

A Guide for Family Law Court Orders

FAMILY LAW

Applicable to the state super members of ESSSuper (being those in the New Scheme, Revised Scheme, Transport Scheme, or SERB Scheme), the Melbourne Transit Authority Superannuation Scheme and the Parliamentary Contributory Superannuation Fund.

To assist in the preparation of Family Law court orders in relation to superannuation entitlements in the funds of the Emergency Services Superannuation Scheme ("the Scheme"), ESSSuper has prepared answers to some common questions and samples of wording that is commonly used in the preparation of Court Orders.

Note: ESSSuper is the trading name of the Emergency Services Superannuation Board, Administrator of the Scheme.

Please refer to the *Family Law Information Sheet* for general information on the operation of superannuation splitting in the schemes, including the clean break of a non-member spouse entitlement.

Please also refer to the relevant governing legislation, listed under Question 3 below, to ensure you have considered the relevant rules of the Scheme before drafting Orders.

FREQUENTLY ASKED QUESTIONS

Question 1: Who acts as the Trustee and Administrator of the Scheme?

Answer:

The Emergency Services Superannuation Board (trading as ESSSuper) is Administrator of the Scheme. ESSSuper is established under the *Emergency Services Superannuation Act 1986*.

On 1 December 2005, the assets and liabilities of the State Superannuation Fund (SSF) were transferred to the Scheme. The SSF has ceased to exist, and all of the superannuation funds that comprised it now form part of the Scheme.

The correct way to refer to an entitlement in the funds formerly of the State Superannuation Fund is "the Emergency Services Superannuation Scheme – [name of scheme]". For example:

- Emergency Services Superannuation Scheme – New Scheme;
- Emergency Services Superannuation Scheme – Revised Scheme;
- Emergency Services Superannuation Scheme – Transport Scheme;
- Emergency Services Superannuation Scheme – State Employees Retirement Benefits (SERB) Scheme.

The funds under the *Parliamentary Salaries & Superannuation Act 1968* can be referred to as:

- Parliamentary Contributory Superannuation Fund.

Question 2: What are the ESSSuper's basic requirements for Family Law Court Orders?

Answer:

- Court Orders must contain a clear and unambiguous statement of the method of superannuation splitting drafted in accordance with the relevant provisions of the *Family Law Act 1975*.
- ESSSuper requests that the operative date be after service of **sealed** Orders on ESSSuper.
- ESSSuper must be accorded procedural fairness. Under the Family Court rules, ESSSuper must be given 28 days in which to comment on draft Orders.
- ESSSuper requests the inclusion of wording enabling the parties to return to the Family Court in the event that issues arise in the implementation of the Orders. For example; "that the parties and the trustee have liberty to apply in relation to the implementation of the orders affecting the superannuation interest".
- ESSSuper believes the orders should include wording to require the member spouse to lodge within 7 days, such documents as are necessary to enable ESSSuper to establish what benefit is payable if the member spouse becomes entitled to a benefit prior to the clean break taking effect, (refer to sample wording below).

Question 3: Where are the Governing Rules for the superannuation funds administered by ESSSuper?

Answer:

ESSSuper is only able to pay benefits in accordance with its governing rules and this includes issues relating to the payment of benefits on death and disability, and to whom such benefits may be paid. The governing rules also include the Family Law "clean break" provisions.

The governing rules of the funds are found in the relevant Trust Deeds or in Victorian State legislation, as follows:

- Revised and New Schemes – *State Superannuation Act 1988*;
- SERB Scheme - *State Employees Retirement Benefits Act 1979*;
- Transport Scheme – *Transport Superannuation Act 1988*;
- Parliamentary Contributory Superannuation Fund – *Parliamentary Salaries and Superannuation Act 1968*.

Question 4: What is meant by Family Law “clean break” provisions?

Answer:

In most cases, ESSSuper is required to pay out the non-member spouse’s entitlement as a lump sum irrespective of whether the member spouse has become entitled to claim a benefit (i.e. ESSSuper is required to apply a “clean break”). This amount will either be rolled over to a complying superannuation fund or Retirement Savings Account (RSA), or paid directly to the non-member spouse, if he or she has satisfied a “relevant condition of release” as defined in the *Superannuation Industry (Supervision) Regulations 1994*, or if the member spouse is in receipt of a pension payable under the governing rules of the relevant fund.

In the case of a member in receipt of a reviewable disability pension, ESSSuper has the discretion whether or not to apply the clean break provisions.

Each of the Acts below contain Parts that refer to the clean break provisions. These are:

- Revised and New Schemes – the clean break provisions are found in Part 7A of the *State Superannuation Act 1988*;
- SERB Scheme – the clean break provisions are found in Part IVA of the *State Employees Retirement Benefits Act 1979*;
- Transport Scheme – the clean break provisions are found in Part 7A of the *Transport Superannuation Act 1988*;
- Parliamentary Contributory Superannuation Fund – the clean break provisions are found in Part 3 of the *Parliamentary Salaries and Superannuation Act 1968*.

