

In the event of separation or divorce, the *Family Law Act 1975 (Cth)* (Family Law Act) affects the way in which super entitlements are treated.

According to the Family Law Act, your super is treated as property that can be divided between parties in the event of a marriage breakdown. The law allows separating couples to value their super and 'split' or 'flag' the super according to a court order or an agreement.

Flagging orders are useful when the value of the super is uncertain at the date of the court hearing, but will be determinable in a short period of time. A flagging order prevents a super fund (like GESB) from dealing with the account until a flag-lifting agreement is issued by the Family Court. Once the flagging order is lifted, the super can be split.

Super that has been split is still subject to Commonwealth preservation laws and is generally only accessible when both parties reach retirement age, or in certain other limited circumstances.

As a GESB member, your super entitlement and the way it can be split with your spouse, is governed by a number of laws including the Family Law Act, *State Superannuation Regulations 2001 (WA)*, and *Family Law (Superannuation) Regulations 2001 (Cth)*. If you receive legal advice, it's important that you ensure your lawyer is aware how the laws apply to your situation.

Western Australian legislation does not allow de facto couples to split their super in the same way as married couples. This means that de facto couples who are resident in Western Australia cannot currently apply to the Family Court for a splitting order, nor rely on an agreement, in relation to their super.

Clean Break

'Clean Break' is the concept which gives parties to a marriage the ability to split a member's super to end all monetary claims between spouses before the member is able to gain access to their super. The Clean Break principle applies to all court orders and splitting agreements made since 28 December 2002.

The super split can be made relatively quickly, as opposed to a pre-28 December 2002 court order or splitting agreement when the split is made at the time the member accesses the benefit (i.e. when the member retires).

A court order made under the Clean Break principle must be presented to the Family Court and both parties will need to be involved in the process. Once a court order is made under the Clean Break principle, the court will generally not hear any further claims that the spouses have for the duration of the parties' lives and even after the death of one of the ex-spouses.

The process of splitting your super

Our role in Family Law matters is to administer the scheme and act upon the agreement or court orders between the two parties.

The splitting of super can be authorised by:

- A formal agreement between separating couples called a Superannuation Agreement (also known as a Splitting Agreement) or a Binding Financial Agreement (if it deals with super), or
- A court order that is issued by the Family Court directing how the super should be split

Super interests and benefits that cannot be split include:

- Benefits of less than \$5,000
- Payments made to the member on financial hardship or compassionate grounds
- Pension payments (by way of salary continuance benefits) that are made as a result of the member's temporary ill-health
- Payments to, or for the benefit of, a child reversionary beneficiary after the death of a member if:
 - the child has not yet turned 18, or
 - the child is over 18, the child was dependent on the member at the date of death and the payment is made to enable the child to complete their education, or
 - the child has special needs of a physical or mental disability and the payment is made to another person for the benefit of that child

Family Law legislation requires that we are afforded 'procedural fairness' before a court order or consent orders are finalised. We will review the draft order and make comment on any amendments that might be required before stating that we have no objections to them. We have 28 days to review draft court orders and raise any objections to them.

Although procedural fairness rights do not exist at law in relation to Superannuation Agreements, we suggest you provide us with a copy of any proposed Superannuation Agreement that may involve super. It may help to avoid any problems in the future.

Draft orders or draft splitting agreements are not legally binding on the super fund. If the benefit becomes payable, the member requests payment and the payment is processed prior to us receiving final court orders or the splitting agreement, then in the absence of any flagging agreement, the benefit will be paid to the member in accordance with the benefit payment instructions.

Family Law and super before 28 December 2002

Before 28 December 2002, the Family Court could order a member to split his or her super and pay their spouse a defined amount once the member reached retirement age and met a condition of release (except for transition to retirement).

We are only able to make payment to the spouse on behalf of the member from the member's benefit on receipt of a signed Irrevocable Authority from the member.

Since 29 December 2002, the law has allowed splits to be made earlier than members' retirement dates. Following receipt of the court order or agreement, we are able to implement the split within 28 days of receipt of the payment form (and ID if required). We will open a new GESB Super account for an eligible person, unless they want the split amount to be rolled over to an existing GESB account or into another complying super fund.

Terminology used in court orders can be very complex and the wording is not always clear.

- Many orders and agreements dated pre-28 December 2002 are not specific when describing the GESB member's scheme. Ambiguity here could mean that the split will be calculated using the values in *all* your GESB accounts and not just the account you held at the date the court order or agreement was issued
- West State Super is a complex scheme and this complexity was often not taken into account when court orders and agreements were written. See the scheme details below for information on how your super is likely to be split
- Some court orders and agreements include specific variables for splitting super. Frequently, we find that we are unable to determine the required values to meet the variables, which makes calculating the super split a very complex and lengthy process

If you are unsure how a Family Court order affects your super, call your Member Services Centre on 13 43 72 to discuss.

There are three main phases in the super-splitting process:

1. Requesting information

An eligible person can request information about a member's super.

An eligible person is:

- A member of GESB
- A member's married spouse
- A member's former spouse
- A person who is intending to enter into a super agreement with a GESB member (including a pre-nuptial agreement)
- If the member has died, their legal personal representative
- If the spouse has died, their legal personal representative

The eligible person requesting information must complete a **'Form 6'** and a **'Superannuation Information Request'** form (available at familycourt.gov.au).

See the 'More information' section below for details on accessing these forms. We do not charge a fee for providing information in response to a **'Form 6'**.

