TAUSSIG CHERRIE FILDES Lawyers

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BINDING FINANCIAL AGREEMENTS IN BLENDED FAMILIES

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ABOUT THE SPEAKER

Paul Fildes was previously the head of Middletons' Family Law Practice Group. He merged with Taussig Cherrie & Associates on 4 October 2010, forming Taussig Cherrie Fildes.

Paul is an Accredited Family Law Specialist and has been practising in family law since 1983. He has completed a Post Graduate Diploma in Family Law and is a trained Family Law arbitrator and mediator. He is also a trained collaborative lawyer. Paul has been ranked as one of Victoria's leading family lawyers by Doyle's Guide for Melbourne 2017.

Paul specializes in large-scale family property litigation, international relocation cases, complex Financial Agreements, de facto property disputes and tax-effective settlements.

Paul is a presenter of *Case Watch* on the Television Education Network which produces educational presentations and material for lawyers. He has published a number of papers and comments on current family law issues. Paul also presents numerous seminars to various professional bodies on a wide variety of family law issues, with an emphasis on complex financial matters.

Paul is a Fellow of the International Academy of Family Lawyers (IAFL) and was a former Chair and Executive member of the Family Law Section of the Law Institute of Victoria. He was previously the Victorian Solicitor Representative of the Family Law Section of the Law Council of Australia, and a former Chair of the FLS National Biennial Family Law Conference. Paul was also on the Board at Relationships Australia (Vic) between 1990 and 2000.

INTRODUCTION

Blended families are becoming increasingly common as individuals enter into second or third relationships during their lifetime. The *Family Law Act 1975 (Cth)* ("the Act") enables parties to a marriage or de facto relationship to enter into a financial agreement either before commencing the relationship, during the relationship or after the breakdown of the relationship.

TYPES OF AGREEMENTS

A financial agreement is a written agreement between two or more people which cover the division of property between the parties, superannuation and/or maintenance.

The types of agreements available are as follows:

Part VIII agreements:

- s 90B : in contemplation of marriage;
- s 90C : during a marriage;
- s 90D : after divorce;

Part VIIIAB agreements:

- s 90UB : in contemplation of a de facto relationship;
- s 90UC : during a de facto relationship;
- s 90UD : after the breakdown of a de facto relationship.

BEST PRACTICE REQUIREMENTS

The sixth edition of the *Australian Master Family Law Guide* provides the following best practice guidelines with respect to financial agreements at ¶19-160:

1. the agreement is signed by all parties and the statements of independent legal advice are signed by their lawyers in the same location and at about the same time;

2. each page of the agreement is signed by each party;

3. the statements of independent legal advice are annexed to the agreement;

4. a detailed letter of advice is given by the legal practitioner to their client before the agreement is signed by the client;

5. the client signs a copy of the letter of advice prior to signing the agreement, acknowledging that the letter and agreement have been read and understood;

6. if the agreement is altered after the advice is given, updated written advice is given;

7. although there is no current requirement that each party be given a copy of the agreement (only copies of the two statements), each party should receive a copy of the executed agreement;

8. it is best to have one original rather than multiple originals which may be different;

9. signing the statement of independent legal advice and exchanging copies of the statements before the agreement is executed may assist in proving later that the advice was provided to each party before they signed the agreement;

10. detailed file notes of conversations of advice and the exchange of documents, should be kept if not done by letter;

11. make sure the legal practitioners are truly independent;

12. can the client understand the legal practitioner? Do they speak the same language? Is the client literate?

13. obtain a full statement of the client's financial position. Instructions must be comprehensive and complete;

14. consider and discuss with the client the circumstances which are reasonably foreseeable in the particular relationship (e.g. moving overseas or the birth of children);

15. set out in the financial agreement any reasonably foreseeable circumstances which have been considered;

16. advise the client that failure to disclose income or assets may be a ground for setting the agreement aside; and

17. use precedent agreements only as a guide. Each client will have different goals and different personal and financial positions.

COMPLIANCE WITH SECTION 90G

In ***Black & Black*** [2008] FamCAFC 7, the court heard an application by the husband to set aside a financial agreement executed in 2002. The husband argued three flaws which offended s 90G(1) of the Act:

- the agreement was amended by the parties after the certificates of independent legal advice were signed;
- the certificates were not annexed to the agreement;
- the agreement did not contain within its body a statement of independent legal advice.

The primary judge, Benjamin J adopted an objective approach in interpreting s90G and concluded that the agreement was binding.

On appeal, the Full Court overturned Benjamin J's decision stating at [44] and [45] that:

> *The agreement entered into by the parties in this case did not refer to the specific requirements detailed in s 90G, although the certificate did*.
>
> *In our view, such an omission meant that the agreement did not comply with the provisions of s 90G and was not binding upon the parties… strict compliance… is necessary to oust the court's jurisdiction to make adjustive orders under s 79.*

Black resulted in a 'strict compliance test' which increased the possibility of agreements being found to be invalid due to minor housekeeping errors by practitioners.

In an attempt to restore certainty of binding financial agreements, s 90G(1A) was introduced through the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009 (Cth).* A more realistic view was taken of the likelihood of all lawyers following the letter of the law all the time in s 90G when preparing, executing and exchanging documents.

Technical non-compliance with the formal certification requirements of s90G is no longer immediately fatal to the agreement. Section 90G was amended, retrospectively, to require actual independent legal advice for both parties as opposed to certificates stating advice had been given being annexed to the agreement.

Although the advice itself must still be provided before the client signs the agreement, the amendments allow the solicitor's statement to be provided before or after the parties sign. This means that procedural untidiness regarding the sequence of signing and exchanging statements will not automatically invalidate an agreement.

Section 90(1)(ca) provides that a copy of each legal practitioner's statement be given to the other party or their legal practitioner. The provisions allow the statement to be annexed, but this is not mandatory. It is, however, recommended that practitioners continue annexing the statement to the financial agreement and give a copy to the client.

The Court has discretion to uphold an agreement despite the formal requirements in s 90G not being complied with, if it is satisfied that it would be unjust and inequitable if the agreement were not held to be binding.

