court before a Judge or Federal Magistrate who will make a decision as to the ultimate division of your property.

New Will

Please note it is imperative that you provide us with instructions regarding your Will. If you pass away prior to resolving your property dispute, and prior to obtaining a divorce your assets may pass to your spouse. Your current Will may provide for them or alternatively if you have no Will, and die intestate the rules of intestate provide that a large portion of your estate will pass to your spouse.

You may also own your property as joint tenants. Joint Tenancy provides that if one of you pass away the property automatically passes to the other (regardless of what your Will states). You can sever your joint tenancy and own the property as Tenants-in-Common (50/50 share each). This will ensure that the property is owned independently of each other (and can therefore be gifted in a Will) during your property dispute.

Please contact us to provide your instructions regarding a new will.

WILLIS & BOWRING
Solicitors
575 Kingsway
Miranda NSW 2228
Tel: (02) 9525 8100
Fax: (02) 9526 1182