

Binding Financial Agreements (Business)

A general Introduction to:
**Binding Financial Agreements
including for Business Planning¹**

What is a BFA?

A BFA can be made before a marriage, during a marriage or after a marriage. Generally, the agreements set out how a couple's property and financial resources are to be divided in the event of the breakdown of the marriage and the maintenance of either of them during the marriage and/or after the marriage.

- A BFA continues to operate despite the death of a party to the agreement and operates in favour of, and is binding on, the legal personal representative of that party.
- A BFA may be terminated by the parties to the agreement by:
 - ◊ terminating the agreement in a subsequent binding financial agreement; or
 - ◊ making a written agreement (a termination agreement) to that effect.
- A binding financial agreement, is not subject to any duty or charge.

Advantages of a BFA

- A BFA is the only methodology in Family Law by which an agreement can be entered into in order to close off certain rights.
- A BFA can actually enhance the relationship of parties as it can settle any suspicions that may be present regarding financial issues in the marriage.
- It enables parties to contract out of the rights and entitlements that are provided for under the Family Law Act.
- It can be used before, during or after a marriage.
- It may include matters that are ancillary and incidental to property and maintenance matters, such as partnership or business arrangements.
- A BFA can also be used as an interim arrangement, after separation.
- Parties are able to use a BFA to re-arrange their financial affairs while still married.

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Disadvantages of a BFA

- A BFA can be complicated as situations such as the parties having children, separation, a party remarrying or the death of a party need to be considered. A BFA can therefore be costly.
- A BFA is usually used to contract out of rights and entitlements provided for under the Family Law Act. It may therefore be difficult to convince the other party to sign the agreement.
- Third parties can not be parties to the agreement.
- There is no judicial scrutiny.
- The BFA may be set aside in the future on the grounds of unconscionability, failure to disclose relevant material, the agreement is void, voidable or unenforceable or a material change in circumstances in relation to the care, welfare and development of a child of the marriage has occurred.
- A proposed BFA prior to the marriage could lead to the termination of the engagement.

BFA for Business Planning

A long running practice of business and professional people is to not hold their assets in their own name so as to avoid creditors upon the collapse of a company or upon bankruptcy. By using a BFA during the marriage, assets can be transferred to the wife or husband.

Whether a BFA will withstand an application by a creditor to the Family Court to have a BFA set aside, is not yet known. The dilemma for the court will be to balance the public policy interests of creditors and shareholders in the companies, against the private interests of the non-entrepreneurial partner. The Attorney-General's Department is in the process of making changes to the current Bankruptcy, Taxation and Family Laws in order to balance the rights of creditors and other third parties and the non-bankrupt spouse. If and when these changes become law, it is hard to say.

Footnotes

- ¹ The law as at 1 November 2002.