Tips on Negotiating a Downturn or Uncertain Market in Family Law Property Settlements

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Negotiating and documenting a property settlement under the *Family Law Act* 1975 (Cth) (FLA) is not always easy. You and your former partner may have a strong desire to keep things amicable, but it is an emotional time and there are added layers of difficulty in times of economic crisis. As a result of the COVID-19 pandemic, the economy as a whole is fluctuating and uncertain, and sectors of the economy have been impacted by a downturn. In "normal" times, the impact of the economy is relatively predictable and resolving a property settlement dispute is less complex.

What steps can you take to protect yourself in a downturn or uncertain times?

The current state of the economy

It is much simpler if everyone uniformly experiences a market undergoing a downturn. However, the economic impacts of COVID-19 and its associated lockdowns have not been felt equally in all parts of Australia and in all sectors of the economy. There have also been fluctuations: real estate prices in parts of Australia initially fell but as at March 2021, prices of houses (but not necessarily city apartments) appear to have recovered and increased; superannuation entitlements fell and then recovered; and some businesses did badly but then boomed as they either "pivoted" or experienced increased customer demand. Many sectors of the economy were cushioned by Government relief or Government-mandated relief. Some businesses are still "alive" only because of Government cash flow boosts, temporary changes to bankruptcy and insolvency laws which expired on 31 December 2020, controls on commercial leases, and the receipt of JobKeeper payments which are due to cease on 28 March 2021. Banks were encouraged to offer to pause mortgage repayments for up to six months, but by the end of 2020 the banks' generosity had largely ended. Furthermore, the COVID-19 Centrelink supplement and controls on domestic leases will expire at the end of March 2021.

Although Australian states and territories have been relatively successful in "flattening the curve" and even eliminating COVID-19, there remains a significant risk that there will be further outbreaks in the community and resultant lockdowns due to cases brought into Australia by returning travellers in quarantine hotels. This risk combined with the end of relief schemes means that further economic uncertainty lies ahead: more jobs may be lost, real estate prices may fall, share prices and superannuation may fall and consumer demand may suffer a further hit which will impact some businesses more than others. As of early March 2021, the vaccine rollout has commenced in Australia but it will take

many months for sufficient numbers of people to be vaccinated and the hoped-for "herd immunity" to be achieved.

You may be negotiating, litigating, or have agreed upon a settlement deal but do not yet have court orders. There are steps you can take to ensure that the settlement is implemented and reduce the risk of it later being set aside or varied.

What if the settlement later seems to be unfair? Can I change the final orders?

In an uncertain market property prices can fall or rise rapidly which may mean that a settlement which was fair, later seems to be unfair. If you entered into a formal property settlement, then changing your mind later and trying to undo the settlement is quite difficult. For example, you may have agreed to pay your former partner the sum of $300,000 when the former matrimonial home was worth $1,500,000, but the home has now fallen in value and is only worth $1,400,000 and you want to pay less or get back some of what you paid.\ Alternatively, your former partner is keeping the home and you agreed to accept $250,000, but the home has now increased in value by $200,000 and you want a larger payment.

If you or your partner don't have a formal property settlement either of you can change your mind and try to renegotiate the deal, but usually people have a formal property settlement so they can get on with their lives without the risk of further claims. A formal property settlement is one finalised by either:

- Most commonly, making final property orders by filing consent orders with a family law court; or
- Entering into a financial agreement which meets the requirements of the FLA.

It is best to assume that final property orders cannot be changed, as the philosophy of the FLA is that parties should have "a clean break" from each other. There are only limited grounds upon which property settlement orders can be set aside. The most relevant grounds during a pandemic are:

- Miscarriage of justice by reason of fraud, suppression of evidence (including failure to disclose relevant information) or the giving of false evidence;
- In the circumstances that have arisen since the orders were made, it is impracticable for the orders (or part of the orders) to be carried out;
- A court is satisfied that a person has defaulted in carrying out their obligations under property settlement orders and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the orders or to set them aside and make new orders.

The above grounds are covered in more detail below. Setting aside a financial agreement is more complex, but broadly similar grounds apply.

Even if the specific requirements of one of the grounds are met, the court still has a discretion as to whether to vary or set aside the orders. If the property settlement orders were made in the midst of a pandemic, a court may decide not to vary or set aside the orders because, for example, it considers that it was foreseeable that the orders might not have the effect that was intended.

