

Consent Orders are a legally binding agreement between former partners regarding parenting arrangements and/or property division. This article looks at what Consent Orders may address and how they can be enforced by the court.



A. WHAT ARE CONSENT ORDERS?

At the breakdown of a marriage or de facto relationship, former partners may come to an agreement about parental, financial and property arrangements. Consent orders allow such agreements to become binding on both parties, so that they can be enforced in court if they are not followed. This is an effective way of ensuring all parties receive their fair share of entitlements, and can prevent any future misunderstandings.

The main consideration of courts when deciding whether to enforce agreements regarding property division or spousal maintenance is if the agreement is just and equitable for both parties.

For the breakdown of relationships that involve children, Section 60CA of the Family Law Act 1975 ("FLA") requires that consent orders are made in the best interests of a child.

B. THE PROCESS

B.1. DRAFTING THE CONSENT ORDERS

The first step is to write the agreement itself. This is the most time-consuming part of the process, as the wording must be clear and accurate to avoid any misinterpretation. Parties will need to negotiate with each other to come to agreement with all the terms.

B.1. FILING THE DOCUMENTS

Consent orders consist of two documents:

- **The Application for Consent Orders:** a formal request for orders to be made in accordance with the agreement, signed by both parties and a lawyer if legal advice is sought; and

- **Terms of Settlement (or Minutes of Consent):** provides further details to the orders requested in the Application.

Applications can only be filed in the Family Court of Australia, generally through the eFiling method available on their website. Once filed, parties will receive a sealed copy of the consent orders if approved, or receive a notice requiring parties to address any concerns regarding the agreement.

C. CONSENT ORDERS FOR PARENTING ARRANGEMENTS

For consent orders regarding parenting arrangements, the financial assets and resources of parties do not need to be disclosed.

When deciding upon consent orders regarding children, the Court looks at whether these arrangements are in the best interests of the child.

Under Section 61DA of the FLA, the Court applies the assumption that it is in the best interests of a child for both parents to have equal shared parental responsibility. This means the Court is more obliged to approve orders which allow both parents' involvement in the child's life.

For example, terms of an approved consent order could state that a father is to spend 3 days with the child and the mother to spend 4 days with the child, and that consent from both parents will be obtained for issues relating to the child's health and education.

When making parental arrangements in the best interests of a child, factors to be considered include:

- The benefit to the child of having a meaningful and ongoing relationship with both parents;



- The need to protect the child from any form of neglect, harm and family violence;
- The age of the child in deciding what type of arrangement is best suited;
- Establishing a consistent routine;
- If it is reasonably practicable for the child to spend equal time with both parents (particularly if a parent lives interstate or overseas);
- Each parent's ability to provide for the child's needs;
- How important decisions relating to school, health care, or religious matters will be made; and
- The child's own views and willingness towards the arrangements and the child's relationship with each parent.

The Court may decide to take other considerations into account, depending on the situation.

D. CONSENT ORDERS FOR PROPERTY AND MAINTENANCE

When applying for consent orders for property and maintenance, both parties should fully disclose the extent of their financial assets, liabilities, superannuation and financial resources. The Application requires parties to disclose detailed personal and financial information for courts to consider.

The main principle used by the Court in deciding consent orders for property and maintenance is whether the agreement is just and equitable (ss 75(2), 79(4) FLA).

To decide whether consent orders are just and equitable, the Court will look at the assets and debts of both parties. After looking at all the evidence, the judicial officer will decide if your agreement is just and equitable based on your unique situation.

The factors taken into account when making this decision include:

- The direct (e.g. salary) and indirect (e.g. gifts) financial contributions made by each party to the relationship;
- The non-financial contributions (e.g. caregiving duties to a child) made by each party to the relationship; and
- The future needs and requirements of each party (considering age, employability, finances, health, etc.).

E. WHEN TO APPLY

Applications for consent orders regarding property and maintenance must be made within 12 months of a divorce or within 2 years of the breakdown of a de facto relationship (s 44 FLA).

If you exceed this timeframe, you can still seek leave to file the application.

F. WHAT HAPPENS IF CONSENT ORDERS ARE NOT FOLLOWED?

Once consent orders are sealed by the Court, they are legally binding on the parties and have the same weight as court orders made by a judge for a trial.

If a party acts in breach of the consent orders they previously agreed to, penalties may be enforced.

The penalty decided by a court depends on a number of factors, such as:

- Whether there has been a minor or major breach of the consent order;
- How many times the consent order has been breached;
- Why the consent order has been breached; and
- The personal circumstances of the party who breached the order.

Some penalties that may be enforced by a court under Division 13A of the FLA include paying a fine, paying damages, participating in community service, entering a bond, or a sentence of imprisonment.

This ensures that both parties are liable to their promises and are discouraged from not following them.

Comasters can advise and assist clients with drafting consent orders and will act in applications to the Family Court.

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