



FAMILY LAW HOW TO MAKE BINDING FINANCIAL AGREEMENTS WORK FOR YOU

What is a Binding Financial Agreement?

A Binding Financial Agreement is an agreement, in writing, which complies with Part VIIIA of the Family Law Act ("the Act"). A Binding Financial Agreement can be entered into by a married couple or by two people who intend to be married in the future (in the latter case the agreement is often referred to as a "pre nuptial agreement" or "pre nup").

If the agreement complies with the legislative requirements, the parties are then prevented from going to Court for orders relating to the property covered in the Binding Financial Agreement. It is sometimes also possible to prevent spousal maintenance applications.

Binding Financial Agreements can be entered into at three stages:

- (i) before marriage (section 90B);
- (ii) during marriage (section 90C); and
- (iii) after separation (section 90D).

What can the Binding Financial Agreements Cover?

Binding Financial Agreements can cover all of the property of the parties, or you may choose to deal with selected assets only. That is, the agreement can specify what happens to all assets (assets owned prior to marriage and assets acquired during the marriage) in the event that separation occurs or the agreement might only be about what happens to one item or a particular class of assets (eg. an inheritance).

A couple who are about to be married may wish to enter into an agreement which deals with the property owned by one or both of them prior to marriage, for example by "quarantining" those assets so that if separation occurs they each get back what they brought in.

To illustrate, we will examine a real life example:

Gina separated from her husband, Gary, 5 years ago. In her property settlement, she received the former matrimonial home (mortgage free). Gina has three children with Gary and they all reside with her. Gina met George one year ago. The relationship has become serious and they intend to get married in the near future. George resides in rental accommodation. Gina and George spend a lot of time together so it no longer makes sense to maintain two separate households. They have agreed that George will move into Gina's home. Whilst Gina loves and feels that she can trust George, she is afraid that, should they separate, George may make a claim on her property. Gina would like to ensure that her children get the benefit of the home in future. What should Gina do to protect her property?

Gina can quarantine her property by entering into a Binding Financial Agreement with George (pursuant to section 90B of the Act). This means that the house will not form part of the asset pool available for division in the event that their marriage breaks down. The Agreement will prohibit George from making a claim in relation to Gina's property.

Here is another example:

Maria and John are engaged to be married. Maria's father Bill has worked hard all of his life to provide for his family. He has three daughters and he has purchased a unit for each of his them. The units are held in his name, however, it was his plan to gift the units to each of his daughters upon their marriage. Bill gets along well with John and has accepted him into his family. However, his friends at work have told him about people they know who have gifted assets to their children and, on subsequent separation, the spouse has made a claim in relation to that gifted asset. Bill wants to protect his asset and Maria understands that her father has made many sacrifices to provide for his family. He does not want John to take half of the value of the unit if he and his daughter separate in the future. Maria agrees with her father that it would not be fair if John benefited from the gift.

Maria should enter into a Binding Financial Agreement with John and specify in that Agreement that, should the parties separate, Maria will keep the unit and John will not make a claim in relation to that property. It is agreed that any assets they acquire together, during the marriage, can be shared between them on an equal basis. When drafting the Agreement, John tells Maria that he has some shares that he received when his grandfather passed away. Maria and John also agree that it is fair for John to keep the shares, free of claim by Maria, if they separate.

Can a Binding Financial Agreement be set aside and, if so, under what circumstances?

If a Binding Financial Agreement complies with the requirements set out in the Family Law Act it will be binding on and enforceable against the parties. It is important to note that a Binding Financial Agreement is essentially a contract. All contracts can be set aside in certain circumstances, for example, where agreement has been obtained by fraudulent means.

Section 90K of the Family Law Act sets out the circumstances in which a Court may set aside a Binding Financial Agreement; they are:

1. fraud, including material non-disclosure (eg. failure to disclose the existence of or the true value of an asset); or
2. a party to the agreement entered into the agreement for the purpose of defrauding or defeating a creditor or creditors of that party; or
3. the agreement is void, voidable or unenforceable (ie. the agreement must be prepared properly and in accordance with the legislation); or
4. circumstances have arisen since the agreement was made which make it impossible or impracticable for the agreement, or a part of the agreement, to be carried out; or
5. since the making of the agreement, a material change in circumstances has occurred that was not dealt with or foreshadowed in the agreement (relating to the care, welfare and development of a child of the marriage) and, as a result of the change, a party to the agreement will suffer hardship if the Court does not set the agreement aside; or
6. a party's conduct in the making of the agreement was, in all the circumstances, unconscionable; or
7. a "payment flag" is operating on a superannuation interest covered by the Agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a "flag lifting" under that part; or
8. the Agreement covers at least one superannuation interest that is an "unsplittable interest".

Binding Financial Agreements are binding and can only be set aside in the very specific circumstances mentioned above.

The Agreement need not be fair or 'even handed' and can favour one party over the other. The Court will not set aside an agreement simply because it is "unfair". This is partly because prior to signing the Agreement, the parties must each obtain independent legal advice from a solicitor, including advice as to the advantages and disadvantages of entering into the Agreement. Once the advice is given, the solicitor for each party will attach a Certificate confirming that advice was given before the parties entered the Agreement. This prohibits parties from arguing that, at the time of signing the Agreement, they were unaware of the consequences of signing it.

What are the Benefits Using a Binding Financial Agreement?

There are many benefits to using a Binding Financial Agreement. Use of a Binding Financial Agreement has been described as "outpatient treatment" as opposed to "emergency surgery". Here's why:

- Certainty of outcome;
- Assets of sentimental or monetary value can be quarantined from the pool, with or without adjustment to the other party;
- An agreement can advantage one party more than the other (Consent Orders, on the other hand, will not be approved by the Court if they are not equitable);
- No Court appearance is required;
- Whilst preparation of a Binding Financial Agreement involves an "up front cost", the cost of finalising property orders on separation far outweighs this cost (the average cost per person for consent orders is \$9,000-\$15,000 and for defended/litigated orders is \$35,000 - \$55,000);
- Recitals (the introduction to the agreement) can be used to give the background to the agreement and justify its terms;
- Stamp duty and other tax concessions also apply to agreements (not just Court Orders);
- Neither party is required to make financial disclosure to the Court (the agreement is not filed with the Court).

Additional Information

If you require additional information about Binding Financial Agreements, or you wish to discuss the contents of this article, please contact Jodylee Bartal on 9609 1585 (direct) or on 9609 1552.

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