



## **FAMILY LAW**

### **BINDING FINANCIAL AGREEMENTS (BFAs)**

Most people have heard of a “Pre Nup” or Pre Nuptial Agreement. A Binding Financial Agreement (BFA) replaces the old Pre Nuptial Agreements and is an agreement that can be made before, during and even after separation or divorce in relation to financial issues.

A BFA can deal with how property is to be dealt with upon the breakdown of the marriage or de facto relationship, how inheritances or jointly-purchased property is to be treated and how one or both parties are to be maintained during and/or after that breakdown.

#### **Legislation**

On 27 December 2000, Part VIIIA was introduced into the *Family Law Act*. This part deals specifically with "*Financial Agreements*" and provides for specific provisions for parties to enter into Financial Agreements, both before, during and after marriage.

In December 2002, the Western Australian government introduced legislation such that de facto and same sex couples are now also able to enter into BFAs.

#### **Legal requirements**

When you enter into a BFA, you and the other party are agreeing to contract out of the *Family Law Act 1975* (for married couples) or the *Family Court Act 1997* (WA) (for de facto and same sex couples).

If you are considering entering into a BFA, it is essential that you obtain proper legal advice and have the agreement properly drafted. By entering into the agreement you are seeking to control your financial affairs without the intervention by the Family Court. There are strict legal requirements in creating a BFA, which can be set aside by the Family Court if the agreement does not comply with the legislation.

In order for a BFA to be binding, the agreement must:

- be signed by both parties;
- contain, in relation to each party, a statement to the effect that the party to whom the statement relates has been provided, before the Agreement was signed by him or her as certified in an annexure to the Agreement, with independent legal advice from a legal practitioner as to the following matters:
  - the effect of the Agreement on the rights of both parties;
  - whether or not at that time when the advice was provided it was to the advantage, financially or otherwise, of that party to make the Agreement.
- have annexed to the BFA a certificate signed by the person providing the independent legal advice stating that the advice was provided; and
- not have been set aside by a Court; and
- after the Agreement is signed the original Agreement is given to one of the parties and a copy is given to the other.

Among the formalities that must be met for a BFA to be implemented are:

- The BFA must relate to a domestic relationship (where there is, will be or was cohabitation) or to a marriage between the parties;
- If there is a prior BFA, there must be specific agreement ending that prior BFA;
- There needs to be a specification of how to know when the marriage has broken down, eg a provision that the parties have lived separately for 60 days;

- The BFA needs to specify whether all of the parties' property is being dealt with, or only some with the rest to be dealt by the Court in the normal way;
- If maintenance is to be provided for, this must be specifically referred to. A BFA can be overridden by the Court if a party is left dependent on Government means tested pensions;
- Each party needs to make full disclosure in the document of their assets and financial affairs to minimise the risk that the BFA could subsequently be set aside by the Court;
- Each party to the Agreement must be advised by separate independent lawyers and the lawyers must sign certificates to that effect that are then attached to the Agreement.

### **Operation of the BFA post death**

Parties should be aware that a BFA continues to operate despite the death of a party to the Agreement and operates in favour of and is binding on the personal representatives of that party.

A BFA does not prevent a challenge to an estate or to super if a party to the BFA dies.

### **Termination of a BFA**

A BFA can only be terminated (during its operation) by the parties entering into another written Agreement known as a Termination Agreement.

However, a Court may make an Order setting aside a BFA if the Court is satisfied that:

- the Agreement was obtained by fraud (including non-disclosure); or
- the Agreement is void, voidable or unenforceable; or
- if circumstances have arisen since the BFA was made which make it impracticable for the Agreement or part of the Agreement to be carried out; or
- since the making of the Agreement a material change in circumstance has occurred (such as there now being a child of the relationship, a circumstance

not contemplated by the BFA) and as a result of the change, a party to the agreement will suffer hardship if the Court does not set the BFA aside; or

- In respect of the making of a BFA, a party to the Agreement engaged in conduct that was in all the circumstances unconscionable.

### **Advantages of a BFA**

The advantages of entering into a BFA include:

- certainty and peace of mind;
- protection of ownership of assets brought into a marriage/relationship;
- protection of ownership of special assets acquired during a relationship (for example, an inheritance);
- protection of ownership and retention of business interests;
- prevention of costly, lengthy litigation if the relationship does breakdown;
- BFAs are binding on the estate in the event of death.

This information constitutes general information only. If you required detailed advice on BFAs, or any other family law issue, please contact Natalie Dimmock at Murfett Legal Pty Ltd on (08) 9388 3100 or [natalie@murfett.com.au](mailto:natalie@murfett.com.au).