

DOCUMENTING A FAMILY LAW PROPERTY SETTLEMENT

Many people in family law matters, whether in a matrimonial or defacto situation, do not properly document the division of their assets.

In many scenarios, parties make the mistake of signing a statutory declaration in the presence of a Justice of the Peace/Commissioner of Declarations, or confirming an agreement in writing and thinking that such written documents will suffice. That is not the case. The only way for a family law property settlement agreement to be legally binding and enforceable are for parties to enter into either Consent Orders or a Financial Agreement.

The risk with not documenting a final property settlement by way of Consent Order or Financial Agreement, is that any other agreement (whether written or otherwise) is not recognised by the Family Court as being legally binding and enforceable, which allows either party to seek a further settlement from their former partner in future. This can be disastrous in some cases where hundreds of thousands of dollars are involved.

Having a Consent Order in place means that your property settlement matter has been properly finalised, without you needing to worry that your former partner is going to “come back at you” in future for more money. Also, if drafted properly, a Consent Order can result in stamp duty exemptions on transfers of real estate.

Most agreed property settlements are documented by way of a Consent Order. To have a Consent Order approved by the Family Court, you must complete and file:

- (a) an Application for Consent Orders; and
- (b) Minutes of Consent (the Consent Order).

Parties are not required to seek independent legal advice before signing the documents, although they are able to if they wish.

Once filed, a Registrar at the Court will review the documents and approve the Consent Order as long as the agreement reached is what the Court refers to as “*just and equitable*”. This basically means the Court must be satisfied that the parties have entered into an agreement which is fair for both sides. Despite parties reaching an agreement, the Court can choose not to approve and make the proposed Consent Order. This could happen in a situation where say, a wife was entitled to 70% of the net assets available for division, but was agreeing to 50%. In such a scenario, the Court will at first instance issue a requisition to the parties advising that the Court requires further information from the parties (usually in affidavit form) setting out why the Court should approve the proposed Consent Order. In the example provided, that would require the wife to swear an affidavit stating that she knows she is entitled to much more than 50%, but that for a number of reasons (which must be listed in the affidavit) she wants to settle at 50%. In most cases, the Court will then approve the Consent Order after receiving such an affidavit. However, the Court can reject the proposed Consent Order if not satisfied with the affidavit filed.

The best way to ensure that your Consent Order documents have the greatest chance of success in being approved, is to seek independent family law specialist advice first.