Miscarriage of justice arising from fraud or non-disclosure

It is imperative to ensure that incomes and values are accurate and are reviewed and updated before a settlement is formalised. This protects against any allegation your former partner was misled by relying on out-of-date figures given by you.

Impracticability

Property settlement orders and financial agreements which have not yet been implemented may seem unworkable or unfair due to changes in personal circumstances and/or the economy since the orders were made. However, the test for impracticability is a high one. It is not enough that it has become unjust or difficult for the orders or agreement to be carried out.

In one case, the wife had transferred her interest in a property to the husband as required by the orders, but the husband had not fulfilled his obligation to pay a sum of money to the wife. After the orders were made the husband had continued to enjoy a high standard of living and contributed to the costs of his daughter's wedding. When the property was eventually sold, the proceeds of sale were not enough to discharge the mortgage or to make the full payment to the wife. The husband argued that it was impracticable for him to carry out his obligations under the orders because his financial circumstances had deteriorated since the orders were made. He gave two reasons for this deterioration. His first and main argument was that after considerable delay (which was largely his fault), the property sold for a price substantially less than he had anticipated. The second was that his business had to make significant payments as a result of embezzlement by another partner.

The Full Court said that “impracticable” meant something different from “impossible”. It was not enough that circumstances had arisen since the orders were made which made it *unjust* for the orders to be carried out. The husband’s circumstances did not reach the high standard required to establish impracticability.

An application to set aside orders so that there can be a new settlement of property will not be successful in circumstances where one party suddenly becomes immensely rich,

and similarly it is not available when one party's financial portion suddenly deteriorates. The Full Court in this case referred to "the vicissitudes of commercial life" – businesses may always be the subject of financial misfortune and this does not give rise to the ability to set aside or vary final property orders.

Default

If one party fails to meet their obligations under the orders, the other party may seek to set the orders aside so that new orders can be made. These types of applications may be made when simply enforcing the orders will not place the innocent party in the same position they would have been in if the original orders were implemented.

In one case, the orders provided that the husband would retain a home worth $600-650,000 (on the parties' estimates) and pay the wife $130,000 within 90 days. The orders were intended to effect an equal division of property. The husband failed to pay the sum until 13 months after the payment was due, and did not pay interest until a further five months later. During the proceedings to set aside the orders, a single expert valuer valued the home at $1 million.

The court found that the orders were intended to effect an equal division of the parties' net assets. The adoption of $130,000 as the cash sum to be paid to the wife was not arbitrary, but was designed to effect an equal division. However, the husband's continuing default over 13 months meant that when the wife finally received the payment of $130,000, even with the later payment of interest, she did not receive an equal division by reference to the home's value at the time of receipt, as the home's value had grown significantly. The orders were set aside.

At a time when values of properties may rise or fall, the wording of default clauses is important. If the orders are intended to effect a certain percentage division of property, then it may be useful to make this clear in the orders. Given the current low interest rates, penalty interest may not be enough to compensate a party for a delay in payment. Whilst a party in default may not be able to rely upon a dramatic drop in property value to have the orders varied or set aside, the innocent party may be able to successfully rely upon a dramatic increase in value to achieve their desired outcome.

Drafting property settlement orders in uncertain times

Once you have secured a "deal", you want the orders to reflect that deal so that you get what was agreed. Some tips are:

1. If there is an order for a sale or transfer of a property, there should also be detailed "machinery" (mechanical or consequential) orders. Property orders include both "substantive" and "machinery" orders. Substantive orders set out who retains

property, transfers or receives property and assumes or retains liabilities. Orders of a machinery nature cover such matters as setting time limits during which actions are to be done, directing which party is to take particular steps, and the terms and conditions of any sale. They give operation and effect to the substantive orders.

A court will more readily vary machinery orders than substantive orders. However, you can avoid costs and disputes if the original orders include a detailed plan which addresses possible problems which may arise. These problems may include an inability to refinance, an auction being unsuccessful or the property not selling within a particular time-frame, lockdowns preventing an auction being held or a significant change in property value because of a market downturn. The more detailed your machinery clauses are, the less likely it is you will need to go back to court to seek a variation of the orders if a problem arises.

2. Expressly allow for an auction or sale date to be deferred if you and your former partner both agree in writing. This gives you both control over the timing of a sale but you still have an enforceable order.

3. In notations to the orders, set out any agreed assumptions as to values of real estate, businesses, shares, and superannuation, and consider including the percentage division of property.

