

Reaching &
Documenting
Your Settlement
Agreement

THE LEGAL STUFF

What's your
separation
story going
to be?

The Divorce Studio

Most separating couples agree on how to divide their property and finances *without going through the family courts.*

Agreeing on a property split without disputing the issues in court saves families the emotional and financial costs associated with a contested hearing, and gives parties greater autonomy over how they divide their property.

Arriving at a negotiated outcome without going through the courts often results in better post-separation parenting relationships for couples with children. Having property orders made also gives you certainty and finality in relation to your financial circumstances, and you can move on without the risk of having to further divide your assets in the future.

Given these benefits, we encourage separating parties to finalise their property & financial arrangements outside of the court, where it is safe and appropriate to do so.

This guide has been developed to assist parties to understand the steps family lawyers take to finalise a property settlement:

1. Documenting the agreement reached;
2. Producing Orders which are enforceable and can be actioned to move the assets between separating couples;
3. Complying with the Laws required to avoid stamp duty on the transfer of existing assets;
4. Ensuring you are indemnified in relation to liabilities incurred during the relationship, including by either party, jointly or through any entity, and including taxation that may be later assessed; and
5. Ensuring the superannuation orders can be carried out by the Superannuation Trustee.

Engaging The Divorce Studio to draft your application and minute of consent orders is relatively inexpensive, low stress and simple, particularly compared to contested court proceedings. Agreeing the way forward and having your agreement finalised as quickly and professionally as possible is particularly advantageous where you have children and it is important for your relationship to remain workable as co-parents.

And when you have reached that agreement, let us document it for you quickly, cheaply and efficiently.

We're here to help.



FAMILY LAWYER & CO- FOUNDER



Strategies and Tactics for a *Successful Property Negotiation*

Navigating a property settlement negotiation is more than a legal transaction; *it's an emotional journey* fraught with challenges and complexities.

In the midst of separating from a partner, emotions often run high, and finding common ground seems like an arduous task. However, adopting strategic emotional approaches can pave the way for a successful and amicable resolution. The following key emotional strategies and tactics will guide you through the process of negotiating a financial settlement.

Acknowledge and Manage Emotions

1. Embrace Emotional Intelligence:

Recognise that emotions play a significant role in negotiations. Emotional intelligence involves understanding and managing your own emotions while empathising with the emotions of others. Begin by acknowledging the emotional impact of the separation and strive for self-awareness.

2. Seek Emotional Support:

Before entering negotiations, surround yourself with emotional support. Lean on friends, family, or even a therapist to provide a safe space for expressing and processing your feelings. Having a support system can bolster your emotional resilience during negotiations.





Establishing *Effective* Communication

3. Practice Active Listening:

Effective communication is foundational to successful negotiations. Practice active listening by giving your full attention to what the other party is expressing. Validate their emotions and concerns, fostering an atmosphere of mutual respect and joint problem solving.

4. Use “I” Statements:

When communicating your own needs and concerns, use “I” statements. For example, say, “I feel overwhelmed by

the financial aspects of this separation” instead of placing blame with “You always control the finances.” This reduces defensiveness and opens the door for more constructive dialogue.

5. Set Ground Rules for Communication:

Establish clear ground rules for communication during negotiations. Agree on respectful language, avoiding personal attacks or inflammatory remarks. Creating a framework for civil discourse promotes a more positive emotional atmosphere.

Building *Empathy* and Understanding

6. Put Yourself in Their Shoes:

Develop empathy by trying to understand the perspective of the other party. What are their concerns, fears, or aspirations? This doesn't mean you have to agree, but recognising their point of view fosters a more compassionate negotiation process.

7. Acknowledge Shared Emotions:

Recognise and acknowledge shared emotions. Both parties are likely experiencing sadness, frustration, or anxiety. By openly acknowledging these shared emotions, a sense of commonality can emerge, making it easier to collaborate towards a resolution.

Managing Conflict Constructively

8. Focus on Interests, Not Positions:

Instead of digging into rigid positions, focus on underlying interests. Identify what truly matters to each party, whether it's financial security, stability for children, or a sense of autonomy. This shift from positions to interests can unlock creative solutions.

9. Introduce Neutrality:

Consider introducing a neutral third party, such as a mediator or family counsellor. A neutral presence can help manage conflict by facilitating communication, ensuring fairness, and guiding the negotiation process towards a mutually agreeable resolution.



