



Australian Government  
Attorney-General's Department

# **Property and Financial Agreements and Consent Orders** – What You Need To Know

July 2024

ISBN: 978-1-920838-83-6 (Online)

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This guide was first published in May 2021. The information in this updated version of the guide is current at July 2024.

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# ABOUT THIS GUIDE

This guide provides information about how to negotiate and draft consent orders for property and financial matters. The principles in this guide are also useful for parties who would like to make an agreement about how to split their property, without involving lawyers, or registering their agreement with the courts. The guide is based on the *Family Law Act 1975* (Cth) (the Family Law Act) and associated case law as at July 2024.

The guide steps parties through the options available to them to resolve their property and financial matters. The options available to the parties include:

- an informal agreement between the parties
- entering into a binding financial agreement, or
- filing consent orders with the family courts.

For couples who cannot reach agreement, a fourth option is litigation. An application can be filed in the family law courts for the courts to determine their property and financial matters.

The guide sets out a practical framework to help parties negotiate the content of their informal or legally binding agreements.

The remaining parts of this guide then explore the main focus of this guide: how to draft workable consent orders. A consent order is a court order which sets out what must be done based on an agreement reached by the parties. Property and financial consent orders may cover such things as:

- real property (for example the family home, an investment property or a farm)
- personal property (for example a car, a boat or jewellery)
- superannuation, and
- spousal or partner maintenance.

Almost everything in this guide applies equally to the law in all Australian states and territories, including Western Australia. However, the law in Western Australia is partly based on its own legislation, the *Family Court Act 1997* (WA) (the Family Court Act). In Western Australia the Family Law Act sets out the relevant law for parties who are or were married, while the Family Court Act sets out the relevant law governing property and financial matters relating to de facto couples. To avoid repetition, and given the focus of this guide on property consent orders, this guide often refers to 'the family courts' or 'courts' for statements that apply equally to the processes in the Federal Circuit and Family Court of Australia and to the Family Court of Western Australia.

This guide provides some examples and case studies to assist parties considering how they might resolve their property and financial matters, and the sort of practical matters that may arise. They are examples only and are not intended to be representative of how property of any particular nature should be split. It is up to individuals to make their own decisions based on their specific circumstances, with legal advice as appropriate. The names used in the examples and case studies, and details about assets and monetary figures, do not refer to any actual person, living or dead, or their circumstances.

## ORDERS RELATING TO CHILDREN NOT COVERED IN THIS GUIDE

This guide does not deal with child support, or with consent orders relating to children.

- Information about child support matters is available from Services Australia:
  - o [www.servicesaustralia.gov.au/individuals/child-support](http://www.servicesaustralia.gov.au/individuals/child-support)
- Help in drafting consent orders relating to children, including in relation to parenting arrangements, is available in the Parenting Orders Guide: What You Need to Know, published by the Attorney-General's Department:
  - o [www.ag.gov.au/families-and-marriage/publications/parenting-orders-what-you-need-know](http://www.ag.gov.au/families-and-marriage/publications/parenting-orders-what-you-need-know)

## WHAT IS IN THIS GUIDE

<b>Chapter one</b>	sets out the various options available for reaching a property settlement.
<b>Chapter two</b>	outlines the process for negotiating consent orders or private agreements.
<b>Chapter three</b>	outlines the process for applying for property consent orders in the family courts.
<b>Chapter four</b>	provides some general guidelines for drafting property consent orders.
<b>Chapter five</b>	sets out commentary about, and some examples of, property consent orders.
<b>Appendix one</b>	provides further examples of property consent orders and the types of paragraphs that can be used in orders <sup>1</sup> .
<b>Appendix two</b>	provides a complete example of a property order.
<b>Appendix three</b>	describes the legal framework in relation to property consent orders.
<b>Appendix four</b>	provides additional information about binding financial agreements.
<b>Glossary</b>	explains some legal terms used in this guide.

<sup>1</sup> This guide refers to 'paragraphs' as the former Full Court of the Family Court of Australia has held that an order for property settlement is a single order made up of various paragraphs. However, paragraphs splitting superannuation interests are referred to as orders as this is the language used in the Family Law Act.

## BACKGROUND TO THIS GUIDE

This guide has been prepared by the Attorney-General's Department with substantial assistance and drafting by Professor Richard Chisholm AM, Honorary Professor, Australian National University College of Law. Together, the department and Professor Chisholm would like to express our deep gratitude to the many people who assisted with this project by providing precedents, suggestions and ideas, as well as reviewing drafts.

They include the Hon Garry Watts, former Justice of the Family Court of Australia, who closely collaborated with Professor Chisholm in drafting the guide; Suzanne Christie SC, who kindly reviewed the draft; and Chris Spink and many other registrars of the Family Court who were kind enough to provide examples, read drafts, and generally help the project along. We also acknowledge the contribution of Registrar Dr Christopher Turnbull to this guide, through the material in his submissions to the Australian Law Reform Commission's Review into the Family Law System.

This is intended to be a practical resource to assist separating and separated couples (the parties) to draft property consent orders. The need for such a publication was recognised by the former Chief Justice of the Family Court of Australia, the Hon Diana Bryant QC AO, who invited Professor Chisholm to prepare a guide for property consent orders along the lines of the guide to parenting orders published by the Attorney-General's Department:

**Parenting orders – what you need to know.**

This guide is available online at [www.ag.gov.au](http://www.ag.gov.au).

We hope this guide will also be helpful to people assisting the parties, including legal practitioners, counsellors and mediators. Most of all, we hope that it will help users of this guide to produce clearly written consent orders that assist the parties to resolve their financial relationship in a way that avoids the time, expense and emotional cost of going to the family courts.

# Chapter one: Options for property settlement

This chapter sets out the options for parties to finalise their financial arrangements, through a private agreement reached by the parties, or an order made by the family courts. As outlined above, this guide focuses on consent orders. A more detailed discussion of the legal framework for consent orders is contained in Appendix 3.

## THE FOUR OPTIONS

Parties have four options when splitting their property and finances:

1. **a non-legal (informal) arrangement**
2. **a binding financial agreement**
3. **consent orders, or**
4. **litigation.**

The only one of these which is not enforceable is a non-legal arrangement. Deciding between these options is a matter for the parties, and the best course will depend on what the parties want to achieve and their particular circumstances.

## OPTION ONE: NON-LEGAL (INFORMAL) ARRANGEMENTS

The first option is for the parties to reach an agreement without taking any legal steps to put this into effect.

For example, the parties can sell their property and divide the proceeds, arrange for one party to pay regular support to the other, and so on, without making any application to the family courts or entering into a legal agreement. This approach means that the parties do not have to take any formal or legal steps, and avoids any delays and costs that might be involved with those steps.

This process will work well for people whose separation is amicable and who are confident that they will maintain a constructive relationship. However, the parties need to be aware that either party still has the right to go to the family courts at a later time and ask for financial orders to be made under the Family Law Act (relating to property division, spousal maintenance and/or superannuation splitting). Time limits apply to applications to the family courts and where parties are out of time an application for leave of the family courts may be required. These orders would be legally binding and displace any informal decisions made between the parties.

Not having any legal arrangement in place might not provide the certainty and finality that some parties want. If the parties decide to take this approach, there may also be tax and stamp duty implications. For example, section 90 of the Family Law Act and relevant provisions of state and territory law provide relief from stamp duty for transfers of property pursuant to property or financial orders made under that Act. If there is no order because the couple has reached an informal agreement this entitlement for stamp duty relief may not be available.



# Chapter one

## Case study:

*Pamela and Jim are separating after 20 years of marriage. Jim earns \$150,000 a year and Pamela earns around \$50,000 a year. Pamela and Jim have two adult children who are dependent on their parents to support them financially while they are at university. Pamela and Jim's property pool includes the family home and an investment property, which both have a mortgage. Jim has \$500,000 in superannuation and Pamela has \$100,000 in superannuation.*

*Pamela and Jim have agreed that they do not need to go through the family courts to settle their divorce. They have agreed that they will each keep their superannuation and Pamela will keep the family home and not seek spousal maintenance from Jim. They have both agreed that the investment property will be sold and the profit will be used to pay off the remaining mortgage on the family home. Jim and Pamela will equitably split any leftover profit from the sale of the investment property.*

*Pamela and Jim decide to settle the financial matters between themselves, rather than seeking court orders, avoiding legal technicality, cost and delay. They have been advised by lawyers that it might be open to either of them to apply to the family courts for property orders in the future, but they think this is unlikely in all the circumstances.*

## OPTION TWO: BINDING FINANCIAL AGREEMENTS

The second option is to make a binding financial agreement.

Binding financial agreements can be entered into at any time before, during or after a marriage or de facto relationship. A binding financial agreement made before the parties marry is sometimes known as a pre-nuptial agreement. The difference between this option and a simple contract between the parties is that a binding financial agreement has a measure of finality—as well as being enforceable, it will generally prevent either party from seeking a different outcome by commencing property proceedings in the family courts. It also has the general effect of preventing the family courts from making different orders, because binding financial agreements 'oust' (that is exclude) the jurisdiction of the family courts. However, binding financial agreements are not as final as consent orders (which are discussed below) as there are some circumstances in which they can be set aside by the family courts and different orders can be made. For example, the family courts can set aside an agreement that was 'unconscionable' or was entered into fraudulently. Parties seeking a greater measure of finality may prefer to apply to the family courts for consent orders.

Before the parties can enter into a binding financial agreement, they must each obtain independent legal advice. There are also a number of other requirements which must be met, which the parties should discuss with their lawyer. Some additional information about binding financial agreements is contained in Appendix 4.

## Case study:

*Anjali and Vihaan have been married for seven years. Anjali earns \$100,000 a year. Vihaan is self-employed and earns around \$65,000 per year. They have two children, aged eight and six. Their family home is worth \$550,000 with a \$200,000 mortgage.*

*Anjali provided a \$100,000 deposit towards the purchase of the family home from funds she had saved before she met Vihaan. Anjali has \$120,000 in superannuation and Vihaan has \$100,000 in superannuation. They also have a family car worth \$40,000, which Vihaan uses primarily for business purposes between Monday and Friday.*

*Anjali and Vihaan have agreed that they will sell their family home. In reaching agreement about how to equitably split the profits Anjali and Vihaan take into consideration the contribution Anjali made by providing the deposit, and other issues including the care arrangements they agree upon for their children. Anjali and Vihaan are also able to reach an agreement about who will retain the family car.*

*Anjali and Vihaan split amicably and do not want to go through the family courts, but they do want to settle their financial affairs in a more formal way once and for all. They have both sought independent legal advice about whether a binding financial agreement could be used to settle their property arrangements. Their lawyers have drafted a binding financial agreement which reflects their agreed division of assets. They have decided to use this method rather than apply to the family courts for consent orders, although they understand that circumstances could arise in the future that might enable the family courts to set the agreement aside if one of them applied for it to do so.*

## OPTION THREE: CONSENT ORDERS

The third option, **which is the focus of this guide**, is applying for consent orders.

A consent order is a court order made with the consent of the parties. Consent orders are made by a registrar without any court hearing, and are enforceable in exactly the same way as if the orders had been made by a judge. Signing draft consent orders means the parties agree with the orders and will comply with them. Consent orders will be final, although in limited circumstances the family courts do have power to set them aside and make new orders.

If the parties wish to make consent orders, it is their responsibility to prepare the consent orders they want and provide the necessary information to the family courts. This may take some time and may require legal or financial advice in some cases. A complete example of a consent order is provided in Appendix 2. Additional information about the legal framework for consent orders is contained in Appendix 3.

## Case study:

*Henry and Collette have been in a relationship for 12 years at the time of their separation. Collette earns \$90,000 per year. Henry is a farmer and his earnings from the farm vary between \$50,000 and \$150,000 per year. The farm, which is in a family trust, is worth \$10.2 million, and includes the house that Henry and Collette live in. Henry is a beneficiary of the trust, along with his mother, father and brother. The trust is managed by a company of which Henry is a director. The family trust owns Henry's car and Collette's car. Henry and Collette also have an investment property worth \$525,000 (with a \$400,000 mortgage). Henry has \$250,000 in superannuation and Collette has \$150,000 in superannuation. Henry is worried that the family trust will be included as part of the property pool with Collette. Henry receives legal advice that because he does not control the family trust and is not the sole beneficiary, it is unlikely that the family trust will form part of the property pool. However, Henry's future entitlement from the trust is likely to be taken into consideration in determining a fair property split. Henry's income from the farm will also form part of the property pool.*

*With their respective lawyers' assistance, Henry and Collette agree to equitably settle their financial affairs. They will each retain their superannuation, and will sell their investment property, with Henry and Collette each receiving a share of the proceeds. The family trust will transfer ownership of Collette's car to her.*

*They are eager to settle their issues once and for all in a formal legal manner, even if that involves some cost, effort and time. Henry's lawyer drafts consent orders outlining the agreed outcomes, and Collette, after receiving separate legal advice, agrees to the draft consent orders. They file the consent orders in the Federal Circuit and Family Court of Australia and split their property in accordance with the orders.*

## OPTION FOUR: LITIGATION

Litigation means that the family courts will determine how the parties' property and finances will be split post separation. While the family courts can take into account the parties' preferences when making orders, by law the family courts cannot make the order unless they consider it to be just and equitable. Litigation may be a necessary pathway in some circumstances, but parties should consider the following issues before pursuing litigation:

- the financial and emotional burden of litigation: litigation can be costly and is very likely to negatively impact the parties' parental relationship and relationships among family members more broadly
- litigation can be time consuming: parties may be required to take periods of time out of work, and/or from the care of children, to attend court hearings.