Case Law

Pascot & Pascot [2011] FamCA 945	The advice given to the wife by her legal practitioner was incorrect. She was told by her solicitor that the agreement would not be binding. She argued that, as incorrect advice had been given to her, this amounted to the advice not having been given at all and the s 90G(1) requirements had not been met. Le Poer Trench J, declined to set aside the agreement on this ground as the husband was unaware of the erroneous advice and said at [343]: *... The provision of the independent legal advice was a matter completely out of his control. It seems to me to be completely unfair to the husband to set the agreement aside for a reason which is completely outside his control. To take that action would, it seems to me, potentially make s 90G and the whole intention of creating 'binding financial agreements' unworkable and give rise to uncertainty*.
Sullivan & Sullivan [2011] FamCA 752	The wife signed the financial agreement prior to marriage, however, the husband signed subsequent to the marriage. The agreement itself was described as being a s 90B agreement. The husband sought to rectify the agreement and the wife sought to set it aside. Young J concluded that as the husband did not receive the requisite

	advice under s 90B the agreement was not a financial agreement under the Act, that it was not enforceable, that it was not binding and was not able to be rectified.
Parker & Parker (2012) FLC 93-499	Strickland J was not satisfied that either party received the necessary legal advice before they signed an amended agreement. Neither the terms of the agreement nor the legal practitioners' certificates positively indicated this had occurred. His Honour said that advice of a general nature was insufficient and found that the s 90G(1) requirements were not met. The Full Court in *Parker* confirmed that courts may look behind a Statement of Independent Legal Advice and find that, even if the s 90(G)(1) requirements are being met on their face, the agreement is not binding. This means that a lawyer who has done everything necessary to meet the s 90(G)(1) requirements may ultimately be faced with an agreement which is determined to be non-binding if the lawyer for the other party failed to meet the required standard.
Hoult & Hoult (2013) FLC 93-546	The wife argued that she did not receive independent legal advice. The Full Court was prepared to look behind the Certificate of Independent Legal Advice to ascertain whether the advice was given. The Full Court's judgment includes a useful discussion of the burden of proof. The party who seeks the protection of the agreement must prove that the agreement is binding. However, the signed certificate of legal advice is prima facie proof that advice was given and the burden of disproving that the requisite advice was given then falls to the party seeking to impugn it.
Wallace & Stelzer (2013) FLC 93-566	The Full Court said at [103]: *Although there appeared to be some suggestion in the husband's case before us that in a case such as the present the court is required to*

	consider the accuracy of the legal advice provided... We note that in the Full Court decision of Logan, and relying on Hoult, it was held that the only enquiry necessary is as to whether advice was given, and not as to the content of that advice.
Bidwell & Bidwell [2014] FamCA	A financial agreement purported to be a pre-nuptial agreement but did not state that it was made under s 90B. Rees J found that this was a mandatory requirement under s 90B(1)(b) and therefore the agreement was not a financial agreement for the purposes of the Act. Therefore, it could not be a binding financial agreement.
Piper & Mueller [2015] FamCAFC 241	The parties executed a single financial agreement which purported to be a financial agreement entered into pursuant to section 90B and 90UC of the Act. The marriage did not eventuate. At trial the appellant contended that the document was not a binding financial agreement because it impermissibly purported to be an agreement under both Part VIIIA and Part VIIIAB. He also complained that he was not given the advice required to be given in order for the agreement to be binding. Can a financial agreement be both an agreement under s 90B and s 90UC at the same time? Judge Willis said at [179] and [181]: *...I am not satisfied that the two provisions, s 90B and s 90UC are mutually exclusive... these parties were engaged and therefore contemplating marriage....these parties were in a de facto relationship. I am not satisfied that by making an agreement under both of these sections of the Act, that this is a fatal technical error or fatal to the agreement. The parties in this matter fitted in my view, squarely under each section.* *..It seems to me that these are the type of technical issues that lead to the introduction of the Efficiency Measures Act 2010 which was in response to Black & Black, which illustrates what the legislators intended in this*

	remedial legislation, which was not a narrow strict interpretation of the requirements of an agreement. The Full Court said: *...There is no reason why a single agreement could not deal with the distribution of their assets on the breakdown of their de facto relationship or the ending of their subsequent marriage. [30]* *...There is no reason why both types of advice could not be given to a party prior to signing a document containing both agreements. [37]* *It follows that without more, there is no statutory imperative which requires that these agreements must be contained in separate documents. [38]* As to the appellant's contention that he had not been given the requisite advice in order for the agreement to be binding, the Full Court said: *Her Honour's conclusion that the financial agreement is binding within the meaning of s 90UJ is plainly correct and should stand. [88]* *That conclusion does not offend any principle emerging from Black and the cases which have applied it. Earlier iterations of s90G required 'strict compliance' with requirements for what was to be recorded in the agreement itself and its compulsorily-annexed certificates. The current s90G and s90UJ are also to be applied strictly for the reason given in Black: an agreement over which the Court has no supervisory role precludes, if binding, access to a Court determination of property interests or adjustments to them. That is satisfied by demanding proof of the required matters if the application of s90UJ is in issue. [93]* The Full Court found that the appellant had been given advice of the type required by s90UJ, as had the respondent, and the financial agreement was binding.
Raleigh & Raleigh [2015] FamCA 625	Watts J declared that a financial agreement entered into between the parties in 2003, eight days before the wife gave birth to the first child of the marriage, was not binding. The wife had conferred with her solicitor for less than 15 minutes.

	The certificates annexed to the agreement indicated that advice was given on non-existent rights, i.e. "*the effect of the agreement on the rights of the parties to apply for an order under Part 90C*". Watts J was not satisfied that the wife's solicitor put himself in a position to know what rights the wife had under Part VIII of the Act or that the solicitor advised the wife about her rights and how a court might approach a case after the parties had children.

THE PRE-NUPTIAL AGREEMENT (s 90B / s 90UB agreement)

A s 90B / s 90UB agreement will benefit individuals with inherited or acquired wealth who are contemplating marriage and seek to protect their wealth. A s 90 / s 90UB agreement can be drafted to protect those pre-owned and inherited assets and resources from financial adjustment in the Family Law Courts thereby maintaining their integrity for future generations.

