



What happens if I have a Financial Agreement (BFA) and my partner dies?

Date: Tuesday October 20, 2020

Previously we have looked at [the types of Financial Agreements \(also called Binding Financial Agreements or BFAs\) available to parties](#). This blog will explore the effects of death on a Binding Financial Agreement and circumstances in which an agreement may be set aside.

Financial Agreements allow parties to determine how property and financial resources of either or both parties will be dealt with in the event of separation and can also set out spousal maintenance rights.

Does a BFA continue after the death of one party?

Even after a party's death, a Binding Financial Agreement will continue to operate.

Pursuant to [section 90H of the Family Law Act 1975](#) ("the Act"), (or section 90UK for de facto couples), the agreement operates in favour of, and is binding on, the personal representatives of the deceased party; for example, the executor named in the Will may be the personal representative.

If you are the surviving party and none of the assets are in your name or control but the BFA stipulates that you will receive certain assets or property upon separation, then you will want the Court to determine that the agreement is binding on the personal representatives of your late partner.

In the event the Court sets aside the agreement **and** does not make any orders with respect to property, the assets will be distributed in accordance with the Will, which may not be as you had anticipated.

Can a BFA be challenged or set aside?

Financial agreements are capable of being challenged and set aside by the Courts ([under s90K of the Act](#)).

An order setting an agreement aside after the death of a party may be enforced on behalf of or against the estate of the deceased party. In other words, the estate of the deceased will no longer be bound by the terms in the BFA.

Accordingly, the Court will then have the power to make an order for the transfer of property or other orders adjusting the rights and interests of the party.

Other common circumstances where there may be proceedings to have a BFA set aside, include (but are not limited to):

- if the BFA was obtained through fraud, which [includes non-disclosure of a material matter such as an inheritance or a lottery win](#);
- if the BFA was used to defeat creditors, for example providing you with all the assets while your partner declares bankruptcy; and
- if there was a material change in the relationship since the BFA was made, such as a birth and care arrangements of a new child.

There are other circumstances in which a BFA can be set aside, therefore, it's best to speak with a family lawyer regarding your individual circumstances if you have concerns about your agreement.

If one party dies during these family law proceedings, then the application is still capable of being continued by or against the personal representatives (for example, an executor) as a party to the proceedings only if the court is of the opinion that:

1. it would have exercised its powers to set aside the agreement under the *Family Law Act 1975* if the deceased party had not died; **and**
2. it is still appropriate to exercise those powers.

Summary

Entering into a Binding Financial Agreement should not be taken lightly as it can have unintended consequences even after you or your partner's death.

For example, as a surviving party of an invalid BFA, the property division may be determined by the Courts. Accordingly, it is unknown if you will receive more or less than what was stipulated in the agreement.

On the other hand, if your partner has passed away and there is no BFA in place, the property division will be in accordance with his/her Will (or the laws of intestacy if there is no Will). Therefore, you may consider making mutual wills with your partner.

Binding Financial Agreements are a complex area of Family Law and it is always advisable that you speak with a family lawyer if you have concerns about your BFA or if you are considering entering into a BFA.

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:0882290200)
- **Western Australia:** [08 9324 8600](tel:0893248600)
- **Northern Territory:** [08 8981 5104](tel:0889815104)
- **ACT:** [02 6274 0300](tel:0262740300)

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