This guide focuses on more cooperative approaches to settling property claims on separation and specifically on consent orders. If parties wish to explore litigation as a potential avenue to settle their financial arrangements, they should seek independent legal advice<sup>2</sup>.

<sup>2</sup> For information about short-form (simpler) hearings for matters involving a property pool that has a small net value see: [www.fcftca.gov.au/fl/ppp](http://www.fcftca.gov.au/fl/ppp) or for parties in Western Australia, see [https://www.familycourt.wa.gov.au/P/ppp500\\_cases.aspx](https://www.familycourt.wa.gov.au/P/ppp500_cases.aspx).

## WHICH OPTION SHOULD I CHOOSE?

It is a matter for each party to work out which option is most appropriate for their circumstances. Deciding which option to choose is an important question. Sometimes each party will favour a different option, in which case it may be difficult for them to reach an agreed outcome. It is up to individuals to make their own decisions based on their circumstances. It may be advisable to seek legal advice, even if in the end the decision is to choose an informal settlement as outlined in option 1 below.

In general terms, the main advantages and disadvantages of each option are:

- **Option 1, non-legal (informal) arrangement.** This is the cheapest and quickest option. Its main disadvantage is that, even if the parties initially intend for it to be a final agreement, it could be changed by the family courts if either party subsequently decided to exercise their right to apply for court orders.
- **Option 2, enter into a binding financial agreement.** That there is no court process may be seen as an advantage, although each party is still required to obtain independent legal advice about the nature and consequences of the proposed arrangements. The possibility of the agreement being set aside by the family courts in the future means that this option is not as final as some might wish.
- **Option 3, consent orders.** This has the advantage that the orders will have the maximum possible finality, are lodged with the family courts, and are enforceable by the courts. The parties will need to provide detailed information, and are likely to need legal advice in connection with the application to lodge them with the family courts. This process will involve some time and costs for the parties, and enforcement proceedings can be slow and expensive if a party does not comply.
- **Option 4, litigation.** This is, in effect, a 'last resort' option for parties who are unable to reach an agreed property and financial split in private negotiations, or with the assistance of a lawyer or mediator. While it provides an outcome which is final and enforceable by the family courts, litigation is the most expensive option available to parties and is usually a time-consuming process.

## FAMILY VIOLENCE AND PROPERTY AND FINANCIAL MATTERS

Family violence is a relevant consideration in determining which option is most appropriate. The definition of family violence in the Family Law Act is very broad, and means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family, or causes the family member to be fearful. It is also sometimes referred to as 'domestic violence'. For illustrative examples of behaviour that would be considered family violence, see 'family violence' in the Glossary. Family violence is a serious problem and issues relating to it often arise when families separate. In such situations, it is important to get legal advice.

In addition, 1800RESPECT provides a confidential and professional counselling, information and referral service that is available 24 hours a day, 7 days a week.

## Chapter two: Negotiating property consent orders

This chapter explains the process for negotiating property consent orders. It is also relevant (in large part) for negotiating non-legal arrangements between parties. When negotiating a consent order, it is important that parties think about what will be a 'just and equitable', or a 'fair' outcome overall.

Parties can structure their negotiations in the following way to achieve a fair outcome:

1. Identify and value all property at the date of making the agreement or filing the consent order:
  - this means working out what assets each party has individually and jointly, and what debts each party has individually and jointly.
2. Determine the contributions by the parties to the relationship, including:
  - direct and indirect financial contributions to the property of the parties, such as contributing wage and salary earnings or gifts and inheritances from family
  - direct non-financial contributions to the property of the parties, such as building the home; and indirect non-financial contributions such as unpaid support of a family business, and
  - homemaker and caregiver contributions, such as caring for children.
3. Once the parties have agreed on their contributions, allocate an overall percentage entitlement to each party for those contributions (the percentages when added together should equal 100%).
4. Look at the future requirements of the parties (known as the 'section 75(2) factors'). Section 75(2) of the Family Law Act lists a range of factors relevant to considering the future requirements of the parties. Some of these include:
  - the age and health of the parties
  - the financial and property resources of the parties (what is the current income and earning capacity of the parties)
  - who will have primary or the majority of caring responsibilities for any dependents or children of the relationship
  - commitments of each of the parties necessary to enable the party to support him/herself and their children
  - responsibilities of either party to support any other person
  - pension/benefit eligibility
  - a standard of living that is reasonable in the circumstances
  - the duration of the relationship and how it has affected the earning capacity of both parties
  - the ability of the parties to earn or gain employment which will support them financially
  - the extent to which maintenance would assist a party increase their earning capacity, for example, through undertaking education or training
  - the financial circumstances of a person with whom a party is cohabitating
  - the amount of child support payable by each of the parties
  - the terms of any specified court orders or financial agreements
  - any relevant fact or circumstance.

5. Taking into consideration the factors listed in step 4, parties may need to readjust the percentage they came to in step 3. This will be the final overall percentage split for the parties' property and finances.

To ensure parties arrive at a fair property split, it is critical, and a requirement under the court rules, that both parties fully disclose all their property and income (including individual savings accounts, profits from the sale of assets and income derived from shares or other paid employment) and any debts or loans they have during this process. There are consequences for failing to provide full disclosure and the family courts have discretion to vary the order, set the order aside and make another order.

## Case study:

*Drago and Constance are separating. They have been together for 15 years and married for eight years. Drago works full time and earns \$87,000 a year. Constance works part-time and earns \$68,000 a year. They have two children aged six and four. Using the negotiation guide they arrived at the following negotiated property settlement and will seek a property consent order from the family courts:*

### *Identifying their assets and debts*

<b>Item</b>	<b>Owner</b>	<b>Asset (market value)</b>	<b>Liability</b>	<b>Net</b>
Family home	Joint	Valued by the bank at \$670,000	\$250,000 mortgage	\$420,000
Subaru Forester	Joint	\$24,000	\$12,000 loan	\$12,000
Holden Commodore	Joint	\$8,000	Nil	\$8,000
Furniture	Joint	\$25,000	Nil	\$25,000
Superannuation	Drago	\$300,000	Nil	\$300,000
	Constance	\$120,000	Nil	\$120,000
Savings account	Joint	\$15,000	Nil	\$15,000
	Drago	\$20,000	Nil	\$20,000
Wesfarmers shares	Joint	\$10,000	Nil	\$10,000
Boat	Drago	\$5,000	Nil	\$5,000
Credit cards	Joint	Nil	\$8,000	(\$8,000)
Transaction account	Joint	\$1,200	\$500 overdraft	\$700

**Identifying their contributions:**

*Both Drago and Constance have worked throughout the duration of their relationship. Since having children, Constance has worked part-time so that she can care for the children two days a week. She is also responsible for taking the children to and from day care and school. While Drago and Constance try to share caring responsibilities for the children after work, Drago travels a lot for work, so Constance is often solely responsible for the care of the children. They also both acknowledge that Constance's ability to earn superannuation was limited by extended periods of maternity leave and the fact that she has been working part-time. On the basis of Constance having the majority of child care responsibilities, she and Drago have agreed that the property should be split with an adjustment in Constance's favour.*

**Considering the section 75(2) factors:**

*Drago and Constance are both in their late 30s and are likely to be able to work until retirement. They agree that the children should live at each of their houses and acknowledge that Constance will likely have significantly more caring responsibilities than Drago. This will impact Constance's ongoing ability to work full time. Taking this into account they agree that the property split should be readjusted to reflect Constance's lost potential earnings.*

# Chapter three: Applying for property consent orders in the family courts

This chapter explains the process for applying to the family courts for property consent orders once separating partners have reached an agreement about their financial circumstances. The parties may need to obtain legal advice and/or financial advice during the process of reaching this agreement, to ensure they are informed about their legal entitlements.

Another option available to parties is to use 'amica', an online dispute resolution tool, that supports separating couples to negotiate and reach agreement about parenting and property issues, via a secure online platform. The tool creates a suggested division of assets which, once agreed, can be formalised in a property agreement or via an application to the family courts for consent orders. For more information, visit <[www.amica.gov.au](http://www.amica.gov.au)>.

The family courts allow people to apply for consent orders without having to attend court. The process involves making a written application to the family courts, setting out the orders that the parties want, and providing the information the family courts need to be able to make the orders. The written application is dealt with by a registrar. Registrars have the power to make the orders if they are satisfied that it is right to do so. While it is possible for registrars to refer matters to a judge, usually registrars either make the orders as requested, or write to the parties if they need more information.

## WHAT IS PROPERTY?

The parties' property interests may include cash, shares, real property (land, houses, or other buildings) and personal property (jewellery, furniture, cars etc). It also includes debts owed to other parties, along with superannuation and interests in businesses and trusts, and includes property located in Australia or overseas.

## REQUIREMENTS

There are a number of threshold requirements that must be met before parties can obtain property consent orders from the family courts. These include the following:

- An application for consent orders must be made within 12 months of a divorce or two years of the breakdown of a de facto relationship (leave of the court will be required to file for consent orders beyond this timeframe).
- For de facto couples the family courts must be satisfied that the parties were in a de facto relationship for at least two years, or there was/is a child of the de facto relationship.
- One of the parties to the relationship must be living in Australia or have a significant connection to Australia. A significant connection to Australia may include children who are living in Australia.

## DISCLOSURE

Parties have a duty to provide full information - 'disclosure' - about their income and assets. A failure to give full and frank disclosure has serious consequences. These consequences may include:

- any consent orders being set aside
- the family courts adjusting a property settlement in favour of the party who has provided full disclosure
- having to pay the other party's legal costs
- being fined, and
- being charged with contempt of court (which can result in imprisonment).



# Chapter three

Part H of the **Federal Circuit and Family Court of Australia – Application for Consent Orders (do it yourself kit)** and Part G of the **Family Court of Western Australia – Application for Consent Orders (Form 11)** are useful templates to use to ensure that parties cover all the relevant points that should be disclosed (see below).

## CONSENT ORDER RESOURCES AND FORMS AVAILABLE FROM THE FAMILY COURTS

Both the Federal Circuit and Family Court of Australia and the Family Court of Western Australia have developed resources to assist people to apply for consent orders with the family courts.

- **Federal Circuit and Family Court of Australia – Application for Consent Orders (do it yourself kit):**
  - o <https://www.fccoa.gov.au/fl/forms/app-consent-kit>
- **Family Court of Western Australia – Applying for consent orders Kit:**
  - o [https://www.familycourt.wa.gov.au/A/application\\_consent\\_orders.aspx](https://www.familycourt.wa.gov.au/A/application_consent_orders.aspx)

Both websites contain detailed instructions on what is necessary to obtain consent orders. This guide provides additional information and guidance in relation to drafting consent orders.

## WHY ARE THE REQUIREMENTS SO DETAILED?

The law does not allow the family courts to make property orders purely on the basis that it is what the parties want. Before making a property order, even where the parties agree, the family courts have to be satisfied that the order is fair. What is fair will depend on the circumstances of each family.

The Family Law Act sets out in some detail what the family courts must take into account in making property orders, to ensure that in all circumstances the orders are fair (the term used in the Family Law Act is 'just and equitable'). These considerations include:

- the contributions that each party has made to the relationship, including:
  - o direct and indirect financial contributions (for example, property brought into the relationship, money earned during the relationship, gifts and inheritances from families etc)
  - o non-financial contributions (such as contributions made to the welfare of the family and contributions as a homemaker and a parent, and other contributions such as the conservation or improvement of the family home), and
- the future requirements and resources of each party. Relevant matters include:
  - o the care of children living with a party
  - o the age and health of the parties
  - o the income, property and financial resources of each party, and the capacity of each of them to be in paid employment
  - o commitments of each of the parties that are necessary to support themselves
  - o the responsibilities each party has to support a child or another person they have a duty to maintain
  - o the duration of the relationship and the extent to which it has affected the earning capacity of both parties.

The family courts are also required to take into account the effect of any proposed order on the earning capacity of each party, other orders made under the Family Law Act affecting a party or a child of the relationship, and any child support that is payable for that child.

Similar requirements apply to orders for spousal or partner maintenance, in which case the family courts must determine that the order is fair in all the circumstances.

