

FAMILY LAW ACT 1975

FINANCIAL CONSENT ORDERS – DE FACTO

SECT 90SF

Matters to be taken into consideration in relation to maintenance

- (1) In exercising jurisdiction under section 90SE (after being satisfied of the matters in subsections 44(5) and (6) and sections 90SB and 90SD), the court must apply the principle that a party to a de facto relationship must maintain the other party to the de facto relationship:
 - (a) only to the extent that the first-mentioned party is reasonably able to do so; and
 - (b) only if the second-mentioned party is unable to support himself or herself adequately whether:
 - (i) by reason of having the care and control of a child of the de facto relationship who has not attained the age of 18 years; or
 - (ii) by reason of age or physical or mental incapacity for appropriate gainful employment; or
 - (iii) for any other adequate reason.

Note: For *child of a de facto relationship*, see section 90RB.

- (2) In applying this principle, the court must take into account only the matters referred to in subsection (3).
- (3) The matters to be so taken into account are:
 - (a) the age and state of health of each of the parties to the de facto relationship (the *subject de facto relationship*); and
 - (b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment; and
 - (c) whether either party has the care or control of a child of the de facto relationship who has not attained the age of 18 years; and
 - (d) commitments of each of the parties that are necessary to enable the party to support:
 - (i) himself or herself; and

- (ii) a child or another person that the party has a duty to maintain; and
- (e) the responsibilities of either party to support any other person; and
- (f) to subsection (4), the eligibility of either party for a pension, allowance or benefit under:
 - (i) any law of the Commonwealth, of a State or Territory or of another country; or
 - (ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;and the rate of any such pension, allowance or benefit being paid to either party; and
- (g) a standard of living that in all the circumstances is reasonable; and
- (h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income; and
- (i) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant; and
- (j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party; and
- (k) the duration of the de facto relationship and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration; and
- (l) the need to protect a party who wishes to continue that party's role as a parent; and
- (m) if either party is cohabiting with another person--the financial circumstances relating to the cohabitation; and
- (n) the terms of any order made or proposed to be made under section 90SM in relation to:
 - (i) the property of the parties; or
 - (ii) vested bankruptcy property in relation to a bankrupt party; and
- (o) the terms of any order or declaration made, or proposed to be made, under this Part in relation to:

- (i) a party to the subject de facto relationship (in relation to another de facto relationship); or
 - (ii) a person who is a party to another de facto relationship with a party to the subject de facto relationship; or
 - (iii) the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or
 - (iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii); and
- (p) the terms of any order or declaration made, or proposed to be made, under Part VIII in relation to:
- (i) a party to the subject de facto relationship; or
 - (ii) a person who is a party to a marriage with a party to the subject de facto relationship; or
 - (iii) the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or
 - (iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii); and
- (q) any child support under the Child Support (Assessment) Act 1989 that a party to the subject de facto relationship has provided, is to provide, or might be liable to provide in the future, for a child of the subject de facto relationship; and
- (r) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and
- (s) the terms of any Part VIIIAB financial agreement that is binding on either or both of the parties to the subject de facto relationship; and
- (t) the terms of any financial agreement that is binding on a party to the subject de facto relationship.
- (4) In exercising its jurisdiction under section 90SE, a court must disregard any entitlement of the party whose maintenance is under consideration to an income tested pension, allowance or benefit.

SECT 90SM

Alteration of property interests

- (1) In property settlement proceedings after the breakdown of a de facto relationship, the court may make such order as it considers appropriate:
 - (a) in the case of proceedings with respect to the property of the parties to the de facto relationship or either of them--altering the interests of the parties to the de facto relationship in the property; or
 - (b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the de facto relationship--altering the interests of the bankruptcy trustee in the vested bankruptcy property;

including:

- (c) an order for a settlement of property in substitution for any interest in the property; and
- (d) an order requiring:
 - (i) either or both of the parties to the de facto relationship; or
 - (ii) the relevant bankruptcy trustee (if any);

to make, for the benefit of either or both of the parties to the de facto relationship or a child of the de facto relationship, such settlement or transfer of property as the court determines.

Note 1: The geographical requirement in section 90SK must be satisfied.

Note 2: The court must be satisfied of at least one of the matters in section 90SB.

Note 3: For *child of a de facto relationship*, see section 90RB.

