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At JPM Legal we understand the experience of going through a court case is not an easy one. As part of our overall service of providing quality legal solutions for our clients, our quarterly newsletter keeps our clients informed about relevant legal issues and developments, as well as lifestyle ideas to keep them going through this difficult time.

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Property Settlement in Family Law

By Tina Ng, *Solicitor*

The current approach taken by the Court in determining a property settlement under the *Family Law Act 1975 (Cth)* (“FLA”) is commonly referred to as the “four-step process”:

1. Identifying the assets, liabilities and financial resources of the parties;
2. Identifying and assessing the contributions made by the parties, which include both financial and non-financial contributions;
3. Considering relevant matters referred to in sections 79(4)(d)-(g); and
4. The court is to be satisfied that the orders it is asked to make are “just and equitable” (section 79(2)).

To allow the Court to make an order that is “just and equitable”, it needs complete and accurate information from the parties. Accordingly, you should ensure that you make full and frank disclosure of your financial circumstances as required under rule 13.04 of the Family Law Rules.



This includes disclosing the following matters:

- (a) your earnings, including income that is paid or assigned to another party, person or legal entity;
- (b) any vested or contingent interest in property;
- (c) any vested or contingent interest in property owned by a legal entity that is fully or partially owned or controlled by a party;
- (d) any income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;
- (e) your other financial resources;
- (f) any trust that is noted in rule 13.04(f);
- (g) any disposal of property by you in the 12 months immediately before the separation of the parties, or since the final separation of the parties.
- (h) Liabilities & contingent liabilities.

Whether you are applying to the court to make orders that are opposed, or even orders by consent, you or your lawyer should work through the four-step process, and fulfil your disclosure obligations, to ensure that the court can be equipped with all the relevant information to make an order to finally determine the financial relationship between the you and your ex-partner.

If you fail to disclose, the Court may:

- Stay or dismiss all or part of your case
- Order costs against you
- Fine or imprison you on being found guilty of contempt of court for not disclosing the document.



Legal Terms used at the Family Court

For the uninitiated layperson, the legal jargon used in family law proceedings may well be a different language. To demystify the proceedings and empower you for your case, here is a list of terms and their explanations from the Family Court.

Address for service – the address given by a party where documents can be served on them by hand, post or some other form of electronic communication.

Adjourn – defer or postpone a court event to another day.

Affidavit – a written statement by a party or witness. It is the main way of presenting the facts of a case to the court. An affidavit must be signed before an authorised person (such as a lawyer or Justice of the Peace) by way of swearing on the Bible or attesting to the truth of the contents of the statement.

Appeal – a procedure which allows a party to challenge the decision made by a court.

Applicant – the person who applies to a court for orders.

Case – when a person makes an application to a court for orders, that becomes the case before the court.

Consent order – an agreement between the parties that is approved by the court and then becomes a court order.

Contravention – when a court finds a party has not complied with (followed) a court order, that party is in contravention of (or has breached) the order.

Court hearing – the date and time when a case is scheduled to come before the court.

Court order – the actions the parties or a party must do to carry out a decision made by a court. An order may be either interim or final.

Divorce order – an order made by a court that ends a marriage.

Enforcement order – an order made by a court to make a party or person comply with (follow) an order.

Ex parte hearing – a hearing where one party is not present and has not been given notice of the application before the court; usually reserved for urgent cases.

Family consultant – a psychologist and/or social worker who specialises in child and family issues that may occur after separation and divorce.

Family dispute resolution – a process whereby a family dispute resolution practitioner assists people to resolve some or all of their disputes with each other following separation and/or divorce.

Family Law Courts – comprise the Family Court of Australia and the Federal Magistrates Court of Australia.

Family Law Act 1975 – the law in Australia which covers family law matters.

Family law registry – a public area at a Family Law Court where people can obtain information about the court and its processes and where parties file documents in relation to their case.

Family report – a written assessment of a family by a family consultant. A report is prepared to assist a court to make a decision in a case about children.

Family violence – conduct (whether actual or threatened) by a person towards a family member, or property of a family member, that causes reasonable fear (or reasonable apprehension) for his/her personal wellbeing or safety.

