Binding Financial Agreements

The Essential Facts

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What is a Binding Financial Agreement?

A Binding Financial Agreement ("BFA") is an agreement in writing when parties are either contemplating entering into a relationship or are in a relationship (de facto, marital or same sex). The BFA deals with what happens with respect to the division of property between the parties in the event of a future separation. The BFA can also deal with what happens in relation to spousal maintenance should the parties separate.

The BFA can also deal with other things, such as lifestyle clauses and who is responsible for payment of debts, but none of those clauses are binding and are not an integral part of the agreement.

The BFA will only come into effect if and when the parties separate and one party signs a separation declaration.

If the BFA is in writing and satisfies the above criteria, it is said to be a Financial Agreement and if it is pursuant to the various steps outlined in the *Family Law Act 1975* (Cth) and done specifically under the correct section, then it can be said to be a Binding Financial Agreement.

A BFA does not prevent a party from filing for property settlement Orders in the Federal Circuit Court or Family Court after separation but if a party does this (contrary to the terms of the agreement) then the other party can rely on the terms of the BFA to oust the jurisdiction of the Court and prevent any Orders from being made.

Are Binding Financial Agreements worthwhile? Do they stand up to challenge?

The answer is absolutely yes, if done properly and carefully in a manner which maximises the validity of the BFA.

The agreements have been able to be entered into over the last 19 years under Australian law. It is suggested, however, that there is a general misunderstanding as to the effectiveness of these agreements and what needs to be done to properly put them into effect.

What are the advantages and disadvantages of BFAs?

For a party who brings more wealth into the relationship, and / or is likely to accumulate more wealth during the relationship, then the BFA is an excellent tool for protecting that wealth from any claim made by the other party should the parties separate in the future.

In that respect, the agreements are extremely important and valuable to protect wealth that has been built up throughout someone's lifetime, and / or through family efforts. In practice, the agreements are most popular and common amongst people entering into second or third relationships where they wish to protect assets they have built up during their lifetime.

There are disadvantages to the agreements if a person would effectively get less under the agreement if they separated at some point in time, than they would pursuant to the *Family Law Act*. However, it is always difficult to predict how long people will stay together and one's claim often depends on many factors, one of which is time and length of the relationship.

In what circumstances can the agreements be set aside by the Court?

There are a number of circumstances in which the agreements can be set aside, but the following are the three most common causes for these agreements falling over:-

1. **Poor drafting**

   This includes many aspects of the drafting exercise. The law requires that the agreements be drafted specifically and precisely under the legislation and even minor mistakes can have consequences.

   More importantly, the drafting needs to be clear, precise and easy to understand. Clauses that are not essential need to be severable. The agreement needs to provide definitions as to terms used in the agreement and provide meaningful recitals and specific operative clauses. Many agreements fall over because of a lack of certainty of terms.

2. **Duress**

   Recently, the High Court introduced a new form of duress known as marital or relationship duress. Basically, in some cases where there is an imbalance of power (through language, wealth, sex or other factors) the law can find that someone was under duress when entering into a BFA.

   In some cases, relationship duress can be said to relate to circumstances rather than to specific things that are said or done to a person. For instance, if a new partner comes from a foreign country and cannot speak the language and has given up their homeland and way of life, the other party requiring them to sign a BFA before marriage may mean that the new partner could have a claim for being under duress because of the circumstances. The new partner would really have no choice but to sign the agreement as they cannot survive in their new home country without the other partner.

   Another factor that can give rise to duress is if the agreement is signed too close to a wedding date.

3. **Non-disclosure**

   This is another major issue that can lead to the setting aside of the agreement as a party may be able to claim that they were not fully aware of what they were signing because they did not understand the exact nature of the other party's wealth and interests.

   The disclosure process is part of a full transparency process which is extremely critical for these agreements to stand up in Court. A failure to disclose not only relates to a failure to mention or disclose valuable assets, but also a failure to put a realistic value on assets rather than a fictional value. In other words, if a husband values his property development enterprise at $5 million, but in reality it is worth $20 million, then that is a fraudulent non-disclosure that can be used to set aside the agreement in the future.

There are other grounds to set aside BFAs, but the above are the three major grounds that we see reported in cases.

