

# **Guidelines for Family Law Proceedings**

Effective as of 24/08/2020

## **Guidelines for parties involved in Family Law property proceedings.**

These guidelines are to assist you (our customers), your legal practitioners and representatives with family law property proceedings relating to:

- the division of matrimonial property;
- division of your joint property that is subject to a mortgage with us; or
- The division of other joint and several liabilities owed to us.

Your liability to us can be either as a borrower or as a guarantor of another person's borrowing. As such, any reference to a liability to us in these guidelines includes both borrowing and guarantee obligations.

Under the provisions of the Family Law Amendment Act 2003 (Cth), the Court has the power to make orders binding on third parties who are not a party to the relevant proceedings i.e. the bank (us).

When the court makes such an order it will take into account our view on each spouse's individual capacity to repay the debt. The court may seek further information from us. Alternatively, in some circumstances, the existing joint loan account may be able to be transferred into one of your names. In circumstances where a court does not make such an order on us and you want to transfer a joint debt into only one of your names, you will need to obtain our consent. Even if you both agree that only one of you will be responsible to repay the debt, we still have the right to require either or both of you to repay it (except of course where we have agreed to the change as to who is liable to repay the debt, or a court has ordered us to relieve one of you of your repayment obligations).

## Guidelines for parties involved in family law proceedings where the court has made an order on us.

1. In the course of a family court proceeding, the court has the power to make an order requiring us to relieve one of the parties from their joint debt obligations. In making such an order, the court will take into account the capacity of the person who will be responsible for the debt to repay it on his or her own. This will often mean that the court will seek information from us concerning the financial situation and repayment capacity of both spouses.
2. Generally, a court will not transfer a joint debt into the name of one spouse if that person does not have the capacity to repay the debt on his or her own.
3. Upon receipt of a court order requiring us to relieve one of the parties from their obligations in respect of a joint debt, we will, where appropriate 're-originate' the debt. This means for example, if you have a home loan in both names, that loan account may be closed, at which point the spouse who will be solely responsible for the debt will need to apply for a new replacement loan in his or her name only. In some circumstances the existing joint loan account may be able to be transferred into one of the names.
4. In processing the application for the replacement loan, we will reassess the applicant's ability to repay the loan without being put in a position where they may suffer undue financial hardship.
5. If we feel that in making an order, the court has not taken our views into account or given adequate consideration to the capacity of the relevant spouse's to repay the debt, we may seek to be 'heard' by the court. This may result in us making an application to the court seeking an amendment to its order concerning the joint debt. We will let you know if we have made such an application, and will not complete processing your application for the new replacement loan (replacing the joint loan) until the court has heard our application.
6. If the court grants one party the sole right to reside in a property, our rights against both parties (including the non-resident party) under the mortgage over the property will be preserved unless we agree to release that party from the mortgage.

## Guidelines for parties where no court order has been made on us and the parties wish to transfer a debt into one name.

1. In circumstances where a court does not make an order on us regarding a joint debt, and you want to transfer the joint debt into only one of your names, you will need to obtain our consent. We are not automatically required to consent to arrangements such as:
  - the transfer of property mortgaged to the bank; or
  - the re-allocation of debt liability between the parties to a marriage.
2. We may provide consent and agree to the transfer of the property subject to the mortgage and release the other party from further liability, or we may retain our rights against both parties under the personal covenants in the mortgage.
3. Typically we may be reluctant to release joint debtors from their joint obligation to us where the debt is an unsecured liability.
4. Where a transfer of the property subject to a mortgage is contemplated, the parties should keep in mind the following points:
  - a) Don't enter into the agreement or seek a court order until you have discussed the proposed arrangement with us.
  - b) Each application for our consent will be assessed on a case by case basis.
  - c) Allow sufficient time for us to make a full assessment of the proposal. We will need to consider both parties financial positions, so as to be satisfied of the ability of the nominated transferee of the property to fulfil the financial commitment to us independently without facing undue financial hardship.
  - d) Full financial particulars including the terms of the proposed agreement must be provided to us before we can agree to anything.
  - e) We must conduct a fresh financial assessment of the party who is to assume responsibility for the mortgage debt.
  - f) If there are continuing credit facilities, such as an overdraft on a joint account that is secured by a mortgage, we may stop further drawings on the account until the matter is resolved, or unless both parties expressly agree to further drawings.

- g) We are unable to divulge information about one of the parties to the other party or to their practitioners or representatives without that party's consent.
  - h) If there are other co-owners of property, their consent will be required prior to any dealing with the property;
  - i) If other persons have guaranteed the parties' obligations, the consent of those guarantors may be required before any re-arrangement of liability or transfer of property occurs;
  - j) There may be bank fees and other fees and costs payable in order to obtain our consent to a dealing and in connection with the dealing itself.
5. When there is a proposal for one party to be responsible to repay a jointly owed unsecured debt, you should obtain our formal consent and acknowledgement of this change in liability. Points a) to j) above must be observed.
6. If it becomes apparent that an agreement is likely to provide for a re-allocation of liabilities, you will need to contact us to ascertain our likely attitude to releasing one of the parties.
7. If we choose to decline either;
- a) a transfer of property to a party, or
  - b) the release of a party from further liability, we will be entitled to enforce our rights under the original contract, if necessary.

***Please Note: These guidelines are intended to be for general information and guidance only. They are not intended to be legal or financial advice. They are not a substitute for legal or financial advice. If you are contemplating or are involved in family law proceedings or a family law agreement you should seek specialist legal and financial advice.***