KEY CLAUSES TO CONSIDER IN A S 90B / S 90UB AGREEMENT

1. Separate property

The s 90B / s 90UB financial agreement may include provisions which deal with the separate property as follows:

(a) Pre-relationship assets or liabilities. A schedule of the parties' respective assets and liabilities ought to be annexed to the agreement.

(b) That property acquired in substitution for a pre-relationship asset will remain the separate asset of the party who owned the original asset.

(c) Gifts and inheritances received during the relationship, including any income received and any increase in their value.

(d) Property acquired in one party's sole name subsequent to the date of the Agreement.

It is important to stipulate in the agreement property which is to be deemed 'separate property' and the following recitals ought to be included:

> *Each of the parties owned separate property as at the date of this Agreement and they wish to provide that each shall retain full and complete control of, and exclusive right to without claim by the other, their respective separate property and any appreciation in the value of such separate property, and any assets acquired in substitution for their separate property as well as any gifts or inheritances from their respective families save as otherwise provided for in this Agreement.*
>
> *The term separate property shall mean:*
>
> i. *the assets and the value of superannuation entitlements of each party as set out in Schedules A and B of this Agreement, even if such assets are later transferred in whole or in part to the other party after the date of execution of this Agreement;*
>
> ii. *all property acquired by each party since the date of the parties' cohabitation by way of gift, devise, bequest, and all property acquired in exchange or substitution for such property;*
>
> iii. *all income or other gains derived or to be derived from a party's separate property whether by sale, exchange, investment, disposition or by dealing or attributable to enhancement or appreciation of that property due in whole or in part to market conditions or to their services, skills or efforts;*
>
> iv. *any future property acquired after the parties' execution of this Agreement in the name of any of the trusts or entities that form of each party's separate property; and*
>
> v. *any award of damages that any be acquired by each party as compensation for pain and suffering, or future economic loss, or as a result of a personal injury.*

2. Jointly acquired property

The financial agreement should specifically provide how joint property will be dealt with at separation. It should deal with:

(a) which party will vacate the home following separation;

(b) valuation of real properties to determine fair market value;

(c) terms of sale;

(d) both parties to cooperate with the agent and auctioneer; and

(e) how the net proceeds of sale will be distributed.

It is usually agreed that any jointly acquired property be distributed between the parties in the event of separation. The agreement will often include a provision as follows:

> *The parties may after the execution of this Agreement acquire further real or personal property either jointly or as tenants in common, or in the name of just one of the parties or through any company or trust (after-acquired property), other that in replacement of or from their existing separate property, which as each party's future separate property, is already included in the definition of each party's separate property.*
>
> *That where either John and Jane contribute towards the acquisition of after-acquired property, they will divide such after-acquired property between them in such proportions as reflect their respective financial contributions. For example, if John contributes 60% of his separate property toward the acquisition and/or improvement of some after acquired property, and Jane contributes 40% of her separate property thereto, in the event of a separation, then John receives a 60% share of such after acquired property, and Jane receives 40% thereof.*

3. Joint and/or separate living expenses

The agreement may contain provisions that deal with the parties' payment of joint and separate living expenses. For example, for joint expenses:

During the relationship, the parties agree that they will each contribute a minimum sum of $400 per week towards their joint living expenses.

Alternatively:

During the relationship, the parties will each pay or cause to be a proper contribution to the following expenses (having regard to their respective financial circumstances from time to time):

- *the rent payable in respect of any home occupied by them jointly;*
- *the mortgage payable in respect of any property occupied by and owned by them;*
- *joint food and household expenses;*
- *expenses for joint holidays; and*
- *joint entertainment.*

For separate expenses, the parties may include a schedule of their respective separate expenses such as council rates and levies; water in relation to any property owned by that party; insurance policies; registration and maintenance costs of vehicles registered in that party's name; clothing and entertainment etc.

4. Superannuation[1]

Section 90MH(1): a financial agreement under Part VIIIA may include an agreement that deals with superannuation interests of either or both of the spouse parties to the agreement as if those interests were property. It does not matter whether or not the superannuation interests are in existence at the time the agreement is made. Section 90MHA is the equivalent provision for Pt VIIIAB financial agreements.

It would be a rare situation for superannuation splitting provisions to be included in a s 90B (before marriage) or s 90UB (before a de facto relationship) agreement.

[1] CCH [¶31-100] Superannuation agreement

They might be included in an agreement entered into under s 90C (during a marriage) or s 90UC (during a de facto relationship). However, the difficulties of getting a base amount and providing judicial fairness to the trustee of the superannuation fund mean that they are more commonly used after a relationship has ended (i.e., in a s 90D or s 90UD financial agreement).

5. Spousal maintenance

Section 90B(2) / s 90UB(2) and s 90C(2) / s 90UC(2) provide that a financial agreement can deal with:

> *(b) the maintenance of either of the spouse parties:*
>
> *(i) during the marriage; or*
>
> *(ii) after divorce; or*
>
> *(iii) both during the marriage and after divorce.*

A 'spousal maintenance' provision will be void unless it complies with s 90E or s 90UH. Section 90E states:

> *A provision of a financial agreement that relates to the maintenance of a party to the agreement … is void unless the provision specifies:*
>
> *(a) the party … for whose maintenance provision is made; and*
> *(b) the amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party …*

6. Child support / maintenance provisions

Subsection 84(5) of the *Child Support (Assessment) Act* 1989 ('Assessment Act') provides that nothing in this part of the Assessment Act is taken to prevent the same document being both a child support agreement and a financial agreement under the Act.

In his paper titled '*Binding Child Support Agreements: everything you need to know'* John Spender correctly stated:

I would strongly discourage practitioners from attempting to make a binding child support agreement a financial agreement as well. There are different grounds for setting aside child support agreements and financial agreements. In such circumstances, too, a lawyer would need to be very careful with respect to the provision of legal advice that is specific to each part of the agreement. More seriously, it is possible that an application could be made to set aside a financial agreement but not the child support agreement, or vice versa. If that application succeeds, however, it may seriously undermine or prevent the continued validity of the other agreement. It is a risk which is simply not worth taking.

