

"HOW TO AVOID SOME OF THE PITFALLS IN PRE-NUPTIAL AGREEMENTS"

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The term 'Pre-nuptial Agreement' often appears in the media, particularly in the latest news about celebrity marriages, either when the agreement is made or when celebrities get divorced. A Pre-nuptial Agreement however, is not just reserved for celebrities with million dollar assets. In Australia Pre-nuptial Agreements are legally enforceable and anyone wanting to protect their assets can arrange to make one.

WHAT IS A PRE-NUPTIAL AGREEMENT?

A 'Pre-nuptial' Agreement is referred to in Australia as a Binding Financial Agreement (BFA). It is made before marriage and it can be a useful way to protect your assets. In the event of separation, if such an agreement is in place, it can exclude stipulated assets in the agreement from the spouses' collective property pool, provided of course, that the agreement has been drafted correctly.

SHOULD I GET A PRE-NUPTIAL AGREEMENT?

Pre-nuptial Agreements can be made by couples before they enter into a marriage. It is particularly useful for spouses who have significantly more assets than their partner (such as businesses, farms, inheritance, lottery wins or other financial assets they want to make sure they keep if the marriage ends), as it outlines how the financial assets should be distributed if the relationship breaks down. It is completely up to the individual to choose whether they decide on making such an agreement. In other words, it is a safety precaution and can make property settlements at the end of a marriage less complicated.

HOW DO I GET A PRE-NUPTIAL AGREEMENT?

It is very important that if you are considering making a Pre-nuptial Agreement that it is done right, recent cases have shown that legal 'slip-ups' are not looked upon favourably by the Court and this could result in an agreement being set aside. This means that, not only is the agreement a waste of time as it is not enforceable, but your assets are then open to being distributed as the Court sees fit.

The legal requirements for making a valid Pre-nuptial Agreement are strict, and Specialist Family Law advice must be sought. The following steps are essential in making a binding agreement:

- Each party must receive **independent legal advice**;
- The legal advice must be from a lawyer **in the Australian jurisdiction** (this may be obvious but there have been some cases where agreements have been set aside because legal advice was received from a lawyer practicing in another country);
- The agreement must be **in writing**;
- It should be drafted and **signed** in the **presence of a lawyer** and
- It must contain a **complete disclosure** of assets, liabilities, expenditure and income;

Two possible problems can arise in the preparation of a Pre-nuptial Agreement, non-disclosure and unreasonable pressure (duress). Great care should be taken that neither of these occur, if they do then it can be a basis for the setting aside of the agreement.

Just such a problem occurred in a recent case considered by the Court. The Husband and Wife entered into a Pre-nuptial Agreement days before the wedding date. The Wife was a student in Australia from Thailand and returned to Thailand when her visa expired after one year of cohabitation with the Husband. She later returned to Australia on a fiancé visa and fell pregnant.

The Husband organised for his solicitor to draw up a Pre-nuptial Agreement 5 days before the couple's wedding date. When the Husband and Wife discussed the agreement, the Wife said she did not believe the agreement was necessary as she would not make a claim against his property. The Wife, however, entered the agreement as the Husband said he would not marry her and would not sponsor her fiancé visa if she did not sign it.

The Wife argued that the agreement should be set aside on the basis that it was entered into under duress. She initially signed the agreement not using her usual signature, the Husband upon realising this insisted that she re-sign with her usual signature. The Wife argued that she felt she had no choice but to sign the document because she was pregnant and unmarried and her visa would not be supported by the Husband.

The Court found that the pressure the Husband placed on the Wife was duress, as he threatened her with no marriage if she did not sign it. This would have put her in a position where she could not remain in Australia and would return to her family unmarried and pregnant without the father of the child.

It is therefore essential that a Pre-nuptial Agreement is accepted by both parties and that each partner is given adequate time to think about the Agreement - not a hasty few days before the wedding date!

Other circumstances where the Court can overturn an agreement include where putting the agreement into effect would cause substantial injustice or hardship on the other spouse, particularly if they are caring for a child.