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Recent Developments regarding Binding Agreements and some interesting uses for them

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Topics covered

- Property settlement process & outcome in the absence of an agreement
- The alternative – the Binding Financial Agreement or de facto Agreement
- Some interesting uses
- Recent cases & their effect

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Family law basics

- Property settlement
- What comprises the pool of assets?
- How is the division of assets worked out?

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What is in the matrimonial pool of assets?

- Section 79 of the *Family Law Act 1975* empowers the Family Court to make orders with respect to property
- **'Property'** is an expanding concept in the eyes of the court

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What is in the matrimonial pool of assets?

- It is a myth that the following assets are automatically excluded from the matrimonial pool:
 - inheritances or gifts
 - assets brought in by one spouse
 - assets held in the names of companies, partnerships, trusts and third parties or by one spouse only

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Section 79 Property Settlement – Four Step Process + maintenance

- 1) Value matrimonial assets
- 2) Compare financial and non-financial contributions of spouses
- 3) Assess each spouse's future needs – Section 75(2) Family Law Act
- 4) Is the outcome produced just and equitable?
- 5) Assess need for spousal maintenance – Sections 72 and 74

Contributions and size of pool

- No presumption of equality of contribution (although 50/50 division is often the outcome after a long marriage)
- Extraordinary or entrepreneurial contributions – perhaps some additional weight where the pool of assets is very large – grey area
- In the past, the smaller the pool, the more the non-business spouse likely to receive – again social trends changing here

BINDING FINANCIAL AGREEMENTS



General overview of financial agreements

- Four Types
 - Financial agreements made prior to marriage under Section 90B (commonly referred to as **pre-nuptial agreements**)
 - Financial agreements made during a marriage prior to separation under the first limb of Section 90C

General overview of financial agreements

- Financial agreements made during a marriage but after the parties have separated under the second limb of Section 90C
- Financial agreements made after divorce under Section 90D

Requirements for a binding financial agreement

- In order for a financial agreement to be binding upon the parties and upon the Court it must meet the following criteria under section 90G:
 - (a) it must be signed by both parties
 - (b) the agreement which is being entered into must not have been terminated or been set aside by a court

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Requirements for a binding financial agreement

- (c) after the agreement has been signed the original agreement must be given to one party, and a copy to the other
- (d) certificates of independent legal advice signed by the practitioner representing each of the parties must be annexed to the agreement


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Mandatory legal advice for binding financial agreements


- The certificates of independent legal advice must confirm:
 - (i) the effect of the agreement on the rights of the parties
 - (ii) the advantages and disadvantages at the time the advice was provided of making the agreement


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Effect on the rights of parties

- Spouses are unable to apply to the Court for property settlement or spousal maintenance contrary to the provisions of the financial agreement
- Two exceptions to this principle –
 - **Centrelink recipients** - if one party can establish that at the time the Agreement came into effect they were unable to support themselves without an income-tested pension or benefit, the party can apply to the Court for a maintenance order
 - Successful application using a ground under **s.90K** to set aside a financial agreement


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Setting aside financial agreements

- Grounds upon which financial agreements may be set aside – Section 90K:
 - the agreement was obtained by fraud including non-disclosure of a material matter
 - the agreement is void, voidable or unenforceable


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Grounds for setting aside

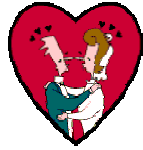
- in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or part of the agreement to be carried out
- since the making of the agreement, a material change in circumstances relating to the care, welfare and development of a child of the marriage) as a result of which the child or the parent who has care and responsibility for the child will suffer hardship if the court does not set the agreement aside



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Grounds for setting aside

- in the making of the financial agreement a party to the agreement engaged in conduct that was in the circumstances unconscionable




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19 Grounds for setting aside

- a payment flag is operating on a superannuation interest covered by the Agreement (with no reasonable likelihood that the flag will be terminated by agreement under the Family Law Act)
- the Agreement covers at least one superannuation interest that is worth under \$5,000 and is therefore unspittable for the purposes of the Family Law Act

20 General issues to be conscious of regarding Agreement

- full and frank disclosure requirement
- can be limited to 1 asset or a category of asset or cover the field
- can protect a client's interest in a trust, company or 3rd party investment

21 General issues to be conscious of regarding Agreements: bankruptcy

- Transactions completed under a Financial Agreement are protected from the Trustee in Bankruptcy, subject to anti-avoidance measures
- An Agreement can be set aside if it was entered into by either party to defraud or defeat a creditor (or with reckless disregard of the interests of a creditor)

22 General issues regarding Agreements: Spousal maintenance

- For various reasons, some agreements only deal with spousal maintenance and some do not deal with spousal maintenance at all
- Parties may elect to deal only with property settlement in their Binding Financial Agreement and leave spousal maintenance issues to be determined after separation either by agreement between the parties or by the Court

23 Some practical advantages of Financial Agreements

- Privacy - agreements do not need to be registered or sanctioned by the court – agreements minimise the risk of family law litigation and airing 'dirty laundry'

24 More practical advantages of Financial Agreements

- Can be used to protect/quarantine all or some of the assets from the other spouse – especially initial contributions made at the commencement of the relationship
- Agreements confer stamp duty and CGT relief, subject to certain exceptions, for separated couples (as de facto agreements under the Property Law Act and family law orders also do)

Even more practical advantages

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- Give as much finality as is available at law in respect of spousal maintenance
- Pre-nups and section 90C (limb 1) agreements are much more cost-effective than negotiating about property, financial resources and/or maintenance after separation

Disadvantages

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- Financial agreements cannot be varied or updated – they must be terminated and a fresh agreement executed
- May not reflect the entitlements the parties would be awarded by a Court
- Section 90B and 90C (limb 1) agreements can cause difficulty in the relationship
- Problematic to alter decisions retrospectively – against whom is most protection sought?

