Binding financial agreements are Australia's 'prenups'. Here's why Lisa signed one https://www.abc.net.au/news on 26/06/23

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By Patrick Wright

Lisa sees her binding financial agreement as an "insurance policy".*(Supplied)*
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When Lisa Eriksson moved in with her new partner about a year and a half ago, she started to think about what it would mean for their finances.

At the time, Lisa, now 41, was running a business as a psychologist and owned her own home. She and her partner both had children from their previous relationships.

After doing some research, Lisa started looking into binding financial agreements, also known as BFAs. She eventually signed one with her partner, who has asked us to withhold his name for his privacy.

These documents are Australia's version of "prenups" — legal agreements that set out how assets are separated if a relationship breaks down.

"I see it as an insurance policy," she says.

"Both my partner and I are divorced. While both of us had a healthy financial separation, I still decided that since I have some of my own assets ... it was a wise thing to do."

While binding financial agreements can be useful for protecting your finances, they can be costly and complex.

Here's what you need to know if you're thinking of getting one yourself.

In a de facto relationship? It won't save you from the cost of a divorce

When Tara Leach's relationship started falling apart she was shocked to find out her partner might be able to take half of what she owned.

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Why your partner may be entitled to your assets

When Lisa and her partner entered their BFA, they'd been living together for nearly two years, but they weren't married.

She was conscious that they qualified as a "de facto" couple — meaning her partner could have a claim on her home, business or other assets if they separated.

"There's a general period of two years to be classified as a de facto relationship, but there are exceptions to that," says Kasey Fox, a Canberra-based family lawyer who advised Lisa on her BFA.

"For example, if you have a child together, you could qualify before the two years. Or if you can show that you've made substantial contributions to the other person's assets, that can get you in prior to the two years as well."

Without an agreement in place, Lisa's partner could make a claim on her assets for up to two years if the relationship broke down — and likewise she could claim on his.

While some couples assume their assets will be divided 50/50 , it's not that simple: a settlement would be determined by each party's circumstances and needs.

It cost Lisa and her partner about $10,000 to draft and execute their financial agreement.*(Supplied)*

How Lisa and her partner negotiated their 'prenup'

In the end, Lisa and her partner settled on a simple arrangement. They each keep assets held in their own name, such as Lisa's home and business, while assets held jointly are to be divided equally.

It's a common arrangement, Ms Fox says.

"[That means] if I come into a relationship with a house in my own name, and then we separate, and I still have that house in my name, that house will remain mine and my partner can't make a claim against it," she says.

In Lisa's case, it wasn't too difficult to find an arrangement that worked for her and her partner.

"I was just like, 'Hey, this is a thing that I've been thinking about … what are your thoughts on it?'" she says.

"I wanted to make sure he felt comfortable with it before we went ahead, and he was happy with it. We know that relationships do split up — we've had that experience."

While the agreement was Lisa's idea, her partner also saw the benefits.

"It made sense for both of us — coming from previous marriages and bringing different things into our relationship — to almost start fresh and distinguish what we were working towards as a couple," he says.

Why financial agreements aren't for everyone

There are a number of requirements for binding financial agreements to be valid. For example, each party must be provided with independent legal advice before entering the agreement .

It's important protection but it also means that drawing up a BFA can be a costly exercise.

All up, Lisa and her partner spent nearly $10,000, which included Ms Fox's fee, her partner's independent advice and an initial consultation for a quote with a third lawyer.

"It's a privileged thing to do. Not many of us have $10K lying around. It was a big expense," Lisa says.

Family lawyer Kasey Fox and her husband signed a financial agreement before they married.*(Supplied)*

How enforceable are binding financial agreements?

One concern that people may have about binding financial agreements is whether they're actually enforceable.

Ms Fox says there is a very high bar for the court to set aside — or disregard — these agreements, but it can happen

In one high profile case, the High Court found that a financial agreement entered into by a property developer and his fiancee was not fair or reasonable.

"This was a case where a very wealthy person was planning to marry someone from overseas," Ms Fox says.

"The court examined all the circumstances in the lead up to signing, and the fact that the agreement was very one-sided. In all of those circumstances, the court decided to set aside the agreement."

The court may also decide to set aside an agreement if there is fraud or non-disclosure involved, Ms Fox says.

Remember, you don't need to sign

Family law is complex, so it's important to get quality, independent advice if you're thinking about entering a BFA.

"At the end of the day, no-one has to sign a financial agreement," Ms Fox says.

"It's entirely within your power to decide whether or not the agreement that's being presented to you is one you want to sign."

This is general information only. You should consider obtaining independent professional advice in relation to your particular circumstances.

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