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## FINANCIAL AGREEMENTS

### What you need to consider - pre and post marriage

Caroline Counsel

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What you as a client need to think about when considering a Financial Agreement (FA).

You can enter into a FA before, during or after a marriage or relationship.

There are different things you need to consider if you are entering into an Agreement before a relationship as opposed to when you are separating at the end of a relationship.

#### **Section 90B Agreements - an Agreement entered into before marriage**

At Caroline Counsel Family Lawyers we understand that the idea of entering into a FA before your marriage commences may be the last thing you want to do or indeed ever thought of doing.

#### **Your first relationship**

The idea of an FA can provoke strong, it not outright heated emotion. We understand that you are about to make an enormous emotional investment in what you are hoping to be a happy relationship. We know that you are not necessarily thinking about your relationship ending in separation.

Even if this is your first marriage, there may be very good reasons why you and your partner are thinking of getting an FA:

- You or your partner may have assets which you are bringing into the relationship and one or both of you may want that recognised.
- You may have built assets up over a number of years before the dating aspect of your relationship commenced.
- You may have inherited the assets and are concerned about what may happen to that inheritance at a future date if you were to separate.
- You may feel that you have a stronger financial obligation to people other than your new partner if you were to break up within a period of time.

#### **Second Relationship**

Even if this is your second long term relationship or marriage you need to be aware that the incidents of separation for the first marriage is approximately 50% and even higher for second marriages.



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When used properly, an FA can be a good way of minimising the angst of what will happen to you and your family should the relationship not last.

It will set out clearly what each of you intends to have happen on separation.

If one or both of you have children from your first relationship or marriage, then the FA, when negotiated to your mutual satisfaction, can afford both of you estate planning options.

### **There's no such thing as a simple Agreement**

We understand that for many clients, having to use our services may not seem like a good investment of your time or money leading up to the commencement of your marriage.

We work in the field of family breakdown. We witness on a daily basis the emotional and financial devastation that a bad separation or divorce can wreck upon our clients, their former spouses and their children.

A well crafted Agreement before a marriage which meets the needs of both you and your partner can go a long way to minimising the trauma to you and your family should separation occur.

The Agreement, if found to be binding, can close the door of the Family Court and enable you and your former partner to extricate yourselves from your relationship with dignity and a positive focus on the future and your children's future. An Agreement cannot prevent someone from starting a case in Court at a later date but it can be produced to try and defeat a future claim.

Many clients assume it is done in the form of a "simple" Agreement or believe a lawyer can just "cast their eye" over the Agreement. This is not possible due to the requirements at law which are imposed on the lawyers for both parties. Once the legal ramifications are explained clients more readily appreciate the breadth of what is involved. Learning about the ramifications of these Agreements is essential before you- the client- make up your mind to enter into one.

### **What are the elements of an Agreement?**

A Financial Agreement has to be drafted to accord with the relevant Section of the Family Law Act. We can advise you on which Section applies in your case.

An Agreement is usually made up of several parts.

First are the names of the parties to the Agreement and their relevant personal details, such as their address, date of birth and occupation.

Secondly there is a basic outline of the relationship -

- If you are contemplating a relationship and life together, when that is likely to occur.



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- If you have already married, then you will be entering into a Section 90C Agreement.
- Are you living together in a de facto relationship but contemplating marriage and if so when do you intend to marry in which case you may require a Section 90UB and then a subsequent Agreement

These are often referred to as "recitals".

Thirdly, there is what is referred to as the operative sections of the Agreement. In other words, what is supposed to happen if you separate.

The Agreement has a signing clause and includes two Statements by two independent lawyers who are required under the Family Law Act to give certain advice to each of you and your partner. (See under heading "What makes an Agreement binding?").

We are required to give you advice prior to you signing your Agreement if the Agreement is to be "binding" under the Family Law Act.

We usually ask that our clients sign the Agreement at the foot of each page so to eliminate confusion later on as to what the Agreement contained. We usually also ask our clients to sign an Acknowledgement that they received the independent legal advice prior to signing the Agreement.

### **What makes an Agreement binding?**

For a Financial Agreement to be binding it must:

- Be in writing
- Be signed by both you and your partner
- Contain, in relation to each partner to the agreement, a statement to the effect that before the agreement was signed by him or her they received independent legal advice from a lawyer as to the following matters:
  - The effect of the agreement on the rights of that party;
  - The advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement;
- Include a certificate signed by the lawyer providing the independent legal advice stating that the advice was provided.