Section 90E/90UH of the Act provides that a provision of a financial agreement that relates to the maintenance of a spouse party to the agreement or a child or children is void unless the provision specifies:

(a) the party, or the child or children, for whose maintenance provision is made; and

(b) the amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party, or of the child or each child, as the case may be.

Where one party to the agreement has dependent children and the other party agrees to support her children, the following provisions may be included:

(a) *John agrees to pay such of the following expenses as are incurred during the relationship for the benefit of each of Jane's children, Ann and Adam:*

i. *Primary school tuition fees at … Primary or such other primary school, including a private primary school(s), at Jane's nomination, capped at $30,000 per annum per child;*

ii. *Secondary tuition fees, whether public or private, the school(s) to be selected by Jane capped at $30,000 per annum per child; and*

iii. *Tertiary tuition fees for the first undergraduate degree undertaken by the children, the degree and tertiary institution to be selected by each of the children, capped at $30,000 per annum per child.*

In ***Boyd & Boyd*** [2012] FMCAfam 439[2], the parties entered into a financial agreement some seven or eight months prior to their divorce. The agreement was extensive and each party was represented during its preparation and was, ostensibly at least, advised of its consequences.

The provision in the financial agreement, which led to the proceedings read as follows:

> *The parties agree that the children's school fees will be paid as follows:*
>
> *The Husband and the Wife shall share the cost of the children's private school fees for the 2010, 2011 and 2012 school years.*
>
> *The Husband will pay for all of the children's private school fees from 2013 onwards until each child has completed high school.*
>
> *The Husband will pay for all reasonable school related expenses such as uniforms, books, excursions and the like from the date of this Agreement until the children each complete high school.*

The husband contended that this provision of the financial agreement was void as a consequence of the provisions of s 90E of the Act which provides that a provision of a financial agreement relating to the maintenance of a child is void unless the provision in question specifies both the identity of the child or children for whose maintenance provision is made and the amount provided for the maintenance of such child or children.

Brown FM rejected the husband's argument that a provision in a financial agreement that the husband pay the children's school fees and expenses did not comply with s 90E(b) as it did not ascribe an amount or value for the benefit to be paid on account of the children. Brown FM said (at para 120):

> *Although the dollar value of the children's private school fees will vary from year to year and may also alter if the children change schools, it is possible for an exact amount to be ascribed to the school fees, once those fees have been levied in respect of each year specified in the provision.*

[2] CCH ¶[32-230] Child support and child maintenance

Brown FM considered that if the husband sought a review of his child support on the grounds of his liability from school fees, the wording of the provision was not so imprecisely drafted as to present an impediment to the review. The intention of inserting s 90E was to protect the revenue of the Commonwealth particularly in the provision of social security (para 123) and the wording of the provision did "not prevent either Centrelink or any other government agency from calculating the level of entitlements payable by him".

Arguably, this is a fairly broad interpretation of s 90E(b), and legal practitioners cannot be confident that it will be adopted by other courts.

The husband in *Boyd* also objected to the enforcement of the provision on the ground that the identities of the children were not specified in the provision. Brown FM considered it sufficient that the children were identified in the recitals to the agreement which meant there could be no doubt as to their identity. Again, this is a broad reading of the requirements of s 90E(b) and might not be followed by other courts.

7. Future eventualities

When preparing a financial agreement, careful consideration should be given to the appropriateness (or otherwise) of inclusion provisions whereby the parties confirm that they intend to be bound to the agreement despite future difficulties such as future illness, the birth of children or becoming unemployed.

Provisions can be included which demonstrate that the parties intend to rely upon the agreement notwithstanding anticipated or contemplated changes in the future. The following recitals, settled by Martin Bartfeld QC, are suggested:

(a) *Before entering into this agreement, the parties have each had regard to the possibility that the circumstances of one or both of them may change in the future, including but not limited to one or both of them:*

i. *dying;*

ii. *becoming parents of a child or children either by birth or adoption;*

iii. *suffering serious illness, injury or death, including but not limited to incapacitating injury or mental or physical illness;*

iv. *becoming unemployed;*

v. *experiencing the loss, theft or destruction of any or all of the assets listed in schedules A and B of this agreement;*

vi. *the loss or significant increase or decrease in any shared property acquired by the parties;*

vii. *becoming bankrupt;*

viii. *receiving gifts or winnings;*

ix. *receiving inheritances;*

x. *receiving distributions or other gains from any trust or company;*

xi. *the prospect that this agreement may be set aside by a Court; and/or*

xii. *the prospect of legislative amendments affecting the validity or enforceability of this agreement.*

(b) *It is the common intention of the parties to have children together. Each of the parties agree that the provisions of this agreement are just and equitable in the event that they have children and that they separate. The parties will make separate arrangements in relation to child support if and when this becomes necessary.*

(c) *It is John's intention to financially support any child or children that the parties jointly have in the event that they separate and should he have the financial capacity to do so, including agreed private school fees, private health insurance, out of pocket medical and associated expenses and periodic child support.*

Practitioners acting for a female of childbearing age could include a provision in the financial agreement which provides that in the event that the parties have a child s 74 and s 79 (or s 90SE and s 90SM) will fully operate. This will, of course,

also require any clauses with respect to maintenance under sections 90B(2) /90UB(2) or 90C(2)/90UC(2) and 90E/90UH to be expressed as terminating upon the birth of a child.

It may be appropriate for a party's entitlements to change depending on the length of the relationship or other circumstances such as the birth of children. By way of example, the following provisions could be included in the agreement:

> *In the event that John and Jane separate prior to having children:*
>
> - *Jane will receive 10% of John's separate property;*
> - *John will receive 10% of Jane's separate property;*
> - *The amount payable to Jane be offset by the amount payable to John.*
>
> *In the event that John and Jane separate with one or more children:*
>
> - *Jane will receive a further 2.5% of John's separate property for each child born of the relationship;*
> - *John will receive a further 2.5% of Jane's separate property for each child born of the relationship;*
> - *The amount payable to Jane be offset by the amount payable to John.*

A financial agreement does not need to be just and equitable - Fewster & Drake [2016] FamCAFC 214

The husband was born in 1942 and the wife in 1967. They commenced cohabitation in 2004. In late 2005 the wife finalised a property settlement with her former husband. The parties married in January 2006.

