



## Simplifying Family Law Parenting Arrangements Following a Relationship Breakdown

### Binding Financial Agreements, rather than Consent Orders, the best option.

The sorting out of parenting arrangements and the distribution of property following the breakdown in a relationship is inevitably a stressful time, but can also end up being a time-consuming (and costly) process.

Over the past decade or so, the law has required disputes over parenting arrangements to be dealt with at mediation as a first step, before court proceedings can be commenced. There are some situations (such as risk of abuse or violence to a child) where the *Family Law Act 1975* (the “Act”) allows for court proceedings to be the first step to resolve a parenting dispute, but the idea is to try and keep matters that can be resolved by genuine negotiation out of court.

This is still not the case for disputes over the division of property following the breakdown of a marriage or de facto relationship. Whilst it is true that once family law property court proceedings are filed that cases are generally referred to conciliation before a court registrar, the matter has still come before the court (either the Family Court of Australia or Federal Circuit Court of Australia, both of which have jurisdiction in relation to family law matters), with the associated time and cost involved.

Court proceedings can, however, be avoided (or if already commenced, can be resolved) through the parties agreeing to an arrangement for the final division of the parties’ property. The agreement is not only final, but must provide for the just and equitable division of the parties’ property.

Family lawyers have traditionally considered that the most effective avenue to achieve a final division of the parties’ property in a negotiated manner is by of “Consent Orders”. These are a set of orders for how the parties want their property (including superannuation) to be divided. They are typically negotiated and drafted by the lawyers representing each party, and then signed off by the parties. The Consent Orders are then filed in court (it must be the Family Court if there are not existing proceedings in court). If the Court approves the Consent Orders as representing a just and equitable division of property between the parties, they then take effect as court orders even though the parties typically have not stepped foot in court. Accordingly, if one party does not comply with the Consent Orders, the other party can file contravention proceedings in court to have the Consent Orders enforced.

Interestingly though, while the Consent Orders are generally a much more favourable option than going to court, they are not the most convenient option. Parties that can reach an agreement regarding the division of property can instead finalise arrangements through a Binding Financial Agreement.

Pursuant to the Act, a Binding Financial Agreement must be signed off by lawyers for each party, to the effect that each party has been advised of their rights and obligations in the Agreement, in order to be enforceable. But to be enforceable, the Agreement does not need to be filed in Court. This automatically saves the parties a \$155 filing fee which applies to Consent Orders, plus the time involved in filling out a 25 page (approx.) Application for Consent Orders which needs to accompany the actual Consent Orders that are filed in court. There are also extra legal fees on top of this.



There is the view among many lawyers that Consent Orders are stronger than a Binding Financial Agreement through taking effect as an order of the Court, and thus should always be used if there is a risk of one party (or both) departing from what has been agreed upon. But this view is misguided, and should not be relied upon to justify the extra time and expense involved in getting Consent Orders prepared and ultimately approved by the Court.

Section 90KA(c) (as well as section 90UN with respect to de facto relationships) of the Act confirms that when a Binding Financial Agreement is sought to be enforced, in addition to granting damages and other remedies, the court can treat the Agreement as being an order of the Court. There would thus be no substantive difference between Consent Orders and a Binding Financial Agreement for the final division of property.

For this reason, we generally advise our clients to use a Binding Financial Agreement to divide property following a relationship breakdown. If there is a need to determine parenting arrangements as well, we recommend that the parties also negotiate and sign a Parenting Plan, which is not binding but has some important consequences under the Act.