

# **The 5 Ways to Save Money, Stress & Worry When Separating**

*Important information about property settlements*



**By Maria Angela Rigoli**

**B.A. LLB. (Melb) Acc.Spec (Fam)**

**Principal Lawyer and founder of Rigoli Lawyers**

**At Last!** Important information about property settlements to ensure your legal and financial matters are settled professionally, affordably and stress free...

# The 5 Ways to Save Money, Stress & Worry When Separating

Separation can be difficult and stressful enough...  
Make sure you have the right guidance so you know where you stand on your property entitlement and you don't lose out!

**From The Desk of Maria Angela Rigoli**

**B.A. LLB. (Melb) Acc.Spec (Fam)**

**Principal Lawyer and founder of Rigoli Lawyers**



Dear Friend,

If you currently separated or are thinking of separating then this guide may be the most important one you will read... perhaps ever.

Here's why...

My name is Maria Rigoli and I am an Accredited Family Law Specialist with 23 years' experience with family law cases. I am dedicated to helping people resolve their family law matters without stress or unnecessary expense. Over the years I have noticed a common thread in questions clients ask about separation and concerns about their financial entitlements. This is why I wrote this guide: to help you get clarity and understanding on the critical matters, instead of feeling overwhelmed and wasting time and money doing the wrong things or relying on incorrect information.



# CRITICAL FACTOR #1

## KNOW WHAT TO DO TO PROTECT YOUR ASSETS

There are 2 main aspects to protecting your assets after separating from your spouse.

***Firstly, asset protection to stop assets being hidden or wasted or given away or transferred:***

There are actions you can take to preserve and protect your property, to ensure that it is not wasted or depleted or disappears altogether. This includes assets that may not be in your name but only in the name of your spouse. It can even include assets that have been recently transferred to other family members just to avoid family law entitlement claims.

Examples of some of these protections are:

- **caveat** over land which is owned by only one of the spouses (to avoid a sale or refinance without the other's knowledge or control);
- in some cases **intervention orders** will make it illegal for a party to take anything from the house or damage their own property in addition to personal protection orders;
- if appropriate, **changing locks** to the property to avoid the contents being cleaned out ;
- **legal letters to banks both informal and formal to freeze further advances on loans and mortgages** (avoids the family home being "hocked up" and the other party taking off with the offset money);
- **urgent family law court orders and injunctions** against a spouse or a company- to compel them to do or not do something in order to protect an asset they control but you don't.

It is important to get your situation looked at immediately upon separating or as soon as you have decided to separate- even if you have not announced your intentions to your spouse. Quite often the spouse who is told that it is "all over" will react badly and use whatever they have in their control at their disposal to vent their anger, grief and payback. Therefore you really want to make sure you secure what you can beforehand if this is likely to occur. This includes decisions on whether to leave the house or not.



Many people believe that leaving the house will mean they get less than their entitlement had they stayed in the home after separation. This is not true. You will however need to consider payments to the bank if the person remaining in the house refuses to pay. If there is no cooperation on the payment of interim bills and loans and the property settlement is likely to be drawn out, then it may be best to seek a court order for how the interim bills will be dealt with until final property settlement

is made by either agreement or final court order. If payment of the mortgage and interim bills is agreed to on an interim basis then you have more “breathing space” for negotiations and may wish to consider mediation to resolve the property dispute.

***Secondly, if you agree on how to divide the assets, you need asset protection to ensure a fair settlement is binding and final***

There are different types of out of court agreements as well as court orders which can be made to ensure that any division of property is final and there is no “come back”. These include **consent orders, orders of the court made by a Judge or binding financial agreements.**



If you can reach agreement with your spouse even without the help of lawyers, it is really important to have that agreement formalised into a binding legal document so there is no come back or second bit of the cherry.



**When is a written agreement to divide property final and legally binding?**

Requirements are different from country to country but in Australia to make a property settlement agreement binding and avoid any “come back” or “second go”, it really has to be in a form that complies with the family law legislation and rules. Generally it would be in

the form of consent orders (agreement approved by the court) or it can be in the form of a binding financial agreement (agreement signed by both parties after they have receive independent legal advice from their own lawyer and each lawyer has also provided a signed certificate to confirm this).

