Pre-nuptial agreements – who needs them and why?

written by SRFL Team | 14 August 2023



The short answer is – anyone who wants to avoid the expense and delays associated with finalising their property settlement through the court system.

No one enters a relationship thinking it will fail. But the unfortunate fact of the matter is, many do. Having a financial agreement (or a 'prenup', as they are more commonly known) allows you and your spouse to decide what's going to happen with your assets in the event you separate, while you're still together and on good terms.

What is a prenup?

A prenup is a legally binding agreement entered into prior to or during a de facto relationship or marriage. It is a 'contract' of sorts (as opposed to a court order), that sets out who gets what if the parties happen to separate.

A prenup can deal with all of the parties' assets or just some of them. It can also deal with assets that don't exist yet (i.e. properties that might be purchased in the future, or inheritances that are yet to be received).

What is typically included in a prenup?

Prenups can deal with property, inheritances, businesses, spousal maintenance (during and after a marriage, but only after the breakdown of a de facto relationship) and (in certain circumstances) child support.

Prenups can deal with assets and liabilities brought into the relationship, as well as those acquired during. Prenups can also deal with all of the parties' assets, or just certain ones. We generally caution against only dealing with some assets, as this leaves the others open to lengthy and expensive litigation.

Why should I have one?

It is a common misconception that a prenup is only required if one of the parties to the relationship or marriage is very wealthy. That is not the case. While financial agreements are an excellent tool to protect assets brought into a relationship, there are several other benefits including:

1. To protect assets you don't have yet, but might acquire during a relationship, such as an inheritance. This is particularly the case if you have children from a previous relationship and want to make sure their inheritance is also protected.
2. To preserve, for future generations, family farms or businesses that have been in the family for generations.
3. To recognise gifts received prior to or during the marriage or relationship, or significant debts brought into the marriage or relationship, and ensure these are taken into account at separation.
4. To give greater weight to the financial contributions of a higher income earning spouse during a marriage or relationship than the Court (bound by the Family Law Act) might otherwise give;
5. To afford transparency in respect of finances from the outset. Entering into a prenup requires you and your spouse or partner to provide full disclosure of all of your assets and liabilities. This opens the door to ongoing open and transparent communication regarding finances and allows parties to avoid 'marrying into' debt they didn't know about.
6. To have comfort in knowing your property settlement is sorted.

Do prenups expire?

An agreement entered into prior to or during a de facto relationship (pursuant to the de facto provisions of the Family Law Act) will cease to be binding if the parties marry each other.

Otherwise, no, prenups do not expire. They can, however, be set aside by a Court for a number of reasons, including (but not limited to):

1. If the Agreement was obtained by fraud (including non-disclosure of a material matter).
2. If the Agreement is void, voidable or unenforceable (because it is uncertain, incomplete or because one party was pressured into signing).
3. If circumstances have arisen since the agreement was signed that make it impossible for all or part of the agreement to be carried out.
4. If, since signing the agreement, a material change in circumstances has occurred that would mean one of the parties to the agreement would suffer hardship if it were not set aside.

Because of (3) and (4) above, we recommend reviewing the terms of your financial agreement regularly. If circumstances change, you can terminate the old agreement and enter into a new one.

If a financial agreement is set aside, the parties fall back into the family law system, and their assets and liabilities will be divided pursuant to the Family Law Act.

How do I broach the subject with my spouse or partner?

Prenups are about as unromantic a conversation as you can have… or are they? We think there's a lot that can be said for promoting openness and honesty in communication and offering certainty and financial security in the event things don't work out as planned. It's sounding more romantic already, isn't it?!

Focus on the positives that a prenup can offer you both and be sure to reiterate (very clearly) that you hope to never even need to read the document after it's been signed, and the conversation should go better than expected.

Free initial consultation: Contact us to discuss your personal situation.

We hope you have found this information to be of use in giving you an understanding of our firm and the work we do specifically in relation to Family Law and matters related to Family Law. We know that every family law matter is unique, and your personal circumstances require you to receive personalised legal advice that considers your specific needs, objectives, and circumstances. We strongly encourage you to contact our office to talk to us about your personal circumstances and how this information specifically applies to your situation. We welcome you to get in touch with us to book a free initial consultation with our team.

We are a boutique legal firm focused on family law. Our team has a depth of experience and expertise that cannot be matched by legal practices that work across numerous areas of law.
Wherever you are in the separation process, our team can assist you. Book your free initial consultation with one of our family lawyers today, phone during office hours on 07 56 466 466 or book online via our meeting calendar here.
