



Application for Consent Orders Kit

www.familycourt.wa.gov.au

Use this kit to obtain an order when you have reached agreement about:

- Your children
- Your property
- Maintenance for a husband, wife or de facto spouse

This kit includes:

- Information (pages A-N)
- Copies of the relevant sections or references of the *Family Law Act*, *Family Court Act* and *Interpretation Act 1984*
- Information for de factos
- Sample orders

Application for Consent Orders (Form 11) is a separate download form

CHECKLIST

This checklist is provided as a guide to completing the form correctly. It highlights particular questions which the Court has found people do not always answer correctly or fully.

- At Part A, Item 3** on page 1, have you clearly stated your contact address (address for service) in Australia?
- At Part B** on page 2, have you given details of your relationship? If you were married you will need to provide the Court with a photocopy of your Marriage Certificate or Certificate of Divorce when you lodge the application. If you were not married and are seeking orders about your children you will need to lodge a photocopy of the children's birth certificates. De facto parties seeking property orders will require an affidavit.
- At Part C, Item 13 & 14** on pages 3 & 4, have you provided details of any ongoing Court cases or existing orders concerning the applicant, respondent or the children? Where there is an existing order you may either attach a copy of the order or set out the details of that order. If the orders you seek are intended to vary or discharge an existing order made in a Court other than the Court in which the Application for Consent Orders is to be filed, then sealed copies of the existing order must be filed.
- At Part C, Item 21** on page 5, if there is a proceeds of crime order or a forfeiture application in existence in relation to any of the property of any of the parties, have you attached a sealed copy of the order or application?
- At Part E** have you signed each page of the draft Consent Orders and dated the last page the same day you swore/affirmed your affidavit? See parts I, K, and M.
- At Part F** on pages 7-9, if you are seeking parenting orders, have you provided separate information for each child?
- At Part G** on pages 10 -18, if you are the applicant and you are seeking property or maintenance orders, have you completed column 1 and has the respondent completed column 2?
- At Part G, Item 49** on page 14, if you are the applicant and you are seeking property or maintenance orders have you provided your total net worth (not including superannuation) by subtracting your liabilities from the total value of property owned by you, and has the respondent done the same?
- At Part G, Item 50** on page 14, if you are seeking property or maintenance orders and either party has acquired or disposed of any property since the date of separation have the details been provided?
- At Part G, Items 51-55** on page 15, for married parties where a superannuation splitting order is sought, have you given the details required and attached a completed superannuation information form? If you have more than one superannuation interest have you attached a list of all your superannuation interests and given the details required for each interest?
- At Part H** on pages 20 & 21, if you are seeking property orders have you addressed each item and provided the net value of the property that the applicant and the respondent will each receive? For married parties, if you are seeking an order in relation to superannuation have you provided the gross value of the superannuation that the applicant and the respondent will each receive and have you set out the taxation consequences of the order sought?
- At Part I & Part K** on pages 22 & 24, have you marked every box that applies to you? Have you sworn/affirmed and signed your affidavit in the presence of a Justice of the Peace, notary public or lawyer?
- At Part J & Part L** on pages 22 & 24, if you have sought independent legal advice about the orders you seek has the lawyer completed and signed the statement of independent legal advice?
- If you are not married and you are seeking an order about children have you filed a copy of the birth certificate of each child with your Application for Consent Orders?
- Have you answered every question that applies to you?
- Do you have the original and five copies of the draft consent orders to lodge with the application. Remember the draft orders should be signed by each party on the same day that that party swears/affirms his or her affidavit (See Parts I,K or M).
- Have you made two copies of the completed application for Consent Orders (Form 11) and one copy of your marriage certificate or divorce orders? These will need to be presented when you file the original application for Consent Orders form.
- Ensure that you file the application within 90 days of the date of the first affidavit (see Parts I and K).

About this kit

This kit can be used to apply for Consent Orders about the care arrangements for your children (known as parenting orders), the division of property or maintenance for a husband, wife or de facto spouse (known as spouse maintenance). It can also be used if you are applying for Consent Orders which vary or discharge existing Family Court orders.

Important note

You should read this kit carefully.

You are responsible for making sure all your paperwork is in order. Family Court staff can help you with the provision of forms and information about the processing of your application but **they cannot give you legal advice**.

If you do not comply with the *Family Law Act*, *Family Court Act* (where applicable) and *Family Law Rules*, your application for Consent Orders may be delayed or refused.

If the parenting orders you intend to seek **are inconsistent with a family violence order** between any of the parties or concerning any of your children then your application must be heard in court. In this case you may need to consider submitting a different type of application. **You should seek legal advice before proceeding any further.**

About the words used in this Kit

Affidavit - is a written statement which is sworn or affirmed by you before a Justice of the Peace, notary public or lawyer. You must have the affidavit at Parts I & K of the Application for Consent Orders sworn or affirmed before filing it with the Court.

