



**WHY YOU SHOULD CONSULT A FAMILY LAWYER AT EVERY
STAGE OF YOUR RELATIONSHIP**

OR

**“WHEN DO I NEED TO DO SOMETHING TO PROTECT MY
ASSETS”**

Brad and Angelina have been dating for 12 months. They are in love and looking forward to a future together.

Brad lives at home with his Mum. He is 30 years old and is an international airline pilot. He has saved nearly every dollar he has ever earned and has a share portfolio of blue ribbon stock worth \$200,000, a car and is debt free.

Angelina is an associate in a major accounting firm working towards partnership. She is 32. She lives in an apartment in the Docklands is worth \$650,000 and she is paying off a mortgage of \$500,000. The apartment is fully furnished. Angelina has a car which is subject to lease. She owes \$10,000 on her credit card.

Angelina has a 3 year old son Maddox. Maddox's father Billy Bob is property developer. He pays Angelina \$1000 a week in Child Support and Angelina uses the money to employ a full time nanny for Maddox.

Angelina's marriage to Billy Bob ended badly and she has told Brad that she never wants to marry again.

Brad's mum decides to sell her house and move to the Gold Coast to live.

Angelina says "why don't you move in with me?"

STAGE 1 – “LET'S LIVE TOGETHER”

Couples decide to live together for many reasons. Sometimes it is the obvious next step in a relationship. Sometimes circumstances are the reason, such as for Brad and Angelina. For almost every couple, however, whether they are of the opposite sex or are same sex moving in together is a positive and happy step in the relationship and indicates to the world that the couple is now exclusive.

Misconception Number 1: That “moving in together” is not as serious as getting married. How often is it said “I don't want to get married but we'll live together and see how things go, if it doesn't work out no harm will be done.”? How wrong can you be?

In reality the very date that you move in together marks the date that your legal obligations to each other change. From the day you start to live together you tax

status changes, your rights to Centrelink benefits changes, in fact some electricity companies even give different rates to couples over singles.

If things don't work out one of the first things you will be asked by your lawyer is "when did you start living together?" and/or what did you own on the date of cohabitation?"

Moving in together is a big deal and the longer you live together the more relevant the date becomes.

Many people I have spoken to are under the impression that you have to live together for two years before things change. It is true the status of a relationship does change from a family law point of view after 2 years. Your status also changes in other circumstances.

Despite the fact that Angelina never wants to marry again the recent changes in the *Family Law Act 1975* ("the Act") mean that if certain conditions are met, the legal obligations for Angelina and Brad are the same as if they married* **even if they have not been living together for two years.**

De facto and same sex couples who meet the criteria of the Act now have the same rights to property, superannuation and maintenance as married couples when they separate.

STAGE 2 – "LET'S GET MARRIED" or "I'M PREGNANT" or "LET'S SHARE EVERYTHING"

Unless otherwise formally agreed through a Binding Financial Agreement (sometimes called a Pre – Nup or a Cohabitation Agreement) the *Family Law Act 1975* applies to financial relationships from the moment that a couple marry, regardless of whether they have never lived together or if they have lived together for 10 days or 10 years.

Those in de facto relationships or same sex relationship are subject to exactly the same law ** as married couples if:-

1. the spouses have lived together in a relationship for at least 2 years; or
2. there is a child of the relationship; or
3. one spouse has made a substantial contribution (whether financial, non-financial or to the welfare of the family) and a failure to allow the claim to proceed would result in serious injustice to them); or
4. the relationship was registered in a prescribed relationship (this is a Victorian State register where same sex and de facto couples can register their relationship – to date it has not been used widely).

So what this means then is that if Brad sold his shares and put the money towards Angelina's mortgage but the property was not transferred into his name, he would still have rights even if they have not been living together for two years.

Or if Angelina had a child and became Brad's dependant whilst she cared for that child the *Family Law Act* would apply. Alternatively if Billy Bob goes broke and

stops paying child support and Brad instead starts paying for Maddox's nanny the Act may apply even though Brad is not Maddox's biological father.

Despite the fact that Brad is away for work almost half of each month if the parties are in a relationship defined by the Act, the Act applies. Even if Brad joined the air force and went to Afghanistan for a tour of service so he was not actually living with Angelina the Act would still apply if the parties regarded themselves as in a relationship.