Filing – the procedure of lodging a document at a family law registry for placing on the court file.

Final order – an order made by a court to bring a case to a close.

Form – a particular document that must be completed and filed at court. Different forms are used for different family law matters.

Independent children’s lawyer – a lawyer appointed by the court to represent a child’s interests in a case.

Interim order – an order made by a court until another order or a final order is made.

Judgment – a decision by a court after all the evidence is heard.

Judicial officer – a person who has been appointed to hear and decide cases; for instance, a judge or federal magistrate.

Jurisdiction – the authority given to a court and its judicial officers to apply the law. For example, the courts have jurisdiction under the *Family Law Act 1975* in family law matters.

Parental responsibility – the responsibility of each parent to make decisions about the care, welfare and development of their children. These responsibilities may be varied by agreement or by a court order.

Parenting plan – a written agreement between the parties setting out parenting arrangements for children. It is not approved by or filed with a court.

Party or parties – a person or legal entity, such as a corporation, involved in a court case; for example, the applicant or respondent.

Precedent – a decision made by a judicial officer which may serve as an example for other cases or orders.

Procedural order – an order made by a court of a practical nature. For example, the court may order the parties to attend family dispute resolution.

Registrar – a court lawyer who has been delegated power to perform certain tasks; for example, grant divorces, sign consent orders and decide the next step in a case.

Respondent – a person named as a party to a case. A respondent may or may not respond to the orders sought by the applicant.

Rules – a set of directions that outlines court procedures and guidelines. The rules of the Family Court are the *Family Law Rules 2004* and the rules of the Federal Magistrates Court are the *Federal Magistrates Court Rules 2001*.

Service – the process of sending or giving court documents to a party after they have been filed, in accordance with the rules of court. Service ensures that all parties have received the documents filed with a court.

Subpoena – a document issued by a court, at the request of a party, requiring a person to produce documents and/or give evidence to the court.

Transcript – a record of the spoken evidence in a court case. All court hearings are recorded, except uncontested divorce hearings. The court does not order transcripts in all instances and does not provide transcripts to parties. If a party orders a transcript, they will be responsible for the costs. ❖



An Important Consideration when Buying a House

By Sandra Buhagiar, *Licensed Conveyancer*

Before you commit yourself to the purchase of a property you need to decide whether you want to get any inspections done on the property. The contract for sale doesn't cover the quality of the buildings on the property, it goes mainly to title matters.

If you are buying a house then you will want to know that the building is structurally sound and that it is not infected by white ants or any other structural pests.

You should expect that any building that is not brand new will have some defects but most will be minor maintenance or cosmetic work that is probably visible on your own inspection. A building report will show these matters and will also advise on any structural problems that may not be obvious to the untrained eye.

A pest inspection will report on any structural pests that may be affecting the property. This report is for the activity of structural pests, it will not normally advise on the presence of cockroaches, mice etc.

It is recommended that you obtain a pest and building inspection. They will give you peace of mind and compared to the price of your purchase, the cost of these reports is minimal. ✨

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Insurance within Super

By Neil Sligar, *Certified Financial Planner*

Authorised Representative AXA Financial Planning

People tend to pay little attention to the insurance cover within their employer's superannuation plan. This can prove a costly oversight.

Several years ago I had dinner with "Tom" and his wife. Tom was 44 years old and the father of two boys. Tom had recently changed jobs. The position he left provided Tom with a life insurance cover of \$120,000 within his superannuation plan. The plan he joined with his new employer provided \$14,000 life insurance cover. Tom's new employer offered him \$20,000 more annual salary. Tom told me that he hadn't given a moment's thought to the insurance cover. Shortly after settling into the new position Tom was diagnosed with terminal prostate cancer.

When looking at life insurance cover in your superannuation plan ask yourself whether it's sufficient. Estimate your family's financial needs, now and in the near future. Take into account all debts you wish to be cleared on your death. Include the cost of your burial or cremation along with legal costs of clearing your estate.

Then, (and many forget this), if your income helps to support a spouse and children, estimate what expenses will need to be met. For example, there could be \$40,000 household expenses per year required until the youngest child leaves school.

