

Financial Agreements

The Australasian Lawyers Group Pty Ltd trading as Butlers, Barristers & Solicitors

What is a Financial Agreement?

A Financial Agreement is essentially a Contract entered into between you and the other party regarding how your property and financial resources are to be dealt with if you separate. The Financial Agreement does not come into effect unless and until there is a separation. Parties may enter into a Financial Agreement:

- before marriage (or de facto relationship);
- during marriage (or de facto relationship), and before separation;
- during marriage, and after separation; or
- after divorce (or the end of a de facto relationship).

It usually spells out the agreement reached between the couple as to their finances, and the division of their assets and financial resources, if their relationship comes to an end. However, a Financial Agreement may incorporate other matters incidental or ancillary to property issues, such as spousal maintenance and child support.

Who can enter into a Financial Agreement?

As stated above, a Financial Agreement can be entered into when a couple are entering into a de facto relationship, prior to a marriage, during a marriage or de facto relationship and before separation, during a marriage and after separation, or after a divorce or the end of a de facto relationship.

Parties in any of the above situations may enter into a Financial Agreement to divide their assets and financial resources, and provide or contract out of providing for payment of spousal maintenance that might be payable by one of the parties to the other.

What is the nature and effect of a Financial Agreement?

1. The Financial Agreement does not come into effect until it has been properly signed, including the "Certificates of Independent Legal Advice," which are attached as Annexures to the Agreement.
2. The effect of signing the Financial Agreement is that both parties will lose rights under the *Family Law Act 1975* (or *Family Court Act (WA) 1997* in the case of de facto couples) to seek Orders regarding property and/or maintenance which are different from the terms of the Agreement, except in the limited circumstances where the Agreement is found to be not binding, and is set aside or varied by the Family Court.



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3. In the absence of a validly enforceable Financial Agreement and upon marriage or the commencement of a de facto relationship, both parties will acquire rights under the *Family Law Act 1975* (or the *Family Court Act (WA) 1997*) to seek the Family Court's assistance regarding how the property and financial resources are to be divided between the parties after separation.
4. If you do not enter into a Financial Agreement, the Family Court will determine your rights and entitlement to property and maintenance based on:
 - 4.1 an assessment of your respective financial and non-financial contributions made by each of you during the marriage or de facto relationship; and
 - 4.2 an assessment of your respective future needs.
5. The Family Court has broad discretion to ultimately make Orders that are "just and equitable" based on the circumstances at the time of your separation and at the hearing of the financial issues before the Court.
6. The effect of entering into the Agreement is that you are agreeing to a method for the distribution of your assets and financial resources after separation, which is substantially different from the methods used by the Family Court in assessing your entitlements to property and maintenance.
7. As a result, there is the potential that you may be entitled to substantially more (or less), in the absence of the Financial Agreement, depending on your future financial and personal circumstances.

What are the advantages of a Financial Agreement?

1. The main advantage to you of signing a Financial Agreement is that, unless the Court sets aside or varies the Financial Agreement, the Financial Agreement will:
 - 1.1 be binding;
 - 1.2 provide you with the ability to effectively quarantine your separate assets.
2. A Financial Agreement prevents the Family Court from making Orders inconsistent with the Agreement.
3. A Financial Agreement gives you and the other party privacy about your arrangements without judicial scrutiny. Unless set aside by the Court, a properly prepared Financial Agreement will have the effect of ousting the Court's jurisdiction to decide on the division of the parties' assets and financial resources.

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4. A Financial Agreement provides both parties with certainty regarding how the assets and financial resources are to be divided if you marry or start a de facto relationship and then separate. This includes eliminating the variables and uncertainties associated with litigation such as legal costs, delay, stress, lack of control over the outcome and the Court's exercise of its broad discretion.
5. A Financial Agreement is a versatile document which allows parties to record an agreement reached privately between the parties themselves as to the division of assets and financial resources between the parties while still providing the same tax advantages as Orders made by the Court.
6. A Financial Agreement may promote a positive and healthy relationship between the couple and relieve future stress, disagreement and hostility. Often, the existence of a clear written agreement which is fair to both parties, and reached in circumstances where each party was able to be open, friendly and frank, can make each partner feel much more comfortable.
7. A Financial Agreement can reduce uncertainty about future financial issues, in advance, and assist each party to feel more secure within their relationship. For instance, in our experience, we have found that Financial Agreements are particularly suited for situations where one or both of a couple have substantial assets or income, or the likelihood of substantial inheritances, or have assets they want to protect for children of an earlier relationship.
8. There is no other legally binding manner in which parties may enter into a contract which determines how their assets and financial resources are to be dealt with prior to a separation, other than a Financial Agreement. The Family Court will only make Orders dealing with how the parties' assets and financial resources are to be dealt with, after the breakdown of a marriage or de facto relationship.
9. A Financial Agreement does not need to be lodged or registered with the Court. This means that the Financial Agreement remains confidential to the parties and their advisors and does not form part of the Court record.
10. The advantage of entering into a Financial Agreement after separation or divorce lies mainly in its flexibility when dealing with superannuation and with the finality it gives in situations where Centrelink is not involved. Further, a technical advantage of a Financial Agreement over a Court Order is that it can be used more than 12 months after a Divorce without the need for an Application to the Court for leave to seek Orders out of time, which is the only way Property Orders can be sought in the Family Court more than 12 months after a Divorce becomes final.