2. Providing information

Once we have received the required forms, we will provide information to the eligible person. This can be used in a number of ways, for example:

- To inform the details of a pre-nuptial agreement on how to split super in case of a future breakdown
- To make an agreement on how to split super after a marriage breakdown
- To take to the Family Court to obtain a court order
- To assist in the splitting of assets other than super

3. Super valuation and decision

We receive a splitting agreement or court order authorising a payment split.

The member and the spouse are notified that the member's interest is subject to a split and the value of the split.

The spouse is contacted and asked where he or she would like their portion transferred.

We will implement the splitting agreement or court order within 28 days of receiving the payment form (and proof of identity if required)¹.

A new GESB Super account is opened for the non-member spouse unless they want the split amount to be rolled over into an existing GESB account or another complying super fund.

Transition to retirement

If you have a court order dated pre-28 December 2002, you are unlikely to be able to access your super early through a transition to retirement arrangement. Transition to retirement is not a condition of release under the State Superannuation legislation with respect to Family Court orders.

It's important that you ensure your advisers are aware as to which regulations apply to your situation. Call your Member Services Centre on 13 43 72 to discuss.

Contact us

Although we are unable to provide legal advice in these matters, we may be able to clarify some of the details in your court order and ensure you have the correct scheme information before you seek advice from a lawyer.

We recommend you contact us if you have a Family Court order or agreement and:

- You have not already sent it to us, and/or
- You plan to access your super early through a transition to retirement arrangement

More information

Go to familycourt.gov.au and type the words 'Superannuation Information Kit' into the search engine. This will provide you with additional information and a copy of the **'Form 6'** (information request).

¹ Implementation of the splitting agreement or order does not mean that the money is paid at this time. Timing of payments will depend on various issues. See scheme detail overleaf for more information.

West State Super	Family Law Court order dated BEFORE 28 December 2002	Family Law Court order dated AFTER 28 December 2002
How is the Family Law split calculated?	The split is based on the amount or formula stated in the court order.	The base amount to be paid from your West State Super account will be adjusted to reflect the investment performance (i.e. change in unit prices) of your account between the operative date ² and the payment date. This means that the amount may go up and down in reaction to market movements. We use the following formula: Member's Units at Operative date x Unit Price at Payment Date = West State Super entitlement. If a percentage is used, the calculation is based on applying the percentage to the account balance on the date of processing or a date instructed on the court order.
Interest on payments/other adjustments	Interest and adjustments depend on the instructions of the court order. If there is no mention of interest in the court order, then no interest is calculated or paid.	Since West State Super is a unitised fund, the base amount is adjusted for investment performance, which is reflected in the unit price rather than in the form of interest.
Who is liable for the tax?	Tax law treats the Family Law split as a re-direction of a member's super benefit. This means the super lump-sum payment is treated as if being made to the member and not the spouse. The tax withheld is based on the member's age because the member is liable for the tax. The Payment Summary is issued to the member. The spouse receives the net amount with no further tax to pay. Unless the court order addresses this issue, the member pays all the tax.	Tax law treats the Family Law split as if the payment is a super benefit of the spouse. When the super benefit is rolled over to a taxed fund, the receiving fund will pay 15% tax on the taxable component – untaxed element. This is because West State Super is an untaxed fund, and untaxed funds are generally taxed when the benefit is paid or rolled over to a taxed fund, not while the money is accumulating.
When is the split implemented?	We can only make the split once the member claims his or her super benefit (i.e. generally at retirement). We must receive the Irrevocable Authority from the member before we can release funds to the spouse.	We can split the benefit once the original or certified copy of the sealed court order, the payment instructions and certified ID have been received. If using an agreement, the member and spouse must also supply certificates from their respective legal advisers confirming that they have been provided with independent legal advice. An exit fee is applied to the member spouse account when the split is processed ³ .
How is the amount paid to a spouse?	Once we have all documents and the member accesses his or her benefit (i.e. at retirement), the spouse is paid their portion of the split amount by cheque or electronic funds transfer (EFT) The amount is paid to the spouse regardless of their age.	A letter is sent to the spouse asking for payment details. We will wait 28 days to hear from the spouse as to their requirements. The spouse has a choice of: <ul style="list-style-type: none"> Rolling in the amount to a <i>current</i> GESB account, or Rolling in the amount to a <i>new</i> GESB Super account that is opened specifically for them, or Rolling the amount over to another complying super fund (nominated by the spouse)
When is the amount paid to a spouse?	Payment is made to the spouse once the member accesses his or her super benefit (i.e. generally at retirement) and once we have received the sealed court orders and the member's Irrevocable Authority.	The spouse can apply to have the amount paid to them once they meet a condition of release of their chosen super fund, usually once they reach retirement age. If using an agreement, the member and spouse must also supply certificates from their respective legal advisers confirming that they have been provided with independent legal advice.

² This is the commencement of recognition of the spouse's entitlement. For a court order, the operative date is usually the date specified within the court order. For a Splitting Agreement, the operative date is the beginning of the fourth day of business after the day in which a copy of the agreement, together with other prescribed documents, is served on the trustee, together with a copy of the Decree Nisi or Separation Declaration.

³ For more information on fees, read the relevant Product Information Booklet and related documents available at gesb.com.au/brochures.

Disclaimer: the information contained in this fact sheet is of a general nature, and does not constitute legal, taxation or personal financial advice. In providing this information, we have not taken into account your investment objectives, financial situation or needs. We are not licensed to provide financial product advice. Before acting or relying on any of the information in this document, you should read this fact sheet in conjunction with the relevant Product Information Booklet and disclosure documents at gesb.wa.gov.au/brochures, and consider whether the information is appropriate for you. You may also wish to consult a suitably qualified adviser to assist you.

How to contact us

T Member Services Centre 13 43 72

F 1800 300 067

W gesb.wa.gov.au

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