In early 2006, the husband's solicitor confirmed that the husband intended to leave the assets of his first marriage to the children of that marriage. In late November 2006, the wife indicated that she would sign the agreement if it was limited only to property and that she would retain the right to seek spousal maintenance. The wife's solicitor sought a number of minor amendments to the

agreement and provided an amended list of assets. All issues were resolved and the agreement was signed in December 2006.

At the time the agreement was signed, the wife was pregnant with the parties' first child, who was born in 2007. The parties' second child was born in 2009.

The agreement included two schedules which listed the property held by each of the parties at the time of the agreement. The financial agreement provided that that on the happening of a terminating event under the agreement:

i. They would each retain the assets comprised in the separate schedules attached to the agreement or any property or income acquired thereafter arising from the disposal of property referred to in the schedules or from gifts received or inheritances received;

ii. That any jointly acquired real property in the absence of agreement would be sold and each of the parties would be reimbursed their respective contributions to the purchase price, costs of purchase, renovations and/or improvements together with interest that 10 per cent calculated on a daily basis from the date of such contributions until the date of completion of the sale and that the balance of proceeds of sale then remaining be divided between the parties in proportion to the total monies advanced by each of them towards the purchase price and other outgoings of the joint property including but not limited to stamp duty, legal costs and disbursements associated with the purchase, rates, insurance levies and mortgage instalments;

iii. That any personalty comprising furniture furnishings and effects jointly acquired by joint contribution to the purchase price be divided on a two lists basis;

iv. That there be a purported release of claims one against the other under the Family Provision Act 1982 (NSW) with an obligation to make a joint approach to the Supreme Court of New South Wales for the approval of the release.

In summary, the agreement provided that in the event that the parties separated, the parties would each retain their own separate property which they brought into

the relationships, and divide any jointly acquired property in the proportions of the contributions made to the acquisition, maintenance and improvement of that property.

The financial agreement did not provide for maintenance of either party, and it did not contemplate what was to happen in the event that the parties had children. The wife asserted that the birth of the parties' children was a material change in circumstances which resulted in hardship to her as the children's primary carers following separation, as the financial agreement did not provide her with a greater share of the parties' assets to recognise her contributions to the care of the children, both during the relationship and in the future.

Justice Forster agreed that the financial agreement did not recognise the wife's contributions as a homemaker and parent, and that as a result of the hardship to the wife the financial agreement should be set aside.

His Honour stated at [87-88]:

> *The agreement provided in substance for the parties to retain their respective assets as at the date of the agreement and as to any after acquired joint property for same to be divided, after reimbursement of contributions with interest thereon calculated at a daily rate, in the same proportion as the contributions. It is not difficult to see that the wife would have little expectancy to any interest in after acquired joint property where at the time of agreement she had no prospective capacity to make any contribution. It is to be inferred that the husband was cognisant of these consequences as he now seeks that the [D Town] property be transferred to him without any consideration to the wife.*
>
> *The agreement makes no provision so as to recognise the possibility of the wife's contributions as contemplated by Evatt CJ in Rolfe & Rolfe (1977) 25 ALR 217. This notwithstanding the very circumstances that existed at the time of the agreement that clearly indicated that such contributions would be made by the wife. Those contributions were later magnified by the birth of a second child.*

His Honour held at [95-99]:

> *The agreement is silent as to matters contemplated by s 79(4)(c) and (e) of the Act: contributions to the welfare of the family including homemaker and parenting and the range of matters contained in s 75(2) of the Act.*
>
> *The agreement whilst leaving the question of spousal maintenance alive, contemplates no provision for the support of the children if separation as contemplated by s 90E of the Act. The inference is that the wife would bear the primary responsibility for the children post-separation.*
>
> *There is no provision contemplating the birth of further children in the agreement.*
>
> *Since the agreement, the parties' second child has been born. This material change in circumstance, the birth of the second child in particular, has a major impact on the underlying circumstances at the time of the agreement. There is no provision for the birth of any future children in the agreement, so the wife's prospective financial responsibility as it is left under the agreement grows substantially with the advent of this change, while her entitlement diminished by the failure to recognise her non-financial contributions as referred to above.*
>
> *The agreement thus inevitably creates "hardship" for the wife.*

The husband appealed against the orders made by Judge Forster setting aside the financial agreement entered into by the parties shortly after their marriage and during the wife's pregnancy with the parties' first child.

On appeal, the Full Court found that, although the birth of the parties' children could and did constitute a material change of circumstances, the primary judge had failed to establish how the wife had experienced hardship and how that hardship was linked to the material change. The Full Court cited *Hoult & Hoult* [2013] FamCAFC 109, confirming that a financial agreement does not need to be just and equitable, and the "fairness" of a financial agreement or otherwise is not a ground for setting it aside under s90K of the Act.

The Full Court set aside the order of the primary judge.

8. Statement of Independent Legal Advice by each party's lawyer

Independent legal advice is a requirement of financial agreements. The advice must comply with s 90G(1) of the Act (Pt VIIA financial agreements), or s 90UJ(1) of the Act (Pt VIIIAB financial agreements).

The spouse party must be provided advice about:

1. the rights of that party; and

2. the advantages and disadvantages at the time the advice was provided to the party of making the agreement.

The advice cannot be given without full financial disclosure by both parties and estimates or formal valuations of assets.

9. Duty of disclosure

Neither Pt VIIIA nor Division 2 of Pt VIIIAB sets out a duty of disclosure in relation to financial agreements. The duty is in the *Family Law Rules* (Ch 13) and the *Federal Circuit Court Rules* (Pt 24).

If a party does not disclose their financial circumstances, the agreement is at greater risk of being set aside pursuant to s 90K(1)(a) or s 90UM(1)(a), or perhaps s 90K(1)(e) or 90UM(1)(h) of the Act.