**Which paper work should you use- consent orders or binding financial agreement?**

Depending on the lawyer drafting the agreement and their fee structure, you may find that consent orders will be more expensive than the drafting of a binding financial agreement for the same set of facts and terms of agreement. However fees vary from lawyer to lawyer and it is best to get either a fixed quote or estimated range of fees and compare. Some



separated couples they may wish their agreement to be not seen by any court or made public and therefore prefer to go with a private binding financial agreement. For other couples, when one of them refuses to get independent legal advice and just wants the agreement signed up and made legal, they would go for the consent orders option (in which case the court can still withhold approval if in the court's opinion the unrepresented party is not getting a fair outcome). A binding financial agreement cannot deal with agreed children/parenting arrangements.

There are a lot of other differences between the two types of written agreements and for specific advantages and disadvantages applicable to each case it is best to get legal advice after explaining one's particular situation to find out what is best for your protection and to cover all aspects of your agreement. In my practice I find that binding financial agreements are becoming far more popular than consent orders these days when parties have only property issues to resolve as it is normally a quicker process, the document is private and does not incur a filing registration fee as with consent orders.

### **What about separated de facto partners?**

What constitutes a "De Facto Relationship" is a complex matter when it comes to the legal interpretation. In very general terms it would apply to couples that have lived together for a minimum of 2 years, or in other cases where there is a child of the relationship or one of the parties can prove substantial contribution to the assets. Generally if the circumstances do not fall into any of these three categories then it is



unlikely that the dispute can come under the jurisdiction of the Family Law Courts. De Facto spouses ("domestic partners") can otherwise apply through the Family Law Courts for court orders on all matters in dispute regarding their property, children or spousal support -if they have separated after 1 March 2009. Likewise they can also enter into consent orders or binding financial agreement if they settle matters.

### **What if I am in a new relationship already? How can I protect my assets in the new relationship? Can a "pre-nupt" be done if I am not yet divorced from my ex but living in a de facto relationship?**

The answers to these questions are yes, you can and it is a type of "prenupt" Binding Financial Agreement.

It is possible for a couple to make it clear that they do not want the new laws to apply to their relationship and make their intentions legally binding. Couples can make an agreement about how they will distribute their property if their relationship was to break down. These are called "binding financial agreements" ("like pre-nupts" but for defactos). These agreements can be entered into at any time provided both parties

have obtained independent legal advice before signing to ensure in order for the written agreement to have any binding effect.

Binding financial agreements can be made *before* entering into a relationship (or *during* a relationship). Some of the terms put in a binding financial agreement may include placing a “quarantine” on certain assets -away from any claims that could otherwise have been made by the other spouse, and cutting out spousal maintenance. With all other assets built up together, the agreement could mention that everything else is up for grabs under the usual laws if separation occurs, or it goes 50/50 or whatever else the couple will agree to put in the binding financial agreement.

This method of asset protection is often far better than simply transferring a property into another family members name, solely for the sake of keeping it out of the other spouse’s target range for any future claims. In any case, the Family Law Courts have power to set aside such transfers anyway (especially if they were really only designed to defeat the spouse’s interest and/or the transaction is a “sham”). A binding financial agreement however can be upheld and is enforceable by the Family Law Courts provided that it meets all the correct legal criteria to make it binding.

## CRITICAL FACTOR 2

### **UNDERSTAND THE BASIS FOR PROPERTY SETTLEMENT - ENTITLEMENT IS NOT BASED ON MORAL GROUNDS - BUT RATHER ON A FOUR STEP APPROACH**

Due to a lot of influence from television and other unreliable sources, unfortunately a lot of people are misled on the facts. They believe that if one spouse is morally at fault, then they will get less in the property settlement so the legal fight keeps going but is an unnecessary waste of money.

You do not necessarily get any more in a property settlement because your spouse had an affair (or more than one affair) or if he /she constantly argued with you to the point you felt you have to leave. If you are left with the financial burden of caring for the children this does not automatically get you 60-70% either.