While not expressly referred to in the provisions of the Family Law Act that deal with property orders, impacts of family violence can be relevant. It is important to seek legal advice in such situations.

## TIPS FOR COMPLETING THE COURT FORMS

Taking the time and effort to ensure the court forms are completed correctly is a good way to enable the registrar to make the parties' proposed consent orders. Many applications for consent orders are unsuccessful simply because the information required has not been provided. At the beginning of court forms there is a checklist of information that needs to be provided. Before submitting a consent order application to the family courts, the parties should go through the relevant checklist and ensure that all the relevant material has been provided. Where the forms require documents to be provided, they should be included.

It is also useful to look at the checklist before filling out the forms. This is because some of the information, such as the value of a superannuation interest, may require the parties to make enquiries with other people or businesses. Making these enquiries before starting the forms will ensure all relevant information is available.

In some cases, the outcome of the consent orders may appear to be unfair to one party. It is a good idea for the parties to think about whether the registrar can be satisfied that the order is fair based on the application and the information they have provided. If there is some fact that explains why the property has been distributed in a way that appears to favour one party over the other, this should be explained in the application, so the registrar can be satisfied that the proposed orders are fair.

## THE PROPOSED ORDERS SHOULD NOT OVERLAP WITH AN EXISTING BINDING FINANCIAL AGREEMENT

Consent orders cannot deal with the same subject matter as a binding financial agreement. If there is a binding financial agreement, it must be attached to the application for consent orders, so the registrar can be satisfied that it deals with different subject matter.

## THE PROPOSED ORDERS SHOULD NOT INVOLVE THIRD PARTIES WHO ARE NOT PARTIES TO THE APPLICATION

Consent orders cannot be made if they create obligations on third parties who are not parties to the application. For example, a third party may be a family member who is a guarantor for the mortgaged property of a party. If it is necessary to involve third parties, they need to be parties to the application, so that the registrar can see that the orders have been agreed to by all the parties to the proceedings. Where third parties are involved, legal assistance in preparing the application for consent orders is recommended.

## THE PROPOSED ORDERS CANNOT INCLUDE CHILD SUPPORT

Child support should not be included in an application for consent orders. Child support is covered by the *Child Support (Assessment) Act 1989* (Cth) and *Child Support (Registration and Collection) Act 1988* (Cth) and handled by Services Australia. The Federal Circuit and Family Court of Australia may consider child support proceedings only in limited circumstances. Parties who wish to seek an order which deals with child support will need to make an application to the Federal Circuit and Family Court of Australia. Further information on this process can be found on the Federal Circuit and Family Court of Australia’s website: [www.fcfoa.gov.au/fl/pd/fam-childsupport](http://www.fcfoa.gov.au/fl/pd/fam-childsupport)

## IF REQUIRED – SPECIFY THE DIVISION OF PROPERTY

The kit for the Federal Circuit and Family Court of Australia requires the parties to indicate the proposed division of their property as a percentage figure. It is important that any percentage division corresponds to the property pool available to the parties and is an accurate representation of the division. This guide provides some suggested methods for arriving at a property division, which can help the parties work out a property division.

## SUPERANNUATION

Parties who were married, or were in a de facto relationship, are able to split their superannuation interests as part of their property settlement.<sup>3</sup> If the proposed consent orders include a superannuation splitting order, parties must declare within the consent orders application that the trustee of the superannuation fund has been notified and has not objected to the splitting of the superannuation account(s). This is part of affording the trustee procedural fairness. In other words, the superannuation trustee must be provided an opportunity to be heard, to ensure they are able to comply with the orders.<sup>4</sup> For example, if the proposed orders specified a splitting amount that was higher than the actual superannuation balance, or if the proposed orders refer to the name of the trustee incorrectly, the trustee would not be able to comply.

Each party must share information about their superannuation interests as part of their duty of disclosure. Parties who are considering splitting their superannuation should fill out and lodge the *Superannuation Information Kit* forms with the superannuation trustee(s). This includes a form used to request information to work out the value of the superannuation interest. The superannuation kits for the family courts can be accessed through the following links:

- **Federal Circuit and Family Court of Australia:**
  - o [www.fcfoa.gov.au/fl/forms/superannuation-kit](http://www.fcfoa.gov.au/fl/forms/superannuation-kit)
- **Family Court of Western Australia:**
  - o [https://www.familycourt.wa.gov.au/\\_files/Information\\_Kits\\_Brochures/Kit\\_Superannuation.pdf](https://www.familycourt.wa.gov.au/_files/Information_Kits_Brochures/Kit_Superannuation.pdf)

<sup>3</sup> The *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020* commenced on 22 September 2022, and as of that date, de facto couples in Western Australia are able to split their superannuation.

<sup>4</sup> It is a legal requirement that a party must send the proposed superannuation splitting orders to the trustee at least 28 days before filing for consent orders with the court.

If you are party to a current proceeding seeking financial or property orders in the family courts, and are not sure which fund/s you need valuations from, you or your legal representative can apply to the family courts to request the other party's superannuation information from the Australian Taxation Office (ATO). The ATO will provide this information to the family courts, which will then provide it to all parties.

Appendix 1 provides further information about superannuation splitting.

## FILING REQUIREMENTS

As part of the legal process, the parties must sign each page of the draft consent orders. The last page must be dated the same day that the parties sign their 'Statement of Truth' – which is an attachment to the application where each party confirms they have disclosed all their property and financial interests. It is also important that the parties are aware of the requirements for filing with the family courts.

As a general rule the parties will need to file:

- Application for consent orders
- Proposed consent orders
- If seeking parenting orders – Notice of child abuse, family violence, or risk
- If seeking superannuation orders – proof of value (for accumulation interests, this will usually be the latest member statement. For other types of superannuation interests, if the Family Law (Superannuation) Regulations provide a method for calculating the value then a valuation must be undertaken using that method)
- A copy of the orders if the application seeks to vary or discharge an existing order, and
- A de facto registration certificate (if applicable).

An Application for Consent Orders filed with the Federal Circuit and Family Court of Australia should be filed electronically on the Commonwealth Courts Portal by uploading the form, or if you are unable to eFile, by filing at a court registry. If filing in a court registry, it may be a good idea for the parties to deliver the documents to the court personally so that, where possible, any problems with the paperwork can be dealt with at that same time. The parties should also ensure they have the appropriate filing fee for the court. Information on the current filing fees is available from each of the family courts and the following links:

- **Federal Circuit and Family Court of Australia:**
  - o <https://www.fcfcoa.gov.au/fl/fees/fl-fees>
- **Family Court of Western Australia:**
  - o <https://www.familycourt.wa.gov.au/F/fees.aspx>

## OTHER ISSUES TO CONSIDER

Parties who have trouble completing the forms, or drafting the orders they need, may need legal advice. It may also be wise to seek independent financial advice and valuations of the property dealt within the orders. This is because the value of particular items of property can be relevant to assessing whether the orders would be considered fair under the circumstances.

Another matter that may require care in some cases is the taxation consequences of the orders.

## Chapter four: General guidance on drafting property orders

### EXAMPLE SCENARIO

Mike and Martha have separated after ten years of marriage. The family home, in their joint names, is their most significant asset. It is mortgaged to the XY Bank in the amount of \$350,000. The home is also security for a personal loan from the AB Bank, on which they owe \$15,000. The parties agree to resolve their affairs as follows. Martha is to retain the home and its contents, and pay Mike \$X,000. She will also pay off the mortgage and the personal loan. Neither will pay maintenance to the other.

### EXAMPLE ORDER – MIKE AND MARTHA

It is ordered by consent and with the intention of finally determining all claims each party may have against the other relating to property adjustment and spouse maintenance, and as far as possible finalising their financial relationship and avoiding further proceedings between them:

1. That Martha pay to Mike by way of settlement the sum of X thousand dollars (\$X,000) within twenty one (21) days of this order; such payment to be made by bank cheque payable to <Mike's full name>, and that contemporaneously with the payment Martha discharge the existing mortgage on the property of 21 Railway Cuttings, Townsville ('the formerly jointly owned home') being an amount of an estimated three hundred and fifty thousand dollars (E\$350,000) as well as the personal loan to the AB bank being an amount of an estimated fifteen thousand dollars (E\$15,000).
2. That at the same time that Martha is complying with Paragraph 1 (above), Mike do all acts and things and execute all deeds, documents, instruments and writings necessary to procure the transfer to Martha, all his right title and interest in:
  - (a) the property known as 21 Railway Cuttings, Townsville, being Lot 2345 of DP 6789 and being the whole of the land in Certificate of Title Folio Identifier 1234567 in the State of Queensland ('the formerly jointly owned home');
  - (b) the furniture goods and personal effects within the formerly jointly owned home at the date of this order.
3. That subject to Paragraphs 1 and 2 the parties each retain for their own absolute use and benefit and as their own property:
  - (a) the items of personal property presently in their respective possession; and
  - (b) all other property or assets including funds, interests, shares and partnerships currently held in their respective names.

### GENERAL GUIDELINES FOR DRAFTING PROPERTY ORDERS

We can use the above example of Mike and Martha as a basis to make some initial points about property orders and provide some general guidance.

## THE ORDER SHOULD HAVE A CLEAR STRUCTURE

It is generally a good idea to set out orders in numbered paragraphs, rather than dot points, and under headings. This helps identify each part of the order, and makes it easier to identify each party's obligations<sup>5</sup>.

## THE ORDER SHOULD USE SIMPLE LANGUAGE

Consent orders should be expressed as clearly and simply as possible, using everyday language. Unnecessarily complex language should be avoided. At the same time, the wording of the order needs to be clear and legally sound.

Consider the language in the example of Mike and Martha.

In paragraph 2, the words *'do all acts and things and execute all deeds documents instruments and writings necessary'* could be replaced by the words *'do everything necessary'*, and the order would have exactly the same meaning. This longer form of words is an example of legalistic writing. Similarly, *'right title and interest'* could be replaced by the simple word *'interest'* without changing the meaning.

Finally, consider the words in paragraph 3 (*'retain for their own absolute use and benefit and as their own property'*). Paragraph 3 would probably not lose anything by omitting the words after *'retain'*. However, a cautious drafter might want to prevent anyone thinking that the clause meant only that the parties were to have the use of the property, but not to own it. Such caution is probably unnecessary, because the order as a whole, especially the statement of intention, makes such an interpretation unlikely.

In general, the choice of language is a matter of taste, so long as the meaning is clear. The best approach is to use simple language where possible. Use technical legal language where there is a risk that a simpler term would be misunderstood. Sometimes, it is necessary to use technical language because the law requires it, as can be seen in some examples later in this guide involving superannuation.

## IDENTIFYING PARTIES AND ITEMS

Orders often refer to the parties as 'the husband' or 'the wife', or 'the applicant' or 'the respondent'. The order will be equally effective if it refers to the parties by name, as in the earlier example of Mike and Martha.

It is also important to specify items of property such as bank accounts, as this example does.

Notice that in relation to the loans, the orders give an estimate of the amount (for example 'E\$350,000'). In the example of Mike and Martha, only an estimate can be given, because at the time of the orders the parties will not know the exact amount payable. Mentioning the estimated amount is not strictly necessary, but may be significant. If the amounts turned out to be very different from the estimates, it might be easier for a party to argue later on that they did not understand the situation, or were misled about it, and that might be relevant if the family courts were considering a party's application to have the financial settlement re-opened.

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<sup>5</sup> This guide refers to 'paragraphs' as the former Full Court of the Family Court of Australia has held that an order for property settlement is a single order made up of various paragraphs. However, paragraphs splitting superannuation interests are referred to as orders as this is the language used in the Family Law Act.

It is important to consider how parties and items are referred to throughout the order. Below are some helpful notes and tips for referring to things briefly, identifying money and identifying third parties.

## HOW TO REFER TO THINGS BRIEFLY

The orders will need to identify individuals as well as bank accounts, items of property, and various other items. There is a well-accepted technique for doing this: set out the full name once, and indicate a short name for it, and then use the short name for the rest of the document.

For example, orders should normally identify a piece of real estate by first setting out the land title details. This only needs to be done once and from then on it can be called, say, 'the former home'. If there are several properties, they can be given convenient short names, such as 'the investment unit', or 'the Queensland property'. Similarly, bank accounts, superannuation interests and share portfolios can be described in full and then given short names ('the ANZ account', 'the joint share portfolio', etc). As long as the first description is detailed so that the item can be identified, the short names can be whatever the parties choose. If those short names are used consistently, the order will be easy to read and understand. Again, there are many examples provided throughout this guide.

One approach to setting out identifying names is to group all the definitions or long names together at the beginning, under a heading such as 'Definitions' or 'Dictionary'. This can be useful in complex matters, where there are many terms that need to be defined. But where there are only a few items of property, many lawyers prefer to include the definitions in the body of the document, as in the above example of Mike and Martha.