Applicant – The person who seeks to have the Court make orders.

Contact address (address for service) in Australia - the address in Australia that a party in a case nominates as being the place where documents are to be left for them or mailed, faxed or emailed to them.

Draft Consent Orders – a term used to describe the signed agreement which you wish to have made into court orders.

Electronic communication – as the context permits includes transmission of information in the form of speech, data, text or images for example by telephone, or videoconferencing, closed circuit television, facsimile or email.

Family violence – means conduct whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes or that or any other member of the person's family reasonably to fear for, or reasonably be apprehensive about, his or her personal well being or safety. Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety. (See the *Family Law Act*, section 4 (1)).

Family violence order – an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence.

Financial agreement – means an agreement that is a financial agreement under section 90B, 90C, 90D, of the *Family Law Act 1975* but it does not include an ante-nuptial or post-nuptial settlement to which section 85A of the Act applies.

Filing - the procedure of you lodging an application or other document with the registry of the Court. You can do this by hand, post or electronic means.

Maintenance – financial support.

Medical procedures – an Application for Final Orders (Form 1) seeking an order authorising a major medical procedure on a child which is not for the purpose of treating some malfunction or disease.

Party - a person involved in a case before the Court. Once the Application for Consent Orders is filed, both the applicant and respondent become parties to the application.

Registrar – the person who considers applications for Consent Orders.

Registry - how Family Court offices are known. For example, the Family Court of Western Australia at Perth.

Respondent – Party to an application for Consent Orders who is asked to consent to an application to have the Court make the orders.

Sealed copy – a copy of a document which has an original Court seal stamped on it.

Service - the process of giving or delivering documents to a party after the documents have been filed. You should obtain the Court *Service Kit*.

Spouse – a husband or wife, or former husband or wife, or de facto husband or wife or former de facto husband or wife.

Spouse maintenance – financial support for a spouse.

Superannuation Information Form – a form required to be used in property cases of married parties where there are superannuation interests being considered as part of the property settlement or division. The form is used to seek information from the trustee of the superannuation plan.

Third party – for property orders a person who is not a party to the marriage or de facto relationship.

What are consent orders?

The Family Court encourages families in dispute to reach agreement about the care arrangements for their children, the division of property or spouse maintenance.

If you want your agreement to become an order of the Court, you can apply for 'Consent Orders' to be made without having to actually go to Court. You can do this by using this kit or with the help of your lawyer.

Consent Orders have the same legal effect as an order made after a Court hearing.

The Consent Orders you cannot seek by using this application

- Child maintenance for children covered by the Child Support (Assessment) Act, that is, those under 18 who were born after 1 October 1989 or whose parents separated after that date – this is handled by the Child Support Agency which can be contacted on 131 272 for the cost of a local call.
- Medical procedures.
- Orders under cross vesting laws.
- A parenting order in favour of a person who is not a parent, grandparent or other relative under Section 65G of the *Family Law Act 1975* or Section 92 of the *Family Court Act 1997*.

You should seek legal advice before proceeding any further with any of these types of applications.

What you need to consider

It is important that you understand the meaning and effect of the orders you are seeking.

Even if you have decided to make your application without the help of a lawyer, you should obtain independent legal advice about the effect and consequences of the order you propose.

If you are seeking **orders concerning children** you should read and consider sections 60B, 60CA, 60CC, 61DA and 65DAA of the *Family Law Act 1975* or Part 5 of the *Family Court Act 1997* for an ex-nuptial child.

If you are seeking **property orders**, you should read and consider sections 75 and 79 and Part VIII B of the *Family Law Act 1975*, or section 205 of the *Family Court Act 1997* and section 13A of the *Interpretation Act 1984* for de facto relationships. If you are seeking **an order or injunction binding a third party** you should read and consider Part VIII A of the *Family Law Act 1975*.

If you are seeking **spouse maintenance orders**, you should read and consider sections 72, 74 and 75 of the *Family Law Act 1975*.

All of these sections, except for Part VIII A and Part VIII B (which deals with superannuation interests), are set out on the following pages. Part VIII B can be accessed through the Family Court website:

www.familycourt.wa.gov.au

What the Court must consider

The matters the Court must consider when deciding an Application for Consent Orders are set out in the *Family Law Act 1975*. The Court has to be satisfied that:

- for parenting orders, the arrangements are proper;
- for property orders, the arrangements are just and equitable.

If the Court is satisfied that the orders should be made, the Court will issue the Consent Orders. Copies will be returned to you.

Setting out your orders

The orders you seek concerning your children, property or spouse maintenance will depend on the circumstances of your family.

You should seek legal advice about what orders to apply for.

Generally, Consent Orders that can be made by a court fall into two categories – parenting orders and financial orders.