### **How a property entitlement is worked out**

There is a 4 step approach which the courts follow to deciding on how property should be divided. This is the approach to follow in negotiations as well to avoid going to court if possible.

## **Step 1 - identify and value the net property**

This really has to be done before you can be given the legal advice on your percentage entitlements and how that translates into who keeps what. It is a good idea compile a list of all the assets and liabilities and get proof of what they are worth or if you do not know at least put the list together. Ask real estate agents for a market appraisal of your home and investment properties, get mortgage balance and other bank balance statements, check what all the motor vehicles are worth by going online to car sales sites. As part of this step you should also consider if any “add backs” are required. For example if one of the spouses has prematurely distributed or taken funds for their own purpose or to spend on legal fees. The amounts spent after separation that would have normally been added into the pool of assets for calculation can then be “added back in” to get a proper percentage of a proper asset pool. You should also look at whether you will need to seek expert advice about value of property or potential liabilities such as capital gains tax, best with a financial advisor/accountant. If you are not sure of all the assets and the other party controlled everything during the relationship then you should ask for disclosure of certain documents that will give you the answers. Under the family law rules of disclosure each party has to disclose any relevant documents that relate to the financial dispute, and if they do not do this the Family Law Courts can make orders compelling disclosure.

## **Step 2 – identify contributions**

Consideration is also given to:

- a) Direct (eg: income) and indirect financial contributions (including your family accommodating both of you rent free for many years);
- b) Non-financial contributions (including being a housewife for the entire time);  
and
- c) Contribution to the welfare of the family, including contribution in capacity of homemaker or parent.

The contributions include *pre-relationship*, *during* the relationship and *after separation* (eg if one of the parties is paying off joint loans and other debts that were incurred during the relationship). The contributions are then balanced against each other but it is not a strict mathematical exercise.

## **Step 3 – future needs factors**

The most common factors that are considered are: if the asset pool is small, the age and health of the parties, the responsibility for children, duration of relationship, ability to earn income and whether in a new relationship or financially supported by another person. However the fact that a party may have entered into a new relationship is usually of little if any relevance. The future needs factors are then also added into the calculation and may increase the percentage entitlement.

## **Step 4 – just and equitable outcome**

The just and equitable test is the final step to work out if percentage calculated so far achieves a just and equitable outcome or if instead it leads to an unjust outcome therefore requiring further adjustment. What is “just and equitable” is not merely a moral judgement about what a person feels is fair, but it is a legal question taking into account all circumstances of the case. This is why property settlements vary

from case to case, even with similar facts. It is a big mistake to assume that because your situation looks like your friend's situation that you should get the same result. Find out for sure as you may be missing out on thousands if not tens of thousands if you do not know and just settle because you believe it is fair.

## CRITICAL FACTOR 3

### FIND OUT WHERE YOU STAND WITH CHILD SUPPORT & SPOUSAL MAINTENANCE

These two issues are often overlooked when finalising property settlement but they can both critically affect the amount of the property settlement and end result. It will save you a lot of stress to make sure you deal with these aspects first if you have children or believe you will have trouble supporting yourself after separation.

#### Child Support and agreements to pay children's expenses

A lot of people are not aware that matters of child support and any agreement about payment of children's school fees and other expenses, may not be binding or enforceable, until it is in the form of a binding child support agreement registered and accepted by the Child Support Agency. There are options available to separating couples for the one paying child support to receive less in their property settlement, in exchange for being child support free for a few years. These types of agreements need to be carefully drafted and not only reflected in the property settlement documents but in the binding child support agreement which must be registered and accepted by the Child Support Agency. If there is no agreement, either party can apply for child support assessment. The Child Support Agency has pre-set formulas they apply depending on each parent's income, and ages and number of children.