4. Consider including in the orders a formula for adjustments to be made to the payments or distributions required under the orders depending upon a property's sale price or updated valuation, particularly if there may be a long delay before the distribution occurs.

5. During the pandemic the courts have not required financial statements and affidavits to be sworn or affirmed. If the matter proceeds to trial, the judge requires the witness to verbally adopt the affidavit or financial statement and confirm its truth. However, as most cases settles before trial it is best to include a notation in the orders that you are each relying upon the other person's financial statement as if it were sworn or affirmed.

Check the ability to borrow

The way in which financial institutions assess financial positions may have changed and may change further as banks re-assess their exposure to risky assets and adjust their balance sheets for loans in default. You should ensure before the orders are made that you can borrow if a loan is required.

If you know in advance that you can't keep the property, then the "deal" and the orders you agree to may be different than if you know you can keep the property. The orders will provide for a sale if you can't refinance and make the agreed payment to the other party. The outcome is likely to be more favourable to you if you know in advance that you (or the other party) can't re-finance as a clause for a sale in default of the payment will usually provide for a fixed sum to be paid to the other party together with interest regardless of the sale price of the property and without any deductions for sale costs.

What are the advantages and disadvantages of entering into a property settlement at the particular time rather than waiting?

You may want to delay negotiating a property settlement until property prices have stabilised or there is more certainty about your future employment. However, there may be advantages in not delaying. Finalising a property dispute achieves the certainty of an outcome, minimises future legal costs, and avoids the stress of an ongoing dispute. On the other hand, economic fluctuations may mean that there is a risk that in six or twelve months' time the outcome may not seem as advantageous to you. There is considerable uncertainty about how and when the economy will recover from the pandemic and the future employment of you and your former partner may also be unclear, so you may not be able to predict whether you will be financially better off by delaying negotiations.

Should you adjourn court proceedings?

If you are involved in court proceedings you may think about an adjournment to delay the proceedings or a trial. A court can grant an adjournment in various circumstances but it has a specific power in property settlement proceedings to grant an adjournment where there is likely to be a significant change in the financial circumstances of the parties or either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings. The adjournment should mean that the orders made are more likely to do justice as between the parties than an order made immediately.

Some recent examples of when adjournments were granted are:

- There was a dispute as to whether a trial should proceed. One party argued that there had been practical difficulties in preparing her case for trial due to the second Melbourne lockdown and the trial had to proceed electronically rather than face to face.

- The husband had a share in a business which had been valued almost 12 months previously. The husband said the performance of the business was not looking good and the judge said that it had to be conceded that the business was "operating in uncertain times." Both parties sought that the trial be adjourned although they conceded that the trial could be run remotely and electronically through Microsoft

Teams. However, the parties and their lawyers agreed that the pandemic made the business environment so uncertain that it was not safe or fair for the judge to make a determination at this time or for at least the next six months or so.

Are there other impacts of COVID-19 which have not been considered?

The impacts of the pandemic are not easily summarised. There are likely to be problems which have not yet been considered by the courts. For example, in one recent case a party's greater vulnerability to COVID-19 due to age (69 years vs the other party's 37 years) was considered to be a relevant factor in him being given sole use and occupation of the former matrimonial home.

Use consent orders if possible

It is usually considered better practice to finalise a division of property using consent orders rather than a financial agreement. This is probably even more important during a pandemic. In turbulent times, the oversight of courts that comes with consent orders means that the settlement is at reduced risk of being set aside.

Anxiety, distress and other mental health issues

Consider how anxious or distressed you and your former partner are and whether this impacts on your capacity to make decisions. Although separating parties often have mental health problems, these may be compounded during a pandemic when there are greater stresses about employment, incomes, business viability, health, school closures, asset values, seeing friends and family and the economy generally.

You are probably both keen to resolve one aspect of stress and uncertainty in your lives, but are you both in a position to make important financial decisions about your futures?

How to manage valuation issues with real property?

The pandemic has caused unexpected changes to real estate prices. In part this was due to low interest rates, and in part due to the reduced demand for city apartments and increased demand for houses in regional and rural areas. It is possible that in the future, as life returns to “normal”, regional and rural house prices may fall and city apartment prices may rise.

In this type of market it is therefore important to access expert valuations or real estate agent’s opinions and to be aware that the value of the property you want to retain may fall or that the sale price obtained at auction may not be as expected.

