

Property Settlement

After Separation: Consent Orders Versus Binding Financial Agreements

CONSENT ORDERS	BINDING FINANCIAL AGREEMENTS
<p><i>What is a Consent Order?</i></p> <p>A Consent Order is an Order made by the Family Court of Australia which documents an agreed division of matrimonial assets for a marriage or de facto relationship.</p> <p>Before a Consent Order can be made by the Court, it must be satisfied that the Orders sought are just and equitable.</p>	<p><i>What is a Binding Financial Agreement?</i></p> <p>A Binding Financial Agreement is an Agreement signed by all parties to a marriage or de facto relationship which details the agreed division of assets in relation to a marriage or de facto relationship. Unlike Consent Orders Financial Agreements are not filed with the Family Court and do not need to be approved by the Court.</p>
<p><i>What financial matters can and can't a Consent Order deal with?</i></p> <p>Consent Orders can deal with one or more of the following matters:</p> <ol style="list-style-type: none"> 1. Property settlement; 2. Spousal maintenance and maintenance for de facto parties; 3. Splitting superannuation. <p>Consent Orders generally cannot deal with child support.</p>	<p><i>What financial matters can and can't a Financial Agreement deal with?</i></p> <p>Binding Financial Agreements can deal with one or more of the following matters:</p> <ol style="list-style-type: none"> 1. Property settlement; 2. Spousal maintenance and maintenance for de facto parties; 3. Splitting superannuation. <p>Financial Agreements cannot deal with child support.</p>
<p><i>Why do I need a Consent Order?</i></p> <ul style="list-style-type: none"> • Finality <p>A Consent Order will finalise your matter in respect to the property settlement with your former spouse/partner and ensure that your ex does not come back in the future for another settlement.</p> <ul style="list-style-type: none"> • Duty exemption <p>Where a house is being transferred from the joint names of the parties to the sole name of a party you will usually receive a stamp duty exemption on that transfer when you have a Consent Order.</p>	<p><i>Why do I need a Binding Financial Agreement?</i></p> <ul style="list-style-type: none"> • Finality <p>A Financial Agreement will formalise your property settlement and spousal maintenance issues so that your ex cannot come back in the future to seek a further settlement and more money.</p> <ul style="list-style-type: none"> • Duty exemption <p>Where a house is being transferred from the joint names of the parties to the sole name of a party you will receive a stamp duty exemption on that transfer when you have a Financial Agreement.</p>

<p><i>Spousal Maintenance under Consent Orders</i></p> <p>An Order relating to spousal maintenance can be varied at any time.</p>	<p><i>Spousal Maintenance under Binding Financial Agreements</i></p> <p>The only way a party can contract out of future liability for spousal maintenance is to enter into a Binding Financial Agreement.</p>
<p><i>Who prepares the terms of a Consent Order?</i></p> <p>The terms of a Consent Order are usually prepared by either party's lawyers.</p>	<p><i>Who prepares a Financial Agreement?</i></p> <p>Financial Agreements are almost always prepared by lawyers due to their complex nature and the requirement that they strictly comply with the requirements of the <i>Family Law Act 1975</i> (Cth).</p>
<p><i>Do I need to obtain legal advice?</i></p> <p>You do not have to obtain legal advice in order for a Consent Order to be filed or made by the Family Court of Australia. It however is strongly recommended that you obtain legal advice.</p> <p>The Courts will only make a Consent Order if it is just and equitable. The absence of legal advice is sometimes a reason why the Court does not grant Consent Orders.</p>	<p><i>Do I need to obtain legal advice?</i></p> <p>Yes. Each party to the Binding Financial Agreement must obtain legal advice for the Agreement to be binding.</p> <p>Both parties to the Agreement must obtain advice in relation to the advantages and disadvantages of entering into the Agreement based on their particular circumstances, as well as the effect the Agreement has on their rights.</p> <p>This is because the Financial Agreement is not filed in the Courts and there is no judicial officer to determine whether the terms of the Agreement are fair, just, and equitable</p>
<p><i>Is a Consent Order Binding and Enforceable?</i></p> <p>Yes, a Consent Order is binding and enforceable. If the terms of an Order are breached, an Application can be made to the Court to enforce the terms of the Order.</p>	<p><i>Is a Financial Agreement Binding and Enforceable?</i></p> <p>Yes, provided the Financial Agreement is drafted strictly in accordance with the legislation, a Financial Agreement is binding and enforceable under principles of contract law.</p> <p>There are very strict legislative requirements that must be adhered to in order for the Agreement to be binding and enforceable.</p>