Question 5: What happens to Court Orders to split a superannuation entitlement in the event of the death of the member?

Answer:

The payment of death benefits in relation to the funds of ESSSuper and Family Law is complex. ESSSuper can only pay out a death benefit in accordance with the governing rules of the fund, found in the relevant State Act, as above.

Points to note are:

- The eligible beneficiaries for death benefits are prescribed in the relevant legislation and cannot be varied – death benefit nominations by the member will only have effect in some of the funds ESSSuper administers and in limited circumstances;
- Pension payments are contingent upon the life of the beneficiary and therefore will cease on the death of the beneficiary (some reversionary pensions may be payable in some circumstances to eligible beneficiaries);
- The value of a benefit paid on death may differ from the value calculated for Family Law purposes. This is because these calculations take into account particular assumptions, for example, that the member will work until retirement age.

Question 6: Can an entitlement under a superannuation split be paid directly to a non-member spouse or must it be rolled over?

Answer:

Preservation standards apply to payments to a non-member spouse pursuant to a superannuation split, and in many cases entitlements are required to be rolled over to a complying superannuation fund until age 65.

Refer:

- *Superannuation Industry (Supervision) Regulations 1994*, Schedule 1, containing the Conditions of Release;
- the governing rules of the funds in the relevant State legislation.

Question 7: What is the situation if ESSSuper is not accorded procedural fairness in relation to Orders to split a superannuation interest?

Answer:

If ESSSuper is not accorded procedural fairness and receives sealed orders that it is unable to put into effect, we will request that they be rescinded so that new orders can be made. Before new orders are made, procedural fairness must be accorded and ESSSuper will require 28 days (in accordance with Rules 10.16 & 14.06 of the *Family Court Rules 2004*) within which to review the Orders. Until this is carried out, we will consider the orders to be invalid and will not commence superannuation splitting procedures.

Question 8: What if there are changes required to proposed court orders after ESSSuper has reviewed and responded to them?

Answer:

If proposed orders are changed after ESSSuper has reviewed them, or our comments are not included in the Orders, ESSSuper will consider that approval has not been sought or given to those Orders. If, as a result, we are not able to put the final Orders into effect, we will require that they be rescinded and new orders made.

ESSSuper will review any amendments made to proposed Orders submitted to it.

Question 9: Can ESSSuper’s letter of response to proposed Court Orders be handed up to the Court?

Answer:

Yes. ESSSuper encourages its letter of response to be handed up to the Court.

COMMONLY USED WORDING FOR FAMILY LAW SUPERANNUATION SPLITTING COURT ORDERS

The following samples of standard wording are commonly included in the drafting of Court Orders and are consistent with ESSSuper's requirements.

Note: ESSSuper is the trading name of the Emergency Services Superannuation Board, Administrator of the Emergency Services Superannuation Scheme.

Sample 1: Where a base amount is specified:

"That pursuant to section 90MT(1)(a) of the Family Law Act 1975, whenever a splittable payment becomes payable in respect of the superannuation interest of [name of member] in the Emergency Services Superannuation Scheme [Name of Scheme]:

- a) [name of non-member spouse] shall be entitled to be paid an amount calculated in accordance with Part 6 of the Family Law (Superannuation) Regulations 2001 using the base amount of \$xxxxx.xx (provided that such base amount shall not exceed the value of the interest determined under section 90MT(2));
- b) there be a corresponding reduction in the superannuation interest of the [member] to whom the splittable payment would have been made but for the Order."

Sample 2: Where a percentage split is specified:

"That pursuant to section 90MT(1)(b) of the Family Law Act 1975, whenever a splittable payment becomes payable from the superannuation interest held by [name of member] in the Emergency Services Superannuation Scheme – [name of Scheme], the trustee shall pay to [name of non-member spouse] [insert percentage required]% of each splittable payment and there be a corresponding reduction in the entitlement [name of member] would have had but for these Orders."

Sample 3: Operative Time to be specified:

"That the operative time for these orders is four business days after service of the final sealed orders on the Emergency Services Superannuation Board".

Sample 4: Inclusion of Liberty to apply:

"That there be liberty to apply to each party and the Trustee in relation to the implementation of the orders affecting the superannuation interest."

Sample 5: Inclusion of requirement for member to provide forms if a splittable payment becomes payable:

"If as a result of termination of his/her employment [name of member] becomes entitled to a benefit prior to the Emergency Services Superannuation Board making a payment under section [insert clean break section of relevant Act], s/he shall provide to the Emergency Services Superannuation Board all such forms as shall be necessary to enable the Trustee to determine the nature and quantum of the superannuation entitlement and any other related information it may reasonably require, within 7 days of that entitlement arising."