Negotiation Strategies for *Emotional Success*

10. Incremental Agreements:

Rather than aiming for a comprehensive agreement in one go, consider incremental agreements. Tackle less contentious issues first, building a foundation of cooperation that can then be applied to more complex matters.

11. Create a Positive Narrative:

Craft a positive narrative around the negotiation process. Focus on the future and the potential for both parties to move forward with renewed clarity and purpose. A positive outlook can shift the emotional tone of the negotiation.

12. Celebrate Small Wins:

Acknowledge and celebrate small wins throughout the negotiation. Recognising progress, no matter how incremental, reinforces a positive emotional environment and encourages both parties to stay engaged in the process.

CONCLUSION

Negotiating a property settlement is undoubtedly challenging, but it's also an *opportunity for emotional growth and resolution.*

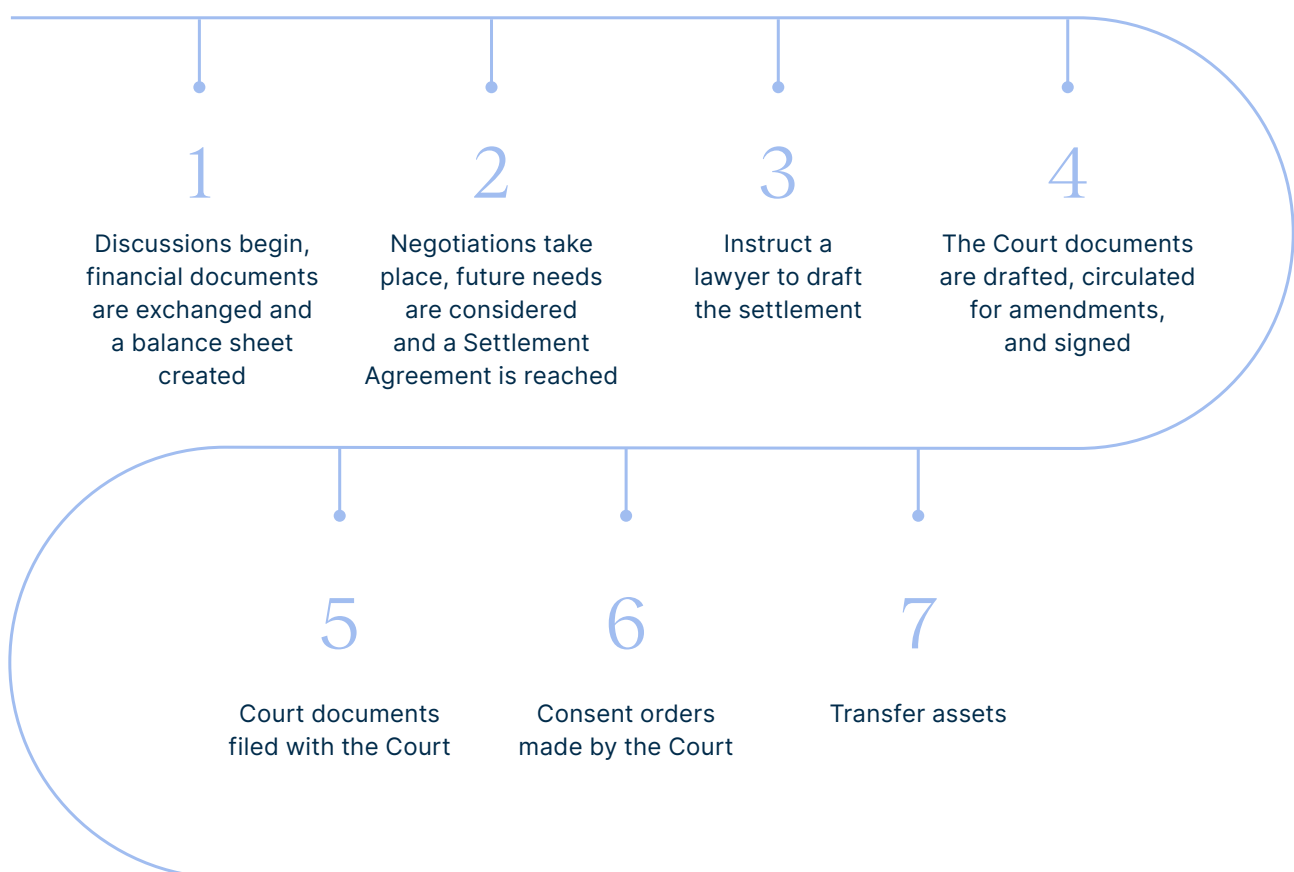
By incorporating emotional intelligence, effective communication strategies, and conflict management techniques, you can navigate the property settlement negotiations with greater ease. Remember, the ultimate goal is not just a legal agreement but a foundation for your family to embark on a new journey in a low conflict, family focused way.

