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WHY YOU SHOULD HAVE A PRENUPTIAL AGREEMENT.

Couples entering into marriage can sign a written agreement which sets the rules for the division of their assets in the event that their relationship comes to an end. These agreements can be a very useful means of:

1. Protecting assets owned by one party to the relationship, especially if that party owned substantial assets when the relationship began;
 2. Providing certainty and a clear definition of how assets will be divided if the relationship does not work;
 3. Obtaining partial exemptions from stamp duty if assets must be transferred from one party to another at marriage breakdown; and
- Avoiding property settlement litigation in Court, which can often be lengthy, expensive and emotionally draining, where an agreement cannot be reached.

In Australia, couples who are considering marriage, are already married or have separated can enter into a "Binding Financial Agreement". Binding Financial Agreements are "binding" in that once the paperwork (in effect a contract under the Family

Law Act) is signed by the couple and their separate solicitors the agreement cannot be overturned by a Family Court unless very specific criteria are met. To overturn a Binding Financial Agreement it must be established by the Court that:

1. The agreement was obtained by fraud, including failure to disclose a material matter including the ownership of, or entitlement to, an asset;
2. The agreement was entered into to defeat a creditor or with disregard to the interests of a creditor
3. The agreement is void, voidable or unenforceable;
4. Circumstances have arisen since the agreement was made which make it impracticable for the agreement or a part of the agreement to be carried out;
5. Since the making of the agreement, a material change in circumstances has occurred relating to the care, welfare and development of a child of the marriage and as a result of that change, the child, or because of their care of the child, a party to the agreement, will suffer hardship if the Court does not set the agreement aside;



• A party to the agreement engaged in conduct that was, in all the circumstances, unconscionable when entering into the agreement

As long as each party has been open about the assets and liabilities each holds when the agreement was entered into and the terms of the agreement are clear (and in some circumstances have considered the possibility of events such as the birth of children during the marriage), then a Binding Financial Agreement should operate to prevent the Family Court having any power to change the initial agreement.

The Family Court may also have a limited ability to vary the terms of a Binding Financial Agreement where one of the parties is unable to support himself or herself without a Centrelink benefit, despite the terms of the agreement. In these circumstances maintenance may be payable to the party who needs that support.



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