

# THE SECRETS TO A SUCCESSFUL SEPARATION

Lewis Family Lawyers is a specialist family law firm providing expert advice to clients for all family law disputes.

This document was prepared to provide a narrow and shortened list of things to consider in a property division and should not be considered legal advice. If legal advice is required, contact Lewis Family Lawyers directly.

How to Successfully Separate?

## **1. Avoid the Dispute**

If you could document the entitlement of each party should a separation arise, this would remove the need for any argument and each party has certainty and clarity should a separation occur. But how? Through a Financial Agreement or “pre-nup”.

Financial Agreements are a useful tool that can quarantine certain assets like future inheritances and can be entered into before, during and after either a marriage or de facto relationship.

Like insurance, you may never need it but not having one could be financially disastrous.

Key issues to consider:

- A. Timing – When the agreement is to be entered.
- B. Representation – Both parties are required to be legally represented by a specialist in family law.
- C. Vulnerable Parties – Both parties must have the ability to negotiate the terms and not be disadvantaged financially, emotionally or physically when entering into the agreement.

*This list is not exhaustive and specialist advice should be sought when considering entering into a Financial Agreement.*

## **2. Division of Assets**

If there is no Financial Agreement in place and the relationship breaks down, everything may be considered joint until there is a formal property division. If there are assets that require division between separated parties, there may need to be a formal property division so that each party can secure financial independence.

How to determine what assets to divide and how is the overall division calculated?

### **Step 1. Identify the assets**

- i. Exchange of financial disclosure by both parties is required to identify the assets
- ii. If there is a risk of depletion of assets, obtain urgent expert advice before they disappear
- iii. Valuations may be required for items in dispute such as real estate, businesses, motor vehicles etc.
- iv. Everything is considered joint regardless of name on title including assets owned by third parties
- v. Determining whether funds received by family or third parties is a gift or loan requires careful consideration and expert advice

### **Step 2. Contributions based assessment**

- i. Initial financial contributions made by each party remembering the shorter the relationship, the more important these are
- ii. Financial and non-financial contributions made by each party during the relationship such as inheritances received, loans/gifts from family, compensation or redundancy payments received
- iii. Wastage arguments require expert advice before forensic review is required
- iv. Income can be equal to homemaker/parenting role

### **Step 3. Adjustment of Contributions based assessment**

This is highly discretionary and each case is considered on its overall facts and circumstances. The following are a short list of primary considerations that may shift the percentage in favour of one party over the other:

- i. Income earning capacity – if there is a significant disparity of income, the party with the lower income may receive an adjustment.
- ii. Care of children – if one party will have the care of the children more than the other, they may receive an adjustment.
- iii. Health – if one party has poor health that impedes their ability to earn an income, they may receive an adjustment however care needs to be taken before raising this issue given the requirement for significant medical evidence to be disclosed which can include all medical records of that party.

*This is not an exhaustive list and expert advice is required to determine what other adjusting factors may be relevant.*

Depending on the circumstances of the parties and the terms, if an agreement is reached, the parties can formalise the property division through the Family Law Courts or through a private and binding agreement. Expert advice should be sought to determine which option is appropriate.

### **3. Ongoing Financial Commitments**

After separation, and even after a divorce, there may be ongoing financial commitments that parties to a relationship are required to maintain. These include:

- A. Child Support
- B. Adult Maintenance
- C. Spousal Maintenance

Child Support can include periodic payments which can be assessed by the government.

Child Support can be agreed between parents and formalised through a Child Support Agreement. A Child Support Agreement can make provision for the payment of private school fees, private health insurance, extra-curricular activities and any other expenses relating to the children.

Adult maintenance can be required where an adult child of the relationship has physical or mental health needs where extra financial support is necessary. It is not automatic and usually is found where both parents agree to fund an adult child's tertiary education or overseas trips.

It is important to consider and, if agreed, make provision for child support and/or adult maintenance in the overall property division to avoid disputes in the future.

Spousal Maintenance is payable where one party's expenses exceed their income and the other party has the capacity to pay. It is not automatic and can depend on the overall property division that is reached.

Spousal maintenance should be included and finalised in all property divisions, even if it is to waive the obligation to pay so that there can be no disputes in the future. This can be achieved through a Financial Agreement and/or court orders.

Separation is stressful and can be all encompassing. Having the right team of experts to support and secure the best outcome is the sensible approach to a successful separation.