

## Financial Settlements on Divorce. 3. Financial Agreements

This factsheet gives answers to questions such as:

- What is the difference between a separation agreement, a consent order and a clean break agreement?
- Which one do I need to get?
- What do these agreements deal with?

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## 1. Separation Agreements

Separation deeds or agreements are generally used where parties do not wish to divorce straight away but want to reach an early agreement on their financial affairs until they can bring divorce proceedings, usually after 2 years or more of separation.

The other situation in which a separation agreement can be used is in you need to put in place a quick legal agreement because you need to formalise a financial transaction such as a house sale or buy out, and cannot wait for the 4 months or so it would take to start a divorce and obtain a Consent Order.

A separation agreement contains clauses to regulate your separation and put in place a deal covering the division of financial assets and maintenance.

Your separation agreement can deal with the following:

- Maintenance for a spouse or child
- The matrimonial home and other property dealt with
- Life insurance policies and endowments
- ISA's and Peps
- Stocks and shares
- Pension sharing arrangements
- Cars and other vehicles
- Business and company assets
- Tax issues and liabilities
- Residence and contact

A separation agreement is a quick to implement temporary agreement that is usually later superseded by a Consent Order.

## 2. Consent Orders

When you get divorced you will need to reach an agreement with your ex-spouse on financial matters.

It is important that your verbal agreement is formalised by signing a Consent Order.

### 1. What is a consent order?

A consent order is a financial contract that is voluntarily and jointly agreed by a divorcing or divorced couple to finalise all financial obligations arising from their marriage.

Depending on your circumstances the order will include:

- Liquid assets: this is anything jointly or solely owned that can be sold for cash, for example property or shares. In fact, anything that can be sold, in legal terms is a realisable asset.
- Pensions: although a pension cannot be sold it is still an asset that can be shared by agreement.
- Maintenance: there are two versions, child maintenance and spousal maintenance. Child maintenance is paid to the parent who has the child or children for the most nights in the year, spousal maintenance is paid to an ex-spouse by the higher earner, to compensate for the difference in their salaries.
- Inheritance: consent orders typically include a clause to dismiss claims on future inheritances.

A Consent Order is a legally binding financial agreement that should be:

- Drafted by a solicitor
- Signed by you and your ex-spouse after you have both provided financial disclosure and taken legal advice
- Reviewed and approved by a judge in a family court.

Consent Orders which do not include spousal maintenance are commonly known as a "clean break" agreement, because there are no ongoing monthly payments other than child maintenance (where applicable). The courts generally prefer clean break agreements where possible (i.e. where it doesn't cause hardship).

## **2. Do we really need to get a consent order?**

When a couple decide to divorce, they follow a formal process to end the marriage. This is a paperwork exercise, usually with a solicitor corresponding with a County Court Judge, that only ends the marriage. What it does not deal with is the division of property and whether any maintenance should be paid or pensions shared.

If you divorce without a consent order then you need to be aware that your ex-spouse may be entitled to make a financial

claim at any point in the future – even after many years have passed.

Some couples decide to divorce without a consent order because they may have nothing to share, or even they are happy just to agree a division informally. The problem is that as time goes by, that agreement may breakdown, a new partner may come along, or friends and family may persuade one person that actually the agreement wasn't really fair. If this happens, a claim can be made in court.

It's also important to remember that assets you develop after divorce potentially can be included in a claim made after divorce.

The simple solution to remove any uncertainty in the future is to have a solicitor write a consent order and have them send it to court to be agreed by a Judge.

### **3. Can we write our own consent order?**

The short answer is no. A consent order is a legally binding document that can be enforced by County Court or Magistrates Court, even High Court. For this and many other reasons a consent order must be written by a qualified solicitor.

Some couples will write their own agreement and even have it witnessed thinking it will be fine; actually, it isn't worth the paper it's written on, it is not binding or enforceable in anyway. These documents are often very technical and include many factors most people not legally qualified would not think of; but even if they did, wording is very important, as is with any legal document.

### **4. What does a consent order include?**

A consent order covers the financial aspects of the divorce.

It generally describes what is to happen to each of the main assets (property, savings, shares, businesses and pensions). It sometimes also covers child and spousal maintenance (where applicable).

So, typically a consent order might stipulate what will happen to

the house: either that it will be sold and the proceeds divided, or that it will be transferred into one person's name – possibly in return for a cash lump sum.

