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Divorce and property - four tips for investors

Many couples facing divorce are not getting fair property settlements due to being in the dark about their spouse's finances, according to family law expert Dan Bottrell, partner at Jones Mitchell Lawyers.

In particular, superannuation is something not often considered when working out property settlements, with many couples unaware how much superannuation they or their spouse have, or that super can sometimes be split between spouses.

According to Suncorp's Untying the Knot report, 85 per cent of divorcees did not consider superannuation in their settlement.

Particularly during such a difficult time, dealing with the logistics of property investments can be a challenging task.

Mr Bottrell offers the following tips to divorcing couples who own property together, to help get you through the process more smoothly.

1. Keep careful records for each property

Evidence is central to securing an early resolution of any family breakdown situation. When you buy a property, ensure that the records associated with that transaction are preserved (e.g. the contract, bank statements showing how the purchase price and purchase costs were paid). Similarly, where a property is purchased with help from family, the amount contributed, and the basis of the contribution, should be documented (if the contribution was a 'gift', the date, amount, and the intended recipient (whether that be one or both spouses) of the gift should be specified; if it was a 'loan', the detailed terms of the loan should be committed to writing; and if the property is acquired from a relative at less than market value, then some evidence of the market value at that time should be kept).

Equally, records which demonstrate how the property has been conserved (e.g. rates and outgoings, repairs and maintenance), and improved (e.g. renovations, what those renovations cost, how long they took, who did that work, how they were funded) during the relationship should be maintained. These documents will be an aid when negotiating a property settlement if you later face a separation.

2. Get valuation evidence for your property at an early stage

Consider seeking a valuation report based on a joint brief to the valuer, setting out common valuation instructions. Getting this evidence at an early stage can arm you with the information necessary to guide the making of, and consideration of, settlement proposals. This information will also allow you to approach a financial planner to assess settlement options (e.g. that you retain one or a number of properties by way of property settlement), and to approach your financier to enquire whether you can secure the finance necessary to make a property settlement outcome 'work' (e.g. sufficient to 'cash out' your spouse).

Both spouses procuring their own separate evidence as to the value of properties can have consequences in terms of legal costs, and lost time, and prevent a case from settling, particularly where there is a differential in the valuation reports ultimately produced (e.g. due to differing instructions from each party). Consider agreeing on an expert valuer by one party submitting a panel of three valuers together with their credentials, and the other party selecting the valuer to be instructed from that list; engaging an experienced family lawyer to help you prepare a joint letter of instruction to that valuer; and sharing the valuer's fees equally.

3. Take account of the present and the future, and get clear advice around tax and revenue consequences, for each property you own

Check whether the property you are to receive under your family law settlement is encumbered by any liability (e.g. a mortgage securing business borrowings of a spouse), and if so, ensure that the settlement documents provide for this liability to be released from the title of the property. Enquire also whether there is an unpaid rates liability, or land tax assessment, attached to the property you are to receive. If these 'inherited' issues are overlooked, they can erode your property settlement, a situation which may not be capable of repair.

Similarly, for the person retaining a property, if it is known that a property is pregnant with unrealised gains, and that the property will be required to be sold in the near future, have those gains and the tax payable on them, estimated, and project the likely sale costs, so that these 'hidden' liabilities are taken into account in the property settlement. This will ensure that one party is not unfairly left responsible for their payment from their share of the property settlement. These considerations are particularly important where the property stands in the sole name of one of the spouses, as there may be no way of securing any contribution from a spouse after a settlement has been executed.

4. Formalise the property settlement, in the form of an Order or Financial Agreement, so as to be eligible for tax relief and stamp duty relief available in family breakdown situations

In many cases the Family Law Act allows for property transfers between spouses to occur without impost of stamp duty provided that the transaction occurs pursuant to the terms of an Order or Agreement (that is, the terms of the transaction appear clearly in the Order or Agreement, and the transaction occurs after that Order or Agreement is effective). Similarly, tax legislation can allow for capital gains to be 'rolled over' (so that no capital gain on which tax will be assessed is crystallised) when the transfer of a jointly owned investment property occurs between spouses (or from a company or corporate trustee of a trust to a spouse), under an Order or Agreement.

These concessions are not available for informal or 'handshake' settlements. These concessions can represent significant savings (or at least the deferral of tax consequences), and can more than justify the cost of engaging a family lawyer to draft the Order or Agreement. It is crucial that the Order or Agreement is carefully drafted so as to be eligible for the concessions, so engage a specialist family lawyer to advise you, and to prepare the settlement documents. Tax and accounting advice specific to the circumstances of your case will also be required. Note that transactions which occur

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