

**HarrisLieberman**  
solicitors

THE IMPORTANCE OF DOCUMENTING  
**YOUR AGREEMENT**



FAMILY LAW  
**PROPERTY SETTLEMENT**

commitment to make a difference

# THE IMPORTANCE OF DOCUMENTING YOUR AGREEMENT

The documenting of an agreement refers to the recording of a property settlement agreement through either Consent Orders or a Financial Agreement under the **Family Law Act 1975**.

You've reached an agreement with your former spouse about the division of your assets. You may ask *why* do I need to document my agreement?

**There are some practical reasons why you should document your agreement:**

- » If you want to divide superannuation (this is done through a superannuation splitting order), you must have an order under the **Family Law Act 1975** or Financial Agreement documenting the agreement.
- » In some cases, you will need to have an order under the **Family Law Act 1975** or Financial Agreement to get an exemption from paying stamp duty on the transfer of a property from joint names to one name.
- » Banks will often want to see a formal agreement about the division of assets when loaning money to a spouse who is making a cash payment to the other spouse in exchange for the transfer of a property.
- » Consent Orders and Financial Agreements are enforceable whereas an informal agreement about the division of property is not. This means that if one spouse doesn't do what they were supposed to do under a Consent Order or Financial Agreement, the aggrieved spouse can apply to the Court to enforce the Order or Financial Agreement.

Another very important reason why you should properly document your agreement is that an informal division of assets is not recognised by the Court under the Family Law Act as a final property settlement.

This is important because unless there has been a formal division of assets, any assets or superannuation entitlements accrued after separation may still be subject to a property order under the **Family Law Act** even if there has

already been an informal division of property by the spouses.

In family law matters, the Court will look at the pool of assets that exists at the date of final hearing. This is often different to the pool of assets that existed as at the date of separation, particularly where there has been a long period of time between the date of separation and the date of final hearing.

**Consider the following example:**

One spouse buys a property after separation. Between the date of purchase and the date of final hearing, the property goes up in value. If there had been a formal property settlement under the Family Law Act before the property had been purchased, then nothing would happen. However, if there had not been a formal property settlement, the Court would be entitled to value the pool of assets at the date of hearing, which would include the post-separation acquired property. The Court would then make appropriate orders for the division of property adopting the principles set out in the Family Law Act. Of course, in applying the relevant principles, the Court may consider that the spouse who purchased the property after separation has made a greater contribution but there is still a risk that the other spouse could end up benefitting from the efforts of the spouse who purchased the property.

**There are two ways to document your agreement after the breakdown of a de facto relationship or marriage:**

1. Consent Orders;
2. Binding Financial Agreement (pursuant to section 90UD in the case of a de facto relationship and pursuant to sections 90C or 90D where the parties were married.)

Consent Orders are the preferred and most common way of documenting an agreement regarding the division of assets, liabilities and superannuation.

**When applying for Consent Orders, there are two documents that need to be prepared:**

- a. An Application for Consent Orders; and
- b. Minutes of Consent Orders.

The Application for Consent Orders sets out the current income, assets, liabilities and financial resources of each party and shows in table form how it is proposed that the assets and liabilities will be divided. There is a section in the form which allows extra information to be added to explain why the parties have come to their agreement about the division of assets and liabilities. For example, one spouse may have made greater contributions or there one party may have special needs which justify a particular division of assets and liabilities. The Minutes of Consent Orders set out who is to do what and in what time frame to give effect to the agreement which has been reached.

Once the Application for Consent Orders and Minutes of Consent Orders have been prepared, both documents are signed by the parties and then filed with the Court for approval. Once the orders have been made by the Court, they are returned with a court seal (stamp) on it. This is the formal record of the property settlement agreement.

“Failure to document your agreement either by way of a Consent Order or Binding Financial Agreement, can leave your Estate open to a potential claim by your former spouse. For example, the Administration and Probate Act 1958 (Vic) includes in its definition of people eligible to apply for family provision, “a former spouse or former domestic partner of the deceased if the person, at the time of the deceased’s death

- i. would have been able to take proceedings under the Family Law Act 1975 of the Commonwealth; and
- ii. has either
  - a. not taken those proceedings; or
  - b. commenced but not finalised those proceedings; and
- iii. is now prevented from taking or finalising those proceedings because of the death of the deceased.

In other words, a former spouse may be able to make a claim under a deceased’s estate if there has been no formal family law property settlement even though the parties had informally divided their assets after separation.”

If you choose to document your agreement by way of Binding Financial Agreement, both parties will need to have independent legal advice. The same requirement does not exist for consent orders although it is recommended that both parties get their own legal advice and that the orders are drafted by a Solicitor.

The wording used in consent orders (or Binding Financial Agreement) is very important and can mean the difference between an order/agreement that is enforceable and once that isn’t.

Please contact our office to discuss how we can help you document your property settlement agreement.





contact Harris Lieberman

## ALBURY

Address:  
2/497 Smollett Street,  
ALBURY 2640

Phone:  
02 6051 5100

Fax:  
02 6051 0010

## WODONGA

Address:  
87 Hume Street,  
WODONGA 3690

Phone:  
02 6051 5100

Fax:  
02 6051 5110

commitment to make a difference