The following recital may be included:

> *Each party has relied upon his or her personal knowledge of the affairs of the other party. The provisions of this agreement have been reached by compromise and do not involve John accepting Jane's circumstances as represented by her or Jane accepting John's circumstances as represented by him.*

CIRCUMSTANCES IN WHICH A COURT MAY SET ASIDE A FINANCIAL AGREEMENT – SECTION 90K

(1) A court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that:

(a) the agreement was obtained by fraud (including non-disclosure of a material matter); or

(aa) a party to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or

(ii) with reckless disregard of the interests of a creditor or creditors of the party; or

(ab) a party (the agreement party) to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship with a spouse party; or

(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship; or

(iii) with reckless disregard of those interests of that other person; or

b) the agreement is void, voidable or unenforceable; or

(c) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or

(d) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or

(e) in respect of the making of a financial agreement - a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or

(f) a payment flag is operating under Part VIIIB on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or

(g) the agreement covers at least one superannuation interest that is an unsplittable interest for the purposes of Part VIIIB.

1. Does the requirement that the other party enter into a 90B agreement prior to marriage constitute illegitimate pressure?

Weldon and Asher (2014) FLC 93-579

The parties commenced cohabiting in the wife's home in late 2002, shortly after they met. They married in March 2004 and separated in February 2010. There was one child of the marriage, born in March 2005, who post-separation lived with the wife and spent time with the husband.

When they parties met, the wife owned her own business, an unencumbered home, superannuation and other assets. The husband had a car, but no other assets. The wife wanted to protect her assets and insisted she would not marry the husband, or even continue her relationship with him, unless he agreed to enter into a financial agreement.

The parties executed the deed of agreement in February 2004. They each received advice about the agreement from a solicitor. Certificates signed by the solicitors confirming the advice said to have been given were contained in the body of the deed.

Shortly prior to their marriage in 2004, the husband and wife signed a financial agreement within the meaning of s90B of the Act.

On 29 January 2004, the wife executed the deed, which provided that the husband would forego any claim in relation to the property then owned by the wife.

Clause 3 specifically provided:

> *The parties want to fix their obligations to each other should their defacto relationship or marriage terminate. They want to accept the terms of this agreement instead of and in full discharge all other rights and claims. Without this agreement the parties would not continue to live in the [wife's home].*

Clause 7 went on to provide that:

> *The parties agree to keep their financial affairs totally separate from each other during the relationship apart from sharing of regular living costs and expenses.*

Thackray CJ stated as follows:

> *The husband feels "hard done by" because he is facing an outcome where he will receive nothing by way of property settlement, notwithstanding having been in a relationship with the wife for eight years, during which time he did at least some work around her property. On the other hand, the wife is anxious to avoid an outcome where the husband shares in any of the assets she currently has, which appear to have been largely, if not entirely, owned by her prior to the commencement of the relationship.* [50]

The husband asserted the existence of both undue influence and duress.

His Honour held that:

> *There can be no doubt that the wife applied pressure to the husband, as explained in my findings set out above. But did this go beyond what was legitimate? I am not persuaded that it did.* [105]

> *Parliament has now overruled the public policy considerations which previously stood in the way of binding agreements between prospective spouses by legislating so as to give legal effect to such agreements, subject to certain conditions. Marriage is, of course, a contract as well as a status. It follows that Parliament contemplated that a party to a prospective marriage could require, as a term of the marriage contract that the other party enter into a financial agreement. A requirement that the other party enter into such an agreement prior to marriage therefore cannot, in itself, constitute illegitimate pressure. The husband could, at any time, have left the relationship or refused to marry the wife. When the second agreement was presented to him, the husband knew he had a choice and, no doubt having weighed his options and having had legal advice, elected to execute it.* [106]

> *I have found that both parties received the requisite legal advice prior to signing the agreement and that the advice received was independent. Absent any other vitiating factor, I conclude that the agreement is binding within the meaning of the Act.* [166]

2. The correct test for determining whether to set aside an agreement on the basis of duress

Prior to the Full Court of the Family Court of Australia's decision in ***Kennedy & Thorne*** [2016] FamCAFC 189, a s 90B agreement signed in contemplation of marriage was at greater risk of being set aside on the basis of duress in circumstances where the agreement was entered into shortly prior to the parties' wedding and one of the parties was in a greater bargaining position than the other.

In ***Parkes & Parkes*** [2014] FCCA 102, the parties entered into a s90B binding financial agreement two days prior to their wedding. The wife sought to have the agreement set aside on the basis of duress.

Justice Phipps found that the wife was in a position of special disadvantage and the agreement was not to the wife's advantage. He determined at [70] that: "*the wife's consent to the agreement was not independent and voluntary because it was overborne thus she was subject to duress and undue influence by the husband*."

Kennedy & Thorne

The trustees of the late husband's estate appealed orders made in the Federal Circuit Court of Australia that two financial agreements entered into between the late husband and the wife were not binding by reason of having been entered into under duress.

Background

1. in or around 19 September 2007, the husband first informed the wife that they were going to see solicitors about entering into a financial agreement;

2. on 20 September 2007 the wife met with her solicitors for the first time;

3. on 21 September 2017 the wife received advice from her solicitors that she ought not enter into the agreement as it was manifestly unfair to her;

4. on 26 September 2017 the wife, ignoring the advice from her solicitor, signed the s 90B agreement and the parties married in late September 2007; and

5. on 20 November 2007, the parties executed a s 90C agreement (agreement made during marriage) in the same terms as the s 90B agreement.

Primary judges' findings

The primary judge found that the relevant test when considering whether a party had been under duress was whether there was pressure on a party, the practical effect of which was compulsion or absence of choice.

The primary judge found that the wife had no choice but to enter into the agreement in the circumstances, and that there was therefore an absence of choice and the wife entered the agreement under duress.

The primary judge concluded that the same considerations applied to the second agreement as it was in essentially the same terms, and found it was also entered into under duress.

Full Court's findings

The Full Court found that the primary judge erred in the test that was applied to determine whether duress had occurred. The Full Court found that the correct test was whether there was threatened or actual unlawful conduct, for which there needs to be a finding that the pressure was illegitimate or unlawful.

The Full Court found that although the husband was certainly in a superior bargaining position for many of the reasons asserted by the wife, this did not amount to duress.

High Court of Australia

The matter was subject to an appeal to the High Court of Australia. The grounds of appeal were:

- That the Full Court erred in law in failing to find the financial agreements were not binding and should be set aside on the ground of duress;

- That the Full Court erred in law in failing to find the financial agreements were not binding and should be set aside on the ground of undue influence;

- That the Full Court erred in law in failing to find the financial agreements were not binding and should be set aside on the ground of unconscionable conduct in circumstances where the husband took unconscionable advantage in securing the appellant's signature to them.