PARENTING ORDERS

These include orders relating to:

- **The person with whom the child lives** – with whom the child lives, including any shared arrangements.
- **The times that a child may spend with** - with a parent with whom they are not living, or anyone else who plays an important part in their life, such as a grandparent and can be either face-to-face, or by phone, email or letters.
- **Child maintenance** – for children not covered by the Child Support (Assessment) Act. If you are unsure contact the Child Support Agency.
- **Any other aspect of parental responsibility**. - this may include the day-to-day care, welfare and development of a child, religion, education and sport.

FINANCIAL ORDERS

These include orders relating to:

- **Spouse maintenance** – financial support for a husband, wife, former husband/wife or de facto.
- **Property** – how your property, superannuation, financial resources and liabilities should be shared between you.

Once you have reached agreement you need to prepare your application to the Court. See the 'How to apply' section on page 1 of this Kit.

Following are parts of the *Family Law Act 1975*, which you should read before applying for Consent Orders.

SUPERANNUATION

For married parties, there are special requirements where you are making an application for orders for property settlement and either party has a superannuation interest.

If you are seeking a splitting order in relation to a superannuation interest in accordance with Section 90MT of the *Family Law Act 1975*:

- (a) You must attach to the application a completed Superannuation Information Form in relation to that superannuation interest.
- (b) You must calculate and agree the value of the superannuation interest and consider the taxation consequences of the order. If the *Family Law (Superannuation) Regulations 2001* provide a method for calculating the value then that method must be used. Otherwise you must agree an appropriate method of valuing the interest. The completed Superannuation Information Form will have sufficient information to allow the value to be calculated in accordance with the regulations.
- (c) Where a base amount is allocated then that amount cannot exceed the value of the interest (see Section 90MT(4)).

If you are seeking an order that imposes an obligation on the Trustee of the superannuation plan you must satisfy the court that the Trustee has been accorded procedural fairness in relation to the making of the order.

The court requires that at least 28 days before filing the application, you must serve written notice of the following matters on the Trustee of the superannuation plan in which the superannuation interest is held:

- (a) the terms of the orders that will be sought from the Court to bind the Trustee;
- (b) that the Trustee may object to the orders sought by giving written notice within 28 days of receiving the notice.

If the Trustee does not object to the orders sought within 28 days after receiving the notice you may file the application.

The draft Consent Orders must contain a provision that each party and the Trustee have liberty to apply in relation to the implementation of the orders affecting the superannuation interest.

You should seek legal advice, and where necessary accounting advice about these requirements.

What if there is an existing order?

If the orders you seek are intended to vary or discharge an existing order which was made in any other Court or Family Court registry, other than the registry in which the Application for Consent Orders is to be filed, then sealed copies of the existing order must also be filed.

Other documents

If there has been no other case involving you at the Family Court registry in which your Application for Consent Orders is to be filed you must also file a photocopy of the following:

- Marriage certificate (see below) or Certificate of Divorce
- Birth certificate of each child (if you were not married and you are seeking an order about children)

Marriage certificate

If you were married, you must file a photocopy of your Marriage Certificate. If you do not have your marriage certificate to photocopy a certified copy can be obtained from the Registrar of Births, Deaths and Marriages in the country, state or territory where you were married.

If you cannot provide a photocopy of your marriage certificate, then the Court will need evidence from you in an affidavit proving that you are married. You should obtain legal advice about how to do this.

If your marriage certificate is not in English, then you must also lodge:

- an English translation of it, and
- an affidavit from the translator which
 - ~ states his or her qualifications to translate,
 - ~ attaches a copy of the marriage certificate,
 - ~ attaches the translation,
 - ~ states that the translation is an accurate translation of the marriage certificate, and
 - ~ states that the attached copy of the marriage certificate is a true copy of the marriage certificate translated.

If you have been divorced you may file a photocopy of the Certificate of Divorce or decree.

Change of name, address

If you change address after the application is filed you must file a Notice of Address for Service (Form 8) so the Court can send any papers to the correct address. This form is available from the Family Court website: www.familycourt.wa.gov.au or Court registry. If you change your name after the application has been filed, you must inform the Court in writing.

Duty of disclosure

You must make full disclosure of your financial circumstances. You must read Rule 13.04 of the *Family Law Rules 2004*.

WARNING

A failure to give full and frank disclosure has serious consequences. These consequences may include:

- any consent orders being set aside;
- you having to pay the other party's legal costs;
- your being fined;
- you being charged with contempt of court.

Who should be a party

A person against whom an order is sought or whose rights may be directly affected by an issue in the case must be included as a party to the application for consent orders. For the persons who must be parties to an application seeking parenting orders see Rule 6.02(2) of the *Family Law Rules* 2004.

If an order or injunction is to be binding on a third party under Part VIIIAA of the *Family Law Act* 1975, that third party must:

- be named as a respondent to the application;
- sign the draft consent order;
- swear or affirm Part M (see supplementary page to the Application to Consent Orders).