If you obtain formal real estate valuations, ask the valuer how long they will be valid. In the past valuations may have been valid for 3-6 months, but this period may be shorter because of the pandemic.

The timing of obtaining valuations and the impact this has on the ability of parties to negotiate a settlement was discussed in a case heard in May 2020 in South Australia. The wife preferred that valuations not be undertaken at that time as she believed that the COVID-19 pandemic might have temporarily depressed the property market. However, until the values of the properties were either agreed or there was valuation evidence, the parties were not able to advance settlement discussions.

Delaying a property settlement may mean that the property pool increases in value, but you might pay more in legal costs in the meantime. There may also be other expenses which you incur in the meantime, such as rent or interest on a debt, or unexpected

changes like losing your job. In addition, you cannot get on with your life in the knowledge that your future income and property acquired is your own.

If you delay, how long do you delay for? When will life return to “normal”?

Business valuations and timing issues

During the pandemic, many business valuers are doing “Limited Scope Valuation Engagements” which do not use the usual valuation methods and reflect the restrictions upon valuers arising because of the uncertain and volatile economic environment.

You may not want to bear the cost of a Limited Scope Valuation Engagement which you may see as having less value than the usual sort while the cost is likely to be the same. You may need to obtain an updated valuation if your matter does not settle promptly after the valuation is obtained, however this can also be true of an ordinary valuation.

As it is not known when the economy or the particular business will be back to “normal”, proceeding with a business valuation which is a Limited Scope Valuation Engagement may be inevitable. Before engaging a single expert valuer, you need accounting advice about the risks and possible outcomes of undertaking the valuation process at that time or another time in the future, and the date at which the business is valued. The most recent financial year’s financial statements and tax returns may not have been prepared and there may be advantages or disadvantages and risks for you in waiting for them to be completed.

Whilst the pandemic may have negatively impacted a business in the short-term, there may not be a significant negative impact on the valuation as the valuer will look at the business performance over a period of several years. A downturn in business performance which is explained by the pandemic may just be a “blip” and not affect the value. Accountants often adjust a valuation by giving less weight to a particular year where something unusually good or bad occurred. It is also possible that a business may have done better in the pandemic than it was doing previously because of increased demand or because of the assistance received from Government grants and subsidies, a COVID-19 relief bank loan or lower rent.

Delaying a valuation until life is “back to normal” may not be realistic and it may be preferable to delay long enough to ensure there is sufficient information about the business’ performance during the pandemic to enable the valuation to be undertaken. In one case, the wife sought an adjournment of a trial listed in four weeks’ time but the husband sought that it proceed. The judge decided that the case should be adjourned for several months to enable further valuation evidence to be produced, including another four months of trading figures for the hospitality businesses which were only able to offer take-away services during lockdown.

If the valuation does proceed, use a "shadow expert" accountant to ensure that the joint letter of instruction asks the questions which need to be answered about the impact of the pandemic so that your case is best presented.

Navigating evidentiary requirements during uncertain times

Uncertain times create unusual evidentiary problems. For example, in one case a horse valuation was impeded by the need for the valuer to maintain a safe social distance because of the pandemic. This is not a problem that might have been anticipated two years earlier.

Whilst some judges may be prepared in certain types of cases to take judicial notice of the impact of COVID-19, it is likely that evidence of this impact will be required. In one case where the trial had been heard in March and April 2019 but judgment had not been delivered, the husband sought to re-open his case in April 2020 to adduce new evidence of values. As he did not produce evidence of falls in value, his application failed. The judge said she could take "judicial notice" of the pandemic itself, but she could not take judicial notice of pandemic's consequences.

Providing financial information in uncertain times

When finalising a property settlement you need to set out details of your financial position. If you do not have court proceedings on foot you will probably file an Application for Consent Orders and Minutes of Proposed Orders with the court. The Application for Consent Orders sets out of the personal circumstances of you and your former partner including a summary of your financial positions. In contested proceedings you are required to file a Financial Statement which sets out your financial position in more detail than in an Application for Consent Orders.

Aim for clarity by stating in a financial statement (or application for consent orders) the dates at which shares, superannuation and real estate were valued. Often these dates will not match the date when the document was signed.

Financial statements may need to be updated more frequently. The rules of the Family Law Courts require that if a party's financial circumstances have changed significantly from the information set out in a financial statement, the party must file a new financial statement within 21 days after the change in circumstances. If the change can be set out clearly in 300 words or less, a short affidavit can be filed instead.