Options for achieving *a just and equitable* property settlement, quickly and efficiently



The process of negotiating a property settlement and obtaining orders made by consent

THE STEPS EXPLAINED:





STEP 1

Discussions begin, financial documents are exchanged and a balance sheet is created

When parties have separated, but are still able to communicate between themselves about what they wish to achieve in their property settlement, they enter into negotiations with a view to trying to obtain a consent position.

When negotiating a consent position, it is important that parties think about what represents a just and equitable or a fair outcome overall, and then use one of the first three pathways above to finalise the agreement.

To achieve a fair outcome, parties can structure their negotiations in the following way:

- 1.** Identify the value of all the property of the relationship being:
 - a)** the assets, liabilities, superannuation and financial resources of the parties; and
 - b)** identify exactly which party owns those assets, individually or jointly, and what debts each party has either individually or jointly.

This information allows us to create a Balance Sheet that will help parties to understand precisely what it is they are aiming to divide, what assets need to be sold or transferred, and debts discharged.

STEP 2

Negotiations take place, future needs are considered, and a settlement agreement is reached

ONCE YOU HAVE THE BALANCE SHEET, THE NEXT STEP IS TO:

2. Determine what **contributions** each party to the relationship has made including:

- a)** Direct and indirect financial contributions to the property of the parties, such as contributing wage and salary earnings or gifts and inheritances from families;
- b)** Direct non-financial contributions to the property of the parties such as building the home, and indirect non-financial contributions such as unpaid support of a family business; and
- c)** Homemaker and caregiver contributions such as caring for the family and children.

3. Once the parties have agreed on their contributions, they need to allocate an overall percentage entitlement to each party for those contributions. The percentages when added together should equal 100%.

4. Then you need to look at the future requirements of each of party (which is

known as Section 75(2) factors). Section 75(2) of the **Family Law Act** lists a range of factors relevant to considering the future requirement of the parties. Some of these include:

- a)** The age and health of the parties.
- b)** The financial and property resources of the parties (what is the current income and earning capacity of the parties).
- c)** Who will have primary or the majority of caring responsibilities for any dependents or children of the relationship.
- d)** The commitments of each party necessary to enable the party to support him or herself and their children.
- e)** Responsibilities of either party to support any other person.
- f)** Any pension or benefit that either party is eligible to receive.
- g)** A standard of living that is reasonable in the circumstances of the relationship.
- h)** The duration of the relationship and how it has affected the earning capacity of each party.



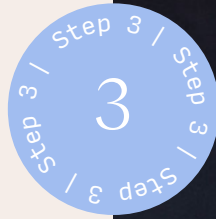
- i)** The ability of the parties to earn or gain employment which will support them financially in the future.
- j)** The extent to which maintenance would assist the party to increase their earning capacity, for example, through undertaking educational training.
- k)** The financial circumstances of the person with whom either party is cohabiting ie a new partner.
- l)** The amount of child support payable by each of the parties.
- m)** The terms of any specified Court orders or financial agreements.
- n)** Any other relevant fact or circumstances.

5. Taking into consideration the factors listed in step four, the parties may need to readjust the percentage they come to in step three. This results in a final overall percentage split for the parties' properties and finances.

To ensure the parties to a relationship arrive at a fair property split, it is critical, and a requirement under the **Family Law Rules** that both parties **fully disclose** all their property and income, including individual savings accounts, profits from the sale of assets and income derived from shares and other employment and businesses and trusts, and any debts or loans they have.

There are consequences of failing to provide full and frank disclosure and the Court has discretion to vary any orders, set aside the order and make another order if it is subsequently caught found that there was a deliberate intention to hide the existence of an asset by one party.

Once the negotiations have been completed and full and frank disclosure exchanged, you are ready to document your settlement agreement.



STEP 3

Instruct The Divorce Studio to *draft your settlement documents*

Parties have four options when it comes to splitting their property and finances.

1. Non-legal arrangements;
2. A Binding Financial Agreement (BFA);
3. An application for Consent Orders; or
4. The Court pathway involving litigation.