If you are entering into an Agreement in contemplation of marriage and the marriage does not take place, then the usual wording included in the Agreement is that the terms of the Agreement will not take effect until marriage.

As De Facto couples are now included under the Family Law Act, we advise clients living together who do not marry or do not know when they marry, to enter into an Agreement relevant to their current living arrangements.

Once signed, one of you will hold the original and the other will hold a copy, although the requirement for this original and one copy was eliminated from the Family Law Act as of



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January 2010. As it is crucial that the FA be kept in a safe place, we will tell you to treat it as carefully as your Will and ensure it is put in a fire proof container or safe. Some lawyers ask for two originals to be signed.

Clearly if one of you seeks to rely on or enforce the terms of an Agreement at a later date, then one of you will need to produce either the original or a copy of the signed Agreement.

#### **We can help you raise the issue of the Agreement**

We acknowledge it is very hard to say "Darling I love you, I want to marry you, but first I want you to sign a Financial Agreement".

If you want to enter into an Agreement but you are unsure if your partner is willing to, we can explore with you ways of raising the issue so that your partner doesn't become alarmed.

As each person will be different we need to explore this with you personally and preferably in conference with you. We can discuss what other clients have reported as being helpful suggestions.

#### **We can help you even when you don't want an Agreement**

We recognise that it may be your parents or indeed your partner's parents who want the two of you to have an Agreement.

We can help you talk to your partner about your views about having an Agreement and can coach you into how to best express your opinions without losing it or getting upset.

We assume you want the relationship to work and therefore can turn a discussion about an FA into an opportunity for you and your partner to explore what is important to you.

You can use the discussion leading up to entering into the Agreement to work out common values and beliefs. Some of our clients find out about themselves and their future partner by talking about how they see their relationship unfolding. A discussion around what sort of relationship you want to have need not be all bad. Some couples are able to work out points they agree on and what they don't agree on.

Financial planners often work with couples in relation to developing a financial plan that suits both parties. Often one party has a vastly different investment profile to their partner. They may be risk takers or risk adverse.

In a similar way, we help you navigate your way through a conversation with your partner and work out what matters to you.

Some of our clients reflect on the fact they never thought about what their relationship may look like prior to an Agreement being mentioned. After discussing the issues with us, they realise they have an opportunity to shape their relationship in a way that would never be available to them if they end up litigating in Court.



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### **We recognise it may not be you or your partner who wants the Agreement**

We never assume that you and your partner are the ones who want the Agreement. We deal with couples whose parents want to see their son or daughter protected and believe that entering into an Agreement can afford that protection.

We work with clients to assist them to navigate their relationship with their parents. It may be that the parents are worried about their adult child inheriting at a future date. We can offer alternatives to the Binding Financial Agreement if both of you don't want to enter into one. For you both to make that decision you really need to have advice about what it is that a Binding Financial Agreement does and doesn't do.

Often in first marriages when neither party has any assets of any magnitude, the couple elects not to enter into such an Agreement, even though the parents might want one. We are able to help you explain to your parents some alternatives that could allay their concerns.

If one or either of you still wants the Agreement because of parental concern, then we can help you understand the nature and effect of a Binding Financial Agreement. We can help you work out what is important to you and what you feel must be included in the Agreement.

We also help you speak to your partner - not just what to say but how to say it.

### **Using Collaborative Practice to help forge a truly mutual Agreement**

We can help you by using interest based negotiation techniques. These techniques should help you and your partner preserve your goodwill whilst agreeing on mutually acceptable terms.

Nobody wants to see a discussion about an Agreement result in your relationship breaking down.

Lawyers are skilled negotiators and some are trained as Collaborative Lawyers. One method to help you and your partner is to call a round table conference so everyone can be present at the one time. This can be done as part of the Collaborative process which is a method in which two lawyers trained in this technique assist you to have a series of discussions in order to reach agreement.

### **What if you are not sure of the marriage date and are already living together?**

If you are living with your partner and may continue to do so for some time pre marriage and if there is an indeterminate date of marriage; you may need to enter into one agreement now and another when you marry.

We can give you specific advice as to what Agreement or Agreements you should be considering entering into in order to achieve what you are intending.



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Sometimes it means being advised to enter into two agreements. We advise against the "two in one special" idea when it comes to De Facto relationship Agreements and pre-nuptial Agreements.

Section 90UC of the Family Law Act provides for you and your de facto partner to enter into a "financial agreement during de facto relationship".