If you are not happy with the child support amount that has been set –either too high or too low, you can apply to have it reviewed and there are various grounds of review. Examples of potentially good reasons for the Child Support Agency to reassess child support -:

- other party's tax returns not up to date or they are self-employed and their returns do not really reflect their true income
- there are extra ordinary expenses for the children related to special needs of the children or there are very high costs for one parent to maintain contact with the children as a result of living interstate or overseas

#### Spousal maintenance

In addition to child support, a party may be entitled to ongoing weekly spousal maintenance for a period of time or a lump sum paid or transferred at the same time they receive their property settlement. It is more common these days for the financially disadvantaged party to claim spousal maintenance which can be paid as a lump sum with the property settlement or on a weekly basis. There are particular



thresholds and tests to assess if you are eligible for this. An experienced family law solicitor will be able to tell you if you are eligible or what information and documents to provide to make that assessment.

## CRITICAL FACTOR 4

### DON'T FORGET TO CHANGE YOUR WILL & SUPERANNUATION

**Here is a scenario of what can happen if your will is not changed immediately after separation:**

Joe and Connie had been living together for 3 years after both leaving failed marriages. Although separated, Joe still had to file for divorce from his wife Angela. His Will had not been changed yet and left everything to Angela. Joe died suddenly without a will, while still married to Angela but in a domestic relationship with Connie. Joe had no children but was helping Connie raise her 3 young children as their biological father disappeared and Joe had been really attached to them like a father and they also depended on him emotionally and financially.



As the law stands in Victoria, even though Joe and Connie were in a domestic relationship and she and her children were dependent on Joe, by his Will all his assets pass to his former Wife Angela. Connie and the children would have to make a County Court or Supreme Court to claim anything and challenge the will if they wanted anything and prove that they were eligible applicants and that Joe should have provided for them. This could be an expensive application to make, especially if Angela contested it, Otherwise Connie and the children would be stuck with the result and not get any of Joe's assets except the furniture left in the home where they both lived.

If Joe had not left a Will then Connie's share will depend on the duration of the relationship -basically Angela would get two thirds and Connie would only get one third but Connie's children would get nothing. If the length of Connie's relationship with Joe was less than two years or disputed that it would not meet the definition of 'domestic partner' she would get nothing but would have to try a claim in the County Court or Supreme Court claim to challenge the automatic distribution where there is no will.

In relation to **superannuation** most people are not aware that your will does not normally control the payment of the death benefit when you pass away. It is important to review the death benefit nomination in your superannuation fund as you may still have your ex listed as the number one beneficiary which may not be the

scenario you wanted, especially now that you are separated. Estate planning these days can be a quite complex matter. It is not recommended that you draft your own will or assume that your assets and superannuation will automatically go to your children if you pass away. It is better to find out where you stand from an experienced solicitor. If you need to amend any deeds with your family trust, company constitution, superannuation fund and your will this can be done relatively inexpensively.

## CRITICAL FACTOR NO.5

### MANAGE YOUR LEGAL FEES IF FIGHTING YOUR EX



Sometimes negotiations and mediation talks break down because the other party just isn't reasonable and will not give you your proper entitlement and is not prepared to move on.

If it is necessary to make an application to the Court for Orders relating to the division of property, great care needs to be taken with the management of the application. Unless the application is sensible and can be supported by evidence you are exposed to danger including the possibility of having to pay the legal costs of the other party. This exposure to an order for costs must always be in the mind of the lawyer when they are guiding and advising you.

An experienced Family Lawyer will have two goals in mind:

1. To obtain a just and equitable division of property for you; and
2. To protect you from applications for costs or a dismissal of your application.

#### **Here is a story about why going to court was a bad idea:**

Betty and Harold had been married for 25 years. Their marriage has broken down after Harold had an affair. The pool of property assets available for division is \$2 million. Betty sought the advice of an old friend who was a General Lawyer but not a Family Lawyer. Harry obtained the services of an experienced Family Lawyer.

Betty made an application to the Court that she receive 80% of the property. There was no justification for such financial orders Betty sought, she just thought that she was morally entitled to this much since Harold had an affair and she was devastated. Harold sought an equal division of property. During the marriage both Betty and Harold contributed equally to the acquisition of assets, whether in terms of raising the children, housework or paid income. All the children had grown up and moved out. Betty and Harold were pensioners on similar incomes and they were of the same age and both in good health.