Pension sharing agreements are a common clause in a Consent Order (where applicable).

The consent order is not an agreement on child residency and contact – those items are covered in other documents.

#### **5. What if only one person wants the consent order?**

Consent orders exist throughout law, not just family law; a single truth applies to all: they must be a consensual agreement made by two people. If the husband and wife don't fully agree you can't have a consent order.

If you are unable to agree on a consent order then your main options are to continue to negotiate (directly or via solicitors) or to go to mediation or to go to court.

If your ex is completely unwilling to even talk about an agreement then your only real option is to apply to court and ask a judge to help you both reach agreement, or if all else fails have a judge make a final ruling on what should happen.

#### **6. Will a judge accept our consent order?**

When a husband and wife make an agreement, a Judge is required to make sure the agreement is fair and lawful and also consider how the agreement was formed.

The judge will consider the Consent Order that you have put forward alongside the financial disclosure documents that you each need to provide.

A judge can refuse an order though, although it seldom happens. By far the most common reason is that the consent order was not written (drafted) by a solicitor, these always will be rejected often with little or no explanation.

#### **7. What is the difference between a consent order and a separation agreement?**

A consent order is a legally binding and enforceable court sealed agreement, once the judge stamps the order it is very difficult to

change in the future unless by mutual consent, even then it may not be possible.

A separation agreement is not enforceable, nor is it binding; although, if the matter becomes contested in the future and court is the only way to settle the financial dispute, it does provide the Judge with the agreement made at the time. If the separation agreement was written by a solicitor, as it should be, and both parties sought legal advice before signing the agreement, it can be a very helpful tool to aid the Judge in how to direct proceedings, or make a final decision as to how assets should be divided.

If you don't intend to divorce, it is advisable to have a separation agreement written. What you should not do, is do nothing or write an informal agreement.

#### **8. What does the court need to know before a judge will accept a consent order?**

When a Judge considers an agreement written as a consent order, they need to be sure of a few things. This is because Judges have a duty of care to make sure the order is legal, fair and workable, so they tend to consider:

- Did a solicitor write the order?
- Technically is it lawful?
- Did both parties seek legal advice before signing the agreement?
- Did both parties provide full financial disclosure?
- Is the agreement fair to both parties and children if they have any?
- Was either person under pressure to sign the agreement?

In the vast majority of cases, so long as a solicitor wrote the consent order, and you both took legal advice before signing the consent order, then the Judge will accept and seal the consent order.

Along with the consent order the solicitor also completes a short form called a statement of information for consent, form D81. Each party needs to complete this form and exchange them with the other side. It is a short form providing details of each party's

income, savings, properties, pensions and debts.

The D81 provides the judge with information so s/he can decide if the agreement is fair and falls within the discretion of family law.

### **9. We have a consent order but now my husband/wife won't sign the order, what can I do?**

It depends on the circumstances.

#### **Refusal to sign**

A draft consent order is often sent back and forth between the parties until everyone is happy with it. It may be that you get very close to an agreement, but then one party starts to backtrack on things that they had previously agreed. If one party pulls out during this back and forth negotiation, then you don't have an agreement. If they decide that they will not sign the order, then you have to explore other avenues to reach agreement such as mediation or making an application to court.

#### **Backtracking after signing**

If you reached an agreement that was: written as a consent order by a solicitor, you both sought legal advice, and you both signed the order – but then for no good reason one person decides they no longer agree, a solicitor can make an application to a Judge to have the order sealed in the agreed terms.

The reason this can happen is to prevent people from withdrawing without reason or for a petty reason that has nothing to do with the financial agreement. Generally, though, before a judge can seal an order, full consent of both parties must be given.

#### **Backtracking after agreeing in court**

Some consent orders are agreed in court, often at a Financial Dispute Resolution hearing. Sometimes people wake up the next day and feel that they have agreed to something unfair – perhaps due to being under pressure. Agreeing a "heads of terms agreement" in court is not a light matter – think it through very carefully – you will find it very difficult to get out of that

agreement once you have agreed on the day in front of the judge.

Only agree if you feel it is the right decision for you, given all the circumstances (e.g. it may be perfectly valid to agree to less than you really wanted because you don't want the costs and hassle of going on to a final hearing).