

# Pre-Nups - are they worth the paper they are written on?



**Sarah Quilliam**  
**Director//Family Law**  
**Accredited Specialist**



In short, pre-nups are worth your while IF:

- they are carefully and thoroughly prepared;
- the parties to the agreement receive the right legal and financial advice; and
- you actually need one.

These types of agreements are not suitable for everybody.

## WHAT IS A PRE-NUP?

A “pre-nup” (short for “pre-nuptial agreement”) is a type of Financial Agreement (contract), which is entered into by people who intend to marry, and wish to predetermine their property and/or maintenance matters.

A Financial Agreement can also be entered into by people who:

- have not yet commenced a de facto relationship;
- are already in a de facto relationship;
- do not intend to marry;
- are already married (whether they are in a relationship or separated); or
- are divorced.

This article will focus on the Financial Agreements entered into by people who are about to begin a de facto relationship, or who are already in a relationship/marriage (but not those who have separated or divorced). For ease, I will use the term “Financial Agreement” to describe these contracts.

## WHAT CAN I INCLUDE IN MY FINANCIAL AGREEMENT

Financial Agreements can be used to deal with:

- how all or any of the property or financial resources of the parties are to be dealt with now, and in the event of

separation;

- spousal maintenance matters; and
- incidental or ancillary matters relating to property and/or spousal maintenance matters.

Many people enter into Financial Agreements to protect all or some of their assets from a family law property claim by their partner/spouse should they separate in the future. Some people wish to manage what they will divide to their partner/spouse in the event of separation, rather than potentially leaving this up to a Judge to decide. This can include a sliding scale of entitlements that increase the longer the relationship lasts.

There are requirements that must be met before a Financial Agreement can be enforceable. This means that written agreements that do not meet the specific requirements under the Family Law Act 1975 may be unenforceable.

A properly prepared Financial Agreement that meets the relevant requirements, is the only way you can protect your assets in a way that can be enforced. A Financial Agreement is not a one-size-fits-all document, and it should be tailored to your particular requirements.

## ARE FINANCIAL AGREEMENTS WATERTIGHT?

The short answer is ‘no’. This is because the Family Law Act 1975 allows the Court to set aside a Financial Agreement in certain (but limited) circumstances, including:

- Fraud (including non-disclosure of assets).
- Duress / unconscionable conduct / undue influence. Each of these terms mean different things, but each involves a person’s ability (or lack thereof) to exercise free will when entering into a Financial Agreement. For those interested, an

interesting judicial discussion on these matters can be found in the High Court decision of *Thorne v Kennedy* [2017] HCA 49.

- The birth/adoption of a child, such that the carer for that child will suffer hardship if the Financial Agreement is not set aside. If you are planning on having children with your partner, then you must tell this to your lawyer during your first consultation.
- Impracticability – an inability to comply with terms due to some intervening event.
- Failure to comply with the legislative requirements of Financial Agreement e.g. obtaining independent legal advice.

Just because a Financial Agreement is very favourable to one party, that fact alone does not mean that the Court will set aside the Financial Agreement – people are allowed to agree to terms that are disadvantageous to them. However, when a Court is considering allegations of (e.g.) unconscionable conduct, then a very one-sided agreement may form part of the Court's consideration.

Your lawyer will tell you if there is some aspect of your agreement that may place you at risk of an application in the future to set it aside. Most of the time, these risks can be avoided or mitigated. Sometimes they can't, and this may later give rise to an application to set it aside, which is why these agreements should not be described as "watertight".

A well-drafted Financial Agreement should withstand a challenge in Court, unless something unforeseen has occurred. A Court application to set aside a Financial Agreement is unlikely because they are often difficult, expensive and complex applications to make. Usually, the cost and risk of making such an application will deter people from taking that action.

### CAN I SIGN A FINANCIAL AGREEMENT WITHOUT GETTING ADVICE FROM A LAWYER?

No – not if you want the Financial Agreement to be enforceable. A mandatory requirement of a Financial Agreement is that each party obtains independent legal advice on the effect of the Financial Agreement on them, and the advantages and disadvantages of that agreement to them.

Financial Agreements oust the jurisdiction that the Court would otherwise have to determine a property settlement and/or spousal maintenance matters in the usual way. This means that parties to an agreement give up their rights to have the Court decide their entitlements.

The lawmakers wanted to ensure that before people do that, they are fully aware of the potential consequences of that decision,

which is why each party must obtain independent legal advice (meaning legal advice from different lawyers) before entering into a Financial Agreement.

### WANT TO KNOW MORE?



If you would like advice as to whether a Pre-Nup is right for you, please contact our office for a free chat with one of our solicitors.

## GET STARTED

anywhere,  
any time with  
our online  
questionnaire

- ◆ DIVORCE & SEPARATION
- ◆ PROPERTY SETTLEMENT
- ◆ CHILDREN & PARENTING
- ◆ RELATIONSHIP AGREEMENTS
- ◆ DOMESTIC VIOLENCE
- ◆ WILLS & ESTATES

*working together*

**P.** 07 5458 9000

**E.** [reception@pippacolman.com](mailto:reception@pippacolman.com)

**A.** 19 First Avenue, Maroochydore

**[www.pippacolman.com](http://www.pippacolman.com)**