

The Sydney Morning Herald

MONEY PLANNING & BUDGETING MARRIAGE

Pre-nups: Good in practice but try getting one

By **Emily Chantiri**

June 12, 2019 – 12.00am

It's a common scenario. Couples join forces and one has more assets than the other.

In order to protect each partner's property, a binding financial agreement – more commonly known as pre-nuptial agreement – is drawn up before they marry, setting out the division of their assets should the relationship fail or one of them dies.



Creating a pre-nup agreement, setting out the division of assets should a relationship fail, is a lot more difficult than it appears. FIONA BIANCHINOTTI

Kevin, 53, and his partner are both happy to sign a pre-nup. They agree that assets held prior to their coming together will remain with each party and any future assets purchased together will be shared.

However, getting a formal pre-nup in place to formalise their commitment has become a difficult task because of the need for the contract to meet both complex family and contract law conditions.

After three failed attempts at finding a lawyer, Kevin feels frustrated.

"We began this process five years ago and were told it would cost about \$5000," Kevin says.

"We didn't have the ready cash, which delayed the process somewhat.

"On the second attempt, we found out I also had to retain my own lawyer, to make sure I was happy for my partner to maintain her assets – more delays and costs."

Last year, the couple tried again. This time, their chosen lawyer said he no longer drew up binding financial agreements because of increased liability risks from being sued for negligence from parties entering into them.

Hayder Shkara, principal of Justice Family Lawyers, said lawyers have become far more careful and vigilant since a landmark ruling in 2017, when the High Court of Australia set aside a couple's binding financial agreement.

'Big scare'

Shkara says the court found there was unequal distribution of power between the husband and wife.

"Under the Family Law Act, a judge must consider whether there will be a just and fair outcome resulting from the decision," he says.

"This was a big scare for the legal profession and has definitely had a knock-on effect.

"It's made the profession more sceptical after the court said it would not uphold the agreement."

“The difficulty for lawyers is a possible financial exposure to a claim made against them for negligence, if an agreement fails”

Kevin says his inability to create a pre-nup is frustrating, especially since he and his partner are in full agreement on how their assets would be divided.

"It's straightforward," he says. "The law should make it easier for people to protect their assets."

Family law specialist Franco Pomare, of Norton Law Group, stopped preparing binding financial agreements about five years ago, following increased liability risks for the lawyers involved.

"The difficulty for lawyers is a possible financial exposure to a claim made against them for negligence, if an agreement fails," he says.

Templates 'don't work'

"The exposure of being sued can come from either party and not just your own client."

Pre-nups have a place in family law but they are not a guarantee against claims by a partner, he adds.

"They work best when using family law specialists and, ideally, someone who understands contract law, too.

"However, templates don't work. At the end of the day, it is a contract that you enter into and it must meet the requirements of both family law and contract law."

More often these days, he says discretionary trusts are used to protect assets.

Pomare says these can be expensive and there are often capital gains tax and stamp duty implications to consider.

"Regretfully, one needs to approach asset protection as a business decision and rely on the advice of specialist lawyers," he says.