You may be able to apply for increased insurance cover within your employer's superannuation plan. Otherwise, apply for the required additional insurance needs through your own personal policy.

If your superannuation plan offers total and permanent disability insurance do a needs analysis as you would for life insurance to work out a sufficient amount of cover.

There are advantages and disadvantages of holding life and total and permanent disability insurance through superannuation. This outline is a mere glimpse at the position.

Advantages include:

- the possibility of lower premiums because the insurance is arranged in bulk at group rates;
- medical evidence requirements may be waived up to specified sums of insurance within some employer superannuation arrangements;
- potential tax advantages if premiums are paid by your employer through a salary sacrifice agreement;
- premiums are tax deductible to the superannuation fund
- less impact on day to day cash flow.

Disadvantages include:

- proceeds of a death claim from superannuation insurance are restricted to dependants as defined by the Superannuation Industry (Supervision) Act or to your estate;
- proceeds may be taxed at a rate of up to 31.5% when beneficiaries of life insurance through superannuation are not dependants as defined by the Income Tax Assessment Act, eg spouse, child under age 18 or a financial dependant of the deceased. Life insurance payments are generally not taxed in the hands of the beneficiary when paid outside superannuation;

- total and permanent disability insurance claims paid through a superannuation plan may be taxed depending on the age of the member, whereas total and permanent disability payments held outside superannuation are generally not taxed;
- restrictions can apply to conditions under which claims may be met. For example, the permissible definition of TPD can be a more difficult condition to satisfy when held within superannuation, rather than as a personal policy outside it.

Note carefully that adult children aged 18 years and over will normally be taxed on the payout of their parents' superannuation including life insurance, unless they are considered to be financially dependant or in an interdependency relationship at the time of death. An interdependency relationship will prevail when a person had lived with the deceased in a close personal relationship where one or both of them provided financial and domestic support and personal care.

There are a couple of strategies that can be implemented to reduce or potentially eliminate the tax on superannuation death benefits paid out to non-dependant i.e. adult children. We suggest you contact your financial adviser to discuss what options will suit your personal situation.

Two other forms of insurance, salary continuance and trauma insurance, can also be held through superannuation.


Salary continuance is known as income protection when held as a personal policy. Salary continuance will pay an income stream for 2 years or up to age 65, after the expiry of the employee's sick leave, in the event of the member being unable to work as a result of illness or injury.

Usually it will pay a maximum of 75% of the employee's normal gross income; however salary continuance benefits vary widely between products.

If your salary continuance plan provides a benefit period of 2 years you might consider extending the benefit period to age 65. Under current regulations, income protection premiums are tax deductible to the payer regardless of whether the insurance is held through superannuation or outside superannuation. The insurance proceeds are taxable to the member at marginal tax rates.

Trauma insurance pays a lump sum on diagnosis of a medical condition or injury specified in the policy document. Trauma insurance is a permissible inclusion within a superannuation plan but there is a major problem.

A trauma payment cannot be paid to a member of a superannuation plan until a "condition of release" has been satisfied. Examples of release conditions are retirement and permanent incapacity. For example where a person is diagnosed with cancer, but is likely to return to work after treatment, he or she may not be able to receive their trauma payment from a superannuation plan until retirement.

Adequate personal insurance cover is an essential element of any financial plan. Whether insurance is held within superannuation or outside superannuation depends on your personal situation. To ensure you make the right decision you should always seek advice from an appropriately licensed professional. 

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The Stoopid Tabwo

By Tina Ng

Babysitting is usually a pretty easy occupation...until you add the 'baby' to it. Today it was Molly, 3 year old from hell. I've babysat her a few times before, but it's always hard work.

Tonight was no different. She was doing her usual running through the rooms pretending to be a runaway bride, when all of a sudden her wailing siren went off.

"What happened?" I immediately looked her over to make sure she wasn't hurt. There was a small red mark on her thigh.

"It waz the stoopid tabwo!" Molly cried through her tears.

"There, there sweetheart." I gave her a cuddle, but Molly was too furious to be comforted and pulled away.

"Stoopid tabwo!" Molly's accusing finger pointed at the coffee table. "Bad tabwo! It hurt me!"

