

Binding Financial Agreements (“BFAs”)

Can cover immediate or future division of property & finances for either a marriage or a de facto relationship

s90B/90UB Pre Commencement

There must be full disclosure of finances & each party must get separate legal advice

s90D/UD Separation

Purpose must not be to thwart creditors or override child support responsibilities

s90C/UC Mid Relationship

BFAs – 3 Types for Marriages & De Facto Relationships

The 3 types of BFAs under the Australian (federal) *Family Law Act 1975* are:

Section 90B or 90UB Agreement – can cover:

- How, in the event of the “breakdown” of the “marriage” or “domestic relationship”, any of the property or financial resources that either party had before they separated is to be dealt with;
- The maintenance of either of them during the marriage or relationship or after separation; or
- both of the above.

This type of BFA is made in contemplation of a marriage or domestic relationship and has no effect unless the parties in fact get married or commence to live together.

Section 90C or 90UC Agreement – must be:

- Between parties to a marriage or domestic relationship;
- In respect of either or both of:
 - How, if the marriage or relationship breaks down, any of the property or financial resources of either party had before divorce is to be dealt with; or
 - The maintenance of either of them during the marriage or after separation.

Section 90D or 90UD Agreement – must be in respect of:

- How any of the property or financial resources of either or both parties acquired during the marriage or domestic relationship is to be dealt with; or
- The maintenance of either of them.

BFAs – Planning Issues

- Can only cover the possible breakdown of the relationship or lifetime transfers
- Does not prevent a challenge to an estate or to super if a party dies
- Can be limited to particular assets, eg a loan from a parent
- Full disclosure of each party's assets & finances required

BFAs – Formalities

Among the formalities that must be met for a BFA to be implemented in Australia are:

- The BFA must relate to a domestic relationship (where there is, will be or was cohabitation) or to a marriage between the parties.
- If there is a prior BFA, there must be specific agreement ending that prior BFA.
- There needs to be a specification of how to know when the marriage or domestic relationship has broken down, eg a provision that the parties have lived separately for 60 days.
- The BFA needs to specify whether all of the parties' property is being dealt with, or only some with the rest to be dealt by the Court in the normal way.
- If maintenance is to be provided for, this must be specifically referred to. A BFA can be overridden by the Court if a party is left dependent on Government means tested pensions.
- Each party needs to make full disclosure in the document of their assets and financial affairs to minimise the risk that the BFA could subsequently be set aside by the Court.
- Each party to the Agreement must be advised by separate independent lawyers and the lawyers must sign certificates to that effect that are then attached to the Agreement.

Effect of Death

Death is not a "breakdown" of a marriage or domestic relationship within the meaning of the Act, although the State and Territory Supreme Courts have had regard to BFAs in determining apportionment of assets post death. There are also circumstances where parties could separate and one of them dies shortly after. In such cases the BFA would come into effect, its operation may clash with a Will and family provision issues may arise as well.

BFAs – Further Reading

**Australian Master Estate
Planning Guide –
Chapter 33 in the
Premium Edition**

**You Can't Take It
With You –
Chapter 17**

The latest version of this Pocket Summary is at
www.mooreslegal.com.au/services/estateplanning/pocketsummaries

Further Reading

- *Australian Master Estate Planning Guide* – Allan Swan, to be published (in both a Standard and Premium Edition) by CCH in 2012.
- *Estate Planning Documents* – Allan Swan, Moores Legal (includes many of the Pocket Summary series).
- *You Can't Take It With You* – Andrew Simpson, Wrightbooks.
- *Tax Issues in Family Law Property Settlements* – Peter Szabo, Moores Legal.

Australia-wide Seminar, Workshop & other Presentations – Allan Swan

EPSTTAP Introductory: • Estate Planning – The A-Z • Superannuation – The A-Z • Trusts – The A-Z.

EPSTTAP Advanced: • Estate Planning – Case Studies • Estate Planning Masterclass (includes both pages of this Pocket Summary) • Superannuation – Death Benefits & Binding Nominations • Testamentary Trusts – Drafting the 6 Major Types • Trusts & Deceased Estates – Income & Capital Distributions • AMEPG Chapter Workshops.

Allan's local Moores Legal client, community & discussion group topics are:

- Estate Planning – Protecting & Enhancing Wealth • Estate Planning – Vulnerable Family Members • Family Trusts – Income & Capital Overview • Farm Succession – Avoiding Tax Pitfalls & Anticipating Disputes • Providing an Estate Planning Service for Clients • SMSFs – Instalment Warrants, Pensions & Binding Death Benefit Nominations • Tax & Business Structures Overview • Update – Estate Planning, Superannuation, Trusts, Tax & Asset Protection.

To book Allan for any of these topics, contact Lilian Bruère on 03 9843 2153. All Pocket Summaries are copyright and are for general information purposes only and should not be relied on as (or in substitution for) legal or other professional advice.