## EXPRESSING MONEY

In the example of Mike and Martha, monetary amounts are set out in both words and figures. While this is not strictly necessary, it can avoid problems that might arise if there were a typo in the number, such as an extra or missing '0'. Setting monetary amounts out in that manner means there will be less risk of confusion later on and the amounts can be relied on if either party disputes the orders.

## THIRD PARTIES

Carrying out financial orders sometimes requires other people (third parties) to do things. For example, selling a piece of real estate normally requires a transfer to be made and registered in the state or territory Land Titles Office. Sometimes, transactions giving effect to property orders involve questions of stamp duty and orders involving superannuation may require the trustee of a fund to take an action.

The requirements and preferences of third parties may vary from one state and territory to another and from one superannuation fund to another. To avoid problems, it is a good idea to check with third parties and ensure that the wording of the consent orders is satisfactory to them, so they are willing and able to put the orders into effect.

It is also important to check the names and titles of any individuals or bodies that are to play some part in carrying out the orders. For example, the orders might include a paragraph that, in the absence of agreement, the real estate agent is to be a person nominated by the president of the relevant real estate agents' organisation. If so, it would be sensible to make sure that the orders refer to the person and the organisation correctly and that the person would be willing to do what is required.

## THE ORDER SHOULD SPECIFY WHO HAS TO DO WHAT, AND WHEN

Many paragraphs of a property order require the parties to do things, for example to pay money, sign documents or transfer property. These paragraphs should be written so that it is clear who is required to take an action and exactly what action they need to take. It should also be clear as to *when* the parties are obliged to take the action.

It is important to avoid statements that do not explain what obligations each party has. Even if the answer seems obvious, it is always best to spell out the obligation. For example, a statement such as *'the property is to be sold'* does not specify what each party has to do. Instead, the order might say that *'Party A must sell the property'*. Appendix 1 provides a number of examples.

The example of Mike and Martha clearly sets out the obligations of each party. For example, paragraph 1 specifies the time and the manner in which Martha is to make the payment of \$X,000 to Mike.

There are different ways of expressing the parties' obligations to do things. Suppose paragraph 1 says that the parties are obliged to have a property sold in the manner set out in paragraph 2. Paragraph 2 could then say that certain things are to happen. It would be clear that paragraph 1 requires each party to do what is necessary to have the property sold in the manner set out in paragraph 2. This technique is illustrated in the example order in Appendix 2.

The words *'Party A must sell the property'* constitute a good start in establishing an obligation, but need to be made more specific to deal with questions like:

- When is the sale to happen?
- What happens if the parties disagree about how to organise the sale, or what offer should be accepted?
- Is the sale to be by auction?
- Is Party A also required to discharge the mortgage?

This guide provides a number of examples which deal with such questions. While it is not possible to anticipate every possible problem, well-drafted orders can avoid many of the more common problems.



## EXPRESSING THE PARTIES' OBLIGATIONS

Orders can express the parties' obligations to do things in a variety of ways. Consider these:

- *Mike must...*
- *Martha shall...*
- *Mike is to...*
- *Mike is ordered to...*
- *Martha is required to...*
- *The court orders that Martha...*

Each of these satisfactorily imposes an obligation on the party, and each form of words would be equally effective. Choosing between the different ways of stating a person's obligation is a matter of style and taste. In general, it is wise to use the same wording throughout the order or set of orders. If the wording changes, for example if one paragraph says a party 'must' do something and another paragraph says a party 'is to' do something else, the reader might wonder whether there is some reason for using different terms in the different paragraphs or orders.

## THE ORDER SHOULD STATE AN INTENTION TO RESOLVE FINANCIAL AFFAIRS

It is important to know whether an order, especially a property order, is intended to be a final resolution of the financial affairs of the parties, or only a temporary resolution, or a resolution of issues relating to some but not all of the property.

Consider the opening words in the example of Mike and Martha:

*with the intention of ... and as far as possible finalising their financial relationship and avoiding further proceedings between them.*

This sentence indicates that this is a final property order. Because of these words, except in limited circumstances it would not be possible for either party to go back to the family courts later and ask for a different outcome. Such statements are not themselves legally binding orders and they do not impose obligations on the parties. However, they can be used to assist in the later interpretation of the orders.

Such statements need not be at the beginning of the order. It would be equally effective to state the intention elsewhere, such as including the following sentence at or near the end:

*The parties agree that this order is made with the intention of finally determining, as far as is legally possible, the financial relationship between the parties and avoiding further proceedings between them.*

Suppose that in the Mike and Martha example Mike inherits a valuable property after the consent orders have been made. In the absence of any statement or indication to the contrary, Martha might argue that the order was not intended to deal with that property and that she can make a further claim. However, if the order included a statement such as that above, the family courts would be more likely to treat the orders as preventing her from making such a claim.

Notice that the last example includes the words 'as far as is legally possible'. There are some circumstances, such as where one party deceives the other about their assets, in which the family courts might allow an application to re-open the matter even if the parties expressed an intention to settle their affairs finally. While the words 'as far as legally possible' might be useful in reminding the parties of this possibility, they would not have any legal effect; the possibility that a settlement would be re-opened would depend on whether the circumstances make it appropriate for the family courts to re-open the settlement.

In considering the wording of a statement that the order is to be a final settlement, the question of maintenance should not be overlooked. Ideally, a statement in the order will make it clear whether it is intended that the order deals finally with any maintenance claims as well as dealing with the property adjustment. This is done in the example of Mike and Martha. However, suppose the statement had been as follows:

*That in full and final settlement of any claim that either party may have against the other at any time for settlement of property it is ordered...*

In that case, it may be open to one of the parties to go back to the family courts and claim maintenance, since the order does not indicate an intention to finally settle all financial matters, but only claims for 'settlement of property'.

## IN BRIEF – HOW ORDERS WORK

It can be helpful to think in terms of 'core' or substantive paragraphs on one hand, and 'machinery' paragraphs on the other. The core paragraphs set out what the orders are to achieve. The machinery paragraphs deal with matters necessary to make it happen. Another way of putting it is to say that the core paragraphs create rights in the parties, and the machinery paragraphs set out ways of giving effect to those rights.

To give effect to the core orders, property orders will commonly include machinery paragraphs dealing with what needs to be done, and things that might go wrong. For example, machinery paragraphs might specify how an agent, solicitor or conveyancer is to be appointed for the sale, if the parties cannot agree. It is not possible, of course, to foresee everything that can go wrong. Some people find it useful to have a paragraph dealing with disputes arising from the other paragraphs, for example that the parties agree to attend mediation, or a particular form of mediation, before initiating court proceedings.

The family courts have power to make additional orders giving effect to the core paragraphs. For example, if the parties could not agree whether the property should be sold by auction or by private treaty, either party could apply to the family courts to determine the matter. Court orders often include 'leave to apply' provisions. This means that, if there is a problem that is preventing the orders from being carried out, the parties have permission to go back to the family courts and apply for machinery orders to deal with that problem. However, even when 'leave to apply' provisions are not expressly included in orders, the family courts still have the power to make these orders.

The operation of machinery and core paragraphs is discussed in more detail later in this guide.

## Chapter five: Examples of paragraphs of property orders

This chapter provides some examples of paragraphs in property orders, covering a range of common issues, which may assist in the drafting of consent orders for applications to the family courts<sup>6</sup>. These are to be used as a guide only. The paragraphs and orders in this chapter can be made for both married and de facto couples under the relevant sections of the Family Law Act or Family Court Act. Below are some of the key sections to be aware of:

- **Married couple's division of property** – Section 79 of the Family Law Act
- **Spousal maintenance for married couples** – Section 75 of the Family Law Act
- **De facto couple's division of property** – Section 90SM of the Family Law Act
- **De facto partner maintenance** – Section 90SF of the Family Law Act
- **De facto couple's division of property (Western Australia)** – Section 205ZG of the Family Court Act
- **De facto partner maintenance (Western Australia)** – Section 205ZD of the Family Court Act

A consolidated version of the example paragraphs and orders in this chapter, without commentary, is provided in Appendix 2.

### NOTE INDICATING INTENTION TO FINALISE RELATIONS

The parties' intention for the orders to finalise their financial relationship might look something like this:

#### NOTE

*The parties intend this order to determine all claims each may have against the other relating to property adjustment and maintenance, and as far as possible to finalise their financial relationship and avoid further proceedings between them.*

### PARAGRAPHS DEALING WITH REAL PROPERTY

Paragraphs dealing with real estate (land) may be grouped together. As mentioned earlier, court orders mainly require parties to carry out actions. Orders can provide that real estate is retained by a person, transferred to a person, or that the property be sold. Real estate is often also subject to mortgages or used as security for personal loans and it is common for orders to provide that one party must pay the amount owing so that the mortgage can be settled.

#### PARTIES OBLIGED TO SELL FORMER HOME

1. *John Smith and Mary Blogs ('the parties') are to do everything necessary to sell the property known as 68 Civic Street Cityville, NSW, being the land in Certificate of Title <title reference> ('the former home') and distribute the proceeds of sale as provided in the following clauses of this order.*

<sup>6</sup> This guide refers to 'paragraphs' as the former Full Court of the Family Court of Australia has held that an order for property settlement is a single order made up of various paragraphs. However, paragraphs splitting superannuation interests are referred to as orders as this is the language used in the Family Law Act.

### **APPOINTMENT OF AGENT FOR SALE**

- 2. The parties are to, within X days, appoint an agent for the sale of the former home, in the absence of agreement, to be a person nominated by the President for the time being of the Real Estate Institute of <specify>.*

### **APPOINTMENT OF SOLICITOR FOR SALE**

- 3. The parties are to appoint a solicitor or conveyancer to act in the sale of the former home, or, in the absence of agreement, to be a solicitor nominated by the President for the time being of the Law Society of <specify>.*

### **TIME OF SALE AND DISTRIBUTION OF PROCEEDS**

- 4. The parties are to take all practicable steps to ensure that the sale and distribution of proceeds are to be completed as soon as practicable.*

### **SALE BY AUCTION**

- 5. <Name of party> is to list the former home with the agent for sale by auction within 3 months of the date of listing.*
- 6. The reserve price is to be the amount agreed between the parties, or if they cannot agree by twenty-one (21) days before the date of the auction, the amount determined by the auctioneer.*
- 7. The parties are to make an equal contribution to any money requested by the auctioneer for advertising or auction expenses. If one party pays the auctioneer, the other party will reimburse him or her so that the parties' contributions are equal.*
- 8. The parties are to give the solicitor such instructions as are necessary to prepare a contract of sale and provide it to the auctioneer by the date nominated by the auctioneer.*
- 9. The parties are to co-operate fully with the auctioneer in relation to the sale, allow inspection at all times reasonably requested by the auctioneer, and ensure that the property is clean, neat and in good order at the time of any inspection and on the day of the auction.*
- 10. The parties are to attend the auction and negotiate with the highest bidder if the reserve price is not reached.*

### **SALE BY PRIVATE TREATY IF PROPERTY NOT SOLD AT AUCTION**

- 11. If the reserve price is not reached and after twenty-eight (28) days the parties have not negotiated a sale, the following will apply.*
  - a) The parties will arrange for the property to be listed with the real estate agent for sale by private treaty.*
  - b) The contract will provide for completion within <specify> days after the date of the contract.*

- c) *Unless the parties otherwise agree, the property is to be listed for the price of five hundred thousand dollars (\$500,000), which will be lowered by three thousand dollars (\$3,000) every twenty-eight (28) days until the property is sold.*
- d) *The parties are to co-operate fully with the agent in relation to the marketing of the property, allow inspection at all times reasonably requested by the agent, and ensure that the property is clean, neat and in good order at the time of any inspection.*
- e) *When agreement is reached with the purchaser, the parties are to execute the contract of sale and all other documents necessary to complete the sale including all transfer documents.*

### **PROCEEDS OF SALE**

12. *The proceeds of sale of the property are to be paid as follows:*
- a) *to discharge the Commonwealth Bank mortgage No 2345 over the former home ('The mortgage')*
  - b) *to pay the agent's commission and advertising expenses and any other expenses payable on the sale*
  - c) *to pay the legal costs and outlays relating to the sale;*
  - d) *to pay the balance equally to each of the parties.*

### **THE INVESTMENT UNIT**

13. *On or before <date> Mary is to pay to John the sum of X thousand dollars (\$X,000), and to effect a discharge of any liability that John has in respect of any mortgage or other encumbrance over Unit 5, 21 Railway Cuttings, Townsville ('the investment unit'). At the same time as Mary makes the payment and effects the discharge, John is to do everything necessary to transfer to Mary all his interest in the investment unit.*
14. *From the date on which Mary makes the payment of X thousand dollars (\$X,000), she is to indemnify John permanently in respect of any liability associated with the investment unit.*
15. *If Mary fails to pay the sum of X thousand dollars (\$X,000) as required by the above paragraph, unless otherwise agreed the parties are to take all appropriate steps to have the investment unit sold. From the proceeds of sale John is to receive X thousand dollars (\$X,000) and Mary is to receive the balance after payment of any costs associated with the sale and any liabilities in respect of the property.*

## JOHN'S HOLIDAY HOUSE

16. John is to retain his interest in the property known as No 45 Hilltop View, Blissful Beach NSW, being the land in Certificate of Title <title reference> ('the holiday house') and is to indemnify Mary against any mortgage or other liability relating to the property.

