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Binding Financial Agreements and Prenuptial Agreements

Are they actually enforceable?

Before the year 2000 you could not enforce Prenupts or Financial Agreements made outside court – you simply couldn't contract out of the Family Law Act entitlements.

These days Binding Financial Agreements including Prenupts are made all the time, and provided that they are prepared and executed properly and have compliant content, they are definitely enforceable.

What is the advantage of having a Prenupt?

Prenupts are now becoming a type of “one off insurance” to protect assets in the event of a relationship breakdown between couples, whether they are married or not and whether they are heterosexual or not. With the increasing numbers of divorces and separations these days, people do not want to lose more of their assets the second time round. The wealthy use prenupts the most and many have reported that they feel comfortable and more secure after the prenupt is signed, knowing that the new spouse is not after them just for their money.

What if I have already separated?

If you have already separated you can still make a Binding Financial Agreement or Consent Orders (out of Court) to record what you have agreed on in dividing the assets which is enforceable. These would normally be drafted to cut all other Family Law Entitlements apart from what you have agreed on.

What is the Advantage of a Binding Financial Agreement over a Consent Order?

Unlike consent orders, the Binding Financial Agreement can be made to seal the deal quickly once and for all, even if it is a bad deal for the other party. This is of course provided that the document meets all strict legal criteria and both still want to go ahead with it.

With consent orders -even though the parties sign and submit the consent order to the Court without turning up, they are still subject to the Court refusing to grant the consent order if the Court is of the view that the property settlement contained in the consent order is unfair to one of the parties.

Is it possible that some Binding Financial Agreements may not be Binding after all?

Yes- if the procedures and strict legal criteria are not met there would be a problem in enforcing it. Some examples of where such agreements were not enforceable are:

-where one of the parties did not disclose a significant asset/cash savings (in Binding Financial Agreements all assets and liabilities have to be disclosed in a schedule and signed off to cover all bases)

-inadequate or no legal advice given to one of the parties before they signed (in Binding Financial Agreements there must be a solicitor's certificate signed by each party's solicitor confirming that they gave the required legal advice to their client) –

-where the agreement was put before a party with inadequate time to consider before signing especially in stressful circumstances eg: a week before the wedding or immediately after a funeral or during serious illness

When should you make a Binding Financial Agreement?

-if you want to protect your assets before any separation happens;

-if you have already separated and want to divide your assets amicably without going to court to “seal the deal” and sleep well at night knowing there is no come back later with more claims.

Experience shows that even if parties amicably separate and divide their assets and believe neither will change their mind later, it often happens that someone else gets in their ear and influences them to apply for their full entitlement- eg: new girlfriend, parents. This ends up costing them a fortune in legal and court fees as well as having to pay the other party their full entitlement. However if the deal had been sealed with a Binding Financial Agreement then the other party would not have had a chance to have a second bite of the cherry.

It's better to be safe than sorry!

Even if you have separated years ago and have no Binding Financial Agreement in place, it is still possible to get one done now, provided the other party is agreeable. Even if you have already moved in with your partner and did not organise a prenupt before hand, it is still possible to do one now to protect your assets in the event of separation.



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