Parenting orders

Please note that the Western Australia law in relation to ex-nuptial children is substantially the same as below (see Part 5 of the *Family Court Act* 1997).

EXTRACT FROM SECTION 64B - MEANING OF PARENTING ORDER AND RELATED TERMS

(1) A **parenting order** is:

- (a) an order under this Part (including an order until further order) dealing with a matter mentioned in subsection (2); or
- (b) an order under this Part discharging, varying, suspending or reviving an order, or part of an order, described in paragraph (a).

(2) A parenting order may deal with one or more of the following:

- (a) the person or persons with whom a child is to live;
- (b) the time a child is to spend with another person or other persons;
- (c) the allocation of parental responsibility for a child;
- (d) if 2 or more persons are to share parental responsibility for a child—the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
- (e) the communication a child is to have with another person or other persons;
- (f) maintenance of a child;
- (g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:
 - (i) a child to whom the order relates; or
 - (ii) the parties to the proceedings in which the order is made;
- (h) the process to be used for resolving disputes about the terms or operation of the order;
- (i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

The person referred to in this subsection may be, or the persons referred to in this subsection may include, either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child).

Note: Paragraph (f)—a parenting order cannot deal with the maintenance of a child if the *Child Support (Assessment) Act* 1989 applies.

- (3) Without limiting paragraph (2)(c), the order may deal with the allocation of responsibility for making decisions about major long-term issues in relation to the child.
- (4) The communication referred to in paragraph (2)(e) includes (but is not limited to) communication by:
 - (a) letter; and
 - (b) telephone, email or any other electronic means.
- (4A) Without limiting paragraphs (2)(g) and (h), the parenting order may provide that the parties to the proceedings must consult with a family dispute resolution practitioner to assist with:
 - (a) resolving any dispute about the terms or operation of the order; or
 - (b) reaching agreement about changes to be made to the order.

SECTION 60B OBJECT OF PART AND PRINCIPLES UNDERLYING IT

60B(1) [Object of Part]

The objects of this Part are to ensure that the best interests of children are met by:

- (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
- (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
- (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
- (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

60B(2) [Principles underlying object]

The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
- (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
- (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future parenting of their children; and
- (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

SECTION 60CA CHILD'S BEST INTERESTS PARAMOUNT CONSIDERATION IN MAKING A PARENTING ORDER

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

Note: Division 10 deals with how a court determines a child's best interest.

SECTION 60CC HOW A COURT DETERMINES WHAT IS IN CHILD'S BEST INTERESTS

60CC(1) [Determining child's best interests]

Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).

60CC(2) [Primary considerations]

The primary considerations are:

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

Additional considerations

S60 (3) Additional considerations are:

- (a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;
- (b) the nature of the relationship of the child with:
 - (i) each of the child's parents; and
 - (ii) other persons (including any grandparent or other relative of the child);
- (c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and

continuing relationship between the child and the other parent;

- (d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;
 - (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
 - (f) the capacity of:
 - (i) each of the child's parents; and
 - (ii) any other person (including any grandparent or other relative of the child); to provide for the needs of the child, including emotional and intellectual needs;
 - (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;
 - (h) if the child is an Aboriginal child or a Torres Strait Islander child:
 - (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
 - (ii) the likely impact any proposed parenting order under this Part will have on that right;
 - (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
 - (j) any family violence involving the child or a member of the child's family;
 - (k) any family violence order that applies to the child or a member of the child's family, if:
 - (i) the order is a final order; or
 - (ii) the making of the order was contested by a person;
 - (l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
 - (m) any other fact or circumstance that the court thinks is relevant.
- (4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:
- (a) has taken, or failed to take, the opportunity:
 - (i) to participate in making decisions about major long-term issues in relation to the child; and
 - (ii) to spend time with the child; and
 - (iii) to communicate with the child; and
 - (b) has facilitated, or failed to facilitate, the other parent:
 - (i) participating in making decisions about major long-term issues in relation to the child; and
 - (ii) spending time with the child; and
 - (iii) communicating with the child; and
 - (c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.
- (4A) If the child's parents have separated, the court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.
- (5) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2) or (3).

Right to enjoy Aboriginal or Torres Strait Islander culture

- (6) For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
 - (a) to maintain a connection with that culture; and
 - (b) to have the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - (ii) to develop a positive appreciation of that culture.

s61DA [Presumption of equal shared parental responsibility when making parenting orders]

H

(1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).

