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PROVIDED BY RANKIN NATHAN LAWYERS

IN THE HEAT OF THE MOMENT – CAN I CHANGE MY PROPERTY SETTLEMENT?

The breakdown of a marriage is one of the most stressful and emotionally draining situations you can go through, regardless of whether it has been your decision to separate or your partner has decided to end the relationship. Where children are involved it can be even more difficult.

In most cases, one of the things that ultimately has to be worked out is the division of assets. For the majority of people they are able to reach agreement about how they are going to divide their assets. But what if you change your mind? What if you agree to something and then later realise that it wasn't appropriate?

There are some limited circumstances where you can seek to readjust your property settlement, depending on how it was finalised. For parties who obtain Court orders, whether by agreement or otherwise, section 79A of the Family Law Act 1975 sets out the circumstances where you can seek to alter previous orders for property settlement. For parties who finalise their property settlement through a Binding Financial Agreement, section 90K of the Family Law Act 1975 provides the circumstances where a Binding Financial Agreement can be set aside.

Both sections provide different circumstances where a property settlement can be altered, although there are some similarities. To set aside previous Court Orders you must be able to establish that

1. There has been a miscarriage of justice due to fraud, duress, suppression of evidence, failure to

disclose relevant information, the giving of false evidence or any other circumstance; or

2. Circumstances have arisen since the order or agreement was made that make it impracticable for the provisions, or some of them, to be carried out; or

3. There are circumstances of an exceptional nature relating to the care, welfare and development of a child of the marriage that mean that the child, or the person caring for the child, would suffer hardship if the Court does not vary the order or agreement; or

4. A person has defaulted in carrying out an obligation imposed on them and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order; or

5. A proceeds of crime order has been made relating to one of the parties or the property.

A Binding Financial Agreement can only be set aside if:

1. The agreement itself is void, voidable or unenforceable; or

2. The agreement was obtained by fraud, including non-disclosure of a material matter; or

3. Circumstances have arisen since the agreement was made that make it impracticable for the provisions, or some of them, to be carried out; or

4. There are circumstances of an exceptional nature relating to the care, welfare and development of a child of the marriage that mean that the child, or the person caring for the child, would suffer hardship if the Court did not vary the agreement;



or

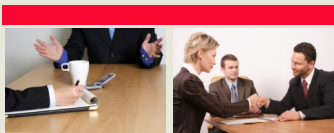
5. When making the agreement, one party engaged in conduct that was unconscionable; or

6. Either party to the agreement entered into the agreement in an attempt to defeat a creditor or with reckless disregard of the interests of a creditor; or

7. The provisions relating to the splitting or flagging of superannuation are not enforceable or, appear unlikely to be able to be implemented.

As can be seen, the circumstances where you can vary an existing property settlement are quite limited. It is important that any agreement you do reach is made after careful consideration. In some situations, this can be easier said than done.

Discussing your property settlement and trying to reach agreement about the division of assets following the breakdown of your marriage involves both parties making rational financial decisions in what is often a very emotional time. It is therefore extremely important that you seek legal advice before you finalise your property settlement. This will ensure that you not only understand exactly what you are signing, but you will also be aware of whether it is in your interests to sign the agreement or whether further discussions should take place to try and negotiate a different division of assets.



Rankin Nathan Lawyers

1300 727 813

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