Issues with superannuation splits

Look at the recent history of fluctuations in your superannuation and that of your partner. Many superannuation funds can provide a chart of performance. Does the value being used for the purpose of calculating the property entitlements of the parties look "fair" in

the context of the past 12 months? Or the 12 months before the Prime Minister Scott Morrison declared a national pandemic on 27 February 2020?

Superannuation is normally valued for family law purposes in accordance with regulations. You and your former partner can, however, agree not to value superannuation interests in the normal way. The court must make a determination of the value of a superannuation interest under the regulations only if an order for a payment split is being made. You are not required to value in accordance with the regulations if the interest is being split in a superannuation agreement or is not being split at all. You may choose to use, for example, the values of superannuation at a date before the pandemic was declared.

Looking at the fluctuations of the fund over recent months may assist you to look at "the big picture". Funds have been impacted differently depending upon the investment strategies taken, including the aggressiveness of an approach and exposure to overseas assets or other asset classes. You may want to implement a split which enable these different impacts to be shared in a way you both consider to be fair.

It is more important than ever to ensure that the superannuation split occurs promptly. If it does not occur then depending on whether it is a percentage split or a base amount split and the variation in the value of the fund when the split is eventually implemented, one of you is likely to be disadvantaged.

In most cases the operative date should be as close to the date of valuation as possible, but the fund may want input into the date. In some states and territories consent orders are taking longer to be made in chambers due to WFH requirements. If there is a court date on which the orders can be made, you should take advantage of that date and submit proposed orders to be made on that day.

Whether you are the member or the non-member of the fund to be split, you need advice as to the risks of fluctuations in superannuation which may mean that the split value which is implemented may not be what you intended. A percentage split rather than the usual base amount (dollar value) split may be appropriate to ensure that you both share in the risks, rises and falls. During the pandemic one or both of you may have withdrawn funds from your superannuation. A maximum of $10,000 could be withdrawn before 30 June 2020 and up to a further $20,000 before 31 December 2021. To be eligible, a citizen or permanent resident of Australia or New Zealand must have required the COVID-19 early release of super to assist them to deal with the adverse economic effects of COVID-19. In addition, they must have be unemployed or eligible to receive JobSeeker or another specific Centrelink payment or on or after 1 January 2020 either:

- They were made redundant
- Their working hours were reduced by 20% or more (including to zero)

- ○ They were a sole trader and their business was suspended or there was a reduction in turnover of 20% or more.

Some people have accessed their superannuation fraudulently and in some cases charges have been laid (*https://www.afp.gov.au/news-media/media-releases/three-people-charged-exploiting-covid-19-superannuation-early-release*). If a party appears to have been ineligible and taken advantage of the scheme or the funds have been used for other than usual living expenses then it may be possible to argue that these funds should be added-back to the property pool. Money spent on reasonable living expenses are not normally added back.

If you are both members of a self-managed superannuation fund and one of you has improperly accessed superannuation during the pandemic, the fund may be non-compliant and there could be tax and other consequences. Expert advice is required on how to rectify the breach and protect you from claims from the tax office.

Dealing with estimations and contingencies in income information

Unpredictability, uncertainty, and fluctuations in income affect property entitlements, spousal maintenance and child support. It is beyond the scope of this paper to deal with the latter two issues but many of the same points apply. For example, a binding child support agreement was set aside for “exceptional circumstances” due to the pandemic. Binding child support agreements had previously been considered to be very difficult to set aside.

For parties who are out of work or not in their usual work or in receipt of JobKeeper, a more detailed assessment of earning capacity than usually occurs is likely to be warranted. Expert evidence may be needed which takes into account skills, experience, age, eligibility for Government assistance (JobMaker), training required and likely employability of the party in the future in the area they worked in the past or other areas. Evidence needs to be presented to the court about qualifications, skills, experience and/or contacts, or lack of these and attempts to find alternative employment.

Conclusion

At first glance, it may seem that delaying settlement negotiations is the best option. However, over 12 months after the start of the pandemic you may prefer to get on with your life and finalise a settlement. To do this you will need to accept the reality of fluctuating and uncertain values which may mean that a property settlement may seem either better or worse in six or twelve months' time than it did at the time the settlement was reached. The risks go both ways. If you want to negotiate and implement a property settlement the priorities are to aim for a practical settlement in which the possible problems and economic fluctuations have been considered, and detailed orders are made to protect you as much as possible and ensure that you receive what was agreed.

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