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DISCUSSION PAPER

BINDING FINANCIAL AGREEMENTS IN NEW RELATIONSHIPS: Making the Unclear, Clearer

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1. INTRODUCTION

- 1.1. In their book “Australian Sociology: A Changing Society”,¹ the authors describe the traditional family unit as moving from ‘nuclear’ to ‘unclear’. Families become “blended” when people embark on more than one significant relationship in their adult lives. While these are undoubtedly happy and hopefully successful unions, they are no different to a traditional relationship in that inevitably a proportion will break down.
- 1.2. Often people will begin a new relationship with reservations, particularly if they have previously endured a challenging property or parenting settlement.
- 1.3. One way to remove a degree of insecurity around entering a new relationship and protecting assets brought to that relationship is to have a discussion about a Binding Financial Agreement. A Binding Financial Agreement will be useful where one party has more significant assets than the other party, or where one party wishes to retain the assets that they bring to the relationship for their own children.

2. WHY A BINDING FINANCIAL AGREEMENT?

- 2.1. When two people are in a relationship, they inevitably build up assets. Those assets form the property pool at separation and are divided in accordance with the *Family Law Act 1975* (Cth) (‘Act’). The parties then take those assets to their next relationship.
- 2.2. They may also have had children together. In the event that each party remarries or establishes a relationship with a new partner, it may be the intention that those assets from the original relationship remain with the children of that first relationship. Understandably, this begins to get more complicated where children are born of the subsequent relationship.
- 2.3. A Binding Financial Agreement can operate to exclude the assets of an earlier relationship from the property pool of the subsequent relationship. Additionally, a Binding Financial Agreement provides clarity at the outset of what will not be considered joint assets of the relationship. The law provides that Binding Financial Agreements can be utilised prior to, during and at the conclusion of a marriage or de facto relationship.
- 2.4. Binding Financial Agreements, once made, cannot be varied. They can only be terminated by agreement either by a provision included in the Agreement or by the drafting of a later replacement Binding Terminating Agreement.

¹ Holmes, David, Kate Hughes and Roberta Julian, Pearson Australia, Sydney NSW, 2011.



3. THINGS TO CONSIDER.

- 3.1. A Binding Financial Agreement may help to avoid expensive and messy proceedings when a relationship breaks down.
- 3.2. Prior to embarking on signing any legal document, there are some non-legal considerations you will need to take into account, amongst them:
 - (a) At what stage is the relationship and how do you see it developing? Is it possible that you and your partner may want to have children?
 - (b) What assets do you wish to exclude?
 - (c) Is what you are asking the other party to agree to achievable? If the other party is unable to fulfil the obligations imposed on them by the terms of the Agreement, the Agreement is doomed to fail. The parties to the Agreement must be frank in disclosing their assets and their ongoing financial obligations.
 - (d) Who is going to pay for what during the relationship?
 - (e) Is the home you will be living in an excluded asset? Is other property owned as an excluded asset earning rental income?
 - (f) What happens in the event one of the parties becomes sick, cannot work and fails to meet the terms of the Agreement?
- 3.3. There are also strict legal requirements which govern the creation of Binding Financial Agreements. Failure to comply will make it likely that the Agreement is not enforceable. Those requirements include:
 - (a) The agreement must be in writing and no other Agreement exist between the parties;
 - (b) The agreement must be made under the appropriate section of the Act;
 - (c) It must contain a separation declaration signed by either one or both of the parties stating that the parties are living separately with no reasonable likelihood of cohabitation resuming and
 - (d) Both parties must have had independent legal advice and provide the other party with a signed statement to attest that independent legal advice has been provided. The independent legal advice must encompass the advantages and disadvantages of entering into an Agreement.



4. FINAL THOUGHTS

- 4.1. This can be a sensitive topic and one that may be difficult to broach. However, a well-planned and well drafted Binding Financial Agreement will assist in reducing doubt around what will happen to each party's assets if the relationship ends.

For further information in relation to the issues discussed in this paper, please contact either Fiona Davis or Roger Curtis.

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