

PROPERTY SETTLEMENT
AGREEMENTS AFTER SEPARATION



REABURN SOLICITORS

Unit 8, 18 Township Drive
Burleigh Heads QLD 4220
Ph 07 5586 2222

Email info@reaburn.com.au
Website www.reaburn.com.au

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Once you have reached an agreement with your former spouse as to property settlement, there are 2 ways by which you can formally document the agreement:

1. **Consent Orders** – this is where your written agreement is filed with the Family Law Courts and once approved by a Registrar of the Court, it is made into a binding Order.

It usually takes between 3 and 8 weeks for the agreement to be assessed by the Registrar. In order to get the Registrar's approval, the terms of the agreement must be within the realms of what a Court would order if it was asked to determine the property settlement.

Technically, either party can withdraw their consent from the Consent Order within 28 days from the date the Consent Order is made and in that case the Court is obliged to set the Order aside.

If the other party breaches the Consent Order, then you may issue enforcement proceedings in Court. It is arguably quicker, easier and cheaper to enforce Consent Orders than it is to enforce the terms of a Financial Agreement;

2. **Financial Agreement** – this is a private agreement, which provided it complies with the technical requirements of the legislation, once it signed by each party and their respective lawyers is binding and enforceable. It does not need to be filed with the Court.

A Financial Agreement can be used to finalise the terms of a final property settlement, partial property settlement or interim property arrangements.

If the other party breaches the Financial Agreement, then it is arguably a more difficult process to enforce than a Consent Order. We would therefore recommend Consent Orders over a Financial Agreement if the terms of any property settlement are onerous or over a lengthy period of time and an enforcement of the agreement is likely.

It is also arguably easier to set aside a Financial Agreement than it is to set aside a Consent Order. This is because the legislative grounds to set aside a Financial Agreement include "unconscionable conduct" whereas this ground does not apply to Consent Orders. If the terms of a Financial Agreement are well outside the range of what each party would be legally entitled to, then the Agreement may be at risk of being set aside on the basis of unconscionable conduct. The Family Law Act lists the grounds upon which either Consent Orders or a Financial Agreement may be set aside.

Transfers of property under both types of documents attract the same stamp duty exemptions, rollover tax relief and tax consequences. Third parties can also be joined as parties to either Consent Orders or a Financial Agreement.

It is possible to include a confidentiality clause in a Financial Agreement.

Provided that neither party is in receipt of an income or means tested pension, allowance or benefit when the Financial Agreement comes into effect, then it is possible to use the Financial Agreement to contract out of future liability for spousal maintenance. This cannot be done in a Consent Order.

Some parties opt to use a Consent Order to finalise their property settlement and a Financial Agreement to finalise potential spousal maintenance claims.

Estate Planning

When negotiating the terms of either a Consent Order or a Financial Agreement, it is recommended that you consider updating your Will or Estate Plan to ensure consistency.

Although it is not possible to use a Financial Agreement to exclude a prospective claim in respect of any Will or Estate, the recitals of the Financial Agreement should make reference to what both parties intend in the case of death as the terms of the Financial Agreement may be relevant in any future claim on the estate.

Reaching Agreement

Some parties prefer to negotiate directly with one another in an effort to reach agreement about their property and financial matters. Once an agreement is reached, we can advise as to whether your matter would be best resolved by way of Consent Order or Financial Agreement.

Often parties will seek preliminary legal advice as to their potential entitlements, rights and obligations before they enter into discussions with their spouse. That party will then know where they stand in a legal sense and usually give them more confidence in conducting the negotiations.

If the financial affairs of the parties are complex involving corporate and trust entities, then we would recommend that the parties' accountant or financial advisor be involved in negotiating the terms of any agreement.

Limitation Period

If negotiations break down and agreement cannot be reached, you might be forced to make an application to the Court. Any application for property settlement must be filed in Court within 12 months from the date of divorce. You will therefore need to advise us if you are divorced or have filed divorce proceedings in Court.