One final disadvantage

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- Section 90B or 90C (limb 1) agreement may prove an unnecessary expense ... after all, 50% of marriages do last forever!



Agreements may contain...

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- Sliding scales or formulas of property and maintenance entitlements based on length of marriage, number of children etc
- Pet maintenance payments following separation
- Champagne, white wine and red wine division
- Sunset clauses with provision for regular reviews
- Confidentiality clauses

Agreements are increasingly sought for ...

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- Collateral loan agreements
- Trust cloning
- Estate planning and asset protection – including for:
 - High net worth clients (especially when compared with their spouse)
 - Those not marrying for the first time
 - Clients with children from a previous relationship

De facto agreements – examples

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- Same-sex couples
- Couples who live together on a genuine domestic basis in a relationship based on intimacy, trust and personal commitment
- “Adult sleeper” couples – does not require 7 nights per week
- 2 year relationship, a child or significant contributions to family welfare or property and financial resources
- Combined cohabitation and pre-nuptial agreements

Case 1 – Ju and Ju

- March 2006 Family Court case in NSW, Ju and Ju
- Binding financial agreements are not subject to the scrutiny of an independent third party (with the exception of the requirement for legal advice under the *Family Law Act*)
- Thus, there is an absolute requirement for strict compliance with the legislation - minor variations will invalidate the Agreement

Husband's arguments

- The solicitors' certificates did not contain exactly what was required by the sub-section in force at the time. The Agreement was signed in November 2004. Amendments made to the legislation 10 months earlier. The certificates were out of date, including that they omitted commas that appeared in the legislation in force at the time
- The certificates recorded that each solicitor explained the document to his client before the client signed, "although I did not personally witness him [her] sign the agreement"

Judge's findings

- The correct certificates could not "cure the defect" in the body of the document
- Each solicitor clearly did witness his client's signature on the document. However, the certificates stated that they did not. This "causes me further concern and to some extent seems to lay a taint over the whole of the document ... I am ... left unable to state with any certainty what was actually done and what was actually explained to each of the parties and the manner in which the document was actually executed and witnessed"

Implications

- Confirmation that Agreements **must** be prepared with scrupulous attention to detail and legislative requirements
- Anecdotally, many NSW family lawyers have developed a strong aversion to preparing these Agreements as a result of this case

Case 2 - Black and Black

- September 2006 Family Court case in Tasmania, Black and Black
- Opposite approach – not strict 'black and white' approach


Husband's arguments

- There had been a change to the Agreement after the certificate was issued by the husband's solicitor. No new certificate was issued
- The certificate should have been annexed to the agreement plus a statement that the parties received independent legal advice should have been in the body of the agreement
- The agreement was so uncertain it must be void, including because of inconsistent numbering
- The wife engaged in unconscionable conduct, duress, misrepresentation and fraud

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Judge's findings

- The amendment had been within the scope of the original legal advice given before the amendment was made. There was not requirement for a new certificate to be issued
- The certificate was annexed to the agreement and it was therefore "*contained within the agreement*" as required
- Inconsistent numbering did not void the agreement – "*the intent of that provision in the agreement is clear from its terms. When construing a document a clause must not be considered in isolation, it must be considered in the context of the whole document*"
- The wife's conduct alleged by the husband was not made out in evidence


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Black and Black: shades of grey


- Considered the intent of the legislation to be to provide an informal way to document parties' agreement ... substantive compliance with the legislative requirements is sufficient
- "*Courts should not make the legal practitioners and the parties cross all of the "t's" and dot all of the "i's" to enter into and give effect to financial agreements. The form should not defeat the substance.*"


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What can we make of these two cases?


- *Ju and Ju* and *Black and Black* are equally authoritative
- Nobody should relax their practices on account of *Black and Black*


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Case 3: Ruzic and Ruzic


- March 2007 Family Court case in Parramatta, *Ruzic and Ruzic*
- The parties entered into a Binding Financial Agreement in February 2006
- The solicitors' certificates were out of date when they were signed - they met the requirements of the 2000 legislation, but did not comply with the 2003 amendments


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Ruzic: facts


- One solicitor realised the error after reading *Ju and Ju*, and wrote to the other solicitor
- Each solicitor executed a fresh solicitor's certificate that complied with the amended legislation
- The new certificates were physically substituted for the old certificates


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Ruzic: judge's findings

- It was held that the new certificates could substitute for the defective certificates – the legislation only requires certificates to be annexed to the Agreement
- Even if this was not the case, the Court could have remedied the agreement pursuant to equitable principles


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Ruzic: judge's findings

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- The new certificates were sufficient to rectify the original error and the agreement was thus binding on the parties
- This conclusion could not have been reached as readily if the body of the agreement did not make it clear that the relevant advice was given to each party as required by the legislation (ie. independently, and prior to entering into the agreement)

Summary

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- Agreements can protect a small initial contribution to a simple pool
- Equally, they can protect extensive wealth or business interests in a complex group structure
- Strict compliance with disclosure and formal requirements represents best practice, given recent cases
- Depending on clients' priorities, Agreements can offer asset protection against spouses, third parties, creditors (subject to anti-avoidance provisions)
- Can dovetail with an integrated estate plan or business structure – loans, trust cloning

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