Binding Financial Agreements as an Estate Planning Tool

Introduction:

Decisions that you make in your personal life may affect your legal position. It is essential to review your Will and estate planning when you experience changes in their personal circumstances, for example marriage or a new de facto relationship, separation or divorce, the birth of children, retirement, etc.

Changes in your asset structure may also necessitate a review of your estate planning, for example a change in your super fund or a new self managed super fund, creating a new trust or company or starting a new business.

You would be wise to also consider the circumstances of your beneficiaries and plan to protect their inheritance against their own vulnerabilities (including disabilities) and risks of bankruptcy or relationship breakdown.

After a lifetime of hard work, most of us do not want our children and other beneficiaries to lose their inheritance during a relationship breakdown or to creditors.

What is a Binding Financial Agreement?

Married[1] and de facto couples[2] may enter into a Binding Financial Agreement (**BFA**) to record their agreement about how their property will be divided and if spousal maintenance is to be paid to one of the parties upon separation or divorce.

You can make a BFA before, during or after termination of your marriage or de facto relationship.[3]

Are all Financial Agreements binding?

A BFA must satisfy certain requirements to be binding[4]:

- You and your partner must both sign the agreement;
- each of you must obtain independent legal advice before signing the agreement. Your family lawyer will explain the effect of the agreement on you and the advantages and disadvantages to you;
- Your family lawyer must sign a statement confirming that the advice was given to you only;
- A copy of your lawyer's statement must be given to the your partner or his/her solicitor;
- It must be clear that the agreement has not been terminated by either yourself or your partner and has not been set aside by the court.

[1] Part VIIIA of the Family Law Act 1975 (Cth)
[2] Division 3 of the Family Court Act 1997 (WA)
[3] s90B, s90C & s90D Family Law Act and Division 3 of the Family Court Act
[4] s90G, s90UJ Family Law Act

How does a Binding Financial Agreement affect your Estate?

By making a BFA you and your partner agree how your property and financial resources will be divided if you separate. Neither of you can later apply to the Family Court for a division of property.

Because you can plan your future rights and responsibilities, you will have greater certainty about your finances if you decide to separate in future. Separation is most often a very emotional and stressful time for families, especially when children are involved. Planning for this unfortunate potential future event may save your family from unnecessary conflict about the division of your property, allowing you to focus on the immediate needs and care of your family.

A BFA[5] binds the estates of married and de facto couples. This means that if you lose mental capacity during your lifetime or when you die, your estate is bound to honour the terms of the BFA for division or your finances and payment of spousal maintenance if this was agreed and if your BFA does not state that spousal maintenance payments cease if you become incapacitated or die.

Your estate planning solicitor must consider the provisions of your existing BFA when your estate plan is reviewed. While you may wish to leave your estate to your intended beneficiaries under your Will, you must ensure that you set aside sufficient funds to continue payment of spousal maintenance under a BFA after your death.

Your solicitor should explain to you the risk of a family provision claim against your estate if your Will does not make sufficient provision for the continued maintenance of your former spouse. This may cause a lot of unhappiness in the family if your former spouse is the mother of your children, but also in the case of a second or third spouse.

Does a BFA prevent family provision claims?

The Family Provision Act 1972 (WA) allows certain persons to make a claim against your estate if your Will or intestate estate does not allow sufficient provision for them.

You cannot agree with a person who is eligible to claim, that they will not make a family provision claim after your death. Even though a BFA is binding on your estate, it still does not prevent a family provision claim.

If your former spouse (married or de facto) was receiving or entitled to receive maintenance from you during your lifetime, he/she may be able to claim provision from your estate after your death, despite the existence of a BFA[6].

[5] s90H Family Law Act & s205ZT Family Court Act
[6] s7(1)(b) Family Provision Act

The court may give consideration to financial agreements between spouses when determining a family provision claim by a former spouse[7].

For this reason, if you are separated or divorced you may include declarations in your Will stating your agreement with your former spouse that the BFA was intended as an exclusive and final method to determine your property rights. You may also include an undertaking not to claim against the estate of your former spouse after his/her death.

In Western Australia persons cannot obtain a court order approving your undertaking not to make a family provision claim against your former spouse's estate when you have obtained a Family Court property settlement order or have an existing BFA. This differs from the position in other States[8].

Can a BFA be used as an Estate Planning Tool?