Betty would not budge from her position. Harold's Lawyer made an open offer of settlement saying he would settle for an equal division of property and the letter also

stated, “In the event the offer is not accepted this letter will be used to support an application for costs.” This part of the letter was totally ignored by Betty’s Lawyer.

The matter proceeded to a trial. The Judgment delivered had the effect of dividing the property equally between Betty and Harold. Harold’s Lawyer then made an application that legal costs incurred by him in having to bring the matter to final hearing, be paid by Betty. The evidence in support of the application for costs was the open offer of settlement sent approximately one month after the application had been made by Betty. It had taken 18 months for the matter to come before the Court and Harold had incurred legal costs of \$45,000.

The Court listened intently to the application and, based on the offer of Harold to settle the matter some 18 months prior to the trial on the same terms as now ordered by the Court, the Court then made an Order that Betty pay the whole of Harold’s costs. Betty was less than pleased with the result. Firstly, she had been led to believe that her application for 80% of the property was reasonable and she expected to be successful. Secondly, her Lawyer had not advised her as to the risk she was exposed to by the offer of settlement from Harold.



The lesson to be learned is that any application to the Court must be managed carefully. You must be advised along the way as to offers that are made, how they should be responded to, and what risk you are being exposed to by those offers. If you are being advised by an experienced family lawyer they will be able to protect you from unnecessary risks saving you money, time and stress.

### **How can I get Legal Aid? What if I can’t afford to pay a lawyer?**

If you are eligible for legal aid then any lawyer that is registered with Victoria Legal Aid or their panel can take the case for you if they agree, and Victoria Legal Aid will cover their fees

If you are not eligible for legal aid and will need to pay a lawyer yourself to help you with finalising property settlement and parenting arrangements, you should receive an estimate of costs from your lawyer around the time they start working for you. They should also give you a costs disclosure to show how they charge their legal fees.

If you are shopping around for cheaper lawyers just be aware that an experienced family law solicitor may charge *more per hour*, but they may also take less time to do the work because of their experience and familiarity in that area of law. If your matter is complicated or has complex legal issues, an experienced family law solicitor that has had a lot of hands on family court work, should be able to get to the crux of the problem quickly and provide a strategy for you case with careful planning and detailed advice about your options. A generalist may take longer to do this and in the end you may pay more for the same service even though the hourly rates were different.

If you cannot get legal aid and cannot afford to pay a lawyer yourself and end up representing yourself, there are duty lawyers often at court that can help with advice and some limited representation at hearings but they generally will not be doing your court documents and they won't be responsible for any errors or omissions in your own court documents.

### **Is it worth it to engage a Family Law Specialist Law Firm?**

If your legal work is simple and straight forward, then any lawyer should be capable of handling it. Having specialist skills in a certain area of law means the Lawyer is used to doing the work over and over again. They are also used to seeing and quickly dealing with complicated problems in that area because they have so much experience. If you are in any doubt get some advice from an Accredited Family Law Specialist - it will save you a lot of time and money in the end and can make the difference between winning and losing.



### **What to do next?**

If you want to know more information or need legal advice now, you can book in for your FREE Consultation with anyone of our Lawyers... call our office on **(03) 8742 3199** and mention you have read this Guide and we will be happy to provide you with 30 minutes of a lawyer's time for FREE. You'll be surprised how much can be accomplished in this time and how easy it will make it for you to decide on what to do next - perhaps you won't need to do anything.

Warmest Regards,

*Maria Rigoli*

Maria Angela Rigoli B.A. LLB. (Melb) Acc.Spec (Fam)

Principal Lawyer and founder of Rigoli Lawyers

**P.S.** This can be a difficult time for you... be sure you are making the right decisions for your future. Call **(03) 8742 3199** or email us at [info@RigoliLawyers.com.au](mailto:info@RigoliLawyers.com.au) to book in for your FREE Family Law Consultation with one of our Lawyers. You will know exactly what to expect so there are no surprises.

We have convenient locations at Werribee, Point Cook and Caroline Springs.

*©Copyright Maria Rigoli all rights reserved 2014. No part of this document may be reproduced without the consent of the author.*