

## Quarantining Family Wealth

Recent developments in Family Law legislation have provided a new tool for protective financial planning. Financial advisors to wealthy families where marriage or divorce is contemplated, should be aware of the potential advantages of Binding Financial Agreements.

Previously a pre-nuptial agreement was only persuasive under the Family Law Act 1975 ("the Act"), a Binding Financial Agreement ("BFA") is now enforceable in Australia in so far as contracting out of the Act is concerned. It is the first time that assets can be prospectively quarantined from the marital asset pool, and therefore a BFA has the potential to be an excellent tool for asset protection if a marriage fails.

### What is a Binding Financial Agreement?

Despite being colloquially known as "pre-nuptial", a BFA is an agreement that can be entered into by parties before marriage, during marriage or after marriage. The BFA may deal with how the property of the parties is to be dealt with, as well as providing for the maintenance of partners and children and other ancillary matters.

### Why suggest a Binding Financial Agreement?

A BFA will enable the preservation of assets for any of the following purposes:

- consistency with inheritance expectations;
- ensuring that children of previous marriage (whether adults or minors) are provided for appropriately;
- preservation of particular property interests such as business interests;
- ability to allocate weight to a higher income earner or party bringing significantly more property to the relationship;
- minimising or avoiding financial disputes upon the dissolution of marriage by enabling more certainty by allocation of assets and liabilities.

### Formalities to be observed

For a BFA to be enforceable it is necessary that:

- the agreement is signed by both parties;
- a certification is provided by a legal practitioner for each party stating that independent legal advice was provided to that party;

*"... and despite being colloquially known as a "pre-nuptial" can be entered into before marriage, during marriage or after marriage ..."*

*It is the first time that assets can purportedly be quarantined, and therefore a BFA can be used in part as an excellent tool for asset protection"*

A BFA can be terminated or set aside in certain circumstances including:

- the agreement was obtained by duress, misrepresentation or non-disclosure;
- the agreement is void, voidable or unenforceable because of non-compliance with formalities;
- in the circumstances that have arisen since the agreement was made, it is impracticable for the agreement or a part of it to be carried out;
- after the agreement, a material change concerning a child of the marriage has occurred and as a result of the change, the child or a party to the agreement will suffer hardship if the court does not set the agreement aside;
- a party has engaged in conduct that was unconscionable in relation to the circumstances surrounding entry into the agreement.

Therefore it is essential that the parties seek legal advice before entering into such an agreement.

### **Binding Financial Agreement is not binding on heirs and executors**

Despite the Act saying that it binds heirs and executors, BFA's do not operate in Victoria to protect assets in a deceased estate from a claim under the Administration and Probate Act 1958 (Vic) for further provision out of the estate. Such claims, commonly known as Testators Family Maintenance (TFM) claims will take into account the entire pool of assets of a deceased at the date of death, and a BFA will be simply another factor to be considered by a court in deciding whether a claimant should receive more from an estate than they would otherwise.

Accordingly, BFA's ought to be seen as a valuable addition to other more traditional financial and succession planning tools such as trusts, family companies, wills and testamentary trusts.

It is vital to take a holistic approach in protecting assets and making your clients aware of this can enhance your role as a financial adviser.

### **Three steps to properly preserve your client's interests**

To ensure that the assets of your client are protected and enhance the potential of these assets being distributed as desired, there are three important steps that should be considered:

- 1. Suggest your client considers entering into or alters an existing BFA that quarantines the assets your client seeks to preserve.**

Financial advice including future tax ramifications of the terms of agreement must be considered.

- 2. Confirm that your client has arranged a will that mirrors the terms of the BFA.**

Although you cannot prevent a TFM claim against a deceased estate, a BFA will assist in deterring such claims, especially if used in conjunction with other financial and succession planning tools so that the likelihood of success of a claim is reduced.

- 3. Ensure that the client's financial structure is properly arranged to give effect to intentions and withstand challenges to ownership.**

It is a prudent exercise to address what assets will be remaining in the estate upon the death of your client which are susceptible to a claim or other challenge to ownership under a TFM application. Financial restructuring may be a desirable option to minimise the assets in an estate, and thereby reduce the likelihood of a TFM claim.

In Family Court proceedings, financial restructuring during the marriage and/or after separation, often attracts the claim that the restructuring was intended to minimise or defeat another party's potential Family Court entitlement. Even if the Court finds that only one of the reasons for that restructure was to defeat a potential Family Court claim, the Family Court may reverse the transaction.

However, in circumstances where a BFA has been entered into prior to a restructure, the restructure may avoid challenge.

All of the areas discussed above are complex, and action should not be taken without first consulting your legal adviser. For further information about our Family Law services please contact our office.

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