- High net wealth families: In many families where wealth has been accrued by one or more generations, for example family farms, family business, property and share investment portfolios, members of the family wish to protect the family wealth for future generations.

  With the lurking risks of bankruptcy or relationship breakdown, you should consider the benefits of entering into a BFA if you are anticipating inheriting significant family wealth at some time in the future.

  A BFA does not replace your Will. You must still include appropriate provisions in your Will to ensure that your family wealth passes to your intended beneficiaries upon your death.

  It is important for each generation who will become a controller of family wealth to obtain independent legal advice about how to protect the family wealth for future generations in creating an estate plan. Serious consideration must be given to the appointment of your enduring attorney and the control of family trusts or companies which hold family wealth. The person that you chose to be your enduring attorney may also become the controller of family trusts or companies and may even be the person to negotiate your property settlement in the Family Court if you become mentally incapable.

  Testamentary trust wills offer significant asset protection and taxation benefits. Because of the complexity of operating a testamentary trust, the effective us of this planning option is more relevant to larger estates.

  It is prudent for you and your partner to reach an agreement about the control of inherited family wealth. You can then plan for your personal assets to pass to your loved ones and ensure family harmony after your death.

[7] Singer v Berghouse (1994) 181 CLR at 201
[8] S95 Succession Act 2006 (NSW); Ridley v Ridley NSWSC, Young J, 13 December 1988

- Blended families: If you or your spouse have children from a previous relationship, you may benefit from making a BFA stating that your assets are to be divided upon your death as if you were separate. This means that each of you can leave your assets to your children in your Wills.

  If you are making only limited provision for your surviving spouse in your Will, it is advisable for you to refer to the financial agreement with your spouse to clarify your reasons. The court may consider these reasons in determining a potential family provision claim by your surviving spouse.

- Separation resulting from illness: Most of us plan for our inevitable demise and some even plan for a loss of mental capacity during their lifetime. However, few people consider the potential of a long or permanent separation from a spouse as a result of illness or dementia.

  Especially in the case of blended families, the potential of conflict about the division and management of assets increases when a family is faced with a parent having to move into a residential aged care facility. In many cases large accommodation deposits must be paid upon moving into a residential aged care facility. This may cause difficulty when the only substantial asset is the family residence.

  If you are living independently, you must consider how you will pay for a refundable accommodation deposit in a residential aged care facility or daily accommodation fees if you cannot remain living at home. It may not be practical to sell the family home if your partner is still living in the house.

  If you consider personally paying your partner's refundable accommodation deposit to enter a residential aged care facility, remember that the deposit will be refunded to the estate of your deceased partner and not to the person who provided the funds. This may not be the outcome that you intended and can possibly be avoided by obtaining timely financial and estate planning advice from a professional specialising in these areas.

  Even though a relationship may not have broken down, it may be appropriate for you and your spouse to have separate property rights agreed to while both of you have full mental capacity to consider the consequences of the agreement. If you need funds to pay an accommodation deposit at an aged care facility or to fund alterations at home or a granny flat so that you can be cared for by a family member at home, your personal funds are clearly identified and can be used to fund your retirement residence without affecting your spouse's assets.

  You should give careful thought to whom you entrust with the management of your finances or decisions about your care and treatment if you lose mental capacity. Make sure that you discuss the powers and duties of an enduring attorney and/or guardian with your solicitor as part of your estate planning. This must be done at an early stage when you have full mental capacity to understand the complexity of dealing with certain assets and can make informed decisions.

If you chose to appoint your adult children as your enduring attorneys, you must understand that they will control your finances, assets and legal affairs if you lose mental capacity. This may affect the position of your spouse, especially if he/she is not the parent of your children[9]. On the other hand, if you appoint your spouse as your attorney, she may control your affairs in a manner which may not accord with your wishes to leave certain assets to your children.

The most important issue to consider in deciding who will control your affairs if you can no longer do so, is to appoint a person that you trust to make decisions that will be in your best interest while you are alive.

Conclusion:

A BFA may not provide the solution to your estate planning concerns. There are many other useful tools in the estate planner's kit, including family trusts and lifetime dispositions, mutual wills agreements, testamentary trusts and many more. Ask you solicitor to discuss alternative methods to ensure that your wishes are given effect to.

Most of us do not plan to fail, but many of us fail to plan. Spending some time planning will give you peace of mind that you have taken care of your own future and that of the persons you care for.

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[9] Stanford v Stanford (2012) 293 ALR 70; [2012] HCA 52