



Types of Binding Financial Agreements (Prenuptial Agreement)

Date: Monday June 29, 2020

Binding Financial Agreements (BFA) are “financial” agreements used in family law. They are often colloquially known as prenups or prenuptial agreements. BFA’s are entered into prior to, during a marriage or de facto relationship or after a marriage or de facto relationship.

What is the purpose of a Binding Financial Agreement?

Due to the flexibility of BFA’s, we find these agreements useful for documenting a party’s financial obligations to each other and how their assets/liabilities and financial resources will be distributed or divided in the event of a marriage breakdown or separation.

BFA’s allow the parties to stipulate and determine a wide range of financial issues including:

- how property and assets you already own prior to the marriage or de facto relationship will be divided upon separation;
- whether any spousal maintenance is payable after the breakdown of a marriage;
- how you will deal with the liabilities you individually or jointly incur in the future;
- what will happen to a party’s salary or wages during the relationship; and
- what will happen to the debts you already have prior to the marriage.

How do I make a Binding Financial Agreement?

To make a valid Binding Financial Agreement, it must be in writing and refer to the correct section of the legislation.

The agreement must be signed by all parties after they have each received independent legal advice. A certificate from a legal practitioner, such as a solicitor, will need to be attached to the BFA as evidence that the legal advice has been provided

There are three main types of Binding Financial Agreement

The three types of BFA are:

1. Prenuptial Agreements (before the parties marry and in contemplation of a marriage);
2. Cohabitation Agreements (when the parties are already living as a married or de facto couple); and
3. Postnuptial Agreements (after the parties are already married, whether you intend to stay married, separate or divorce.)

The type of BFA you and your partner will ultimately enter into will depend on your individual circumstances. This blog will focus on prenuptial agreements which are entered into when the parties intend to marry and in contemplation of marriage; probably the most common one.

What is a prenuptial agreement?

This type of BFA is often referred to as a section 90B or 90UB agreement depending on the type of relationship you are in. This type of agreement is a common way to protect your wealth in the event of separation.

Being a Binding Agreement, it is a pre-requisite for the parties to the agreement to receive independent legal advice if both parties intend to be bound by such an agreement; [similar to a Binding Child Support Agreement](#).

The case of Thorne v Kennedy (2017)

The case of [Thorne v Kennedy \(2017\)](#), which was appealed all the way to the High Court of Australia, depicts a classic example of where a party (usually one who holds a superior financial position) attempts to protect their assets with a BFA in the event of separation. Unfortunately for Mr. Kennedy, the High Court set the BFA (prenup) aside and [referred the case back to the Federal Circuit Court for determination](#).

Some key facts in the Thorn v Kennedy matter

- Kennedy had assets worth approximately \$18 million and Ms. Thorne had no significant financial assets, nor any children.
- Thorne was overseas and had moved to Australia with the intention of getting married to Mr. Kennedy.
- 11 days before the wedding, Mr. Kennedy brought Ms. Thorne to the solicitor's office to sign a Binding Financial Agreement and told her the wedding would not happen if she did not sign.
- Thorne was then asked to seek her own independent legal advice prior to signing.
- She did so and was advised that the prenuptial agreement was solely in Mr. Kennedy's favor and did not provide anything to her in the event of a separation.

- Four days before the wedding, Ms. Thorne signed the Agreement and the parties continued with the marriage.

The High Court of Australia sets the prenup aside

Ultimately, the High Court set the prenuptial agreement aside due to the following:

- Kennedy told Ms. Thorne, who was in Australia at the time, that the agreement was non-negotiable.
- There wasn't enough time for Ms. Thorne to consider and reflect on the effects of the prenuptial or financial agreement.
- Kennedy threatened to end the relationship if she didn't sign it.
- Thorne was in a considerably less powerful position compared to Mr. Kennedy in the sense that, Ms. Thorne didn't have any significant financial assets of her own and she had recently relocated to Australia (a foreign country for her).

As a result, the High Court determined there was both unconscionable conduct and undue influence by Mr. Kennedy towards Ms. Thorne. This is, however, a case of extremes. In most situations, parties act fairly reasonably and only wish to protect some modest assets which they may have inherited from a family relation, financial windfall obtained prior to the marriage/relationship or received as a property settlement from a previous marriage.

That said, we have come across situations which mirror the facts in *Thorne v Kennedy (2017)*. The decision broadens the circumstances in which prenuptial agreements can be set aside especially in circumstances where there is a significant disparity in income, property and resources.

In summary

Ultimately, prenups or Binding Financial Agreements before marriage are a useful tool for protecting assets of a financially stronger party so long as adequate provisions are made to the other party and the parties act fairly reasonably. It is important to note that Binding Financial Agreements may be void after a significant life event such as having children.

We always inform our clients that the agreements should be drafted by a lawyer who specialises in this aspect of family law to minimise the potential for it to be challenged in court and possibly set aside.

Hall Payne no longer provides services in family law

If you require assistance with your family law matter, we recommend you contact the relevant Law Society in your State or Territory for a referral:

- Queensland:** [1300 367 757](tel:1300367757)
- NSW:** [02 9926 0333](tel:0299260333)
- Victoria:** [03 9607 9311](tel:0396079311)
- Tasmania:** [03 6234 4133](tel:0362344133)

•South Australia: [08 8229 0200](tel:08 8229 0200)

•Western Australia: [08 9324 8600](tel:08 9324 8600)

•Northern Territory: [08 8981 5104](tel:08 8981 5104)

•ACT: [02 6274 0300](tel:02 6274 0300)

This article relates to Australian law; either at a State or Federal level. The information contained on this site is for general guidance only. No person should act or refrain from acting on the basis of such information. Appropriate professional advice should be sought based upon your particular circumstances. For further information, please do not hesitate to contact Hall Payne Lawyers.