"Yes bad table!" I said, playing along. "Why don't we leave the bad table alone and we go find something else to play with?"

But Molly didn't want to play. She wanted to see what hurt her hurt too.

She pulled out her cooking utensils from the Master Chef toy series, and started to attack the table with all her might, a fury raging in her eyes.

The plastic bounced off the table and nearly hit her in the eye.

"Okay Molly sweetie, time to go." I tried to steer her away.

"No!" She wasn't giving up. She found a big ball, and held it above her, ready to be thrown. I grabbed it off her, knowing exactly where the ball was going to end up.

Unsurprisingly, she started crying, but this time her anger was directed at me. She started screaming, punching and kicking me. I tried to hold her without hurting her. Then she bit me.

I let go of her and raised my hand ready to give her a hiding. She screeched and then ran to her room, slamming the door behind her.

What was I doing? Was I also going to give in to my temper at a three year old kid who didn't know better?

I went to her room and saw her crying into her pillow.

"Hey." I said softly. I was lost for words.

She didn't respond for a while, but slowly turned around and said to me, "I hate you."

She then pulled the covers over her, shutting me out.

I turned off the lights and closed the door, just as her parents' car pulled into the driveway.

They were surprised, but pleased, to see their little girl was in bed so early.

"Seems like she's had a pretty fun time with you." The parents were looking at the state of the lounge room.

"Sorry about that," I replied. "I guess we got carried away. I'll tidy it now."

"No don't be silly. I'll get Molly to clean up her own mess tomorrow morning." Molly's mum was so sweet it was hard to imagine Molly is her daughter.

Molly's dad sees me to the door and pays me for the night. I was hesitant in receiving it and wanted to tell him what happened that night with Molly. But just as I turned around to tell him, I saw Molly's mum on her hands and knees cleaning up the mess Molly had made in the lounge room. I smiled at him, and for the first time I didn't see him as Molly's dad who pays me to babysit his annoying daughter, but for the first time, I saw him as a father.

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As I drove home, I started to think about the tantrum Molly threw earlier on. As much as I'd like to think I've grown up and grown out of tantrums, I hadn't. I still get upset and annoyed when I am hurt, and seek redress from what I perceive had caused my pain, sometimes seeking it in things that are as innocent as a stupid table. Often, it was because of my own stupidity in running into it that had caused the pain in the first place, and yet it was so much easier to place the blame on the object of my anger to ease my own responsibility and guilt. I started to remember the times when I got upset over getting a speeding ticket (police's fault), or doing unwell at school (teacher's fault), or being unhappy in a relationship (boyfriend's fault), or even blaming the economy for why my pay is so low! Getting upset at these things is like getting angry at the stupid table that Molly bumped into. Trying to take revenge on them is like throwing a ball at a table – we're the ones who get hurt in the end.

Then the shame of my reaction towards Molly; to think that I had raised my hand and was ready to lay it on a little girl who simply didn't know better, out of anger! In a way, there are many Mollys who walk amongst us. They may be 3 or 13 or 30 or even 60 years old. But if they have no insight into their own problematic behaviours and ways of thinking, if they are drowned by immaturity and negativity, if they are unaware of the delusions they hold, if they are – in summary – acting like a 3 year old, then what use is there to blame and get upset at them?

In a way, I felt hurt that Molly would turn around and hate me when I had just been trying to protect her from harm. That's similar to when I get upset at people who are ungrateful for what I have done for them, but on second thought that tells me that what I have given them wasn't unconditional, but conditional upon them showing their appreciation and boosting my ego. Holding such a self-centred view, no wonder pain came back to bite me.

Finally, the kindness the parents treated me, and more importantly, their unconditional love towards Molly despite how difficult no doubt she would be to them every day, reminded me of the power of unconditional love, which quells the fires of anger and shames the darkness of hatred.

Even the thought of loving kindness was enough to bring a smile to my face, and I started to laugh heartily, remembering Molly's cries, "stupid tabwo!" ❖

**This is a work of fiction and any resemblance to persons or events is purely coincidental.*



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ADVOCATING WITH CARE AND EXPERTISE

