

Do I need to put my Agreement in Writing?

Article by Townsville Family Lawyer, Jodi Dingwall

10 August 2021



I have Separated and have reached an Agreement with my ex. Is it important to Document the Agreement? Yes!

Do I need to put my Agreement in Writing?

Sometimes, people who have separated, are able to discuss their situation and reach an agreement about arrangements for their children and/or property, quite quickly.

Often, people need to obtain to some legal advice first and with some negotiation they reach an Agreement.

A question I am asked frequently by clients is: "Do I need to put my agreement in writing?"

In nearly all cases, I advise clients: Yes! You should be documenting your agreement in writing so that you have a **legally binding agreement**.

Why?

The reason is simple – A legally binding agreement provides certainty AND it's enforceable.

If the agreement is about arrangements for the children, certainty is important for the kids.

If the agreement is about property, there is certainty about what must happen with the 'sorting' and transferring of property. Sorting can begin in earnest as both parties have the confidence of knowing that the agreement is in place and that the terms of the agreement must be followed through.

When it comes to separated couples, more often than not, emotions are running high and often, there are times where one person wants to change their mind. This can cause grief to the other party. The only way to make sure that this doesn't happen and to make sure your agreement is enforceable is to put it in writing **and** to make sure it is a legal binding agreement.

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Does the Agreement need to be a certain 'type' of Agreement?

Yes. And if you do not document your agreement with the right type of document, your agreement may not be enforceable. The *Family Law Act 1975 (Cth)* sets out the various agreements that the court recognises. Not all are enforceable though.

The *Family Law Act* refers to various Agreements:

For parenting matters – you can use a Parenting Plan or Consent Orders.

For property matters – you can use Consent Orders or a Binding Financial Agreement.

It's important to understand which agreements are enforceable.

Types of Agreements:

- **Parenting Plans**
- **Consent Orders**
- **Binding Financial Agreements**

What is a Parenting Plan?

A parenting plan is a written document that sets out the agreement you have reached for the care arrangements for children. It is not legally enforceable and is different from a parenting order which is made by a court.

It is signed and dated by the parents. It does not need to be witnessed and there is no set format for the document. The document can be handwritten on a piece of paper. It just has to be in writing, signed and dated and be made free from any threat, duress or coercion.

A Parenting Plan is NOT legally enforceable and can be changed at any time by entering a new parenting plan or by court order.

If you apply to the Court for a parenting order, while the court will consider the terms of your parenting plan, the Court does not have to follow it and can make other/different orders.

While a parenting plan shows the parties intentions at the time they signed the agreement, if the parties fail to do what they agreed to, you are not able to bring the matter before the Court to enforce the terms of the agreement (like you can with a consent order).

For a parenting matter, the only way to ensure you have an enforceable agreement, is to document your agreement with a **Consent Order**.

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What are Consent Orders?

Consent Orders are essentially an agreement, that has been stamped and sealed by the Court and is therefore legally binding.

You can have Consent Orders that refer to both parenting and property settlement matters.

Consent Orders, if 'breached' or disregarded can be enforced by the Court.

Also, if they are about property/financial matters, there are tax benefits.

Stamp duty

For example – if part of your property settlement is that an interest in a property (real-estate like a house or land) is to be transferred to you from your former spouse, IF this is documented in a Consent Order, you will not have to pay stamp duty on the transfer. Normally, all transfers attract stamp duty. This can be a considerable amount of money. And usually much more than the cost of paying a lawyer to prepare Consent Orders.

Capital gains tax; Stamp duty on shares

Consent Orders may also exempt you from having to pay capital gains tax on property transfers or from paying stamp duty on share transfers or to remove a party from a trust or when transferring shares in a company. (These are just a few examples.)

How do I obtain Consent Orders?

