

Binding Financial Agreements (including Prenuptial Agreements) | Empower Family Law & Mediation

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Details:

Services

Binding Financial Agreements (including Prenuptial Agreements)

If you and your partner can agree to the division of your property, you can formalise these arrangements outside of Court, by entering into a Financial Agreement.

This can happen following separation, during your marriage or de facto relationship, or before your marriage or de facto relationship.

Financial Agreement

A Financial Agreement is a binding and enforceable contract made under the Family Law Act 1975 which sets out how the property of a relationship will be divided in the event of a separation.

It is important to consider a Financial Agreement when:

You wish to protect your assets or business in the event of separation;

You want to agree upfront the terms of your property division;

You want to avoid the risk of litigation;

You want certainty about your financial future;

You want to formalise an agreement about future payments of spousal maintenance.

A valid Financial Agreement means the Federal Circuit and Family Court of Australia generally can't make its own orders about the matters your agreement covers, such as dividing your property or whether one of you pays spousal maintenance. Instead, you and your partner decide those terms yourselves.

The law and Financial Agreements

Because Financial Agreements purport to oust jurisdiction of the Court, the law about them is complex. The Agreements themselves must meet certain technical requirements in order to be binding.

Importantly, all parties to a Financial Agreement are required to obtain independent legal advice. It is a requirement that both parties' lawyers sign a Certificate of Independent Legal Advice and a copy must be exchanged between the parties and/or their lawyers.

A Court can set aside a Financial Agreement in limited circumstances, including where:

it was obtained by fraud, including hiding important financial information

it was made to defeat a creditor or a de facto partner's rights

a party engaged in unconscionable conduct, such as taking unfair advantage of the other person

it is void, voidable or unenforceable under general contract law

it has become impracticable to carry out

a change in circumstances relating to a child's care, welfare or development would cause hardship if the agreement stayed in place

it deals with superannuation in a way the law doesn't allow

Section 90B Financial Agreement ("Pre nuptial agreement")

A Section 90B Financial Agreement is a Financial Agreement that is made before you get married. It sets out how your property and finances will be divided if the relationship ends. Many couples use one to protect assets they bring into the marriage, such as a business, an inheritance or property. De facto couples can make similar agreements. To be legally binding, these Financial Agreements must meet strict requirements, including that each of you receives independent legal advice before signing.

How we can help

At Empower Family Law and Mediation, we can help you to ensure that your Financial Agreement clearly sets out your agreement and meets all legal requirements. Contact us on (03) 7020 6542 to discuss whether a Financial Agreement is right for you.

FAQ's

Do we each need our own lawyer?

Yes, each party must receive independent legal advice from their own lawyer, who signs a certificate confirming they have been given advice. You can't share a lawyer with your partner.

Do we have to disclose all our finances?

Disclosure isn't a stated requirement for every agreement, but failing to disclose important information can be grounds to set the agreement aside. Full and frank disclosure is strongly recommended.

How is a Financial Agreement different from consent orders?

Consent Orders are approved by the Court, which must be satisfied the outcome is just and equitable. A Financial Agreement is a private contract that can be made before, during or after a relationship, but it must meet strict technical requirements and can be challenged later.

Can we change or end our agreement?

Yes, by making a new agreement that meets the same legal requirements. A Court can also set one aside in limited circumstances.

Does it cover our children?

It can deal with property and spousal maintenance, but parenting arrangements are decided based on the child's best interests.

Speak with us

Your first 30-minute consultation is free. Call (03) 7020 6542 or contact our team to discuss your circumstances and next steps.

Phone : (03) 7020 6542

Email : info@empowerfamilylaw.com.au

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What is a binding financial agreement and when can it be made?

A binding financial agreement is a private agreement that can address financial matters between partners, including how property or financial resources will be dealt with and, in appropriate cases, spousal maintenance. It can be made before a marriage or de facto relationship, during the relationship, or after separation. The correct form and statutory requirements depend on timing and relationship status. A financial agreement is different from consent orders because it is not approved by the Court as a just and equitable outcome when it is made. Its effectiveness instead depends on strict legal requirements, careful drafting and the circumstances surrounding the agreement. It cannot determine parenting arrangements, because decisions about children remain governed by the child's best interests. Each proposed agreement should be designed around the parties' actual assets, liabilities, objectives and foreseeable risks rather than copied from a generic template.

Why must each person obtain independent legal advice?

For a financial agreement to be binding, each party must receive independent legal advice about the agreement's effect and the advantages and disadvantages of entering it. The lawyers provide signed statements confirming that advice. One lawyer cannot act for both parties because their interests and the consequences of the proposed terms may differ. Independent advice should occur when there is enough time to understand the document and make a free decision. Late pressure, incomplete information or a significant imbalance in bargaining power can create both practical and legal risk. Each person should give their own lawyer complete instructions, ask about provisions they do not understand and consider how the agreement would operate under realistic future events such as children, illness, career changes, asset growth or separation.

What financial disclosure should be exchanged before signing?

Although the disclosure requirements for financial agreements are not identical to the Court's ordinary disclosure process, withholding significant financial information can undermine informed decision-making and may contribute to an application to set the agreement aside. Full and frank disclosure is therefore strongly recommended. The information should usually identify assets, liabilities, superannuation, income, trusts, companies, financial resources and any material contingent interests. Disclosure should be current enough for the agreement being negotiated and supported by documents where appropriate. If an asset's value is uncertain or material, an independent valuation may be needed. The agreement should also record how particular assets, debts, inheritances, family assistance or future acquisitions are intended to be treated. A lawyer can advise on the information required for the specific arrangement and on any issue that should be investigated before terms are finalised.

Can a financial agreement be changed, ended or set aside?

The parties can replace or terminate a financial agreement by following the applicable legal requirements, usually through another properly drafted agreement supported by independent advice. A casual written note, later conversation or informal change may not achieve the intended result. The relationship between an earlier agreement and a new document should be checked carefully so the parties do not create conflicting obligations. A Court may set an agreement aside on limited grounds, which can include fraud or material non-disclosure, certain forms of unconscionable conduct, impracticability, or circumstances relating to children that cause hardship. The availability of a ground

depends on the evidence and the legislation applying to the agreement. Because the consequences can be significant, obtain advice before signing, varying, relying on or attempting to challenge a financial agreement.