Do both parties need a lawyer?

Yes – absolutely. The *Family Law Act* requires that each party receive independent legal advice about the nature and effect of the agreement and the advantages and disadvantages of entering into the agreement.

It is extremely important that both parties receive this independent legal advice, preferably in writing, and that the receipt of this advice is acknowledged prior to signing the agreement.

A failure to obtain independent legal advice means that the agreement would not qualify as a Binding Financial Agreement.

What is involved in drafting and finalising a BFA to ensure it is binding and enforceable in the future?

We have a very detailed and systematic process in place which maximises the chance of these agreements standing up and being watertight in the future.

Under no circumstances should parties ever download precedents or think that the drafting of these agreements is a simple exercise.

The drafting is but one of the important stages in making sure these agreements are watertight. In fact, the drafting is probably the stage that takes the least amount of time and effort in putting these agreements into place.

We undertake the following essential steps in preparing and finalising agreements for parties:-

1. **Due diligence enquiry prior to drafting**

   This involves a detailed questionnaire which is designed to identify the true wishes of each party and also identify any potential problems or pitfalls that may exist.

   This stage also involves conferences with the client and their advisors to explore the answers to various questions and identify any problem areas that need to be addressed before drafting commences.

2. **Drafting the agreement**

   After completing the due diligence stage (which is vitally important) the next stage is the drafting of the agreement. As specialist family lawyers, we are able to draft agreements which properly reflect the different needs of parties and strictly comply with the various different sections of the *Family Law Act.*

   We prefer to draft agreements that are simple and easy to read and understand. We do not recommend or encourage parties to include complicated arrangements for property settlement should they separate. The more detailed and more difficult these agreements are to draft, then the more likely it is they will fall down in the future. Simplicity and clarity are the keys in drafting.

3. **Disclosure**

   As part of the drafting and when the first draft of the agreement is made available to the parties, it is extremely important to ensure that both parties have made full and frank disclosure of all interests in property and resources. Typically, this is done through a schedule which is attached to the agreement but also more importantly can involve the actual physical production and provision of documents to the other party.

   In most circumstances there is an invitation sent to the other side to inspect, copy and value any of the assets of the other party. Most times that invitation is not taken up by the other party, but it is extremely important that each party display a willingness and openness to disclose all of their assets and interests and to make sure the values in the schedule reflect market value.

4. **Executing the agreement**

   We have in place a number of strict guidelines in relation to finalising and executing these agreements. It is extremely important that certain documents be executed prior to the agreement being signed and that various acknowledgments and receipts are exchanged by the lawyers.

5. **Timing**

   At all stages in the preparation and finalisation of an agreement timing is critical. It can never be rushed. There must be sufficient time between letters that are sent enclosing drafts and / or letters that are sent offering or providing disclosure.

   There needs to be a follow up, further requests and invitations and at no stage can the process appear to be a rushed process. We recommend a minimum of three months from the time the process commences until the time the process ends.

   It is our experience that Courts are more likely to infer marital duress in circumstances where agreements are prepared over a short period of time and / or signed hurriedly.

What else should I know about BFAs?

It is important to understand that these agreements cannot be amended, varied or updated.

There have been many cases, including a few celebrities, who have had their agreements struck down by the Court due to the fact that they did things such as drafting a variation deed, an addendum to the agreement and / or varying terms and signing a variation agreement.

Whilst at common law, and generally under contract law, such documents would be valid, the fact remains that under the *Family Law Act* a financial agreement cannot be amended, varied or updated.

The only avenue available is to fully terminate the agreement and re-enter into a new agreement.

Is there 100% guarantee that these agreements will stand up?

No, unfortunately there can never be an absolute guarantee when it comes to agreements and Orders in the Family Court.

However, if drafted correctly with due diligence, care and full and frank disclosure, then the agreements stand a very good chance of being effective in preventing any future property settlement claim.

In Full Court decisions, the Family Court has made it clear that bad agreements can stand up as long as they are drafted correctly and properly. In other words, an agreement will not be set aside merely because a party may have been entitled to more assets in the Family Court had they not signed the agreement.

This provides a vital advantage to parties in protecting their assets from any future claim upon separation.