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What are the disadvantages of a Financial Agreement?

1. A Financial Agreement can be a costly document to prepare because:
 - 1.1 Each of the parties will require very specific and detailed independent legal advice; and
 - 1.2 There are strict requirements for a Financial Agreement and there are broad grounds upon which they can be set aside.
2. While the intention of a Financial Agreement is to create certainty between the parties about the financial and legal responsibilities towards each other, and to reduce the possibility of litigation if you separate, it is not possible to predict all the material changes in the circumstances of a couple at different stages in life. For example, it is not possible to predict:
 - 2.1 the composition and value of your respective assets at separation. The future financial position of each of party can never be known with any certainty. The pool of assets and liabilities and financial resources may change in a multitude of ways between now and the time of separation;
 - 2.2 assets which are available now and which it is expected will form the basis of any future claim, may no longer exist at the time that separation occurs. Assets may change form, be sold, encumbered, diminish or increase in value;
 - 2.3 the nature of each party's future respective financial and non-financial contributions during the marriage. A Financial Agreement may appear to be reasonable at the time of signing. However, the Agreement may be unjust and inequitable depending upon the specific circumstances existing at the time of separation;
 - 2.4 the possibility of future amendments to the legislation which may result in a Financial Agreement being unenforceable;
 - 2.5 future developments in case law which may result in a Financial Agreement being unenforceable. The approach of the Courts to the relevant provisions of the Family Law Act which govern the Financial Agreement and how they might be varied or set aside, is unsettled. There are areas where clarification will only be known by ultimate rulings from the Full Court of the Family Court or the High Court of Australia;
 - 2.6 a Financial Agreement represents the most that the law presently offers to persons seeking to agree on how property and financial resources are to be dealt with, in the event of a separation. It is, however, not a guarantee against all potential future claims by the other party;

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- 2.7 the parties' respective financial circumstances including earning capacity and health. Under a Financial Agreement each party loses rights under the *Family Law Act 1975* (or Family Court Act (WA) 1997) to ask for property Orders different from those set out in the Agreement.
3. Each of the above matters may have an effect, for better or for worse, upon a party who enters into a Financial Agreement.
 4. The above changes in the future circumstances of the parties may result in a dispute between the parties regarding the Agreement and the operation of the Agreement. We therefore recommend that parties who have entered into a Financial Agreements regularly review their Financial Agreement, much as they would their Wills, to ensure that it remains consistent with their wishes.
 5. The other party may apply to the Family Court to set aside or vary a Financial Agreement, in certain circumstances as set out below:
 - 5.1 If the circumstances which arose after the Agreement was signed, made it impracticable for part or all of the Agreement to be acted on.
 - 5.2 If one party has not disclosed full and accurate details of their financial position including their income and assets. It is important that the parties to a Financial Agreement give full disclosure of their current financial circumstances.
 - 5.3 If there has been a material change in relation to a party's circumstances which involves a child of the marriage, and as a result of the change, the child, or the party caring for the child, will suffer hardship if the Court does not set aside the Agreement.
 - 5.4 If the Court finds that a party to the Agreement engaged in unconscionable conduct in relation to the making of the Agreement, or if the Agreement was entered into by fraud, duress, undue influence, or other void or voidable circumstances.
 6. In addition, in order to enforce the Financial Agreement in the event of a dispute, you may have to commence proceedings in the Family Court of Western Australia.
 7. While the Agreement provides for some flexibility by way of Prescribed Agreement, it is not based on a determination of your respective contributions during the marriage, and may therefore arguably be "unfair and inflexible".
 8. You have no control over the advice provided to the other party by his/her solicitor. Although the other party's solicitor may sign a Certificate indicating that he/she was given legal advice, the Court may still find that inadequate advice was given and set aside the Agreement.

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9. The Agreement may become non-binding and unenforceable if it is determined by the Family Court that the parties have not strictly complied with the technical formalities/requirements.

Who can prepare a Financial Agreement for me?

Due to the requirement for each party to receive very specific and detailed independent legal advice, it is very important that parties seek the assistance of a lawyer with experience in this area. The lawyer can guide you in the preparation of the agreement and can assist you to ensure that the agreement is comprehensive, accurately records your wishes and is likely to be as final as possible.

What happens after a Financial Agreement is signed?

At present, there is no process for the registration of Financial Agreements with the Family Court of Western Australia so it is important that parties who have entered into a Financial Agreement ensure that the original and signed copies are stored safely and that their whereabouts are recorded.

Butlers

At Butlers we pride ourselves on being "The Personal Law Firm". Our commitment at Butlers is to make the law more accessible, affordable, understandable and human. We aim to reduce your concerns by speaking and writing in plain English, cutting through legal jargon and keeping you informed at all times. Through it all, we work closely with your family's accountant, bank manager, financial adviser, and other professionals as required. We therefore encourage you to contact us if we may be of any assistance.

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