## PARAGRAPHS DEALING WITH PERSONAL PROPERTY

Matters to do with the parties' personal property – that is, portable goods or 'chattels' – may be dealt with next.

### PERSONAL PROPERTY

17. John is to retain the following items free from any claim by Mary:

- a) any bank accounts in his name;
- b) the Holden motor vehicle Reg No ABC 1234.

18. Mary is to retain the following items free from any claim by John:

- a) any bank accounts in her name;
- b) the Toyota motor vehicle Reg No XYZ 9876;
- c) her engagement ring.

19. Mary is to transfer to John any interest she may have in the sailing boat. John is to indemnify Mary permanently against any liability relating to the sailing boat.

20. Apart from the items otherwise referred to in this order, each party is to be solely entitled to:

- a) property in the name of that party, or being in neither party's name, in the possession of that party at the date of this order; and
- b) money in any bank accounts in the name of that party.

## PARAGRAPHS DEALING WITH SUPERANNUATION AND LIABILITIES

Finally, the orders might provide for the couple's proposed superannuation splitting arrangements, as well as their debts – that is, who will be liable for paying them off.

### SUPERANNUATION-SPLITTING ORDER GIVING MARY PART OF JOHN'S SUPERANNUATION INTEREST

Any proposed superannuation splitting orders must first be sent to the trustee before being filed with the family courts.

21. In accordance with paragraph 90XT(1)(a) of the Family Law Act 1975 (the Act), whenever a splittable payment within the meaning of section 90XE of the Act becomes payable to or on behalf of John from his interest in the Australian Super superannuation fund, Mary is entitled to be paid (by the trustee) the amount calculated in accordance with Part 6 of the Family Law (Superannuation) Regulations 2001, using a base amount of \$X,000 and there is a corresponding reduction in the entitlement John would have had but for these Orders.

22. *In accordance with paragraph 90XT(1)(b) of the Family Law Act 1975 (the Act), whenever a splittable payment within the meaning of section 90XE of the Act becomes payable to or on behalf of John from his interest in the Industry Super superannuation fund, Mary is entitled to be paid (by the trustee) X% of the splittable payment and there shall be a corresponding reduction in the amount John would be entitled to receive but for these Orders.*
23. *The operative time for paragraph 21 is four business days after the service of the final orders on the trustee.*
24. *The operative time for paragraph 22 is four business days after the service of the final orders on the trustee.*
25. *This order binds the trustee and any subsequent trustee of the superannuation fund.*

### **LIABILITIES**

26. *Except as otherwise provided in this order, each party is to be solely responsible for any liability incurred in that party's name or relating to any item of property which is to be that party's property pursuant to this order (including liabilities for borrowings, personal loans and credit card liabilities), and is to indemnify the other party permanently against any such liability.*

## **PARAGRAPHS ABOUT CARRYING OUT PROPERTY SETTLEMENTS – MACHINERY PARAGRAPHS**

Core paragraphs of a property order would provide that the property is to be sold and divided in a certain way, but machinery paragraphs would spell out how this is to be done. When drafting machinery paragraphs, it is a good idea to start by considering what might go wrong and how that can be avoided.

### **OBLIGATION TO GIVE EFFECT TO ORDER**

27. *Each party is to do everything reasonably required by the other party, including the signing and execution of all necessary documents, to give effect to this order within <specify, for example seven> days of being requested to do so.*

### **REGISTRAR MAY EXECUTE DOCUMENTS IN PLACE OF PARTY WHO FAILS TO DO SO (s106A)**

28. *If after a written request from the other party, either party refuses or neglects to sign or execute and return a document when obliged to do so under this order, within seven days of the request a registrar of the Federal Circuit and Family Court of Australia is hereby appointed under section 106A of the Family Law Act 1975 to execute such document on behalf of that party.*

### **IMPLEMENTING ORDERS**

29. *After giving seven days' notice to the other, each party can apply to the court for orders to assist in the implementation of this order.*

# Appendix 1: Some further examples of orders and paragraphs in orders

## INTRODUCTION

Chapter 4 sets out some general guidelines for drafting financial orders. This appendix contains some further examples of paragraphs dealing with matters that commonly occur in property orders.<sup>7</sup> It does not attempt to deal with every situation that might arise. However, examples of wording suitable for some commonly occurring situations may help with wording for other situations.

### TRANSFER OF PROPERTY

*(1) On or before <date> <name 1> must do everything necessary to transfer to <name 2> or his/her nominee all his/her interest in the property known as <address> being the land in Certificate of Title <title reference>.*

In this draft, the words 'or his/her nominee' are intended to cover the situation where <name 2> would prefer to have the property transferred to someone else. Under this form of words, it is clear that <name 1> would comply with the order by transferring the property directly to <name 2> or to a person nominated by <name 2>. Such a transfer may have taxation or stamp duty implications, and parties should seek advice from an accredited financial adviser before finalising their consent orders.

### EXECUTING (SIGNING) DOCUMENTS TO EFFECT A TRANSFER OF PROPERTY

It is sometimes convenient to provide for the transferring party to execute (sign) the documentation provided by the receiving party. This could be achieved by words such as these:

*(1) On or before <date> <name 1> must do all acts and execute all documents submitted by <name 2> to transfer to <name 2> or his/her nominee all his/her interest in the property known as <address> being the land in Certificate of Title <title reference>.*

### ONE PARTY TO TRANSFER PROPERTY AFTER PAYMENT

Sometimes, one party is to transfer property at the same time as the other party pays an agreed amount of money. In other words, one party can 'buy out' the other.

*(1) On or before <date>, <name 2> is to pay to <name 1> the sum of <specify amount, in words and figures>, and at the same time <name 1> must execute all documents submitted by <name 2> and do everything else necessary to transfer to <name 2> or his/her nominee any interest of <name 1> in the property known as <address> being the land in Certificate of Title <title reference>.*

### ONE PARTY TO TRANSFER PROPERTY AFTER PAYMENT (ALTERNATIVE)

Another approach might be to put each party's obligation in a different numbered paragraph. Paragraph 1 could provide that one party – 'name 2' – must pay a sum of money to the other party on or before a particular date.

*(1) On or before <date>, <name 2> is to pay to <name 1> the sum of <specify amount, in words and figures>.*

<sup>7</sup> This guide refers to 'paragraphs' as the former Full Court of the Family Court of Australia has held that an order for property settlement is a single order made up of various paragraphs. However, paragraphs splitting superannuation interests are referred to as orders as this is the language used in the Family Law Act.



# Appendix 1

- (2) *At the same time as <name 2> complies with paragraph 1, <name 1> must execute all documents submitted by <name 2> and do everything else necessary to transfer to <name 2> or his/her nominee any interest of <name 1> in the property known as <address> being the land in Certificate of Title <title reference>.*

## DEALING WITH A PROPERTY SUBJECT TO A MORTGAGE

If the parties want to transfer a property that is subject to a mortgage, the order should specify who is to pay the amount owing under the mortgage, as well as other amounts payable in respect of the property, such as rates and insurance premiums. Even if one party will be paying the amount owing under the mortgage, because the mortgagor (for example a bank) requires both parties to sign a request of discharge form, it will usually be appropriate for the order to require that both parties must take all necessary steps to have the mortgage settled.

- (1) *Within <time period> <name 1> and <name 2> take all necessary step to discharge the mortgage <specify the mortgage>.*

## RETENTION OF PROPERTY ORDERS

Where one party is to retain an item of property, it is a good idea to include that in the order, so that it is clear that the party's retention of the property is part of the agreed settlement.

- (1) *From the date of this order <name 1> is to retain his/her interest in the property known as <specify>.*

## RETENTION OF PROPERTY ORDERS (ALTERNATIVE)

Sometimes, especially if the other party might otherwise have an interest in the property, the paragraph could continue:

- (1) *From the date of this order <name 1> is to retain his/her interest in the property known as <specify> and <name 2> relinquishes any interest he/she might otherwise have had in the property.*

## PAYMENT OF RATES AND EXPENSES RELATING TO A PROPERTY

It may be advisable to include paragraphs covering which party is to be responsible for the payment of rates and other expenses relating to a property. This could be done by adding a paragraph such as this:

- (1) *As from the date of this order <name 1> is to make all payments for municipal, council and water rates and charges levied on the property, including arrears, and permanently indemnify <name 2> in relation to such liability.*

The above order does two things; first, it requires <name 1> to make the payments. Second, it deals with the situation in which a rate notice is served on <name 2> who is obliged to pay it, in order to avoid a penalty. Notice that this wording simply speaks of 'the property'. This is suitable and convenient provided that in some other paragraph 'the property' has been defined to refer to a specific and identifiable property.

## ORDERS FOR SALE OF PROPERTY AND DISPOSAL OF PROCEEDS OF SALE

It is common for parties to agree that certain property, such as a family home, shares or an investment property, should be sold and the profits divided in a particular way. The wording of such paragraphs will be a little more detailed than in the situation where the property is divided between the parties. If the property is to be sold to a third party, the order will often need to include paragraphs setting out who has to take what steps to enable the property to be sold, how any mortgage should be discharged, and what is to happen to the profits. The paragraphs will normally spell out how the sale is to be conducted, whether by auction or otherwise, and how and by whom any negotiations for the sale are to be conducted, as shown by the example in Appendix 2.

## PARAGRAPHS ABOUT CARRYING OUT PROPERTY SETTLEMENTS – MACHINERY PARAGRAPHS

Here are some ideas for machinery paragraphs dealing with situations of conflict:

- The paragraphs can set a sale price, or a minimum sale price, or they might provide that if the parties cannot agree the agent can set the price. Similarly, the paragraphs might provide that the agent or auctioneer can set the reserve price at an auction.
- The paragraphs can provide for a third party to determine a dispute – for example, paragraphs might provide for the estate agent to be a person nominated by the head of a body such as the real estate institute.
- The paragraphs can provide that if the parties cannot agree on a real estate agent, one is to provide the other with a list of three names and the other can choose one of the three.
- The paragraphs can provide that if the property does not sell at the auction, it is to be listed for sale at a particular price, and then if necessary, at successively lower prices, until it does sell.
- One party rather than the other, or a third party trusted by both, can be given the task of carrying out the sale.

Sometimes, people are unable or unwilling to do what they are required to do under their consent order. For example, the order may provide for one party to pay a sum of money, but when the time comes that party may be unable to do so. Court orders are binding, and in principle the other party can take enforcement action if a party does not comply with the orders. But enforcement proceedings can be slow and expensive. Well-drafted paragraphs can often include 'machinery' provisions that provide a simpler solution to the problem.

In the case just mentioned, where a person fails to pay a sum of money when required by the order to do so, a possible solution might be for the order to include a paragraph that if the payment is not made by the due date, a property belonging to the person is to be sold and the profit used to pay the debt due under the order.

## EXECUTING A DOCUMENT

To transfer property from one person to another, it is often necessary for the first person to sign certain documents, and the order can provide for this. It is often convenient to provide that the person must execute documents provided to them by the other party.

*(1) <name 1> must execute all documents submitted by <name 2> to implement these orders.*

### WHERE A PARTY FAILS TO EXECUTE A DOCUMENT

If the person fails to execute documents when required to do so by an order, section 106A of the Family Law Act provides that a third person, such as a registrar, can sign the documents, and this will have the same effect as if the individual had done so.

*(1) The registrar, <name>, of the <name of registry>, Federal Circuit and Family Court of Australia is appointed to execute documents in the name of <name 1> and do all acts and things necessary to give validity to any documents <name 1> is required to execute by <these orders>.*

### WHERE BOTH PARTIES ARE REQUIRED TO EXECUTE A DOCUMENT

*(1) If either party refuses or neglects to sign any document necessary to implement this order within 14 days of a request to do so, <name of person appointed> is appointed to execute such document on behalf of that party.*

### PAYMENT OF INTEREST WHEN A PERSON FAILS TO PAY BY THE DUE DATE

One commonly used form of machinery paragraph requires interest to be paid when a person fails to pay money as required:

*(1) If <name 1> does not pay <name 2> the sum of <specify sum of money> in accordance with <specify paragraph>, <name 1> must pay to <name 2> interest thereon at the rate <prescribed by the Federal Circuit and Family Court of Australia (Family Law) Rules 2021> calculated from the due date on so much as is from time to time outstanding.*

Alternatively, such a paragraph could specify a rate of interest rather than refer to the Federal Circuit and Family Court of Australia (Family Law) Rules 2021. .