You need to apply to the Family Court for Consent Orders. You need to complete, sign and date:

1. An 'Application for Consent Orders form'. This is a lengthy document that sets out all the details of the marriage and details about the children and property of the relationship; and
2. Attached to this Application is another document which contains your proposed orders (or the terms you and your former partner have agreed to). This is called 'Minutes of Consent or Orders'.

The Family Court provides specific templates that are accessible from the Family Court website. There is quite a lot of information and detail that the Court requires.

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What does it Cost to obtain Consent Orders?

There is also a filing fee for filing an application for consent orders. (It is much less than the fee charged for a Divorce Application). The rate changes yearly – at the time of writing this article it is \$170. If you have a concession card you can claim an exemption from paying this fee.

Can I do this myself?

You can make the application without a lawyer but be aware there is quite a lot of information to gather and documentation to consider and fill out. I always recommend that people obtain independent legal advice about the orders you are agreeing to. Also – be aware, if you have property matters that involve superannuation splits or property transfers, the orders need to be very specific so as to be enforceable.

At the very least, I always recommend engaging a lawyer to:

1. look over your proposed orders and Application documents so that you can be certain that your documents meet the Courts requirements, and
2. ***to ensure that your orders are specific enough to be enforceable.***

What does the Court do with the documents?

A Registrar of the Family Court will read through the documents and apply the law that is relevant. Various sections of the Family Law Act apply to parenting matters and property matters.

If the Court is satisfied that your agreement – which is set out in the consent orders, is in the best interests of your children (for a parenting matter) and is legally fair (for a property matter) then a Court seal will be placed on your orders.

Once you have the Court's seal – the Consent Orders are made and final.

You are then able to apply to the Court to enforce your agreement if one party fails to comply with the terms of your agreement.

Consent Orders are regarded as *final* and can only be changed by a further consent order, an order made by the Court or a parenting plan.*

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(*The parenting plan will only vary the consent order to the extent it addresses specific issues. The parenting plan may refer to a couple of specific things that will effectively vary the consent orders. The consent orders may refer to several things and matters that are not referred to in the parenting plan will remain intact.)

Costs

There is a fair bit of paperwork and time required to turn your agreement into Consent Orders. A parenting plan requires less energy, however, in my opinion, it is worth the additional time it takes to obtain Consent Orders.

It is also worth the cost of legal advice and assistance. If you have reached agreement, and you retain an experienced solicitor who does this type of work regularly, it should not be that expensive.

In my experience, people usually need some advice to make sure they are on the right track with what they are prepared to agree to. They also need some help to negotiate with their former spouse to finalise things. They also need assistance from a lawyer to carefully draft the actual orders. This can cost a little more. But it is well worth it.

In situations where one of the parties isn't disclosing details about property and/or they don't want to agree to reasonable proposals, this will (of course!) slow down the process of negotiation and make reaching an agreement impossible. In these situations, people often need a lawyer to file an application to the Federal Circuit or Family Court. And yes – this is expensive. Sadly, when one party is unreasonable, this is the only option.

My thoughts on 'Fixed Fees'.

On a side note – there are many law firms who are now advertising 'fixed fees' for consent orders. I know from experience, that it is virtually impossible to say how much something like this will cost until you have met the client and have investigated the circumstances.

For example, for Property Consent Orders:

At OSheaDyer Solicitors, we say that Consent Orders 'start at \$2000'. A fee of \$2000 will only be possible if full disclosure has been made, you provide every small detail in chronological order regarding your property by filling in a draft Application form, the agreement is straightforward, the property pool is a 'standard size' and both parties are in complete agreement. Consent orders in these circumstances will still take around 5 hours of my time and 3+ hours of a para-legal's time.

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If there are additional things to do like – obtaining disclosure, doing searches to obtain property descriptions, finding super funds and shareholdings, filling out the Application form, and there are still matters that need to be negotiated to reach agreement, so letters and phone calls need to be done.... This could take 10- 15 hours of my time plus 10 or more hours of para-legal's time. The cost to obtain Consent Orders will then obviously be more than \$2000!

