



The Family Law Act makes provision for binding financial agreements between parties to a marriage and between parties to a de facto relationship. These agreements can be made before, during or after the marriage or de facto relationship. Agreements entered into before a marriage are colloquially known as 'prenuptial' agreements.

What is involved?

The drafting of a binding financial agreement is complex. The couple need to be clear about what they want the agreement to say. Financial agreements entered into before a marriage or de facto relationship can set out how the property and financial resources of the parties are to be dealt with in the event of the breakdown of the relationship. They can also contain provision for the maintenance of either of the parties.

Deciding what the agreement should provide requires careful consideration. The couple need to think about how they plan to arrange their finances during their relationship. They also need to think about all the things that might happen in the future, whether expected or unexpected, such as the birth of children, loss of employment, illness or disability, inheritances and so on.

There are certain formal requirements that need to be met. In order to be binding, a financial agreement must be in writing and signed by both parties. Each party must obtain independent legal advice and the lawyers advising the parties must sign statements to say that they have given independent advice.

When will a financial agreement not be binding?

The court can set aside a financial agreement in the following circumstances:

- If the agreement was obtained by fraud. This means that one party has tricked or deceived the other party. Fraud includes the failure to disclose something that is relevant. It is therefore vital that each party discloses to the other party full particulars of his or her financial circumstances and any other relevant matter before the agreement is signed.
- If the agreement is void, voidable or unenforceable. This involves complex principles of contract law which your lawyer can explain to you.
- If, in circumstances that have arisen since the agreement was made, it is impracticable for the agreement or a part of the agreement to be carried out.
- If since the agreement was made, a material change in circumstances has occurred relating to a child and as a result of that change the child, or the parent caring for the child, will suffer hardship if the court does not set aside the agreement.
- If a party has, at the time the agreement was signed, behaved in a way that was unconscionable.
- If a superannuation interest has not been dealt with appropriately.

Advantages of a financial agreement

A well drafted financial agreement, prepared after proper consideration by the parties as to what they require, can enable a couple to embark upon their relationship knowing that if the relationship ends they will not have to fight about the division of their property. This can be particularly important for someone who has already experienced a relationship breakdown.



Disadvantages of a financial agreement

If a financial agreement is entered into without careful thought then circumstances might arise which were not anticipated and which make the terms of the agreement unfair. Furthermore, the court has taken a very strict approach to determining whether a binding financial agreement meets the requirements of the Legislation and, consequently, it is difficult to provide reassurance that an agreement will stand up to the scrutiny of the court.

What should you do if you want a binding financial agreement?

If you intend to enter into a financial agreement then you must first think about how you want your property and your future partner's property to be dealt with if your relationship breaks down.

You and your partner should discuss your future plans including:

- Whether you both intend to work during the relationship;
- Whether you plan to have children;
- What arrangements there will be in relation to children that either of you currently have;
- What will happen if either of you can't work because of illness or injury or the need to care for a disabled child;
- Whether you wish to make special provision in relation to inheritances and if so what you expect to receive and what you expect to do with your inheritance;
- What provision you each intend to make for retirement;
- How you intend to meet your financial commitments and pay your living expenses;
- Whether you intend to have a joint bank account or intend to keep your finances separate.

Once you have thought about these issues you should talk to your lawyer. Your lawyer will need a detailed statement of your current income, assets and liabilities. The more information you provide the more likely it is that your agreement will be binding. You should obtain evidence of the value of assets and provide statements of bank accounts, shareholdings, superannuation interests and other investments.

You should talk to your lawyer about the agreement well before the marriage or the commencement of the de facto relationship. If the agreement is prepared hastily then important considerations may be overlooked and the closer to the date the greater the prospect that the agreement will be overturned on the basis of duress. The more care that is taken in preparing the agreement the more likely it is to be binding and the more likely it is that you will be happy with the terms of the agreement if the relationship breaks down.

An important aspect of financial agreements between de facto partners is that they are of no effect if the parties marry. If you enter into a financial agreement with your current or intended de facto partner and subsequently decide to marry it is essential that you obtain legal advice well before the marriage.

If you would like to discuss any aspect of this Plain English Guide, please do not hesitate to contact us.



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