Prior to your marriage (one the date crystallises), you can then enter into a termination agreement in relation to your Section 90UC Agreement and then enter into a Section 90B or pre-nuptial agreement.

Yes, this is a more expensive way of arranging your affairs. The alternative (i.e. Court) could be much more expensive not just in terms of money spent but time and emotional energy.

You may not realise the legal protection that those agreements will afford you. Once signed, those agreements will bring certainty into your financial lives.

An Agreement can help you avoid the financial cost, emotional angst and the time lost in litigation. They give you and your partner the ability to shape your financial relationship and future.

Some clients assume that if they split up, then going to a judge will provide certainty. In our experience, it certainly does not. There is often disparity between what clients think will happen when they go to Court and what actually occurs. It is our experience that even for those clients who do "well" in their court outcomes, if asked they would be most reluctant to repeat the process.

### **What can you do to help the process?**

#### **Things to do**

- Allow plenty of time prior to the marriage to explore and resolve the issues associated with the Agreement.
- Ensure you allow time between receiving final advice from us and signing the Agreement.
- Do not assume you can resolve the Agreement and have it signed days prior to living together or getting married.
- Map out in your own words what is it that you think you want to achieve by entering into an Agreement
- What do you think your partner wants to achieve by entering into an Agreement?
- If you have a complex financial structure such as companies/trusts, get your accountant or financial planner to draw up an overview of these entities and indicate your entitlement in them
- Find out what assets you own and what debts you owe- obtain current balances
- Obtain a current member benefit statement from the trustees of any superannuation to which you are entitled



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- If you are entitled to share options or employee shares, obtain specific details relating to these entitlements including current information on value
- Similarly if you own shares in a public company, find out the current value.

### **Things to think about**

Prior to meeting your Lawyer, think about the following possible issues:

- What if you separate and you are not financially independent? What if your partner is financially dependent on you?
- What if you have given up your employment to raise children and are in the middle of your child caring years when the marriage ends?
- What if your partner is the one who has sacrificed their career for your family?
- What if you or your partner's qualifications at the start of the relationship/child rearing years, are no longer applicable in the workforce when trying to re-enter?
- What if you and your partner don't agree to spend equal time with the children post separation and one of you ends up with a greater degree of caring for the children?
- What if your partner has a different work ethic from you?
- What if you have a significant income earning disparity or such disparity develops during the relationship?
- What if you/your partner decide to relinquish spousal maintenance entitlements under the FA because it is assumed you both will be financially capable of self support at the time of separation?
- What if you wish to quarantine your house in which you, your spouse and your children end up living throughout your married life?
- What if your spouse then makes significant contributions to the house both of a direct financial/non financial and also makes the predominant home maker/parent contributions. Do you consider it still appropriate to quarantine 100% of the total value of the home and if so, for what period of time?
- What if your spouse to be wants to include a clause that enables them to acquire assets in their sole name using income derived during the marriage? Is that acceptable to you if you are not contributing in a non financial/ home maker/parenting role but not deriving financial benefit from joint efforts?
- What if it is you who wants to be able to quarantine assets from the joint funds?
- Do you still consider it just and equitable to equally divide all assets acquired during your marriage if contributions either financial or non financial have not been equal?
- What if it was you or your partners' significant wealth at the commencement of the relationship that has built up subsequent assets? Do you think you or your partner should be entitled to retain for their own benefit those assets so acquired?

What if you think you can just leave a relationship or marriage anytime it doesn't suit you so you can activate asset protection clause and then find you can't make that jump?

Some client say, oh well, if I don't like the way the relationship or marriage is trending, I can always call it quits, initiate enforcement of the agreement and then be on my way. What



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that client may not have countered on is not being as ready to quit the relationship or marriage and the exposure they thought they could minimise subsequently increases.

#### **Are you as financially savvy as your intended?**

In our experience, clients don't want to admit to us they don't know or understand something. This is not a time to be coy about how much you know or don't know. Be as forthcoming as you can be with us and we can help you have a better sort of conversation with your partner.

We cannot simply "sign off" on the Certificate of Independent Legal Advice to an Agreement, particularly if it is a Section 90UB or 90UC (before marriage or before relationship) Agreement given the lasting effects of the Agreement on your rights both now and into the future.

If you remain in any doubt about the Agreement or its meaning, make sure you raise it with us in detail before you sign and before we certify or provide the Statement of advice to the Agreement

#### **CONTACT US**

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