Firms who tell you the cost is fixed at \$2000 (or something like that) will often give you a revised quote down the track after you have retained them. (And most clients feel once they have engaged a lawyer they are 'stuck' – especially if they have already spent money with them.)

That's not how we operate at OSheaDyer Solicitors. **We offer all new clients a first appointment with an experienced lawyer for a low fixed fee of \$220.** At the end of this appointment, after we have investigated your circumstances, we then give you an accurate written quote. And then you can make an informed decision to retain us or not.

Our family lawyers practice exclusively in Family law. We have a Family Law team of lawyers, paralegals and secretaries who practice in family law. We offer a streamlined, personalised service, excellent value for money and obtain excellent results for all of our clients.

What is a Binding Financial Agreement? (BFA)

A Binding Financial Agreement is a written agreement between parties that sets out what has been agreed to in regard to their property.

A BFA can be entered into *before, during or at the end* of a marriage/defacto relationship. (If the financial agreement is entered into *before* marriage – it may be referred to or called a '*prenup*'.)

Although they are not sent to the Court for the Court's approval, they are enforceable in Court if there are compliance issues.

There are many requirements for a Binding Financial Agreement. This can make them quite expensive.

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For example:

1. Both parties are required to have their own solicitor.
2. Both parties are required to have their solicitor sign a certificate. The certificate says that the party has obtained independent legal advice about the affect the agreement will have on their rights and the advantages and disadvantages of entering into the agreement.

The certificate needs to be attached to the agreement before the agreement is signed by the parties.

There are other technical requirements that need to be met. The BFA should be prepared by an experienced family lawyer to ensure that the document complies with all legal requirements of the document.

If the legal requirements of the BFA are not met – the BFA will not be enforceable.

If you are looking to document your agreement after separation, a Binding Financial Agreement is usually more expensive to have prepared than a Consent Order – due to the additional requirements. (A BFA is most commonly used when making a 'prenup'.)

Sometimes a BFA is useful to document an agreement. If the parties have reached an agreement but it is likely the court won't approve it as Consent Orders because the Court might not consider the agreement to be legally fair (i.e the agreement favours one party more than the other), a BFA may be the best agreement to use.

You also receive the same benefits of not paying stamp duty or being relieved of paying capital gains tax like you do with a Consent Order.

Costs

Because there are more requirements for a BFA to be valid, it takes a lot of time. A BFA may cost between \$5,000 - \$7,000 (whereas consent orders may cost between \$2000 - \$4000).

I would normally only recommend the use of a BFA if the document was prepared before or during your relationship with your spouse as a means of protecting your wealth in the event you separate for this reason.

Because of the higher costs of preparing a BFA to document your agreement after separation, I would normally recommend consent orders.

There is also a filing fee for filing an application for consent orders. (It is much less than the fee charged for a Divorce Application). The rate changes yearly – at the time of writing this article it is \$170. If you have a concession card you can claim an exemption from paying this fee.

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My Advice in a Nutshell

For a Parenting matter, document your agreement with Consent Orders.

For a property matter, where you have separated from your spouse, my usual recommendation is to document your agreement with Consent Orders.

For parties' looking to protect their wealth *before* or *during a relationship*, my recommendation is to document your agreement in a BFA (Binding Financial Agreement).

Jodi Dingwall is a senior family lawyer at OSheaDyer Solicitors, Townsville. Jodi was Admitted in 2007 and has been practicing exclusively in Family law since 2014. Jodi is also a Collaboratively Trained Family Lawyer.

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Everyone's situation is unique. We always recommend that people see an experienced family lawyer so you can discuss your situation and obtain customised advice about how this process specifically applies to you.

O'Shea Dyer Townsville has experienced lawyers who practice exclusively in Family Law

We offer first appointments with experienced family lawyers for \$220 - a low fixed fee, so that everyone can afford to obtain advice about their situation.

Call us on 4772 5155 to make an appointment. We would love to help you.