- (2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:
- abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or
 - family violence.
- (3) When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.
- (4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

s65DAA [Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances]

Equal time

- (1) If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:
- consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
 - consider whether the child spending equal time with each of the parents is reasonably practicable; and
 - if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend equal time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

Substantial and significant time

- (2) If:
- a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and
 - the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents; and
- the court must:
- consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and
 - consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and
 - if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

- (3) For the purposes of subsection (2), a child will be taken to spend **substantial and significant time** with a parent only if:
- the time the child spends with the parent includes both:
 - days that fall on weekends and holidays; and
 - days that do not fall on weekends or holidays; and
 - the time the child spends with the parent allows the parent to be involved in:

- (i) the child's daily routine; and
- (ii) occasions and events that are of particular significance to the child; and
- (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

(4) Subsection (3) does not limit the other matters to which a court can have regard in determining whether the time a child spends with a parent would be substantial and significant.

Reasonable practicality

(5) In determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents, the court must have regard to:

- (a) how far apart the parents live from each other; and
- (b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
- (c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
- (d) the impact that an arrangement of that kind would have on the child; and
- (e) such other matters as the court considers relevant.

Note 1: Behaviour of a parent that is relevant for paragraph (c) may also be taken into account in determining what parenting order the court should make in the best interests of the child. Subsection 60CC(3) provides for considerations that are taken into account in determining what is in the best interests of the child. These include:

- (a) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent (paragraph 60CC(3)(c));
- (b) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents (paragraph 60CC(3)(i)).

Note 2: Paragraph (c) reference to future capacity—the court has power under section 13C to make orders for parties to attend family counselling or family dispute resolution or participate in courses, programs or services.

s4(1) [Interpretation]

“Aboriginal” or “Torres Strait Islander” culture In relation to a child:

- (a) means the culture of the Aboriginal or Torres Strait Islander community or communities to which the child belongs; and
- (b) includes Aboriginal or Torres Strait Islander lifestyle and traditions of that community or communities.

“Family violence” means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.

(1AB) For the purposes of:

- (a) the definitions of *family violence* and *step-parent* in subsection (1); and
- (b) paragraphs 60CC(3)(j) and (k); and
- (c) section 60CF;
 - a person (the *first person*) is a *member of the family* of another person (the *second person*) if:
- (d) the first person is or has been married to, or in a de facto relationship with, the second person; or
- (e) the first person is or has been a relative of the second person (as defined in subsection (1AC)); or
- (f) an order under this Act described in subparagraph (i) or (ii) is or was (at any time) in force:
 - (i) a parenting order (other than a child maintenance order) that relates to a child who is either the first person or the second person and that is in favour of the other of those persons;
 - (ii) an order providing for the first person or the second person to have custody or guardianship of, or a right of access to, the other of those persons; or
- (g) an order under a law of a State or Territory described in subparagraph (i) or (ii) is or was (at any time) in force:

- (i) an order determining that the first person or the second person is or was to live with the other of those persons, or is or was to have custody or guardianship of the other of those persons;
- (ii) an order providing for contact between the first person and the second person, or for the first person or the second person to have a right of access to the other of those persons; or
- (h) the first person ordinarily or regularly resides or resided with the second person, or with another member of the family of the second person; or
- (i) the first person is or has been a member of the family of a child of the second person.

(1AC) For the purposes of subsection (1AB), a *relative* of a person is:

- (a) a father, mother, grandfather, grandmother, step-father or step-mother of the person; or
- (b) a son, daughter, grandson, grand-daughter, step-son or step-daughter of the person; or
- (c) a brother, sister, half-brother, half-sister, step-brother or step-sister of the person; or
- (d) an uncle or aunt of the person; or
- (e) a nephew or niece of the person; or
- (f) a cousin of the person; or
- (g) if the person is or was married—in addition to paragraphs (a) to (f), a person who is or was a relative, of the kind described in any of those paragraphs, of the person's spouse; or
- (h) if the person is or was in a de facto relationship with another person—in addition to paragraphs (a) to (f), a person who would be a relative of a kind described in any of those paragraphs if the persons in that de facto relationship were or had been married to each other.

Financial orders (other than child maintenance)

Please note that the Western Australia law in relation to de facto spouses is substantially the same as below (see Part 5A of the *Family Court Act 1997*).

SECTION 72 RIGHT OF SPOUSE TO MAINTENANCE

72 A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether –

- (a) by reason of having the care and control of a child of the marriage who is not attained the age of 18 years;
- (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or
- (c) for any other adequate reason, having regard to any relevant matter referred to in sub-section 75(2).

SECTION 74 POWERS OF COURT IN SPOUSAL MAINTENANCE PROCEEDINGS

74 In proceedings with respect to the maintenance of a party to a marriage, the court may make such order as it considers proper for the provision of maintenance in accordance with this Part.

SECTION 75 MATTERS TO BE TAKEN INTO CONSIDERATION IN RELATION TO SPOUSAL MAINTENANCE

75(1) [Exercise of jurisdiction] In exercising jurisdiction under section 74, the court shall take into account only the matters referred to in sub-section (2).

