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BINDING FINANCIAL AGREEMENTS

What is a Binding Financial Agreement?

This is a written agreement between two people which can be made:

- before marriage (or de facto relationship);
- during marriage (or de facto relationship), and before separation;
- during marriage (or de facto relationship), 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 Binding Financial Agreement may incorporate other matters incidental or ancillary to property issues, such as spousal maintenance and child support.

Who can enter into a Binding Financial Agreement?

As stated above, a Binding Financial Agreement can be entered into when a couple are entering into a de facto relationship, prior to marriage, during a marriage (or de facto relationship) and before separation, during a marriage (or de facto relationship) and after separation, or after a divorce (or the end of a de facto relationship). Therefore, parties in any of the above situations may enter into such an agreement to divide their assets and financial resources, provide for payment of child support payable by one of the parties, or for payment of spousal maintenance that might be payable by one of the parties to the other.

The advantages of a Binding Financial Agreement

A Binding Financial Agreement avoids the need for any Court proceedings. It is a versatile document which allows parties to record an agreement as to the division of assets and financial resources between the parties without the need for it be lodged and dealt with by the Court while providing the same tax advantages as Orders made by the Court.

If it is entered into when the couple's relationship is friendly and harmonious, a properly prepared Binding 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. It 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 Binding 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.

The advantage of entering into a Binding 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 Binding Financial Agreement over a Court Order is that it can be used more than 12 months after a

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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 made once the 12 month period after a divorce becomes final.

What are the disadvantages of a Binding Financial Agreement?

A Binding Financial Agreement can be a costly document to prepare. Each of the parties will require very specific and detailed independent legal advice. There are strict requirements for a Binding Financial Agreement, and there are broad grounds upon which they can be set aside. This can make the document costly to negotiate, prepare, and have signed. In addition, parties may incur significant costs in relation to a proposed “prior to marriage” agreement which may never actually be used.

At present, there is no process for the registration of Binding Financial Agreements with the Family Court of Western Australia.

The transactions that are provided for in a Binding Financial Agreement may not necessarily be exempt from tax.

Who can prepare a Binding Financial Agreement for me?

Due to the requirement for each party to receive very specific and detailed independent legal advice, it is necessary to seek the assistance of a solicitor with experience in this area. The solicitor 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.

It is important that the parties to the agreement give full disclosure of their current financial circumstances. Should either party not fully disclose their financial circumstances, there is the potential that the Binding Financial Agreement may be set aside in the future if the other party seeks to challenge it. This is only one of a number of grounds upon which a Binding Financial Agreement can be set aside.

It is therefore essential that full disclosure is given to your solicitor and that both the intended parties to the agreement receive detailed independent legal advice. It is also recommended that the parties consult their financial advisors as to the potential tax implications and other financial implications of any Binding Financial Agreement.

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