

SUPERANNUATION ORDERS (BY COURTESY OF STEPHEN BOURKE)

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Precedent superannuation orders

These precedent orders and notes have been supplied by courtesy of Stephen Bourke. Stephen was formerly the head of the Family Law Division of the Commonwealth Attorney-General's Department and project leader on the amendments for superannuation and family law. He is now a director of the specialist legal practice, Certus Law, a practice that specialises in superannuation, trusts and estate planning. He also consults to other practitioners on superannuation and family law through the consulting practice, SuperSplitting. Stephen is the author of "Super Splitting for Family Lawyers" which is available from www.supersplitting.com.au

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General notes on drafting

1. The splitting of superannuation occurs through the combined operation of two sets of laws. The first set of laws is, of course, the *Family Law Act 1975*. The second set of laws is the law governing the prudential regulation of superannuation, the *Superannuation Industry (Supervision) Act 1993* and associated regulations as well as the governing rules of the superannuation trusts.
2. All splitting orders require provisions derived from the first set of laws, the *Family Law Act 1975*. These might be called the mandatory elements.
3. However, provisions in a splitting order relying on superannuation law are not mandatory but may be used depending on the type of superannuation involved. Trustees of superannuation in an accumulation plan are required to observe the operating standards of Part 7A of the *Superannuation Industry (Supervision) Regulations 1994*. Trustees of superannuation in a defined benefit plan are bound by the terms of the governing rules of the superannuation trust.

The mandatory elements – the *Family Law Act* requirements

1. The power of a court exercising jurisdiction under the *Family Law Act 1975* in relation to superannuation is a power to split payments (s 90MS).
2. The court does not have the power to order the superannuation trustee to split the underlying superannuation interest. All splitting orders must therefore be made in accordance with that limitation on the court's power (s 90MT).
3. The trustee of the superannuation plan is a third party to the marriage but is not bound by the terms of the payment splitting order unless the trustee has been accorded procedural fairness (s 90MZD).
4. The court may make one of three types of payment splitting orders (the first two will be the most frequently used):
 - a. an order which allocates an amount ("the base amount") – this may be referred to as a type (a) order because it is an order made in accordance with s 90MT(1)(a);
 - b. an order which prescribes a percentage – this may be referred to as a type (b) order because it is an order made in accordance with s 90MT(1)(b);
 - c. an order which prescribes a percentage for the percentage-only interests – this may be referred to as a type (c) order because it is an order made in accordance with s 90MT(1)(c). However, these orders will be quite rare as they would only apply to a few judicial, parliamentary and governors' superannuation schemes.
5. The four required elements of a payment splitting order are as follows:
 - a. Allocate the base amount or prescribe the percentage, depending on whether the order is a type (a) or a type (b) order;
 - b. Order that the non-member spouse has an entitlement to be paid from payments made to the member spouse;
 - c. Order that the superannuation trustee is to:
 - i. calculate the entitlement of the non-member spouse in accordance with the *Family Law (Superannuation) Regulations 2001*;