75(2) [Matters]

The matters to be so taken into account are –

- (a) the age and state of health of each of the parties;
- (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;
- (c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years;
- (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;
- (e) the responsibilities of either party to support any other person;
- (f) subject to subsection (3) 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;

- (g) where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;
- (h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of the 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;
- (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;
- (k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;
- (l) the need to protect a party who wishes to continue that party's role as a parent;
- (m) if either party is cohabiting with another person – the financial circumstances relating to the cohabitation
- (n) in terms of any order made or proposed to be made under section 79 in relation to the property of the parties;
- (na) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage; and
- (o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.
- (p) the terms of any financial agreement that is binding on the parties.

75(3) [Entitlement to pension]

In exercising its jurisdiction under section 74, a court shall disregard any entitlement of the party whose maintenance is under consideration to an income-tested pension, allowance or benefit.

SECTION 79 ALTERATION TO PROPERTY INTERESTS

79(1) [Orders] In proceedings with respect to property of the parties to a marriage or either of them, the court may make such order as it considers appropriate altering the interests of the parties in the property, including an order for a settlement of property in substitution for any interests in the property and including an order requiring either or both of the parties to make, for the benefit of either or both of the parties, or a child of the marriage, such settlement or transfer of property as the court determines.

79 (1B) [Adjournment of proceedings] The court may adjourn proceedings with respect to the property of the parties to a marriage or either of them, except where the parties to the proceedings are –

- (a) parties to concurrent, pending or completed proceedings for principal relief;
 - (b) parties to a marriage that has been dissolved or annulled under the law of an overseas country, where that dissolution or annulment is recognised as valid in Australia under section 104; or
 - (c) parties to a marriage who have been granted a legal separation under the law of an overseas country, where that legal separation is recognised as valid in Australia under section 104,
- on such terms and conditions as it considers appropriate for such period as it considers necessary to enable the parties to the proceedings to consider the likely effects (if any) of an order under this section on the marriage or the children of the marriage, but nothing in this subsection shall be taken to limit any other power of the court to adjourn such proceedings.

79(4) [Matters to be taken into account] In considering what order (if any) should be made under this section in proceedings with respect to any property of the parties to a marriage or either of them, the court shall take into account –

- (a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or 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 marriage or either of them;
- (b) the contribution (other than the financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage, or either of them, or 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 marriage or either of them;

- (c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent;
- (d) the effect of any proposed order upon the earning capacity of either party to the marriage;
- (e) the matters referred to in subsection 75(2) so far as they are relevant;
- (f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and
- (g) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage.

79(5) [Adjournment of proceedings] Without limiting the power of any court to grant an adjournment in proceedings under this Act, where, in the proceedings with respect to the property of the parties to a marriage or either of them, 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 marriage 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 the property of the parties to the marriage or either of them if that significant change in financial circumstances occurs is more likely to do justice as between the parties to the marriage than an order that the court could make immediately with respect to the property of the parties or either of them,

the court may, if so requested by either party to the marriage, adjourn the proceedings until such time, before the expiration of a period specified by the court, as that party to the marriage applies for the proceedings to be determined but nothing in this subsection requires the court to adjourn any proceedings in any particular circumstances.

In respect of orders or injunctions binding third parties see Part VIII A of the Family Law Act.

In respect of superannuation interests see Part VIII B of the Family Law Act

The Family Court of WA's internet site www.familycourt.wa.gov.au provides useful links to all relevant legislation such as the Family Law Act 1975 and Family Court Act 1997.

Copies of the entire Family Law Act 1975 and Family Court Act 1997 are also available from libraries or can be purchased from the Commonwealth or State Government Information Shops (previously known as Commonwealth or State Government book shops) which are located in all capital cities. These are listed in the white pages of your phone book. Copies of the Family Court Act are available from libraries or from the office of the State Law Publisher.

Legal advice

Family Court staff cannot provide legal advice, although they can help with questions about legal procedure and the Court process.

It is important that you understand the meaning and effect of the orders you seek.

Even if you have decided to make your application without the help of a lawyer, you should obtain independent legal advice about the effect and consequences of the orders you propose and the rules of evidence that may apply to your affidavit.

If you are unsure of how to seek legal advice or how to choose a lawyer, the Law Society or Institute in your State or Territory may be able to help you.

If you think you may be eligible for legal aid, contact your nearest Legal Aid office. If you are an Aboriginal or Torres Strait Islander you can also contact your local Aboriginal, or Aboriginal and Torres Strait Islander Legal Service.

You may also be able to obtain assistance from your nearest Community Legal Centre.

