

**FAMILY LAW ACT 1975 - SECT 90K**

**Circumstances in which court may set aside a financial agreement or termination agreement:**

(1)  A [court](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s20.html#court) may make an order setting aside a [financial agreement](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#financial_agreement) or a termination agreement if, and only if, the [court](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s20.html#court) is satisfied that:

(a)  the agreement was obtained by fraud (including non-disclosure of a material matter); or

(aa)  a [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party) to the agreement entered into the agreement:

(i)  for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party); or (ii)  with reckless disregard of the [interests](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#interests) of a creditor or creditors of the [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party); or

(ab)  a [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party) (the ***agreement***[***party***](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party)) to the agreement entered into the agreement:

(i)  for the purpose, or for purposes that included the purpose, of defrauding another person who is a [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party) to a de facto relationship with a [spouse party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#spouse_party); or

(ii)  for the purpose, or for purposes that included the purpose, of defeating the [interests](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#interests) of that other person in relation to any possible or [pending](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#pending) application for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship; or

iii)  with reckless disregard of those [interests](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#interests) of that other person; or

(b)  the agreement is void, voidable or unenforceable; or

(c)  in the circumstances that have arisen since the agreement was [made](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#made) it is impracticable for the agreement or a part of the agreement to be carried out; or

(d)  since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a [child](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child) of the [marriage](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s90md.html#marriage)) and, as a result of the change, the [child](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child) or, if the [applicant](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#applicant) has caring responsibility for the [child](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child) (as defined in subsection (2)), a [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party) to the agreement will suffer hardship if the [court](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s20.html#court) does not set the agreement aside; or

(e)  in respect of the making of a [financial agreement](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#financial_agreement)--a [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party) to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or

(f)  a [payment flag](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s90md.html#payment_flag) is operating under Part VIIIB on a [superannuation interest](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s90md.html#superannuation_interest) covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a [flag lifting agreement](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s90md.html#flag_lifting_agreement) under that Part; or

(g)  the agreement covers at least one [superannuation interest](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s90md.html#superannuation_interest) that is an [unsplittable interest](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s90md.html#unsplittable_interest) for the purposes of Part VIIIB.

(1A)  For the purposes of paragraph (1)(aa), ***creditor***, in relation to a [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party) to the agreement, includes a person who could reasonably have been foreseen by the [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party) as being reasonably likely to become a creditor of the [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party).

(2)  For the purposes of paragraph (1)(d), a person has ***caring responsibility***for a [child](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child) if:

(a)  the person is a [parent](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#parent) of the [child](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child) with whom the [child](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child) lives; or

(b)  a [parenting order](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#parenting_order) provides that:

 i)  the [child](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child) is to live with the person; or

(ii)  the person has [parental responsibility](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#parental_responsibility) for the [child](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child).

(3)  A [court](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s20.html#court) may, on an application by a person who was a [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party) to the [financial agreement](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#financial_agreement) that has been set aside, or by any other [interested](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s90md.html#interest) person, make such order or orders (including an order for the transfer of [property](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#property)) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that [financial agreement](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#financial_agreement) and any other [interested](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s90md.html#interest) persons.

(4)  An order under subsection (1) or (3) may, after the death of a [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party) to the [proceedings](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#proceedings) in which the order was [made](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#made), be enforced on behalf of, or against, as the case may be, the estate of the deceased [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party).

(5)  If a [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party) to [proceedings](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#proceedings) under this section dies before the [proceedings](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#proceedings) are completed:

(a)  the [proceedings](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#proceedings) may be continued by or against, as the case may be, the legal personal representative of the deceased [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party) and the [applicable Rules of Court](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s112aa.html#applicable_rules_of_court) may make provision in relation to the substitution of the legal personal representative as a [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party) to the [proceedings](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#proceedings); and

(b)  if the [court](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s20.html#court) is of the opinion:

(i)  that it would have exercised its powers under this section if the deceased [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party) had not died; and

(ii)  that it is still appropriate to exercise those powers;

the [court](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s20.html#court) may make any order that it could have [made](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#made) under subsection (1) or (3); and

(c)  an order under paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased [party](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102p.html#party).

(6)  The [court](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s20.html#court) must not make an order under this section if the order would:

(a)  result in the acquisition of [property](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#property) from a person otherwise than on just terms; and

(b)  be invalid because of paragraph 51(xxxi) of the Constitution.

For this purpose, ***acquisition of***[***property***](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#property)and ***just terms***have the same meanings as in paragraph 51(xxxi) of the Constitution.