- (2) If a party to the de facto relationship dies after the breakdown of the de facto relationship, an order made under subsection (1) in property settlement proceedings may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (3) The court must not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.
- (4) In considering what order (if any) should be made under this section in property settlement proceedings, the court must take into account:
 - (a) the financial contribution made directly or indirectly by or on behalf of a party to the de facto relationship, or a child of the de facto relationship:
 - (i) to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or
 - (ii) otherwise in relation to any of that last-mentioned property;

whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the de facto relationship or either of them; and

- (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the de facto relationship, or a child of the de facto relationship:
 - (i) to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or
 - (ii) otherwise in relation to any of that last-mentioned property;

whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the de facto relationship or either of them; and

- (c) the contribution made by a party to the de facto relationship to the welfare of the family constituted by the parties to the de facto relationship and any children of the de facto relationship, including any contribution made in the capacity of homemaker or parent; and
 - (d) the effect of any proposed order upon the earning capacity of either party to the de facto relationship; and
 - (e) the matters referred to in subsection 90SF(3) so far as they are relevant; and
 - (f) any other order made under this Act affecting a party to the de facto relationship or a child of the de facto relationship; and
 - (g) any child support under the *Child Support (Assessment) Act 1989* that a party to the de facto relationship has provided, is to provide, or might be liable to provide in the future, for a child of the de facto relationship.
- (5) Without limiting the power of any court to grant an adjournment in proceedings under this Act, if, in property settlement proceedings in relation to the parties to a de facto relationship, a court is of the opinion:
- (a) that there is likely to be a significant change in the financial circumstances of the parties to the de facto relationship or either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings; and
 - (b) that an order that the court could make with respect to:
 - (i) the property of the parties to the de facto relationship or either of them; or
 - (ii) the vested bankruptcy property in relation to a bankrupt de facto party to the de facto relationship;

if that significant change in financial circumstances occurs is more likely to do justice as between the parties to the de facto relationship than an order that the court could make immediately with respect to:

- (iii) the property of the parties to the de facto relationship or either of them; or
- (iv) the vested bankruptcy property in relation to a bankrupt party to the de facto relationship;

the court may, if so requested by either party to the de facto relationship or the relevant bankruptcy trustee (if any), adjourn the proceedings until such time, before the expiration of a period specified by the court, as that party to the de facto relationship or the relevant bankruptcy trustee, as the case may be, applies for the proceedings to be determined, but nothing in this subsection requires the court to adjourn any proceedings in any particular circumstances.

- (6) If a court proposes to adjourn proceedings as provided by subsection (5), the court may, before so adjourning the proceedings, make such interim order or orders or such other order or orders (if any) as it considers appropriate with respect to:
 - (a) any of the property of the parties to the de facto relationship or of either of them; or
 - (b) any of the vested bankruptcy property in relation to a bankrupt party to the de facto relationship.
- (7) The court may, in forming an opinion for the purposes of subsection (5) as to whether there is likely to be a significant change in the financial circumstances of either or both of the parties to the de facto relationship, have regard to any change in the financial circumstances of a party to the de facto relationship that may occur by reason that the party to the de facto relationship:
 - (a) is a contributor to a superannuation fund or scheme, or participates in any scheme or arrangement that is in the nature of a superannuation scheme; or
 - (b) may become entitled to property as the result of the exercise in his or her favour, by the trustee of a discretionary trust, of a power to distribute trust property;

but nothing in this subsection limits the circumstances in which the court may form the opinion that there is likely to be a significant change in the financial circumstances of a party to the de facto relationship.

- (8) If a party to the de facto relationship dies after the breakdown of the de facto relationship, but before property settlement proceedings are completed:
 - (a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings; and

- (b) if the court is of the opinion:
 - (i) that it would have made an order with respect to property if the deceased party had not died; and
 - (ii) that it is still appropriate to make an order with respect to property;

the court may make such order as it considers appropriate with respect to:

