A DIVORCE LAWYER DISCUSSES THE IMPORTANCE OF INCLUDING AN APPROPRIATE PROVISION IN A FINANCIAL AGREEMENT

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A divorce lawyer can advise you of the various provisions in the *Family Law Act 1975* (Cth) that allow for the protection of financial resources and matters. Often, when parties enter a relationship there is a discussion about financial resources; how they are to be used in the relationship or how they will be used for the maintenance of children to come from the relationship.

To account for these considerations, a financial agreement can be drafted by a divorce lawyer and signed by the parties. This type of document is a legally enforceable tool that provides a set of conditions for the distribution and future use of monies.

What is considered a financial matter?

The law outlines what conditions are considered to be a financial matter, however a divorce lawyer should recognise that the status of the relationship (i.e. if there is a marriage or not) will determine which provision of the act applies.

In the case of a marital relationship, parties can include matters that relate to the following:

- The maintenance of one of the parties; or
- The property of those parties or of either of them; or
- The maintenance of children of the marriage.

If the relationship is de facto then the following may be considered:

- The maintenance of one of the parties; or
- The distribution of the property of the parties or of either of them; or
- The distribution of any other financial resources of the parties or of either of them.

What is the agreement is made prior to marriage but signed after?

A recent decision in the Federal Circuit and Family Court of Australia considered the importance of timing when drafting and signing a financial agreement. In *Carran* [2022] FedCFamC2F 818, a s 90B financial agreement was first prepared by a divorce lawyer prior to the parties' marriage. However, it was not signed until afterwards.

The judge recognised an error in applying the provisions of s 90B(1)(a) which emphasises

parties must simply ‘contemplate’ entering a marriage. Instead, the parties had actually been married by the time the agreement was finalised and therefore this contravened the applicability of s 90(B)(1)(a). The more appropriate avenue should have been with reference to s 90C.

His honour said:

“*The erroneous reference to s 90B, almost certainly a product of human error by the parties’ solicitors, prevents that common intention from properly manifesting in the written instrument.*”

It is therefore crucial to seek a divorce lawyer who will recognise the subtle differences in family law provisions so that no discrepancies arise when enforcing a financial agreement.

Contact us on 1800 300 170 or email us at famlaw@matthewsfolbigg.com.au

Disclaimer

Family law situations can be complex and sometimes they can involve serious issues. Information outlined is proposed to provide general guidance only. Due to the seriousness of legal matters as well as the uniqueness of your individual situation, professional advice should be sought. For advice, please contact one of our Family Lawyers.