

## Binding Financial Agreements



Parties can enter into a Binding Financial Agreements (BFA's) pursuant to the Family Law Act 1975. Agreements of this nature outline the proposed division of assts. BFA's can take the following form:

1. A Financial Agreement before you marry - a Pre-Nuptial Agreement;
2. A Financial Agreement during marriage (this is often an agreement that is entered into after the marriage has broken down but prior to the parties divorcing) and;
3. A Financial Agreement after a Divorce Order is made.

For an agreement of this nature to be binding, the following must apply:-

- i. The Agreement must be signed by both parties;
- ii. The Agreement must contain a statement to the effect that both of the parties have received independent legal advice from a Solicitor as to the following matters:-
  - (a) The effect of the Agreement on the rights of the parties;
  - (b) The advantages and disadvantages at the time the advice was provided to the party of making the Agreement;
- iii. An annexure must be provided in the Agreement containing a Certificate signed by the solicitor providing the legal advice.
- iv. The Agreement has not been terminated and has not been set aside by the Court;
- v. The Agreement is signed, the original Agreement is given to one of the parties and a copy is given to the other.



The Court has the power to set aside one of these Agreements, if, and only if, the Court is satisfied that any one of the following has occurred:-

- i. The Agreement was obtained by fraud (including non-disclosure of a material matter such as an asset held by a party);
- ii. Either party to the Agreement has entered into the Agreement for the purposes of defrauding a creditor, or with reckless disregard to the interests of a creditor (for example, if a party enters into an agreement transferring all their assets to their spouse because they hold the belief they are about to be declared bankrupt);

- iii. The Agreement is voidable or unenforceable;
- iv. In the circumstances that have arisen since the Agreement was made, it is impractical for the Agreement to be carried out;
- v. Since the Agreement was made, a material change in the circumstances has occurred being a circumstance in relation to the care, welfare and development of the children and as a result, the party who entered into the Agreement will suffer hardship if the Court does not set aside the Agreement (this may include an example where a child becomes very ill following the making of an Order and a parent is required to become their fulltime carer).
- vi. In respect of the making of the Agreement, one of the parties conducted themselves in a way that is unconscionable.
- vii. The Agreement attempts to deal with superannuation (that is described as unsplitable) under the Family Law Act.



## **Pre-Nuptial Agreements**

It has become more and more common to have clients consult us in relation to the preparation of a Binding Financial Agreement prior to their marriage. The aim of the parties is to identify the assets held by either party and to “quarantine” them so that in the event the parties separate in the future, each party may retain the assets that they held at the commencement of the relationship.

Although Binding Financial Agreements are a relatively new concept (they were introduced in 2000) they are still somewhat unchallenged. There is yet to be a case which has come before the full Court of the Family Court examining a Pre-Nuptial Agreement and the attempt by one party to have the Agreement set aside. However, it is always in a parties’ best interest to enter into an Agreement of this nature, in the event that they wish to protect their assets, as an agreement like this,

- Clearly dictates the parties’ intent entering into the relationship,
- It recognises the assets which are held by them,
- And it stipulates hows they wish for those assets to be divided in the event that they separate.

We recommend to all clients who are considering entering into a BFA before marriage that they consult a solicitor well in advance of the marriage. It takes time, and consultation with your partner and their solicitor, to create a BFA that is workable. No client wants to be dealing with or signing a document of this nature the day before their wedding!

## **Binding Financial Agreements during marriage and Binding Financial Agreements after a Divorce**

Both of these Agreements are generally dealt with in the same manner. They involve parties dividing their assets and resources following their separation or their divorce. The effect of an Agreement of this nature, is that it stipulates the assets held by the parties and the means by which they wish to divide the assets.

The benefit of a BFA is that neither party is required to attend Court or to seek the approval of the Family Court in relation to the Agreement. The Family court does not merely “rubber stamp” agreements and can reject terms of settlement if they feel that the division is not just and equitable. You overcome this hurdle by finalising your proceedings with a BFA.

In all instances Binding Financial Agreements require full disclosure. This means that parties must disclose all information in relation to assets , financial resources and liabilities. Non disclosure can result in an Agreement being overturned at a later date.

Should you require our assistance in relation to the drafting of a Binding Financial Agreement, please do not hesitate to contact us on 9525-8100.