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Separation And The Family Home

Property settlement isn't automatically divided 50/50 between couples.

HOME is where the heart is. The family home often represents the largest and most significant asset and for many it is also a place of great emotional and personal significance.

To protect the family home many couples use Binding Financial Agreements, popularly known as "Prenuptial Agreements". These agreements offer a practical way of protecting your assets in the event of separation or divorce and can be entered

into prior to and during your relationship or marriage. Enforcement of these agreements must comply with the very technical requirements of the Family Law Act and we recommend that you only engage a lawyer who practises or specialises in family law and has the knowledge of these requirements.

In the case of family breakdown or separation, which accounted for approximately 48,000 married Australian couples in the year before last, the main dispute is often in regard to who will retain the family home at the time of property settlement. Our experience shows us that while some couples can amicably divide their property, a significant number have difficulties that result in protracted negotiations or court proceedings.

Common misconceptions and questions arise as to which partner will retain the family home during separation in the following circumstances:

- One partner will have the primary care of their children;
- The title of the home is held in the other partners' name;
- One partner has primarily paid for the home or is paying the home loan;
- The home was gifted to one of the partners.

The Family Law Act doesn't draw a distinction between the 'family home' and any other property of a couple. Instead it provides us with an expansive definition of property. The definition can include: jointly owned assets, individual property of one partner, business interests and assets, inheritances received by either partner, interests in a family trust and superannuation.

The court generally adopts a 4 step process to determine a fair outcome:

1. By identifying all of the couples' property including debts and liabilities;
2. It looks at all financial and non-financial contributions made by both parties including situations where one party has sacrificed their career or opportunity for education to take care of the children;
3. It considers the future needs of both parties taking into account age, health, earning capacity/employment and care of dependents;
4. It will then take into account all of these factors in making a fair and equitable division based on current and future financial resources, assets and liabilities.

We recommend that you obtain independent legal advice regarding your entitlement to property settlement even if you have reached an informal agreement with your partner, there may be some savings with stamp duty depending on your settlement and whether you decide to formalise your agreement. It is also important to bear in mind that there is a time limitation period involved with making an application to the Court for Orders for your property settlement. Married couples have 12 months from the date of their divorce becoming final and De facto couples have a period of 2 years from the date of separation.



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