

What is a financial agreement (a prenuptial)?

Date: Monday March 9, 2020

A financial agreement, colloquially referred to as a “prenuptial agreement” (and even more colloquially, a prenup) or Binding Financial Agreement (BFA), is a written agreement between parties to a marriage or a de facto relationship, including same-sex couples.

Your financial agreement can deal with property ownership and entitlements, financial resources, superannuation or spousal maintenance and how they will be dealt with in the event of separation.

Why use a financial agreement?

Financial agreements can be an effective tool to:

quarantine and protect assets acquired before the commencement of a relationship;

divide assets at the conclusion of a relationship; and

deal with the financial maintenance of a party to a relationship at its conclusion.

A financial agreement can be entered into:

before a marriage or de facto relationship has commenced;

during a marriage or de facto relationship;

before or after parties separate; or

after parties divorce.

Is a financial agreement really binding?

There are strict legal and legislative requirements that **must** be complied with to ensure a financial agreement is an enforceable agreement.

Both parties must receive independent legal advice before entering into the agreement, about the effects of the proposed agreement on their rights and entitlements.

Each party must receive a certificate of independent legal advice before signing the agreement.

The financial agreement must be prepared under the correct section of the relevant family law legislation in your state or territory.

There are a number of circumstances where a financial agreement may be found to be unenforceable and set aside by a court. These include:

if the court determines the agreement was obtained by fraud; i.e. non-disclosure of assets or liabilities;

the agreement was entered into for the purpose of defrauding a creditor or creditors of one of the parties;

if the agreement is found to be void or unenforceable; or

a significant change in circumstances to the parties, i.e. hardship or continuing care or welfare of any children.

What does a financial agreement cover?

Financial agreements can only deal with financial and property matters of a relationship. This is typically how the assets, liabilities and superannuation of parties will be divided should the relationship end.

Financial agreements can deal with a myriad of scenarios, including:

assets either party has acquired before or during the relationship;

financial maintenance of a spouse should a relationship end; and

separating business and personal assets.

Financial agreements cannot deal with parenting or care arrangements for children. Care arrangements for children must be dealt with separately.

When a financial agreement may be appropriate

There are a number of situations when a financial agreement may be appropriate, including:

individuals who have accumulated assets and wealth and are entering into a new relationship or subsequent marriage;

preservation and protection of family business, assets and future inheritances;

avoiding the court imposing their judicial decision-making on the property settlement of parties, particularly in circumstances where parties wish to keep the details of their separation confidential.

Advantages and disadvantages of a financial agreement

These will vary from relationship to relationship however, the advantages and disadvantages may include the following.

Advantages of a financial agreement

Parties can contract out of the property settlement and spousal maintenance provisions of the *Family Law Act* for both married couples and de facto relationships, providing certainty to parties as to their respective rights to property settlement and maintenance in the event their relationship ends.

Financial agreements do not require approval from the Family Court or registration with an external authority or government body.

A financial agreement can provide certainty as to how initial contributions or assets of parties will be treated.

A financial agreement can bind parties' estates.

Financial agreements can provide tax relief, such as stamp duty reductions for the transfer of real property between the parties.

Parties avoid costly litigious court proceedings in the event of separation.

Disadvantages of a financial agreement

Each party must obtain separate independent advice prior to signing a proposed financial agreement.

There are a number of grounds, including duress, fraud and failure to disclose material information, where the court may set a financial agreement aside.

As there is no way to predict future circumstances, if future contingencies are not considered, such as maintenance requirements, the financial agreement may be unfair to one party, and it may be difficult to terminate or set aside the agreement.

Get help from a family lawyer

There is no one-size fits all template for financial agreements. A financial agreement should be tailored to your particular circumstances and relationship.

Meillon & Bright is experienced in preparing financial agreements for a myriad of circumstances and relationships.

The information contained in this article is of general nature and should not be construed as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.