There is a non-exhaustive list of factors that may indicate to a court that two people have a relationship to which the Act applies, the court can consider the following:-

1. the duration of the relationship;
2. the nature and extend of the common residence;
3. whether a sexual relationship exists;
4. the degree of financial dependence or interdependence, and any arrangements for the financial support, between them;
5. the ownership, use and acquisition of their property;
6. their degree of mutual commitment to a shared life;
7. whether the relationship is or was registered;
8. the care and support of children; and
9. the reputation and public aspects of the relationship.

If you are deemed to be in a relationship to which the Act applies, how your assets and financial resources will be divided at the end of a relationship is the same as if you had decided to marry.

STAGE 3 – "IT'S OVER"

Everyone should be aware that:-

- It does not matter who does something to cause the end of the relationship. If your partner sleeps with your best friend, a sex worker or your brother or sister their entitlements will generally be the same.
- You do not have to be married for your partner to make a claim on all that you earn during your relationship or **even what you had before the relationship begins.**
- If you buy assets together and share finances you may be vulnerable even if you do not live together full time.
- Even if your partner is perfectly able to support themselves, if they have done things to support your career and/or lifestyle or it they are financially dependent upon you, then they may be entitled to spousal maintenance and for you to keep her in the style to which they have become accustomed.
- Even if your assets are tucked away in a company or trust, if you control that company or trust then those assets are usually available for division.
- All the property, investments and superannuation you have, even if they are just in your name are at risk.

- Time limits apply when filing an application for property division; if you are married it must be within a year of divorce, if you are not married it must be within 2 years of the breakdown of the relationship although the court may grant leave to extend time limits in the event of hardship.

The Family Court will divide all of the property and superannuation that you and your partner have, irrespective of whether it is in your name or in joint names.

In simple terms when dividing assets, the court will look at what each of you had at the commencement of your cohabitation, what you have now, how assets were accumulated and the future needs of both of you.

Powers of the Court

The court now has the same range of powers when dealing with de facto and same sex couples as it does when dealing with married couples. The court can and will adjust property and superannuation interests and must take into account:-

1. The direct and indirect financial and non-financial contributions made to the acquisition, conservation or improvement of the assets of either or both of the spouses; and
2. Contributions made to the welfare of the family constituted by the spouses and any children of the relationship.

The court must then consider the financial circumstances of each of the parties and their **future needs** having regards to:-

1. their age and state of health;
2. their income, earning capacity, property and financial resources;
3. whether either has the care of a minor child of the relationship
4. their respective commitments for the support of themselves and others;
5. a standard of living that in all the circumstances is reasonable;
6. the extend to which one party has contributed to the earning capacity and financial resources of the other;
7. the length of the relationship and whether it has affected the earning capacity of either party
8. the need to protect the party who wishes to continue that party's role as parent; and
9. and child support payable to likely to be paid.

Spousal maintenance

One of the major changes of the new legislation is that now, those in de facto or same sex relationships that are governed by the Act have rights to spousal maintenance – previously this could only be claimed in Victoria *** by married couples.

Now the same factors must be considered for all relationships and a court can order spousal maintenance:-

1. when the respondent has capacity to pay; and

2. the claimant needs such maintenance because they are unable to support themselves due to;
 - a. having the care and control of a child of the relationship;
 - b. physical or mental incapacity;
 - c. any other good reason having regard to the wider financial circumstances and future needs of the party.

One suspects, however, that ongoing spousal maintenance orders for de facto and same sex couples will be as rare as they are for married couples. In general spousal maintenance is only payable until issues are resolved by the court or for a short and defined period, such as the time need to retrain (for example if your spouse is a trained nurse and has not worked for 10 years you may have to pay spousal maintenance whilst he/she retrains to return to the workforce).

How to take control from the very beginning

Fortunately it is fairly simple to protect yourself and your assets from relationship breakdown. Binding Financial Agreements have been law in Australia for a number of years and if executed properly and with legal advice will protect you. The recent changes to the law effecting same sex and de facto couples means that now you can sign a Binding Financial Agreement (“BFA”) even if you are not planning to marry but have decided to live together.