How to apply

- STEP 1** Type the orders you seek in a draft Consent Order, giving careful consideration to the information set out in the front section of this kit on pages A to M. Set out each order sought in a separate paragraph and number each paragraph. Each page should be signed by each party and dated.
- STEP 2** Complete the Application for Consent Orders (Form 11) in this kit. The application should be completed by all parties and should be typed or clearly handprinted in ink. The parties must sign the Application in the space provided at the bottom of each page.
- STEP 3** If you are applying for Consent Orders for property settlement and either party has a superannuation interest, there are special requirements which need to be met for married parties. See page C for details.
If you are applying for a consent order for property settlement and an order sought will bind a third party there are special requirements which need to be met. See page E under “Who should be a party” for details.
 If you are applying for a consent order for parenting orders or orders which would vary existing parenting orders (see s 64B on page E), you must consider what is in the best interests of the child. You should bear in mind that the Court is required to apply the presumption that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child, except where the circumstances in s 61DA(2) apply (printed on page H). In cases where the circumstances in s 61DA(2) do not apply, and all parties are seeking a parenting order or orders which will provide for something different to the child’s parents having equal shared parental responsibility, you are going to have to provide information to persuade the Court that the order or orders you are seeking, is in fact in the child’s best interests.
- STEP 4** Sign each page of the draft consent orders and date the last page.
 Make sure you do this on the same day you swear/affirm the affidavit in Parts I, K and M.
Note: Each party must sign both the consent orders and the affidavit on the same day. However, all the parties do not need to sign on the same day.
- STEP 5** At the end of the application at parts I & K there are affidavits which each party must complete and swear or affirm. Be careful to mark [X] all the boxes that apply to your application. You must do this before a Justice of the Peace, Notary Public or lawyer.
- STEP 6** If you have sought independent legal advice about the orders you seek, your lawyer must complete the ‘Statement of Independent Legal Advice’, contained in parts J and L of the application form.
- STEP 7** File:
- the original and two copies of your Application for Consent Orders (Form 11) along with (5) five certified copies of the draft Consent Orders;
 - one photocopy of your marriage certificate or divorce orders; and
 - any other document that is referred to in this kit.
- Provide extra copies of the documents for any additional parties. When filing your application it may be better to personally deliver the documents to the Court so that where possible any problems with your paperwork can be attended to at the time.
You must file your application within 90 days of the date of the first affidavit (see Parts I and K) otherwise the consent orders may not be made.
 Each party should keep copies of the completed application and the orders.
- STEP 8** After an Application for Consent Orders is filed a registrar will consider it. If the registrar is satisfied that the orders should be made, the registrar will sign the proposed orders and sealed copies will be sent to you. If the registrar is not satisfied, a notice will be sent to you with a brief explanation as to what you need to do. It may be necessary for your application to be heard in court.
- STEP 9** If the order splits, flags or otherwise imposes an obligation on the trustee of a superannuation plan, the applicant must serve written notice of the terms of the order on the Trustee of the superannuation plan in which the interest is held.

Please note: It is in your interests to seek legal advice.

IMPORTANT INFORMATION FOR DE FACTOS

De facto partners can only make application for property orders or for partner maintenance if they separated on or after 1 December 2002. There are also other requirements that must be satisfied before the Court can make orders.

To satisfy these requirements you must file an affidavit with your Application for Consent Orders (Form 11).

- 1. The affidavit must establish that at least one of the parties is residing in Western Australia on the day the application for orders is made.**
- 2. The affidavit must also establish at least one of the following 3 things:**
 - that you lived in a de facto relationship with the other party for at least two years, **or**
 - that you lived in a de facto relationship for less than 2 years but that there is a child of the relationship under the age of 18 years and failure to make the order sought would result in serious injustice to the party caring or responsible for the child; **or**
 - that you have lived in a de facto relationship for less than 2 years but that the partner applying for the order has made substantial financial, non-financial or homemaker/parent contributions and failure to make the order would result in serious injustice.
- 3. The affidavit must also establish at least one of the following 2 things:-**
 - that both you and the other party resided in Western Australia for at least one third of the period of your de facto relationship; **or**
 - that substantial financial, non-financial or homemaker/parent contributions have been made by you or the other party while resident in Western Australia.
- 4. The affidavit must also advise whether you or the other party has a spouse. If either party has a spouse the affidavit should indicate that a sealed copy of the Form 11 will be served on that spouse.**

The affidavit can be sworn by one or both of the parties. If the affidavit is sworn by only one party, a sealed copy must be served on the other party.

Section 205ZB(1) of the *Family Court Act 1997* requires an application seeking a property settlement (pursuant to Part 5A of that Act) be made within two years after the relationship ended.

The affidavit form is available at the Court registry or on the Internet at www.familycourt.wa.gov.au. Customer Service Officers can provide further advice about procedural issues but are not permitted to give legal advice.

SUPERANNUATION IMPORTANT INFORMATION FOR DE FACTOS

There are some important matters concerning superannuation that de facto couples should take into account when seeking property orders in the Family Court.

De facto partners are not able to seek orders to “flag” or “split” their superannuation entitlements. These options are only available to parties who were legally married.

This does not mean that the Court does not take superannuation into account when deciding how to divide property between de facto partners. The Court is, in fact, required by the law to consider the superannuation entitlements of both parties.