## OTHER APPROPRIATE PARAGRAPHS

### PARAGRAPHS STATING LUMP SUM PAYMENT WAS FOR THE PURPOSE OF MAINTENANCE

*(1) This is an order to which section 77A of the Family Law Act applies and \$<amount> of the <money payable/value of the property transferable> to the <receiving party> is maintenance <where for limited period, specify period>.*

Section 77A of the Family Law Act provides that where the family courts order a transfer of property or a lump sum payment and one of the purposes of the transfer or payment is the maintenance of a party, it must state that section 77A applies to the order. In the absence of such a declaration, the order will be taken not to have been made for the purpose of maintenance. Section 90SH of the Family Law Act provides the same in relation to de facto partners.

The reason for this section has to do with means-testing for social security purposes. Maintenance, whether in the form of payments or the transfer of property, is treated differently from other income and assets. The declaration enables those administering social security to treat the transfer of property as maintenance.

## INJUNCTIONS

A property order can be combined with orders that restrain people from acting in a certain way, or require them to act in a certain way. These orders are called 'injunctions'. An example is an order preventing a person from selling or mortgaging a property without the consent of the other party.

*(1) <name> and his/her servants and agents are restrained from:*

- a) transferring, encumbering, mortgaging or otherwise dealing with his/her interest in <identify property>
- b) selling, transferring, encumbering, mortgaging or otherwise dealing with his/her interest in any household furniture, bank accounts and personal effects
- c) withdrawing, disposing of or in any way dealing with the money in <identify account/s>
- d) spending, disposing of or in any way dealing with the proceeds of sale of the property at <address>
- e) entering or remaining upon or loitering near the property known as <address> <or any other premises at which (name) is residing or employed>
- f) removing or causing to be removed any furniture, effects, appliances and chattels from <identify premises>.

An order of this kind needs to outline the period in which it is to operate. Since property orders are intended to resolve the parties' affairs, interim (temporary) orders are generally unsuitable for inclusion in consent orders.

## PARAGRAPHS RELATING TO DIVISION OF PERSONAL PROPERTY

The distribution of personal property can take a number of forms. Where the items are of considerable commercial value or personal significance, they can be dealt with by individual paragraphs. Where they are not, they can sometimes be grouped into categories such as a party's stamp collection, tools or musical instruments. Sometimes parties will agree, after having dealt with the more important items, that other items will belong to the person having possession of them at a particular time. Sometimes, especially where there are numerous objects of no great individual value, the parties can agree on a process for allocating the items. There are many ways of doing this. Below are two examples.

### PARAGRAPHS PROVIDING FOR DIVISION OF PERSONAL PROPERTY – EXAMPLE 1

*(1) Items of personal property, furniture, furnishings and effects belonging to the parties or either of them are to be divided between the parties in the following manner:*

- a) Within <a specified time> <name 1> must prepare and provide to <name 2> two lists of <specify what property, for example furniture in the home> such that the property in each list has approximately the same value.
- b) If within <a specified time> of receiving the two lists, <name 2> notifies <name 1> of his/her selection of one of the lists, <name 2> becomes solely entitled to the items on that list and <name 1> becomes entitled to the items on the other list.

- c) Each party must make the items to which the other party is entitled available for collection by the other party or any person nominated by that party at any reasonable time proposed by that party.
- d) Pending the distribution of the property as indicated above each party shall properly maintain all items of property in that party's possession or control.

### **PARAGRAPHS PROVIDING FOR DIVISION OF PERSONAL PROPERTY – EXAMPLE 2**

*(1) The parties are ordered to divide items of personal property, furniture, furnishings and effects contained in the home between themselves in the following manner:*

- a) The items are to be valued by agreement or failing agreement within seven days of the date of this order, by <name of valuer>.
- b) The parties may each select such items as they wish.
- c) An account is to be taken of the total value of the items selected by each party and any adjusting payment to be made by one to the other be paid within seven (7) days (or paid contemporaneously with the payment in paragraph <specify paragraph number> of this order).
- d) If each party selects the same item or items then a ballot for such items will be conducted by and under the supervision of the parties' solicitors or such persons as the party may appoint and the result of such ballot will be binding upon the parties.
- e) The cost of the valuation and any ballot will be paid by the parties equally.

### **PARAGRAPHS PROVIDING THAT POSSESSORS HAVE OWNERSHIP OF PERSONAL PROPERTY – EXAMPLE 1**

*(1) Other than as is specifically provided for in this order the parties are solely entitled to the exclusion of the other to all other property and chattels of every nature and kind in the possession of each of the parties as at the date of the making of this order.*

### **PARAGRAPHS PROVIDING THAT POSSESSORS HAVE OWNERSHIP OF PERSONAL PROPERTY – EXAMPLE 2**

*(1) The <Applicant/Respondent> is declared to be the sole legal and beneficial owner of all items of personal and real property in <his/her> possession or of which <he/she> is the registered proprietor as at the date of this order, including but not limited to all or any money standing to his/her credit in any bank or building society, shareholdings, motor vehicles and any present or future expectation under a trust or estate.*

## PARAGRAPHS ABOUT MONEY

The order can also require a party to pay a specified amount to another party. This may be in the form of a single payment (lawyers tend to speak of a 'lump sum') or periodic payments. It is common to combine this paragraph with another paragraph to the effect that late payment will attract interest of a specified rate.

*[1] On or before <date>, <name 1> must pay to <name 2> the sum of \$<amount>.*

It is often helpful to make the obligation more specific, for example by providing that the money is to be paid into a particular bank account.

## PARAGRAPHS RELATING TO MAINTENANCE OF A SPOUSE OR PARTNER

An order can be made for one party to pay maintenance to the other. Such an order often provides for periodic payments. It should specify:

- who is to make the payments
- who is to receive them
- the amount of the payments
- the times at which they must be paid
- the date on which the first payment is to be made, and
- if the order is for maintenance over a specified period, the date of the last payment.

The order could also spell out how the payment is to be made, such as by payment into a specified bank account. Alternatively, a maintenance order might provide for the payment of a lump sum rather than periodic payments.

As mentioned in Appendix 3, while matters dealing with property settlement should be drafted as paragraphs of a single property order, provisions dealing with maintenance should be treated as separate orders.

### PERIODIC PARTNER MAINTENANCE

*[1] <name 1> is to pay to <name 2> maintenance of \$<amount> each <week/fortnight/month> until <date> and is to pay the first payment on or before <date>.*

If the words <until date> are absent, under the Family Law Act the order requires maintenance to be paid until one of the parties dies, the party entitled to maintenance re-marries, or the order is later varied or discharged.

### LUMP SUM PAYMENT OF PARTNER MAINTENANCE

*[1] In respect of the period from <date> to <date> <name 1> is to pay to <name 2> on or before <date> maintenance of \$<amount>.*

## LUMP SUM PAYMENT OF PARTNER MAINTENANCE IN INSTALLMENTS

*(1) In respect of the period from <date> to <date> <name 1> is to pay to <name 2> on or before <date> maintenance of \$<amount> payable by instalments of \$<amount> on <specify dates>.*

## PARAGRAPHS RELATING TO COMPANIES, TRUSTS AND BUSINESSES

Where the parties' assets include interests in companies, they will often need legal advice about formulating and drafting the property order. The drafting of appropriate paragraphs in complex situations is beyond the scope of this guide. However, it may be useful to note some generally applicable points.

### SHARES IN PUBLIC COMPANIES

If parties own shares in public companies, those shares are simply a form of property that can be readily dealt with in a property order.

*(1) <name 1> is to transfer to <name 2> his/her shares in ABC Pty Ltd on or before <specify date>.*

### DIRECTORS OF COMPANIES AND TRUSTEES

If the parties are directors of companies or are trustees, paragraphs of the property order will normally state their personal obligations in those roles. The paragraphs might require a person to exercise their powers as director of a company in a particular way. They might also include an injunction restraining a director from altering the current shareholding in a company, or dealing with a company's loan account.

In the case of a trust, the paragraph might say that a party is prevented from removing a trustee, appointing a person as trustee or distributing assets of the trust in a particular way.

In relation to interests in businesses, what is required to be included will depend on the legal status of the business. Again, while it will be prudent to obtain legal advice, the paragraphs are likely to focus on actions to be taken by the parties. For example, a paragraph might require a party to transfer their interest to the other party in a particular business. But if the business has creditors, debtors or trading partners, legal advice will probably be necessary.

## SUPERANNUATION

A superannuation interest is an asset which is property for the purposes of a property division. There are some technicalities that apply to the splitting of superannuation assets because there are legal requirements relating to superannuation. Implementing orders may require the cooperation of the trustee of a superannuation fund. Superannuation interests may also have some tax advantages and parties are likely to need legal or financial advice on this aspect, as well as advice about drafting the orders. Most common superannuation interests are in:

- accumulation funds
- defined benefit funds, and
- self-managed superannuation funds.

A superannuation interest can either be in the growth phase (where the person is not yet able to access their superannuation interest), or in the payment phase (when conditions of release are satisfied, usually as a result of the member of the fund reaching retirement age). Most superannuation interests are in accumulation funds in the growth phase. They are just like bank accounts but the member cannot yet make a withdrawal.

## **OPTIONS FOR THE PARTIES RELATING TO SUPERANNUATION**

As part of an overall property settlement order, parties can usually choose between two options.

First, any superannuation interests can be left with the party who is the member of the fund (or funds) and that party's interests in other property may be adjusted to achieve an overall result that is fair. A potential draft for an order like this might be:

- 1. Each party is to retain any superannuation interest in their name and the other party foregoes any claim to such interest.*

Second, the superannuation interest can be divided ('split') between the parties, so the non-member party gets some or all of the party's superannuation interest.

In a self-managed superannuation fund, the parties can also change the membership entitlements in the fund or, more commonly, split up the assets in the fund (such as real estate, shares and cash) by rolling some of those assets out into another fund for the benefit of one of the parties.

## **SUPERANNUATION SPLITTING ORDER**

A splitting order is one that splits a single superannuation interest into two interests (which may or may not be equal) so that each party will have a superannuation interest. The order may set a dollar amount or a percentage value, which will be used to calculate the entitlement for the party who is not a member of the superannuation fund when the other party reaches retirement age. There are certain legal requirements for splitting paragraphs that do not apply to dividing other types of property.

An order splitting a superannuation interest must allocate either:

- *a dollar amount ('the base amount'), or*
- *a 'percentage'.*

A 'base amount' order is the most common type of superannuation splitting order. For certain types of interests, a 'percentage' order may be used.



## WHAT SPLITTING ORDER MUST DO

A splitting order should be drafted with reference to the following sections of the Family Law Act:

- 90XD (or 90YD for WA de facto couples) – sets out the legal definitions for superannuation-related terms
- 90XT (or 90YY for WA de facto couples)– sets out the orders the family courts can make to split superannuation
- 90XZD (or 90YZT for WA de facto couples)– sets out when superannuation orders will be binding on the trustee of a superannuation fund.

A superannuation splitting order should do the following:

- state that whenever a splittable payment is made to the member party, the 'non-member' party is to be paid an amount calculated in accordance with the *Family Law (Superannuation) Regulations 2001* or a percentage of the payment
- specify the base amount or the percentage that the non-member party is to receive (if the non-member party is to be paid an amount, and not a percentage) state that there is a corresponding reduction in the entitlement that the member party would have received but for the order
- set the time at which the order operates (commonly this is set as the fourth business day after the day on which the property order is served upon the trustee), and
- order the trustee of the fund, and any subsequent trustee, to do what is required to calculate and pay the non-member's entitlement from the operative date of the order.

## TRUSTEE OF FUND REQUIRED TO GIVE NON-MEMBER THREE OPTIONS

For the most common situation – accumulation funds in the growth phase – once a superannuation splitting order has been made, the trustee is required by law to give the non-member three options:

1. *retain that new entitlement for the non-member party in the trustees' fund*
2. *rollover or transfer the entitlement to another complying superannuation plan, or*
3. *pay the entitlement to the non-member party, but only if the non-member party has met a superannuation condition of release.*

Although the trustee must offer these options, it is open to the parties to include in their consent order a paragraph requiring the non-member to choose one of these options.

## VALUATION

If an order is to be made for superannuation to be split by way of a base amount or a percentage, the Family Law Act requires that the interest must be valued in accordance with the Family Law (Superannuation) Regulations, or if there is no suitable valuation method in the regulations for the type of interest being split, then the family courts must determine the value of the interest. Members of a superannuation fund, or former partners of a member, are able to complete the superannuation information kit and send it to the trustee to obtain this information. In response to the information request, the trustee of a superannuation fund will provide information required by the Family Law (Superannuation) Regulations, which may include a value of the interest, or information needed to determine the value of the interest. Where the superannuation interest is a defined benefit interest the member may need to seek a valuation from an actuary using the information provided in response to the request.

