

BINDING FINANCIAL AGREEMENTS AND CHILD MAINTENANCE IN VICTORIA

BINDING FINANCIAL AGREEMENT

Binding financial agreements (“BFA”) can be more commonly known as ‘prenuptial agreements.’ These are important in protecting your assets if your relationship breaks down. These agreements can be made before, during or after a marriage or de facto relationship.

Scope – A BFA can cover most issues, such as how property and money are distributed and ongoing financial support after the breakdown of the relationship. A BFA, however, cannot cover parenting issues.

Legal effect of a BFA – If a BFA is valid, it removes the court’s jurisdiction to issue orders about the distribution of assets which would otherwise be governed by the Family Law Act 1975 (Vic) (“FLA”). The BFA does not have to be lodged with the court when it is made, rather only when applying to enforce the BFA through the Family Court.

Requirements for creating a valid BFA – The BFA must be in writing and both parties must sign it. Each party has to obtain independent legal advice about the agreement prior to signing it. This advice must detail how the BFA will affect their rights and the advantages and disadvantages of signing one of these agreements. A signed statement to this effect must be provided by each legal practitioner and attached to the BFA. All parties must have their own copy of the agreement.

Altering the agreement – The BFA can be altered, although all of the above requirements have to be met again to ensure that it remains an enforceable, valid agreement.

Terminating the BFA – It can be difficult to terminate a BFA unless both parties consent to it. Otherwise, as long as the BFA complies with the above requirements it is a binding and enforceable agreement against both parties.

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Voluntary termination: Each party has to sign a 'Termination Agreement.' Before this occurs, however, each party has to get another document from their lawyers saying that they have been given independent legal advice as to the merits of terminating the BFA.

If both parties cannot agree to terminating or altering the agreement: The court can amend or terminate the BFA if you can prove either that dishonesty was involved in making the agreement; the agreement is no longer practical to enforce; there has been a dramatic change in the care and welfare of any children or the other person has acted in an unconscionable manner.

SEPARATION AND CHILDREN

The presumption under law is that each parent has equal shared responsibility for their children when they are below the age of 18. This is still the case even after divorce, separation or remarriage. This presumption can be rebutted when there are reasonable grounds to conclude that it is not in the best interests of the child to have equal shared parental responsibility.

Children cannot be covered in a BFA. A separate agreement must be made. The main three options are:

1. The parents work together to make a parenting plan
2. A consent order is made that the courts approve
3. The courts implement an enforceable parenting order

Parenting plans – This is a written agreement that lists the parenting arrangements for the children. This is a good option if you, as parents, are both in agreement as it means you do not have to go to court. This is not a legally enforceable agreement meaning it can be flexible and subject to change, as long as there is no court order to say otherwise.

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Consent orders – This is a written agreement that a court has approved after it has been made. It is therefore a legally enforceable agreement.

Parenting orders – These usually are made when parents cannot agree about the arrangements for their children. The court makes these orders so as to safeguard the best interests of the children. The court will take into account various factors when making a parenting order.

The two main factors are (1) the benefit the child will have by having a meaningful relationship with both parents and other important people like grandparents and (2) the child is protected from both physical and psychological harm. The court will also look at which parent can provide for the best interests of the children.

The court will also try not to separate siblings unless it is necessary for the child's welfare. The opinion of the children can be taken into account as well, especially if they are older.

DISCLAIMER: This information is provided as a broad overview and should not be relied upon as a substitute for legal advice. If you require further advice in relation to the above or Property, Franchising, Leasing, Trademarks, Commercial and Corporate Law, Trusts, Wills and Probate, please contact Mike Poynter or Shane Frost @ MCP Commercial Lawyers on (03) 9620 2001.

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