

## How A Court Works Out A Property Settlement Under The Family Law Act

Section 79 of the Family Law Act provides the statutory framework for the Court to make court Orders for property settlement, in the event of a marriage breakdown. <sup>1</sup>

### Four steps to working out property settlement under Section 79

These are:

#### Step 1. Determine the net value of all property i.e work out the pool

- Identify all property currently owned jointly and separately by the parties. Property includes items such as real estate, cash, investments, shares, furniture, motor vehicles, business interests and superannuation.
- A value, which may be obtained by independent experts, is then placed on each item of property.

#### Step 2. Assess the contributions of each party before, during and after the marriage.

Under Section 79 of The Family Law Act the Court assesses contributions by each party including the financial, and non-financial contributions to property made directly or indirectly by or on behalf of the party, and the contributions to the welfare of the family. Any post separation' contributions are gaining more focus.

The Court examines and assesses:

- Financial contributions made directly (eg. employment income) or indirectly (eg. gifted money) towards the acquisition, conservation or improvement of any matrimonial property.
- Non-financial contributions made directly (eg. home maintenance) or indirectly (eg. sacrificing career to care for children) towards the acquisition, conservation or improvement of any matrimonial property.
- Contributions made for the welfare of the family, including contributions made in the capacity of home-maker or parent.

Once the contributions are assessed they are expressed in percentage terms. In a relationship of a reasonable duration, the Court may find that the contributions made by each party have been equal. There is no set rule to this effect however and each case must be determined based on its own facts.

A detailed and complete Statement of Facts identifies the strengths and weaknesses of your case. It is critical that a full & complete and rigorous history of the facts be taken so we may express any legal opinion based on the proper facts of your case.

<sup>1</sup> Based on an article which appeared in The Australian 26 October 2005 'Taking the pain out of Divorce'.

### **'Global' or 'Asset By Asset' approach**

The Court determines matters based on a 'global' or 'asset by asset' approach. Generally, the Court adopts a global approach. However, if the marriage is short, or where for example there have been significant post separation contributions, the Court may look at the matter on an asset by asset basis. The difference in these two approaches may be significant.

### **Step 3 Other circumstances**

In this next step the court determines what percentage of the nett assets should be allocated in this category. It was sometimes called the 'needs' factors. This step compensates for any disparity in the financial circumstances of the parties.

The Courts are now giving greater emphasis to Section 75(2) factors and assessing them more substantially. This step may result in an adjustment being made in favour of one of the parties. The Court has very wide discretion in making adjustments to property based on these factors including:

- The age and health of the parties.
- The income, property and financial resources of the parties and their physical and mental capacity for appropriate gainful employment.
- Additional sources of income, allowances, benefits or support.
- Whether either party needs to care for a child of the marriage who has not yet reached 18 years of age.
- Any child support that a party to the marriage has provided, is to provide or might be liable to provide in the future, for a child of the marriage.
- The duration of the marriage and the extent to which it has affected the earning capacity of either party.

### **Step 4 What is a 'just & equitable' settlement ?**

Lastly, the Court will look at the whole settlement to consider what settlement is just and equitable. This does not mean the settlement must be necessarily equal, or '50% /50%', or even that '50% /50%' is even a starting point. In fact, most often the settlement will be in favour of one party or another by a percentage margin determined based on the facts in that case.

The Court has a wide discretion to make an order that it considers proper and that in all circumstances is 'just and equitable'. This factor makes it more difficult to predict the result of litigation.

### **Step 5 Any spousal maintenance?**

Where spousal maintenance is also sought it becomes, in effect, the fifth step.

***Please ask us if you have any questions about the issues raised in this publication.***