Documenting a property settlement will generally involve drafting a Binding Financial Agreement or an Application for Consent Orders. In either case, you will need the assistance of an experienced Family Lawyer to avoid the traps and pitfalls.



Option One: Non-Legal Arrangements

People in a marriage or de facto relationship who separate can reach an agreement without taking any legal steps. For example, they can sell their property and divide the proceeds between themselves and put in place arrangements to provide financial support from one to the other without making any application to a Court or entering into any legal agreement.

If the family home is sold, the parties can divide the net proceeds of sale between them which does not require the intervention of the Court.

Bank accounts can be easily split, and household contents divided.

The process works well for people who are in an amicable relationship and are

not intending on transferring assets such as real estate from one party of the relationship to the other, and where they do not intend to transfer superannuation or other such assets between themselves.

There are risks in taking this approach as there can be a lack of certainty about whether the other person might change their mind and ask for more of the assets later on down the track. If you want certainty, and have assets to protect, it is wiser to document your agreement using one of the methods below.



Option Two: Binding Financial Agreements

Binding financial agreements or BFA's, can be entered into at any time before, during or after a marriage or de facto relationship.

A BFA made before parties marry is sometimes referred to as a prenuptial agreement. A BFA applies to both marriages, and de facto relationships, both of which fall within the ambit of the **Family Law Act 1975** (Cth).

The purpose of a BFA is to create a contract between parties so they are both fully aware of how their assets will be divided between them in the event they should separate. It is a private agreement entered into by parties to a relationship to settle their property affairs. It allows parties to avoid going to court, and to dictate how their property is to be dealt with, as well as what maintenance might be payable by one party to another following separation. A

BFA created during a relationship has the same effect.

A BFA following separation sets out the agreement reached between parties as to how they will divide their assets between now that separation has occurred, and does not require the approval of the Court.

BFA's have the general effect of preventing a Court from making different orders to the agreement reached between parties because the BFA effectively ousts or excludes the Court from having jurisdiction to divide the assets of the parties.

But there is a warning about the use of BFA's. If they are not properly drafted and the requirements of the **Family Law Act** are not strictly complied with, the BFA may not be worth the piece of paper it is written on.

BFA's generally cost thousands of \$\$ and there are risks o documenting your agreement this way. That is why we recommend you file an Application for Consent Orders instead. It's cheaper and more reliable.

The relevant provision of the Act is section 90G which is titled "When financial agreements are binding", NOT may be binding. NOT can be binding. When they ARE binding and that is because the legislation says:

(1), a financial agreement is binding on the parties to the agreement if, and only if:

(a) the agreement is signed by all parties; AND

(b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; AND

(c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); AND

(ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; AND

(d) the agreement has not been terminated and has not been set aside by a court.

That means that a lawyer must be given all of the relevant facts about your relationship, children, health, your financial position, your aspirations and goals, and they must give you advice (PREFERABLY WRITTEN ADVICE) about the effect of the proposed agreement on your rights under the Act, and about the advantages and disadvantages of you making that agreement at that point in time.

That is not a task that can be undertaken quickly or without due diligence.

If you want to make sure the agreement is binding, enforceable and cannot be set aside, you **MUST** have done all of these things and have received detailed legal advice. You and your partner must both obtain that advice independently of each other. If you don't, be warned! Your agreement maybe set aside and everything you own will be considered as part of the matrimonial pool and may be divided up in ways that you never expected or wanted.



Option Three: Application for Consent Orders

(OUR PREFERRED AND RECOMMENDED METHOD)

An Application for Consent Orders is an application filed in the Federal Circuit and Family Court of Australia seeking orders which parties propose to be made with the consent of the parties.

The Orders are made by a Registrar without any Court hearing and are enforceable in exactly the same way as if the Orders had been made by a Judge.

Signing Consent Orders means the parties agree with the Orders and will comply with them. They will be final, although in limited circumstances a Court does have the power to set them aside and to make different Orders to those agreed.

If parties wish to make sure that the Court will grant the Orders they seek, they must make sure that the outcome, the adjustment of the assets between the parties, represents a just and equitable outcome.

The Court is not in the practice of essentially rubber stamping Orders

sought and will not endorse Consent Orders if the Registrar is not of the opinion that the Orders are just and equitable in the circumstances of the marriage or relationship being considered.

