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To Prenuptial or Not?

Binding Financial Agreements, popularly known as 'Prenuptial Agreements' are not only used by the 'rich and famous'.

A BFA is a practical way of protecting your assets in the event of separation or divorce. Yes, I make no apology, BFAs are practical not romantic. You can enter into a BFA before marriage, during marriage and even following separation or divorce to record your agreed property settlement.

What are the advantages?

The main advantage of entering into a well drafted and considered BFA is you are able to document a binding arrangement

as to how your property will be dealt with in the circumstances of separation or divorce without having to argue it in Court. Litigation in the Family Court is costly, time consuming and can be incredibly stressful.

A BFA can give couples security in knowing that the assets they owned prior to their marriage or commencement of their de facto relationship are safe from claim by their partner.

Other benefits include:

- Preserving the inheritance for children from a previous relationship
- Protecting businesses and family farms for future generations
- Giving greater weight to the higher earning income party
- Providing certainty and avoiding dispute regarding property.

What are the disadvantages?

For a BFA to be enforceable it must comply with the strict technical requirements of the Family Law Act. Therefore, the main disadvantage of entering into a BFA is that it can be set aside by the Court if it doesn't meet strict technical requirements and also in some other circumstances. For example, the agreement is obtained by way of fraud, there is a material change in the care arrangements for a child or there has been duress or undue influence when the BFA was prepared. If the BFA is set aside by the Court, the Court will then have the power to determine how your property will be divided. This could result in one of you receiving significantly less of the property than you agreed.

The key to avoid having your BFA set aside by the Court is engaging an experienced lawyer who has extensive knowledge and experience of the technical

requirements. Experience shows that well drafted and properly considered BFAs which involve second marriages or which make adequate provision for maintenance for the less wealthy party especially where children are involved are less likely to be set aside.

Tips and Considerations

- Do your research. Only engage a lawyer who practises or specialises in family law and has the knowledge of the technical requirements.
- The cost of preparing a BFA will set you and your partner back a few thousand dollars. A BFA is complex and requires expert advice. Cheaper is not always better. Cost will be an issue if you are planning your wedding. However, compare the cost of preparing a well considered and drafted BFA versus the possible loss if you pay for a BFA which could be set aside or the risk of not having one at all.
- Give yourself and your partner plenty of time to consider the draft BFA. Avoid having the BFA prepared or signed just before your wedding. This will assist with any possible claim of duress in the future as well as a hasty BFA being prepared with significant matters overlooked.
- Be clear about the object of the BFA.
- Discuss the future with your partner as clearly as possible: Who will be the primary income earner? Will one of you work on a part-time basis or stay at home if you have children? Consider the possibility of employment losses, disabilities and possible inheritances. These considerations are the keys to having a relevant and binding agreement.

A well considered and drafted BFA may well save you unnecessary heartache.



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