If the parties agree to leave a superannuation interest with the party who is the member of the fund, rather than splitting the superannuation between the parties, they should agree on the value of the superannuation interest. However, there is no requirement under the Family Law Act to value a superannuation interest if no superannuation splitting order is being made.

## THE TRUSTEE

Except for self-managed superannuation funds (where the trustees are normally the spouse or spouses, or a company controlled by them), the trustee is not related to the parties and has responsibility for the interests of all members of the fund. A property order cannot include an order binding the trustee unless the trustee has been accorded procedural fairness in relation to the making of the order which is sought. To ensure that procedural fairness is afforded to the trustee, the member must notify the trustee of the terms of the orders being sought with at least 28 days' notice, to allow the trustee to object should they so wish. Further explanation of the requirements for notification to a trustee can be found in Rule 10.06 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*.

## REQUIREMENTS AFTER THE ORDERS ARE MADE

An order splitting a superannuation interest does not bind the trustee until it is served upon the trustee.

## Appendix 2: Example of a property order issued pursuant to section 79 of the Family Law Act

### NOTE

The parties intend this order to determine all claims each may have against the other relating to property adjustment and maintenance, and as far as possible to finalise their financial relationship and avoid further proceedings between them.

### IT IS ORDERED UNDER SECTION 79:

#### *Parties obliged to sell former home*

1. John Smith and Mary Blogs ('the parties') are to do everything necessary to sell the property known as 68 Civic Street Cityville, NSW, being the land in Certificate of Title <title reference> ('the former home') and distribute the proceeds of sale as provided in the following clauses of this order.

#### *Appointment of agent for sale*

2. The parties are to appoint an agent for the sale of the former home, in the absence of agreement to be a person nominated by the President for the time being of the Real Estate Institute of <specify>.

#### *Appointment of solicitor for sale*

3. The parties are to appoint a solicitor or conveyancer to act in the sale, in the absence of agreement to be a solicitor nominated by the President for the time being of the Law Society of <specify>.

#### *Time of sale and distribution of proceeds*

4. The sale and distribution of proceeds are to be completed as soon as practicable.

#### *Sale by auction*

5. The former home is to be listed with the agent for sale by auction within three (3) months of the date of listing.
6. The reserve price is to be the amount agreed between the parties, or if they cannot agree by twenty-one (21) days before the date of the auction, the amount determined by the auctioneer.
7. The parties are to make an equal contribution to any money requested by the auctioneer for advertising or auction expenses. If one party pays the auctioneer, the other party will reimburse him or her so that the parties' contributions are equal.
8. The parties are to give the solicitor such instructions as are necessary to prepare a contract of sale and provide it to the auctioneer by the date nominated by the auctioneer.

9. The parties are to co-operate fully with the auctioneer in relation to the sale, allow inspection at all times reasonably requested by the auctioneer, and ensure that the property is clean, neat and in good order at the time of any inspection and on the day of the auction.
10. The parties are to attend the auction and negotiate with the highest bidder if the reserve price is not reached.

***Sale by private treaty if property not sold at auction***

11. If the reserve price is not reached and after 28 days the parties have not negotiated a sale, the following clauses will apply.
  - a) The parties will arrange for the property to be listed with the real estate agent for sale by private treaty.
  - b) The contract will provide for completion within <specify> days after the date of the contract.
  - c) Unless the parties otherwise agree, the property is to be listed for the price of five hundred thousand dollars (\$500,000), which will be lowered by three thousand dollars (\$3,000) every twenty-eight (28) days until the property is sold.
  - d) The parties are to co-operate fully with the agent in relation to the marketing of the property, allow inspection at all times reasonably requested by the agent, and ensure that the property is clean, neat and in good order at the time of any inspection.
  - e) When agreement is reached with the purchaser, the parties are to execute the contract of sale and all other documents necessary to complete the sale including all transfer documents.

***Proceeds of sale***

12. The proceeds of sale of the property are to be paid as follows:
  - a) to discharge the Commonwealth Bank mortgage No 2345 over the former home ('The mortgage')
  - b) to pay the agent's commission and advertising expenses and any other expenses payable on the sale
  - c) to pay the legal costs and outlays relating to the sale
  - d) to pay the balance equally to each of the parties.

***The investment unit***

13. On or before <date> Mary is to pay to John the sum of X thousand dollars (\$X,000), and to effect a discharge of any liability that John has in respect of any mortgage or other encumbrance over Unit 5, 21 Railway Cuttings, Townsville ('the investment unit'). At the same time as Mary makes the payment and effects the discharge, John is to do everything necessary to transfer to Mary all his interest in the investment unit.

14. From the date on which Mary makes the payment of X thousand dollars (\$X,000), she is to indemnify John permanently in respect of any liability associated with the investment unit.
15. If Mary fails to pay the sum of X thousand dollars (\$X,000) as required by the above clause, unless otherwise agreed the parties are to take all appropriate steps to have the investment unit sold. From the proceeds of sale John is to receive X thousand dollars (\$X,000) and Mary is to receive the balance after payment of any costs associated with the sale and any liabilities in respect of the property.

#### ***John's holiday house***

16. John is to retain his interest in No 45 Hilltop View, Blissful Beach NSW, being the land in Certificate of Title <title reference> ('the holiday house') and is to indemnify Mary against any mortgage or other liability relating to the property.

#### ***Personal property***

17. John is to retain the following items free from any claim by Mary:
  - a) any bank accounts in his name
  - b) the Holden motor vehicle Reg No ABC 1234
18. Mary is to retain the following items free from any claim by John:
  - a) any bank accounts in her name
  - b) the Toyota motor vehicle Reg No XYZ 9876
  - c) her engagement ring
19. Mary is to transfer to John any interest she may have in the sailing boat. John is to indemnify Mary permanently against any liability relating to the sailing boat.
20. Apart from the items otherwise referred to in this order, each party is to be solely entitled to:
  - a) property in the name of that party, or being in neither party's name, in the possession of that party at the date of this order; and
  - b) money in any bank accounts in the name of that party.

#### ***Superannuation-splitting order giving Mary part of John's superannuation interest***

21. In accordance with paragraph 90XT(1)(a) of the Family Law Act 1975 (the Act), whenever a splittable payment within the meaning of section 90XE of the Act becomes payable to or on behalf of John from his interest in the Australian Super superannuation fund, Mary is entitled to be paid (by the trustee) the amount calculated in accordance with Part 6 of the *Family Law (Superannuation) Regulations 2001*, using a base amount of \$X,000 and there is a corresponding reduction in the entitlement John would have had but for this Order.

22. The operative time for Paragraph 21 above is four business days after the service of the final order on the trustee.

This order binds the trustee and any subsequent trustee of the superannuation fund.

***Liabilities***

23. Except as otherwise provided in this order, each party is to be solely responsible for any liability incurred in that party's name or relating to any item of property which is to be that party's property pursuant to this order (including liabilities for borrowings, personal loans and credit card liabilities), and is to indemnify the other party permanently against any such liability.

***Obligation to give effect to order***

24. Each party is to do everything reasonably required by the other party, including the signing and execution of all necessary documents, to give effect to this order within <specify: for example, seven (7)> days of being requested to do so.

***Registrar may execute documents in place of party who fails to do so (s 106A)***

25. If after a written request from the other party either party refuses or neglects to sign or execute and return a document when obliged to do so under this order, within seven days of the request a Registrar of the Federal Circuit and Family Court of Australia is hereby appointed under section 106A of the *Family Law Act 1975* to execute such document on behalf of that party.

***Liberty to apply***

26. After giving seven (7) days' notice to the other, each party has liberty to apply to the court for orders to assist in the implementation of this order.

## Appendix 3: The legal framework for applications for property consent orders

This Appendix provides information about the legal framework for applications for property consent orders. It is not necessary to read it in order to complete either of the consent order kits, but it might be helpful in explaining why the kits contain all of the requirements that they do.

### THE COURT'S POWER TO MAKE PROPERTY ORDERS

The Family Law Act is a federal law. The Family Court of Australia is a federal court and it can make orders about financial arrangements of parties who are married or in a de facto relationship. The Federal Circuit and Family Court of Australia cannot currently make orders about the financial arrangements for Western Australian de facto couples. This is because Western Australia has its own financial and property laws for de facto couples. The Western Australia de facto property and financial framework is discussed further below.

Under the Family Law Act, orders can only be made when there is a connection with Australia. In brief, the law requires that at least one party to the proceedings must be an Australian citizen, or present in Australia, or living in Australia. As the name of the Family Law Act suggests, the orders must also have something to do with families, whether it is the allocation of property, superannuation and spousal maintenance or orders relating to children. The law also requires that the proceedings must be between the parties to a marriage or a de facto relationship although other people, 'third parties', may also be parties to the proceedings.

In relation to married couples, the Family Law Act gives the court authority (jurisdiction) to hear and determine 'matrimonial causes'. The term matrimonial cause includes proceedings between parties to a marriage about:

- spousal maintenance
- the joint property of the parties, or
- the property of either of them, and some related matters.

The Family Law Act has similar provisions relating to financial and property matters involving de facto couples.

### WESTERN AUSTRALIA

The situation in Western Australia is slightly different. The Family Court of Western Australia is a state court which exercises federal jurisdiction under the Family Law Act in relation to married couples, and the superannuation of de facto couples in Western Australia. Family law matters relating to de facto couples other than superannuation are dealt with under the *Family Court Act 1997 (WA)*, which is state law. The Family Law Act and Family Court Act generally mirror each other, however, there are a few distinct differences in relation to property matters, including financial agreements.

## REGISTRARS' POWERS TO MAKE CONSENT ORDERS

Broadly speaking, the judges of the family courts are the ones to make decisions, including decisions determining property and financial matters. However, the Family Law Act allows judges to delegate some of their powers to registrars.

In proceedings under the Family Law Act, registrars can make an order where the terms have been agreed upon by all the parties to the proceedings. The Family Law Rules define the word 'order' as including a decree, decision, declaration and judgement and, for an appeal or review of a decision, a refusal to grant an application or make an order. In the context of the Family Law Act, the orders that a registrar could make are termed consent orders and include:

- property and financial orders
- a declaration that a lump sum payment has been made for the purposes of maintenance
- orders for divorce, or
- the exemption of a party from compliance with a provision of the rules of court.

Registrars cannot make consent orders which are directed at third parties, or directly affect their rights, unless those parties are included as parties to the application for consent orders.

## CERTAIN ORDERS THAT CANNOT BE MADE BY REGISTRARS

Although the general rule is that registrars can make orders where the parties agree, there are some orders that they cannot make. Such orders can be made only by a judge, and should not be included in an application for consent orders.

Registrars cannot make orders that relate to the marital status of the parties, including:

- a decree of nullity of marriage
- a declaration of the validity of a marriage
- a declaration of the validity of a divorce, or
- the annulment of a marriage.

Registrars are unable to make a final order about children in contested matters. But they can make final orders about children with the consent of all the parties to the proceedings. Registrars can also make interim orders, although generally people seeking consent orders want final orders rather than interim orders.

Finally, provisions of the Family Law Rules limit the orders that can be obtained by an application for consent orders. The orders excluded are orders for:

- step-parent maintenance
- relying on a cross-vesting law
- approving a medical procedure
- a parenting order when section 65G of the Family Law Act applies, or
- an order under child support legislation.



## DISCRETION OF REGISTRAR TO MAKE ORDER

It is convenient to speak of registrars making consent orders, or orders by consent. But it is wrong to think that the parties' consent is all that is needed. This is because when deciding whether to make the orders that the parties have agreed to, the registrars have to apply the law, and the law does not say that the parties' consent is the basis for the decision. The family law courts (acting through the registrar) still need to consider whether to make the decision. As explained earlier, in relation to property and financial matters, the law requires the registrar to consider a range of matters. Only if they are satisfied that on the facts the order is in accordance with the law will the registrar make the order.

Broadly speaking, registrars will make an order on an application for consent orders only if:

- the order is one that the Federal Circuit and Family Court of Australia, or the Family Court of Western Australia can make
- all the parties have agreed on the terms of the order
- the order falls within the registrars' powers, and
- the registrar determines that in the circumstances making the order is proper and just and equitable, having regard to the guidelines in the Family Law Act or Family Court Act.

## PROPERTY 'ORDER' OR PROPERTY 'ORDERS'?

The former Full Court of the Family Court of Australia has held that an order for property settlement is a single order made up of various paragraphs under the Family Law Act. Accordingly, although this is not always the practice, the examples in this guide relating to property settlement are drafted as paragraphs of a single property order, rather than a set of orders. Other matters, such as injunctions or orders for maintenance, would be appropriately set out as separate orders.