The pathway to Consent Orders is fairly straight forward, and generally involves the following steps:

- Once an agreement is reached, you (or The Divorce Studio) need to draft an Application for Consent Orders and a Minute of Consent Orders ('the Minute'). The application must set out all the income, assets, liabilities and superannuation interests of the parties. The Minute must detail the full extent of your agreement and must be set out in a form which is enforceable. It is important to have your documents drafted or reviewed by an experienced family lawyer to ensure they covers everything that needs to be dealt with, and to ensure the Minute is enforceable.

- Both parties then review the draft documents, ensuring the Application contains full and frank disclosure of their respective financial circumstances and the Minute accurately reflects the agreement reached.
- Once you are each happy with the documents, you should then both sign each page of the Application and also sign the Minute.
- The original documents must be filed at the Federal Circuit and Family Court and the filing fee paid (as at December 2023 in New South Wales the filing fee is \$195). Depending on your circumstances and the nature of the orders sought in your Minute, you may need to file additional supporting documents, which your solicitor will discuss with you.
- Provided the Court can be satisfied that the property orders sought are just and equitable, or parenting orders sought are in the children's best interests, the Orders will be made in terms of the Minute.
- Your Orders should be made within about a month to 6 weeks, depending on the court resources and the number of applications they are presently dealing with.
- You will receive your Orders via the ComCourts Portal and can download them as soon as they are available.
- The next step is to move around the assets as set out in the Orders made by the court and that part of the process is at an end.

[Learn more in The Separation Suite.](#)



Option Four: Litigation

**(OUR LEAST PREFERRED AND RARELY
RECOMMENDED METHOD)**

Litigation means that a Judge will determine how your property and finances will be divided between you, post-separation. Whilst a Court can take into account each party's preference when making those Orders, the Court cannot make the order unless it considers it to be just and equitable.

Litigation maybe a necessary pathway in circumstances where there is family violence, an uneven and unfair balance of power between the parties to the relationship, and where parties are not able to communicate effectively to resolve issues and disputes themselves.

Parties to a relationship that has broken down should always attempt to avoid litigation because it is costly and can cause financial distress, it is very likely to negatively impact their capacity to co-parent the children and litigation is time-consuming and causes parties a lot of stress.

If one of these categories applies to you, it may still be possible to negotiate a settlement, but chances are you will need help from a lawyer.

If that is the case for you, please head to our directory of recommended lawyers or send us a DM so we can make a recommendation in your area.

**STEP 4**

How The Divorce Studio can help you create Consent Orders

Our experienced Settlement Drafters within The Divorce Studio, will take instructions to draft the settlement documents, and will receive from you:

1. Any Balance Sheet you created;
 2. The disclosure documents underpinning that Balance Sheet;
 3. Details about the settlement agreement reached, including your notes about what is expressly agreed.
- We will then draft the documents and send them to you, as a first draft, for you to review. We will also provide

you with a letter for the trustee of the superannuation fund if you are seeking orders relating to your superannuation interests.

Once you have reviewed the draft we have prepared, you will meet with us again over Zoom to make sure the Orders reflect the agreement before you approve the final version.

Once approved, the documents are signed by you and your ex before you are given detailed instructions on how to lodge the documents with the Court.





STEP 5

Lodging documents with the Court

Using our instructions, you will lodge the Application for Consent Orders and Minute of Consent Orders (along with any other required documents) with the Court via its portal.

A filing fee will be paid to the Court when the documents are lodged, and you and your lawyer will be able to see your matter on the Court portal.

Usually, Orders will be made within 4-6 weeks.

STEP 6

Consent Orders made by the Court

The Court will notify you and your lawyer when the Orders have been made.

The Orders can then be downloaded from the Court portal and will consist of a stamped copy of the Orders you signed with your spouse, which will have been dated and signed by the Court.

We refer to this as a sealed copy of the Orders.

STEP 7

Transfer Assets

Once you have received a sealed copy of the Orders, you can take the steps required to transfer or sell assets, discharge debts, and transfer superannuation interests between you and your ex. The settlement process is then complete.

This eBook is packed with information we *hope helps you navigate these early stages of separation*, and understand the pathway from separation to settlement.

If there is anything you think we should add, which may have helped you, let us know by sending an email to hello@thedivorcestudio.com. If we can, we will prepare a short video or add any additional content for you to access, and we are certain if you need it, so will others.

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The Divorce Studio

PO Box 6028,
NORTH RYDE NSW 2113
hello@thedivorcestudio.com

THEDIVORCESTUDIO.COM