Update: On 8 November 2017, the High Court of Australia handed down its decision, upholding the appeal by the wife against the decision of the Full Court of the Family Court of Australia.

The High Court has restored the decision of a Judge of the Federal Circuit Court of Australia who determined, in summary, that the Financial Agreements signed by the husband and the wife were not binding, and should be set aside.

The High Court agreed with the primary Judge's finding that:

- the Wife was "*subject to undue influence – powerless, with what she saw as no choice but to enter the agreements*";

- that ultimately the Wife was subject to a "*special disadvantage in her entry into the agreements*"; and

- that the Wife's "*special disadvantage*" should have been known to the Husband given he had, in part, created these circumstances for the Wife, in particular the "u*rgency with which the pre-nuptial agreement was required to be signed and the haste surrounding the post-nuptial agreement and the advice upon it*".

The matter has now been referred back to the Federal Circuit Court to determine the Wife's application for property adjustment orders.

SECURE THE BLENDED ESTATE [3]

1. Position in New South Wales

A financial agreement can provide support to an estate plan and the financial agreement include a provision that the agreement is binding upon each party's heirs, executors, administrators and assigns.

Section 90H of the Act provides:

> *A financial agreement that is binding on the parties to the agreement* ***continues to operate despite the death of a party*** *to the agreement and operates in favour of, and is binding on, the legal personal representative of that party.*

Section 90UK applies to Pt VIIIAB financial agreements.

In New South Wales, a clause can be included in the financial agreement which absolutely prohibits, subject to Supreme Court approval, a claim under testator's family maintenance legislation.

The financial agreement should contain a clause that provides that the parties relinquish all rights they may have in the future to make any application under the *Succession Act 2006* (NSW) in respect of the other party's estate and, that they each accept that the provisions of the financial agreement are fair and reasonable for the purposes of s 95 of the *Succession Act 2006* (NSW).

These provisions will be subject to the approval of a Court of competent jurisdiction pursuant to s 3 and s 95 of the *Succession Act 2006* (NSW).

2. In addition to the prerequisite statement of independent legal advice, the parties should also annexe a statement of independent legal advice from a legal practitioner who is qualified to provide legal advice with respect to s 95 of the *Succession Act 2006* (NSW) specifically in relation to the clauses in the agreement which deal with the parties' rights pursuant to the *Succession Act 2006* (NSW).

3. Position in Victoria and other states

In Victoria and other states, it not possible for a financial agreement to definitively exclude any claim by a party on the other party's estate. Clauses purporting to do

[3] CCH ¶32-700 death of a party to a financial agreement

so are non-binding statements of intention. An example of such a clause is as follows:

> *"John hereby acknowledges and agreed that it is appropriate that if Jane dies after the marriage breaks down he will have no claim to Jane's estate or any part thereof other than as may be provided by Jane for John under the terms of her Will."*

4. Ways in which a testator's family maintenance claim can be avoided

1. Ensure that the spouse is adequately provided for in the will.

2. Contract for mutual wills.

The parties can enter into an agreement setting out the entitlements of each party if the other dies. The consideration for the contract is the mutual wills which detail these entitlements.

These provisions could, arguably, be included in a financial agreement as an "ancillary" matter. More properly, and for convenience of drafting, they should be in a separate agreement.

The pre-nuptial agreement provides considerable support for the view that the provision in the will was 'adequate' for the 'proper' maintenance and support of the respondent.

In ***Hills v Chalk*** [2008] QCA 159, The Full Court of the Supreme Court of Queensland allowed an appeal against a decision that the husband be given provision out of the estate of the deceased, Mrs Chalk.

Mr Hills (respondent) and Mrs Chalk (testatrix) were married for eight years. The parties were 69 years of age and 64 years of age respectively. Both had been married before and had adult children from those prior marriages.

The parties executed a pre-nuptial agreement on 3 December 1994, to keep assets separate to provide for family for first relationship by of inheritance but pool for joint living expenses. The testatrix died on 26 February 2003. Mr Hills made an application for an order that adequate provision for his proper maintenance and support be made out of the estate of the testatrix.

Keane JA [44] and [46]

> *In my respectful opinion, the learned primary judge erred in failing to appreciate that the pre-nuptial agreement made by the parties, though not of itself directly decisive against Mr Hills' claim, is of significance to the assessment to be made by the court of Mr Hills' application for further provision from the estate of the Testatrix. The mutually agreed intentions and expectations of the Testatrix and Mr Hills expressed in the pre-nuptial agreement in relation to their adult children, and their acknowledgment that each should not seek to defeat the intentions of the other in that regard, was a consideration which should be regarded by the court as illuminating the totality of their relationship, and as suggesting that the provision made for Mr Hills by the Testatrix was adequate for his proper maintenance and support within the meaning of the Act. …*
>
> *In this case, the voluntary statement of the parties of their mutual intentions and expectations in a form intended to be binding affords a reliable conspectus of the totality of the relationship of the parties and of their respective relationships with others who have a claim on their bounty. In my opinion, the court should have regard to such a voluntary statement by the parties of their intentions and expectations, unless there is good reason for the court to conclude that these intentions and expectations would not have shaped the thinking of the wise and just testator or testatrix postulated by the Act. There may be cases, for example, where the length of time and change in circumstances between the making of a pre-nuptial agreement and the death of one of the parties is such that the pre-nuptial agreement is no longer a true reflection of the parties' relationship. Or it may be that the evidence shows that the execution of the pre-nuptial agreement was procured by economic or other pressure. In this case, there is no such evidence, and the circumstances to which I have referred confirm that there are, in truth, good reasons why the pre-nuptial agreement should be regarded as an accurate reflection of the thinking of a wise and just wife in relation to the proper provision that should have been made from her estate for Mr Hills.*

Fraser JA said at [209]:

> *The strength of a pre-nuptial agreement as one of the relevant factors must of course vary from case to case: in this case, the brief summary of the evidence*

> *I have given suggests that this pre-nuptial agreement provides considerable support for the view that the provision in the will was 'adequate' for the 'proper' maintenance and support of the respondent.*

5. Terms of agreement can be taken into account

Craig v Craig [2015] WASC 109 (Mitchell J)

The wife and husband were married on 18 December 1994 they were 71 and 76 years old respectively at that time. Each of the husband and wife had three adult children from a previous marriage. The parties maintained a committed relationship until the death of the husband almost 19 years later. Prior to their marriage, the parties entered into a "Mutual Statement of Prenuptial Intent". This was not a Binding Financial Agreement under the Act.