## HOW FINAL ARE CONSENT ORDERS?

All final orders, including consent orders, can be set aside by the Federal Circuit and Family Court of Australia if there is a successful appeal. However, appeals need to be brought within a limited time, unless the family law courts grant an extension of time. The Family Law Rules provide that generally, an appeal must be brought within 28 days of the decision. If an Application for Consent Orders is determined by a registrar of the Federal Circuit and Family Court of Australia, the registrar's decision can be reviewed by filing an application for review within 21 days of the decision. Applications to review an order of a registrar of the Family Court of Western Australia must be filed within 28 days of the order. In the absence of an appeal or application for review, final orders cannot generally be changed, with the exceptions noted below relating to property orders and maintenance orders. Further information about appeals and applications for review can be found through the family courts websites.

## PROPERTY ORDERS – WHEN THEY CAN BE SET ASIDE

There is provision for property orders to be set aside on specified grounds, if a party applies for them to be set aside. In summary, it might be possible to have property orders set aside if:

- there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance
- circumstances that have arisen since the order have made it 'impracticable' for the order, or part of the order, to be carried out
- a person has defaulted in carrying out an obligation imposed by the order and, in the circumstances that have arisen as a result, it is just and equitable to vary the order or set the order aside and make another order in substitution for it
- exceptional circumstances that have arisen since the making of the order mean that a child (or the applicant, if he or she has caring responsibility for a child) will suffer hardship if the family courts do not vary or set aside the order and make another order in substitution for it, or
- a proceeds of crime order has been made covering property of the parties to the marriage or either of them, or a proceeds of crime order has been made against a party to the marriage or relationship.

If the family courts are satisfied that any of these matters apply to the consent order, it may in its discretion vary the order or set the order aside and, if it considers appropriate, make another property order in substitution for it.

## MAINTENANCE ORDERS – WHEN THEY CAN BE DISCHARGED OR MODIFIED

The legislation provides that maintenance orders can be discharged (meaning the orders cease to have effect) 'if there is any just cause for so doing'. And where the maintenance order has been made by consent, the family courts have power to increase or decrease the amount payable if they are satisfied that the amount ordered to be paid 'is not proper or adequate'.

## ENFORCEMENT OF CONSENT ORDERS

As consent orders are binding court orders, they can be enforced. A property order made under the Family Law Act will normally be enforced only if a party to the order brings an application to the family courts for some kind of enforcement or sanction against the other party.

The Family Law Act provides for various sanctions against people who fail to comply with orders. Sanctions can be imposed when the family courts find that a person has contravened a court order, and the person does not satisfy the family courts that he or she had a reasonable excuse. The term 'contravene' means a failure to comply with (or follow) an order – a person contravenes an order by intentionally failing to comply with it, or by making no reasonable attempt to comply with it. The possible sanctions include fines, bonds and imprisonment.

There are separate provisions, under the 'Family Law Rules for the enforcement of financial orders. It is enough to say that the payer's obligation to pay money can be enforced by seizing real estate or personal property and using that property to satisfy the person to whom the money should have been paid under the order. It can also be enforced by legally seizing a portion of the wages or earnings of the person who is ordered to pay, and using that money. The family courts also have powers to require the payer to provide their financial information.

## Appendix 4: Additional information about binding financial agreements

This Appendix provides additional information about binding financial agreements.

The relevant sections of the Family Law Act for binding financial agreements are:

### For married couples:

| section 90B | section 90C | section 90D |

### For de facto couples:

| section 90UB | section 90UC | section 90UD |

### For de facto couples in Western Australia the relevant sections in the Family Court Act are:

| section 205ZN | section 205ZO | section 205ZP |

## HOW FINAL ARE BINDING FINANCIAL AGREEMENTS?

A binding financial agreement excludes the family courts' jurisdiction on the matters covered by the agreement while the agreement is in force. However, the court has power to set the agreement aside and make orders in certain circumstances.

## SETTING ASIDE BINDING FINANCIAL AGREEMENTS – FRAUD OR DECEPTION

A binding financial agreement can be set aside by the family courts where one or both of the parties have deceived the other, or there has been fraudulent conduct. This can include instances where:

- the family courts are satisfied that 'the agreement was obtained by fraud including non-disclosure of a material issue'
- a party to the agreement entered into the agreement for the purpose of defrauding or defeating a creditor, or with 'reckless disregard' of a creditor's interests, or
- a party to the agreement entered into the agreement to defraud a de facto partner or to defeat the interests of the de facto partner under the Family Law Act, or with reckless disregard of those interests.

## SETTING ASIDE BINDING FINANCIAL AGREEMENTS – OTHER REASONS

Other reasons an agreement might be set aside may include that:

- the agreement is 'void, voidable or unenforceable' under the general law
- when making the agreement a party to the agreement 'engaged in conduct that was, in all the circumstances, unconscionable'
- in the circumstances which have arisen since the agreement was made, it is impracticable for the agreement or part of the agreement to be carried out
- since the agreement was made a 'material change' in circumstances has occurred and, as a result of that change, the child or a party to the agreement will suffer hardship if the family courts do not set the agreement aside
- there is a 'payment flag operating under Part VIII B on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation will be terminated by a flag lifting agreement', or
- the agreement covers an 'unsplittable' superannuation interest for the purposes of Part VIII B.

# Glossary

<b>actuary</b>	A statistician who calculates risks and rates, especially for insurance purposes, according to probabilities available through population statistics or based on an established formula.
<b>application</b>	A form filed as part of legal proceedings, particularly an initiating application which is filed to begin legal proceedings.
<b>consent orders</b>	Orders made by a court with the agreement of the parties, as distinct from orders made by a judge after a contested or undefended hearing. In practice, the family courts may refuse to make the proposed consent orders if it considers that the proposed orders are not fair under the circumstances, with reference to the <i>Family Law Act 1975</i> . Consent orders have the same legal force as if they had been made after a court hearing.
<b>creditor</b>	A person who is owed money.
<b>debtor</b>	A person who owes money to a creditor.
<b>de facto</b>	A marriage-like relationship between two people who are not married.
<b>discharge</b>	To terminate or remove something, such as a court order or liability under a mortgage.
<b>disclosure</b>	Revealing information about something, such as assets or income. In financial proceedings under the Family Law Act, the parties have an obligation to make full disclosure of their assets.
<b>duress</b>	Pressure or undue persuasion applied to someone, to make the person do something or refrain from doing something. Duress can include constraint, confinement or threats.
<b>Family courts</b>	For the purposes of this guide, 'family courts' means the Federal Circuit and Family Court of Australia and the Family Court of Western Australia.
<b>Family Court Act</b>	The <i>Family Court Act 1997</i> (WA) is the Western Australian law that applies to de facto parenting, property, and other proceedings in the Family Court of Western Australia.
<b>Family Law Act</b>	The <i>Family Law Act 1975</i> (Cth) is a federal law that applies to parenting and property proceedings and other proceedings in the family courts. It is frequently referred to in this guide.
<b>Family Law Rules</b>	The <i>Federal Circuit and Family Court of Australia (Family Law) Rules 2021</i> are made by the Federal Circuit and Family Court of Australia and outline the procedures and processes of the operation of the court. The Family Law Rules can also be referred to as the 'court rules' or the 'rules of court'.

# GLOSSARY

<b>Family Law (Superannuation) Regulations</b>	<i>The Family Law (Superannuation) Regulations 2001</i> are rules connected to the <i>Family Law Act 1975</i> and outline the operation and procedures of the family law superannuation splitting regime.
<b>family violence</b>	Also sometimes referred to as 'domestic violence'. Violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful. Some illustrative examples of behaviour that may constitute family violence include (but are not limited to): <ul style="list-style-type: none"><li>• assault</li><li>• sexual assault or other sexually abusive behaviour</li><li>• stalking</li><li>• repeated derogatory taunts</li><li>• intentionally damaging or destroying property</li><li>• intentionally causing death or injury to an animal</li><li>• unreasonably denying the family member financial autonomy</li><li>• unreasonably withholding financial support</li><li>• preventing the family member from making or keeping connections with family, friends or culture</li><li>• unlawfully depriving the family member, or any member of the family member's family, of their liberty</li></ul>
<b>Form 6</b>	Part of the Superannuation Information Kit.
<b>filing</b>	Taking or sending documents to the court registry.
<b>financial order</b>	An order made by the family courts relating to the division of property and financial assets. This can include orders for the payment of spouse or de facto maintenance.
<b>final order</b>	An order made by the family courts bringing a matter to a close. If final property orders have been made, the parties cannot re-litigate the issues, except in limited circumstances.
<b>fraud</b>	A dishonest act or omission done with the purpose of deception.
<b>impracticable</b>	Not practicable, something that cannot be put into practice with the current available means or situation.
<b>indemnify</b>	Legal protection from a liability, as where one person indemnifies another against liability arising under a mortgage. Such an indemnity would mean that the person indemnified can recover from the indemnifying person the amount paid to the creditor.
<b>injunction</b>	An order made that requires a person to do something, or refrain from doing something, breach of which may be punishable.
<b>initiating application</b>	The first form to be filed to begin legal proceedings.
<b>interim order</b>	An order that applies for a limited period, typically until the court has the opportunity to make final orders after a full hearing. Interim orders are often made in situations of urgency, and the court will often lack detailed evidence.

<b>jurisdiction</b>	The authority of a court to decide matters brought before it. May also refer to the specific state or territory in which an offence was committed or a dispute is to be determined (for example 'the jurisdiction of Queensland').
<b>leave</b>	Permission provided by the family courts to do something such as to appeal, seek further orders or seek orders outside of statutory time limits.
<b>liabilities</b>	A person's legal obligations to do something or pay something.
<b>maintenance</b>	Maintenance in this guide is used to refer to spousal or partner maintenance. This is distinct from child maintenance which is a payment ordered to support a child or dependent. Maintenance refers to payment(s) provided by one partner to the other as financial support following separation or divorce if a person cannot meet their own reasonable expenses from their personal income or assets.
<b>notice</b>	A formal written statement providing notification of a specific legal action or intention.
<b>payment flag</b>	A technical term used in the <i>Family Law Act 1975</i> in relation to superannuation. A payment flag has the effect that a trustee of a superannuation fund is prevented from making any payments out of a superannuation fund until the flag is lifted. As a result, it is not possible to split a superannuation fund that is subject to a payment flag.
<b>personal property</b>	Items or property that a party can own and take with them, such as jewellery and furniture (distinct from 'real' property, ie land).
<b>procedural fairness</b>	A legal principle that says people must be made aware of claims or charges against them and have the opportunity to defend the claim or charge. Previously often referred to as 'due process of law'.
<b>property</b>	Property is broadly defined under the <i>Family Law Act 1975</i> to mean property to which the parties to a marriage/de facto relationship are entitled, whether jointly or separately, and whether the right to that property is a current right, or a future right. This may include real estate, goods and personal property, money owing to the party(ies), business interests and shares, licences and permits that can be sold or transferred, an interest in a trust, and superannuation.
<b>property settlement</b>	The division of assets and debts acquired during a marriage or relationship. Property settlements are based on the contributions made and the future needs of each person, and any children.
<b>real property</b>	Land or a building which is part of land, such as a house. Does not include personal property.

<b>registrar</b>	An officer of the Federal Circuit and Family Court of Australia or the Family Court of Western Australia who has authority, among other things, to make property orders by consent.
<b>sealed copy</b>	A document or form which has been filed with the family courts and carries the stamp of the court.
<b>service</b>	The formal process of giving court documents to a party to proceedings or bringing the documents to the attention of a party to proceedings. Generally, ordinary service is completed by personally delivering the documents to an individual.
<b>set aside</b>	To cancel, annul or revoke a judgment or order.
<b>spouse</b>	Either member of a married couple in relation to the other.
<b>superannuation</b>	Money for retirement accumulated throughout an individual's working life, which is considered property in family law property settlements and agreements.
<b>superannuation information kit</b>	Available from the family courts, it provides information and forms required to obtain information from a superannuation trustee in relation to the value of a superannuation interest. The kit includes the Form 6 Declaration and Superannuation Information Request Form which are to be completed and provided to the trustee, as well as the Superannuation Information Form which is completed by the trustee. For parties to a current proceeding who are unsure which fund/s they require valuations from, the kit provides information about requesting superannuation information held by the Australian Taxation Office.  The superannuation fund may charge a fee for providing information in response to the kit.
<b>third party</b>	A person whose interests are part of a family law matter and who is not a member of the marriage or de facto relationship.
<b>trustee</b>	In relation to superannuation, a person or persons, appointed to administer the affairs of the superannuation fund and manage the assets held by the fund.
<b>unconscionable</b>	Conduct not in accordance with what is just or reasonable.
<b>unenforceable</b>	Something which is unable to be put into effect, or not enforceable by the actions of a court.
<b>unsplittable superannuation interest</b>	It is not possible to split some superannuation interests, outlined in the Family Law (Superannuation) Regulations, including a superannuation interest less than \$5000.
<b>vary</b>	Change or alter an order.
<b>void</b>	Without legal force or effect, not legally binding or enforceable.
<b>voidable</b>	Something has effect until it is set aside as void (normally by a court order).



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