

A PLAIN ENGLISH GUIDE TO



>>PRENUPTIAL AGREEMENTS

The Family Law Act makes provision for binding financial agreements between parties to a marriage. These agreements can be made before the marriage, during the marriage or after the couple divorce. Agreements entered into before marriage are commonly known as prenuptial agreements.

>>What is involved?

The drafting of a prenuptial agreement is complex. The couple need to be clear about what they want the agreement to say. Prenuptial agreements can set out how the property and financial resources of the parties are to be dealt with in the event of the breakdown of the marriage. They can also provide for the maintenance of either of the parties during the marriage or after the parties divorce.

Deciding what the agreement should provide requires careful consideration. The couple need to think about how they plan to arrange their finances during the marriage. They also need to think about all the things that might happen in the future, whether expected or unexpected, such as the birth of children, loss of employment, illness or disability, inheritances and so on.

There are certain formal requirements that need to be met. In order to be binding, a financial agreement must be in writing and signed by both parties. Each party must obtain independent legal advice and the lawyers advising the parties must sign certificates to say that they have given independent advice.

>>When will a financial agreement not be binding?

The court can set aside a financial agreement in the following circumstances:

- If the agreement was obtained by fraud. This means that one party has tricked or deceived

the other party. Fraud includes the failure to disclose something that is relevant. It is therefore vital that each party discloses to the other party full particulars of his or her financial circumstances and any other relevant matter before the agreement is signed.

- If the agreement is void, voidable or unenforceable. This involves complex principles of contract law which your lawyer can explain to you.
- If in circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out.
- If since the agreement was made, a material change in circumstances has occurred relating to a child of the marriage and as a result of that change the child, or the parent caring for the child, will suffer hardship if the court does not set aside the agreement.
- If a party has behaved in a way that was unconscionable.
- If a superannuation interest has not been dealt with appropriately.

>>Advantages of a prenuptial agreement

A well drafted prenuptial agreement, prepared after proper consideration by the parties as to what they require, can enable a couple to



upon their marriage knowing that if the marriage ends they will not have to fight about the division of their property. This can be particularly important for someone who has already experienced a marriage breakdown.

>>Disadvantages of a prenuptial agreement

The law in relation to binding financial agreements between married couples is quite new and there is some uncertainty about how the courts will interpret the law. It is therefore unclear in what particular cases a prenuptial agreement will be set aside. If an agreement is entered into without careful thought then circumstances might arise which were not anticipated and which make the terms of the agreement unfair.

>>What should you do if you want a binding prenuptial agreement?

If you intend to enter into a prenuptial agreement then you must first think about how you want your property and your future spouse's property to be dealt with if your marriage breaks down.

You and your partner should discuss your future plans including:

- whether you both intend to work during the marriage;
- whether you plan to have children;
- what arrangements there will be in relation to children that either of you currently have;
- what will happen if either of you can't work because of illness or injury or the need to care for a disabled child;

- whether you wish to make special provision in relation to inheritances and if so what you expect to receive and what you expect to do with your inheritance;
- what provision you each intend to make for retirement;
- how you intend to meet your financial commitments and pay your living expenses;
- whether you intend to have a joint bank account or intend to keep your finances separate.

Once you have thought about these issues you should talk to your lawyer. Your lawyer will need a detailed statement of your current income, assets and liabilities. The more information you provide the more likely it is that your agreement will be binding. If possible you should obtain evidence of the value of substantial assets and provide statements of bank accounts, shareholdings, superannuation interests and other investments.

You should talk to your lawyer about the agreement well before the marriage. If the agreement is prepared hastily then important considerations may be overlooked. The more care that is taken in preparing the agreement the more likely it is to be binding and the more likely it is that you will be happy with the terms of the agreement if the marriage breaks down.

>>What about de facto relationships?

De facto couples, including same sex couples, can have a binding financial agreement prepared under the provisions of the Property (Relationships) Act. In many respects the information in this guide is relevant, but there are some differences between the provisions that apply to de facto couples and the law as it relates to married couples. Your lawyer can explain these differences.

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