- (iii) any of the property of the parties to the de facto relationship or either of them; or
 - (iv) any of the vested bankruptcy property in relation to a bankrupt de facto party to the de facto relationship; and
- (c) an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (9) The Family Court must not make an order under this section in property settlement proceedings (other than an order until further order or an order made with the consent of all the parties to the proceedings) unless:
- (a) the parties to the proceedings have attended a conference in relation to the matter to which the proceedings relate with a Registrar or Deputy Registrar of the Family Court; or
 - (b) the court is satisfied that, having regard to the need to make an order urgently, or to any other special circumstance, it is appropriate to make the order notwithstanding that the parties to the proceedings have not attended a conference as mentioned in paragraph (a); or
 - (c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).
- (10) The following are entitled to become a party to proceedings in which an application is made for an order under this section by a party to a de facto relationship (the *subject de facto relationship*):
- (a) a creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the order were made;
 - (b) a person:
 - (i) who is a party to a de facto relationship (the *other de facto relationship*) with a party to the subject de facto relationship; and
 - (ii) who could apply, or has an application pending, for an order under section 90SM, or a declaration under section 90SL, in relation to the other de facto relationship;

- (c) a person who is a party to a Part VIIIAB financial agreement (that is binding on the person) with a party to the subject de facto relationship;
 - (d) a person:
 - (i) who is a party to a marriage with a party to the subject de facto relationship; and
 - (ii) who could apply, or has an application pending, for an order under section 79, or a declaration under section 78, in relation to the marriage (or void marriage);
 - (e) a person who is a party to a financial agreement (that is binding on the person) with a party to the subject de facto relationship;
 - (f) any other person whose interests would be affected by the making of the order.
- (11) Subsection (10) does not apply to a creditor of a party to the proceedings:
- (a) if the party is a bankrupt--to the extent to which the debt is a provable debt (within the meaning of the *Bankruptcy Act 1966*); or
 - (b) if the party is a debtor subject to a personal insolvency agreement--to the extent to which the debt is covered by the personal insolvency agreement.
- (12) If a person becomes a party to proceedings under this section because of paragraph (10)(b), the person may, in the proceedings, apply for:
- (a) an order under section 90SM; or
 - (b) a declaration under section 90SL;
- in relation to the other de facto relationship described in that paragraph.
- (13) If a person becomes a party to proceedings under this section because of paragraph (10)(d), the person may, in the proceedings, apply for:
- (a) an order under section 79; or
 - (b) a declaration under section 78;
- in relation to the marriage (or void marriage) described in that paragraph.
- (14) If:
- (a) an application is made for an order under this section in proceedings between the parties to a de facto relationship with respect to the property of the parties to the de facto relationship or either of them; and
 - (b) either of the following subparagraphs apply to a party to the de facto relationship:

- (i) when the application was made, the party was a bankrupt;
 - (ii) after the application was made but before it is finally determined, the party became a bankrupt; and
- (c) the bankruptcy trustee applies to the court to be joined as a party to the proceedings; and
- (d) the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under this section in the proceedings;

the court must join the bankruptcy trustee as a party to the proceedings.

(15) If a bankruptcy trustee is a party to property settlement proceedings in relation to the parties to a de facto relationship, then, except with the leave of the court, the bankrupt party to the de facto relationship is not entitled to make a submission to the court in connection with any vested bankruptcy property in relation to the bankrupt party.

(16) The court must not grant leave under subsection (15) unless the court is satisfied that there are exceptional circumstances.

(17) If:

- (a) an application is made for an order under this section in proceedings between the parties to a de facto relationship with respect to the property of the parties to the de facto relationship or either of them; and
- (b) either of the following subparagraphs apply to a party to the de facto relationship (the *debtor party*):
 - (i) when the application was made, the party was a debtor subject to a personal insolvency agreement;
 - (ii) after the application was made but before it is finally determined, the party becomes a debtor subject to a personal insolvency agreement; and
- (c) the trustee of the agreement applies to the court to be joined as a party to the proceedings; and
- (d) the court is satisfied that the interests of the debtor party's creditors may be affected by the making of an order under this section in the proceedings;

the court must join the trustee of the agreement as a party to the proceedings.

(18) If the trustee of a personal insolvency agreement is a party to property settlement proceedings in relation to the parties to a de facto relationship, then, except with the leave of the court, the party to the de facto relationship who is the debtor subject to the agreement is not entitled to make a submission to the court in connection with any property subject to the agreement.

- (19) The court must not grant leave under subsection (18) unless the court is satisfied that there are exceptional circumstances.
- (20) For the purposes of subsections (14) and (17), an application for an order under this section is taken to be finally determined when:
- (a) the application is withdrawn or dismissed; or
 - (b) an order (other than an interim order) is made as a result of the application.