The purpose of such agreements is to allow parties to determine what will happen to their assets and financial resources should their relationship breakdown. The parties themselves are able to make commercial decisions about their own future in much the same way as they make decisions about employment and how they spend their money.

With one in three marriages ending in divorce, couples commencing relationships later in life when they have more assets, and with de facto and same sex couples now having the same rights as married couples more and more people should consider contracting out of the *Family Law Act* and signing a BFA.

What is a Binding Financial Agreement?

In simple terms a Binding Financial Agreement is a contract between two people, irrespective of gender, who are living together in a genuine domestic relationship and who want financial certainty as to what will happen in the event their relationship beaks down. A BFA can be signed by those people who are living together in a de facto or same sex relationship or those who are already married or intending to marry.

By signing a BFA couples such as Brad and Angelina can know from the start of the relationship the implications of financial decisions they make during their relationship. They are taking control rather than taking a risk and ultimately giving the control of what should happen to their assets to a court if they are unable to agree.

Ideally an agreement should be signed from the moment you start living together. However, if you have been living together or have been married for a while it is still possible and advisable to enter into such an agreement.

The agreements protect your assets and dictate what will happen in the unfortunate event of relationship breakdown. Agreements can be as limited or as detailed as you like. They can last for the entirety of your relationship or for a limited period.

You can agree to exclude just the income and assets you had before you started living together and divide what you earn whilst you are together. Alternatively you can agree that everything you have now or will earn during the relationship is excluded.

You may elect to exclude certain things but not others, for example you can agree that your partner can have half the house that you live in, but she can not have any investments or other property that you acquire. Any inheritance or gift from your family can also be excluded.

Misconception Number 2: There is a perception that signing such an agreement is not romantic. At the beginning of your relationship you might believe that your spouse will do the right thing by you and that you trust her.

At the beginning of the relationship when you are just “seeing how things go” you might think such an agreement is unnecessary, but then the months pass, you start merging your finances and then one of the events referred to above happens and you are deemed to be in a relationship governed by the Act.

And then at the end of the relationship trust may have disappeared and been replaced by anger and greed so that your spouse wants you to “pay”. He or she will look to you for money and assets so they can look after themselves in the future.

Who should sign a Binding Financial Agreement?

In simple terms everyone who is considering living together with a spouse should immediately get advice from a Family Lawyer on the advantages and disadvantages of signing a Binding Financial Agreement. There is no time limit as to when an agreement can be signed; it can be signed before to after you start living together or in anticipation of or even after your marriage.

The media constantly bombards us with stories of nasty celebrity divorces. No doubt Paul McCartney and Brittany Spears are examples of two people who wish that they had the ability to obtain legal advice and draft up an agreement as to how to protect themselves and their assets at the end of their marriages.

Other people who should seriously consider signing such agreements include:-

- those entering second relationships or marriages who have already been “burnt” by a previous separation;
- individuals who have significant assets or if one partner has significantly more than the other;
- those who wish to preserve the family business, family trust or family farm;
- those who wish to preserve assets for their children of previous relationships;

- those who expect or who have received significant inheritances that they wish to keep separate;
- those whose families wish to set their son or daughter up for life and thus want their family gifts to be acknowledged and retained by that spouse;
- where one party has substantial debts or exposure to debt;
- where one party is moving, giving up employment or doing any other act which affects their earning capacity because of the relationship;
- spouses who are giving up a career to enable them to stay home and care for children and or elderly relatives.

If your partner is not willing to sign such an agreement then maybe you should question what they expect from you financially. Of course if the relationship stands the test of time then such an agreement will be unnecessary, but why take the risk?

You do not question it when it is suggested you get investment or tax advice. You should also consider getting Family Law advice and controlling your assets in the event your relationship breaks down. Otherwise you are giving away control of your assets and financial resources to a court to decide what should happen under the Act.

*South Australia and Western Australia have not adopted the new legislation and de facto couples in those states are governed by different legislation

** The new law with respect to de facto and same sex couples does not apply if the couples separated prior to the commencement of the amendments to the Act on 1 March 2009

*** The laws with respect to de fact spousal maintenance varied between the various states and territories