

THE TREATMENT OF PROPERTY THAT IS GONE!

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One of the challenges that often arises between separating couples is the preservation of property.

Property has a wide definition, it is not limited to just real estate.

It is not uncommon (before or after separation) for a spouse to take property. For example, take money out of a bank account, draw down special repayments of a mortgage, run a credit card to its limit, try and sell a house (in their name) or a car, take valuable collections or take pieces of art work, etc. Sometimes, these events happen with the best intentions but quite often – not!

How to preserve property is a topic for another day. This article focuses on how a property settlement is determined when one spouse has independently taken property and the property is gone.

Notional property

As set out in our article [‘Property Settlement’](#) the first step the court takes is to ‘identify and value the property’. Therefore, where an item of property is gone, the court has to come up with a creative way of assessing the “property pool” to minimise any injustice to the other spouse. This missing property is commonly described as “notional property”.

Over the last couple of decades, case law has developed that now enables courts to include notional property that one party has already had the benefit of.

THE 3 CATEGORIES OF ADD-BACKS

The court has identified 3 categories of cases where it will notionally add-back the property.

1. **where parties expended money on legal fees**

The normal approach taken by the court is to notionally “add back” into the property pool any matrimonial money already spent by the parties on legal fees. It should be noted that neither spouses’ outstanding legal fees are included in the ‘property pool’ as a liability.

Recently, the Full Court determined that, in exercising its discretion to add-back notional property, it should have regard to the source of the funds spent on legal fees, in that:

- If the funds used to pay legal fees existed at separation and both parties have an interest in them, then such

- funds should be added back as a notional asset of the party who has had the benefit of them; or
- If the funds have been generated by a party post-separation from his or her own endeavours or a loan, they generally would not be added back as a notional asset or liability in the calculation of the net property of the parties. However, funds generated post-separation from assets or businesses that both parties had made significant contributions to or have legal entitlements in, may need to be looked at differently from other post-separation incomes, or acquisitions.

The treatment of funds used to pay legal costs ultimately remains a matter of discretion for the court.

2. **where there has been a premature distribution of assets**
3. **where one of the spouses has undertaken reckless investments or deliberately set out to diminish the value of the property pool**

Money wasted or spent by one spouse on their own pursuits such as, gambling, the purchase of extravagant gifts or lavish holidays should be added back into the pool of assets. The court has clearly stated its position in such situations, saying:

“Financial losses incurred by the parties or either of them in the course of the marriage whether such losses result from a joint or several (individual) liability, should be shared by them (although not necessarily equally) except when:

1. *one of the parties has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of the matrimonial assets; or*
2. *one of the parties has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value.”*

SUMMARY

- Monies reasonably spent by a spouse in the conduct of their post-separation lives will not usually be added back into the property pool.
- The treatment of funds used to pay legal costs remains ultimately a matter for the discretion of the court, who will have regard to the source of funds.
- Parties should maintain accurate records of the source utilised for the payment of legal fees as the court can only make findings based on evidence.
- The best course is to get Specialist Family Law advice (ideally, prior to separation) on how to preserve property.