

What is a Binding Financial Agreement?

Binding Financial Agreements (**BFA**) are agreements that provide for the splitting of assets of a marriage or de-facto relationship. They are commonly referred to and known in other countries as pre-nuptial agreements.

In Australia, these agreements are generally entered into pursuant to the provisions of the *Family Law Act 1975*. This allows parties to enter into BFAs:

1. Prior to a marriage or de-facto relationship;
2. During the relationship; or
3. At the time of separation.

Why a BFA

Many parties to a marriage or de-facto relationship may wish to enter into a written agreement prior to or during the relationship to agree on how property or financial resources of either or both of the parties are to be dealt with where the parties separate. This can be of particular importance when the parties have previously experienced bitter property separation, or where one party to the relationship has assets greater in value compared to their partner.

Alternatively, separating couples who have reached an amicable agreement between themselves, or through their legal representatives, may wish to enter into such an agreement in order to avoid Court involvement.

Factors to consider for a BFA

Generally when deciding on the division of property the Courts take a four step approach:

1. Identify the assets and liabilities of the parties (**property pool**);
2. Assess the contribution of the parties, whether **financial** or **non-financial**;
3. Consider relevant future need factors of the parties such as the age, health and future earning capacity of the parties; and
4. Consider a division that is 'just and equitable' in the circumstances of the matter.

When considering whether to enter into such an agreement, it is important to consider the relevant factors of your relationship and the individuals needs of each party.

How to enter into a BFA

BFAs have strict legal requirements, and must only be entered into following expert independent legal advice.

For a financial agreement between the separating parties to be considered a 'BFA' certain legal rights and formalities **MUST** be met. This means the parties will need expert independent legal advice on the BFA prior to signing it.

The Advantages of entering into a BFA

The Advantages of entering into such an agreement will much depend on the personal circumstances of your particular relationship. Expert legal advice would need to be obtained in order to assess whether such an agreement would be in your best interests.

In general BFAs **can** be advantageous in circumstances where:

1. There is a clear agreement as to the division of assets and the parties wish to formalise this into a written agreement that generally cannot be challenged when undertaken properly;
2. The effect of a BFA entered into prior to separation **can** be that you are assured a certain degree of financial security in the event of separation;
3. In circumstances where you have significant assets prior to entering into the relationship, you may wish to separate these assets from the matrimonial property pool. This may be particularly important when you have children of a previous relationship, or when you have received a significant financial contribution prior to entering into the relationship;
4. If you have entered into a non BFA at the time of separation, entering into a BFA has the added effect of significantly reducing the ability of one party to later challenge that non-BFA through the Family Court; and
5. The agreement can only be terminated through agreement by both parties, or by a court order.

Disadvantages of a BFA

1. A BFA can only be entered into with agreement from both parties, after obtaining independent legal advice. The effect of this is that you will have upfront legal expenses. However, this upfront cost should be considered against the legal costs incurred if there is no BFA and the parties try and negotiate a settlement through lawyers or the courts.
2. There is a risk a court may **set aside** the BFA. This could be for a number of reasons including:
 - a. The BFA was obtained by fraud, non-disclosure of material financial information by one party;
 - b. The BFA is not valid, or if it is voidable or unenforceable;
 - c. Circumstances since the BFA make it impracticable to carry it out;
 - d. A **material** change in circumstance occurs since the BFA (e.g. relating to the care, welfare and development of a child of the relationship) meaning a child of the parties or a party to the agreement will suffer hardship. *This risk is significantly reduced when appropriate legal advice has been obtained by both parties when entering into the agreement, and, in addition where the*

parties regularly revisit their agreement at times of significant change in their relationship.

Next Steps

Although BFAs are complicated and require expert legal advice, in appropriate circumstances they can offer certain advantages to parties.

If you are considering entering into such an agreement, or if you would like to obtain further specialist legal advice on the issues raised in this article, please do not hesitate to contact me on (03) 8555 3895.

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