<p><i>How do I enforce a Consent Order if my ex does not comply?</i></p> <p>In the event an Order compels a party to sign a document, which is not signed by that party, a Registrar can sign documents on behalf of the non-complying party.</p> <p>You can make an Application to Court for contravention where you can seek enforcement orders and seek to penalise the non-complying party.</p>	<p><i>How do I enforce a Binding Financial Agreement if my ex does not comply?</i></p> <p>Before a Binding Financial Agreement can be enforced, a party needs to make an Application to the Court (for a declaration that the Agreement is valid). Therefore, if property settlement terms are onerous and enforcement is likely, it is generally not advisable to enter into a Binding Financial Agreement. This is because enforcement process will be expensive due to the Court process.</p>
<p><i>When can Consent Orders be set aside?</i></p> <p>Consent Orders can be set aside where a court is satisfied there is a valid reason to set the Orders aside. These reasons include impracticality, hardship for a child of the relationship or default in carrying out the terms of the Order.</p>	<p><i>When can a Financial Agreement be set aside?</i></p> <p>Financial Agreements can be set aside by a Court if the Court finds there is a reason. These include when the Agreement is obtained by fraud (including non-disclosure of a material matter), where there hasn't been strict compliance with the legislation in drafting and signing the Financial Agreement, where a party to the Agreement engaged in conduct that was unconscionable or circumstances have arisen since the Agreement which make it impracticable for it to be carried out.</p>
<p><i>Is there a "Cooling off Period" when signing Consent Orders?</i></p> <p>Technically speaking, any Consent Order has a risk period of 28 days from the date the Order is sealed for the following reasons:</p> <ul style="list-style-type: none"> • Either party can appeal the making of the Consent Order; • An appeal from the making of a consent Order is a hearing de novo (which means "a hearing from the beginning"); • As the party appealing the decision withdraws their consent, the court then has no option but to set aside the Consent Order. 	<p><i>Is there a "Cooling off Period" when signing Consent Orders?</i></p> <p>A Binding Financial Agreement is binding from the time it is signed and certified and there is no appeal period.</p>

What will it cost me to get a Consent Order?

The cost of your Consent Order will depend on the terms you are seeking and how complex they are. It is usually (though not always) less expensive to prepare Consent Orders than Financial Agreements.

What will it cost me to get a Financial Agreement?

The cost of your Financial Agreement will depend on the terms you are seeking and how complex they are. It is usually (though not always) more expensive to prepare a Financial Agreement.

What are some Advantages of Signing Consent Orders?

- Consent Orders are arguably quicker, easier and cheaper to enforce than the terms of a Binding Financial Agreement.
- The Court must be satisfied that the Orders sought are just and equitable.
- Parties must sign a "Statement of Truth" at the back of the form indicating that all assets and financial resources have been disclosed in the body of the document.
- In the event an Order compels a party to sign a document, which is not signed by that party, a Registrar can sign documents on behalf of the non-complying party.

What are some Advantages of Signing a Binding Financial Agreement?

- The proposed agreement does not have to be fair, just or equitable.
- Both parties to the Agreement are required to obtain independent legal advice prior to entering into the Agreement, which ensures both parties are aware of the advantages and disadvantages of entering into the Agreement based on their particular circumstances, as well as safeguarding both parties' rights in the future if either party to the Agreement wishes to have the Agreement set aside.
- The only way a party can contract out of future liability for spousal maintenance is to enter into a Binding Financial Agreement.
- Confidentiality clauses can be written into the Agreement.

What are some disadvantages of signing Consent Orders?

- An Order relating to spousal maintenance can be varied at any time. This may be a disadvantage if you wish to extinguish your partner's ability to seek spousal maintenance from you in the future. However, should you wish to seek spousal maintenance from your partner, a Consent Order is advantageous.
- There may be delays associated with the Court to seal the Orders (depending on the Court's capacity and resources).

What are some disadvantages of Signing a Binding Financial Agreement?

- If your Agreement deals with Spousal Maintenance you may be precluded from bringing an Application for spousal maintenance against your former partner in the future.
- By entering into a Binding Financial Agreement parties give up the rights they would otherwise have to have their spousal maintenance and property settlement entitlements determined by a Court. A party may act to their own detriment by signing an Agreement.
- Binding Financial Agreements are usually more expensive to prepare and advise on having regard to the strict legislative requirements.
- Before a Binding Financial Agreement can be enforced, a party needs to make an Application to the Court (for a declaration that the Agreement is valid).
- If there is ever a dispute in relation to the validity of the Agreement in the future, you may be subject to lengthy and costly litigation;
- A Binding Financial Agreement can be set aside based on a technical deficiency (such as the drafting of the Agreement).

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