The wife brought a claim against the deceased husband's estate. The wife sought leave to file an application under s791 of the *Family Provision Act 1972* (WA) out of time.

The pre-nuptial statement and subsequent actions of the husband and wife during the marriage which were consistent with agreement were considered relevant for making the value judgment that the parties were financially independent from each other.

Facts

Two days prior to their marriage, the plaintiff and deceased signed a Mutual Statement of Prenuptial Intent in contemplation of their marriage, which stated:

> *The parties agree that the assets of each party should remain the assets of that party for the benefit of their family and that neither party intends to claim against the assets of the other party in the event of the dissolution of the marriage or in the event of the death of either party.*
>
> *The parties declare that it is their intention and desire that during their marriage each party shall be completely independent of the other as regards the enjoyment and disposal of all assets whether owned by them at the commencement of the marriage or coming to them or either of them during the marriage.*

Mitchell J held at [51]:

> *The plaintiff and deceased maintained throughout their married life a financial independence from each other which is unusual for a married couple. Their initial intention to maintain their assets for the benefit of their separate families was stated in their "Mutual Statement of Prenuptial Intent" and, on the plaintiff's evidence, the financial independence proposed by that prenuptial statement was maintained throughout their relationship. It is true that the prenuptial statement cannot oust the jurisdiction of this court under the Act. However, the statement and the conduct of the plaintiff and deceased provide evidence of a relationship in which each of the parties broadly maintained financial independence from the other, and sought to preserve their assets for the benefit of their children. That agreed basis of the relationship, in which neither party to the marriage assumed any financial responsibility or obligation to the other, is evidence which informs the value judgment as to what is "adequate" provision for the plaintiff's "proper" maintenance. While not controlling, the prenuptial statement and the actions of the parties to the marriage broadly consistent with that statement, can be taken into account for the purpose of making that value judgment.*

A BLENDED OR CURDLED FAMILY

Chen & Chen and Ors (No 2) [2017] FamCA 555

The husband was 63 years of age and the wife was 64 years of age at the date of trial. They married in 1982 and were married for 33 years. There are three adult children of their marriage.

In 1998, while still married to the wife, the husband commenced a de facto relationship with a de facto wife. The husband and the de facto wife had two children together. Unbeknown to the wife, the husband continued his relationship with the de facto wife for 16 years.

Between 2012 and 2014 the husband transferred to the de facto wife, in two tranches, his entire shareholding in the family business, valued at E$10million. The family business was under the full control of the de facto wife. The husband also purchased properties in China and Hong Kong for the de facto wife. The net value of the assets which are registered in the name of the de facto wife and other entities controlled by her was E$13million.

The remaining assets owned by the husband and wife were valued at E$700,000.

The genesis of the dispute stemmed from the husband and the de facto wife, assisted by lawyers, entered into a financial agreement said to be made under s 90UD of the Act in October 2015.

The position of the de facto wife was to maintain that the financial agreement was binding. The position of the husband and the wife, supported by the children, was to attack the binding nature of that agreement.

The agreement contained the following recitals:

> "*Mr Chen is married and is still married to Ms Chen since 1982".*
>
> *"Ms Quen and Mr Chen have two children together…"*
>
> *"Mr Chen and Ms Chen have three children together…."*

> *"…In order to arrange their property affairs and avoid litigation, the parties have agreed to enter into this agreement under the provisions of section 90UD of the Family Law Act 1975 to deal with the division of their property."*

The agreement contained a confidentiality clause as follows:

> *(a) The parties covenant that this deed and the contents of same are confidential and will be kept confidential by the parties.*
>
> *(b) The parties covenant that each will refrain from, by herself or himself, by her or his servant or agent or in any other manner whatsoever disclosing to any persons, entity, organisation or body, the content of this agreement.*

The agreement contained statements signed by the parties' respective legal representatives pursuant to section 90UJ of the Act and a separation declaration pursuant to section 90UF of the Act.

In 2016, the wife issued an application in the Family Court of Australia seeking, inter alia, that the agreement between the husband and the de facto wife be set aside pursuant to section 106B of the Act or, in the alternative pursuant to section 90UM(1) of the Act and, that pursuant to section 79 of the Act, there be an adjustment of property between the husband and wife.

Section 106B(1) of the Act provides:

> *In proceedings under this Act, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order.*

Section 90K(1)(aa) of the Act allows a Pt VIIIA financial agreement to be set aside, if the married person intended to defraud their de facto partner, defeat the de facto's interest, or had a reckless disregard for it.

Section 90UM(1)(d) is the mirror provision relating to de facto partners aiming to defeat a wife or husband's claim.

Sections 90K(1)(aa) and 90UM(1)(d) are stricter than section 106B. Merely having the effect of defeating a claim is not sufficient. There must be an intention to defraud or defeat a claim, or have reckless disregard for the claim.[4]

> Section 90UM(1)(d) of the Act provides:
>
> *A court may make an order setting aside, for the purposes of this Act, a Part VIIIAB financial agreement or a Part VIIIAB termination agreement if, and only if, the court is satisfied that:*
>
> *…*
>
> *(d) a party (the agreement party) to the agreement entered into the agreement:*
>
> *(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a marriage with the spouse party;*
>
> *(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 79, or a declaration under section 78, in relation to the marriage (or void marriage); or*
>
> *(iii) with reckless disregard of those interest of that other person.*

On 27 July 2017 Justice Cronin ordered that the dispute relating to the binding nature of the financial agreement executed between the husband and de facto wife in October 2015 be heard separately from all other matters pending in the proceedings. At the time of writing, the Court is hearing the matter.

[4] CCH [¶57-480]