

Make sure your financial AGREEMENT IS WATERTIGHT

Financial agreements are imperative for the safe transition of business and assets, writes Dan Bottrell.

Financial agreements under the Family Law Act are designed to allow couples to agree, in advance of separation, what will happen with their jointly and separately owned wealth if they part company. In doing so, spouses agree that the Family Courts will have no role in determining their financial fate, and are bound by their own 'contract' about financial matters in the event they decide to go their separate ways.

Financial agreements can be entered into before marriage or at the start of a de facto relationship (colloquially known as 'pre-nup agreements'), during marriage or a de facto relationship ('mid-nup' agreements); and after separation or divorce ('separation' agreements).

'Pre-nuptial' and 'mid-nuptial' style financial agreements are of particular interest to those couples seeking as much certainty as possible in the event their relationship ever comes to an end, including:

1. Those entering into second (or later) relationship and who seek to 'quarantine' the property retained from their prior relationship settlements.
2. Those who seek to preserve, and protect from claim, particular items of property (e.g. an intergenerational family farm or a long-standing family business).
3. Those who have inherited property from relatives which they seek to preserve for their own blood relatives or other nominated survivors.

4. Those who seek to leave wealth to their children (such as a family estate or business) and ensure that their legacy is not eroded by family law claims.

5. Those in business or involved in ongoing ventures, where it is reassuring for the other stakeholders to know that, in the event of separation or divorce, the operations of the business or the future of the venture will not be hamstrung by a spouse being involved in a protracted family law dispute.

To be binding, each spouse must receive independent legal advice from a legal practitioner, so that each can understand the effect of the agreement, and the advantages and disadvantages of having it.

Financial agreements are highly technical. They must be tailor-made for particular relationships to achieve their objective. Couples considering an agreement should consult specialist family lawyers and expect to commit significant funds to the negotiation, drafting and finalisation of the agreement in order to achieve their goals. For most spouses it is a case of investing funds in the agreement at the beginning of a relationship, rather than a much greater sum in resolving a post-separation dispute.

Most relationships are dynamic and, over time, involve substantive change in spousal roles, particularly with childbirth and departure from the workforce.

Agreements should be reviewed regularly, and advice taken as to whether it must be updated to take such changes into account. It is important to also take advice about ensuring that the provisions set out in the financial agreement mirror the provisions laid out in corresponding wills.

Media reports that financial agreements are coming under scrutiny by the Family Courts are now an almost weekly event. Couples are regularly seeking to have agreements set aside for technical defects or because of some miscarriage of justice at the time they were entered into.

For the time being however, financial agreements remain the only means for spouses seeking to define what will happen with their wealth if, and when, they ever separate in the future. Some spouses take the view that they have nothing to lose by having an agreement, and if a change in the law determines that it is no longer binding, then they are no worse off. **TGR**



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