The Court distributes a Superannuation Information Kit to assist parties who are making an application to the Court for property orders. The information in the kit is relevant only to married couples. De facto couples should not attempt to follow the procedures set out in the Superannuation Information Kit.

Two forms used by parties to proceedings in the Family Court indicate that a Superannuation Information Form should be attached. These are the Form 11 (Application for Consent Orders) and the Form 13 (Financial Statement). De facto partners are not obliged to attach the Superannuation Information Form.

De facto partners also do not have to complete paragraphs 54 of the Form 11 application for Consent Orders.

PARENTING ORDERS EXAMPLES

*These are general examples only.
You should take legal advice before seeking orders.*

- 1 The children Jack Smith born on 25 January 1997 and Jill Smith born on 8 April 1999 live with the wife/husband/mother/father.
- 2 The husband and the wife/The father and the mother have shared parental responsibility for the children.; or

The wife/husband/mother/father have sole parental responsibility for the children.
- 3 The wife/husband/mother/father spend time with the children as agreed between the parties.

OR

Defined times

Note – These are not recommended times. They are examples and will only be appropriate for some families. There is no need to specify times if you feel you can work these out with the other party. In this example the children live with the husband and spend time with the wife.

- 4 The children Jack Smith born on 25 January 1997 and Jill Smith born on 8 April 1999 spend time with the Wife as follows:
 - (a) Each alternate weekend from 9 am on Saturday until 5 pm on Sunday, extending to 5.00 pm on Monday if the weekend is a long weekend.
 - (b) The weekend time described in paragraph (a) be suspended during school holiday periods.
 - (c) Each year from 5 pm on the Saturday until 5 pm on the Sunday of the Mothers' Day weekend, if that time is not already provided for under this order.
 - (d) The weekend time described in paragraph (a) be suspended on the weekend of Fathers' Day each year from 5 pm on the Saturday until 5 pm on the Sunday.
 - (e) One half of each of the school holiday periods at the conclusion of Terms 1, 2 and 3 each year, commencing at 5 pm on the Friday of the last week of term.
 - (f) The expression "school holiday period" in this order means the period from 5 pm on the last day of the school term to 5 pm on the day immediately before the start of the next term.
 - (g) Three weeks during the Christmas school holidays each year, commencing at 9 am on the first Saturday in January.
 - (h) Each alternate Christmas from 5 pm on 24 December until 10 am on 26 December, commencing in 2008.
 - (i) Each intervening Christmas from 10 am on 26 December until 10 am on 28 December, commencing in 2009.
 - (j) Each alternate Easter from 5 pm on Thursday until 5 pm on Monday, commencing in 2003. If Easter falls during the school holidays at the conclusion of Term 1, the time shall form part of the wife's time for that holiday.
 - (k) On the children's birthdays each year from 9 am to 2 pm, provided the birthday does not fall on a school day.
 - (l) Telephone calls for up to 15 minutes on each of the children's birthdays if the birthday falls on a school day.
 - (m) Telephone calls for up to 15 minutes each Wednesday, with the mother to initiate the call between 6.30 pm and 7 pm.
 - (n) The wife collect the children from the husband's residence at the start of these times and return them to his residence at the end of these times.

EXAMPLES OF PROPERTY ORDERS

*These are general examples only.
You should take legal advice before seeking orders.*

Sale of land and division of proceeds

- 1 The applicant and respondent shall cause the property situate at (*address*), and being more particularly described as (*land description as shown on the Certificate of Title*) to be placed on the market for sale at a price and on conditions to be agreed between them.
- 2 The proceeds of sale of the property be disbursed as follows:
 - (a) in adjustment of rates and taxes
 - (b) in payment of the expenses of sale including real estate agent's commission;
 - (c) in payment of any monies required to secure discharge of any encumbrance registered against the title to the said property; and
 - (d) the balance be divided in proportions % to the applicant and % to the respondent.
- 3 The applicant and respondent have liberty to apply to the Court in relation to the terms and conditions of sale.

Transfer of interest in land

- 4 The applicant/respondent transfer his/her right, title and interest in the property situate at (*address*) and being more particularly described as (*land description on the Certificate of Title*) to the respondent/applicant absolutely.

Transfer of interest in land upon payment

- 5 The applicant/respondent shall pay to the respondent/applicant the sum of \$X within 30 days.
- 6 Upon payment of the said sum the respondent/applicant transfer to the applicant/respondent the whole of his/her right, title and interest in the property situate at (*address*) and being more particularly described as (*land description on the Certificate of Title*).
- 7 The applicant/respondent indemnify the respondent/applicant and keep the respondent/applicant indemnified in relation to all liabilities and outgoings with respect to the property including all obligation pursuant to the mortgage registered against the title to the property.

Assets other than land

- 8 The applicant and respondent each retain the motor vehicles and furniture and household contents presently in their possession or control.

