DRAFTING BINDING FINANCIAL AGREEMENTS AND COVID-19

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INTRODUCTION

1. Solicitors drafting a financial agreement should use their best endeavours to ensure that the agreement is:

   1.1 binding – in accordance with section 90G (in the case of a financial agreement between married parties) or section 90UJ (in the case of a financial agreement between de facto partners) of the *Family Law Act 1975* (Cth) ("Act"); and

   1.2 drafted in a way that reduces the risk of the agreement being set aside in accordance with section 90K (in the case of married parties) or section 90UM (in the case of de facto partners) of the Act.

2. This paper will address some tips and traps in drafting financial agreements including:

   2.1 Precision Drafting:

      2.1.1 Key clauses

      2.1.2 How to improve the likelihood that the agreement will be upheld by a court

   2.2 Tips and Traps:-

      2.2.1 The letter of advice

      2.2.2 When is the court likely to set aside a financial agreement?

      2.2.3 To disclose or not to disclose?

      2.2.4 Does a financial agreement need to be fair?

   2.3 When the Drafting Goes Astray

   2.4 Force majeure and frustration of agreements

   2.5 Recent Cases

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2.6 Case Studies

3. It is important to note at the outset that the suggestions outlined in this paper relate primarily to financial agreements prior to separation, meaning those made under section 90B (before marriage or in contemplation of a marriage), section 90C (during marriage but prior to separation), section 90UB (before de facto relationship) or section 90UC (during a de facto relationship) of the Act. It is those agreements which are at most risk of being set aside by a court when the parties have separated and it no longer suits one of the parties to have their claim for property settlement or spousal maintenance limited or extinguished by the terms of the financial agreement.

4. Although some principles may also be applied to financial agreements drafted post separation, meaning those under section 90C (during a marriage but post separation), 90D (after a divorce) or 90UD (after the breakdown of a de facto relationship) of the Act, it is acknowledged that such agreements are less common.

5. Where possible, we suggest that you consider utilising court orders to formalise any agreement reached post separation given that orders do not carry the same risks of being set aside or varied as a financial agreement.

PRECISION DRAFTING

Key Clauses in Financial Agreements

6. Whilst each agreement will be individual to the cases, there are certain clauses which practitioners may consider including in order to minimise the risk of the financial agreement being set aside in future as a result of the drafting. These key clauses include:

6.1 How joint property will be dealt with upon separation. Some considerations are:

6.1.1 Which party will vacate the home?

6.1.2 Who will be responsible for the outgoings of property post separation?

6.1.3 Who will prepare the property for sale? For example, you might provide for the party in the financially stronger position to pay for

the cost of any repairs or cosmetic improvements at first instance and then be reimbursed from the proceeds of sale.

6.1.4 Valuation of real property to determine fair market value.

6.1.5 Terms of sale.

6.1.6 How the net proceeds of sale will be distributed.

Examples

6.1.6.1 In accordance with legal ownership.

6.1.6.2 In accordance with a specified percentage.

6.1.6.3 In accordance with financial contributions.

6.1.6.4 Another option is to simply exclude separate property and otherwise the parties agree that their respective entitlements in respect of joint property will be determined pursuant to the Act.

Note - if you leave it for the court to determine, the court is required to consider pursuant to section 75(2) and section 79(2) the separate property each party will retain in accordance with the financial agreement. You may therefore wish to include provision for the parties to instruct an arbitrator to determine the issue not having any regard to the separate property which each party will retain.

6.2 Exclude each party's separate property. Determine what this will include and how any tracing of the sale proceeds of separate property will be conducted or calculated. Separate property may include:

6.2.1 Pre-relationship assets or liabilities.

6.2.2 Property acquired in substitution for a pre-relationship asset.

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

6.2.4 Property acquired in one party's sole name subsequent to the date of the agreement.

6.3 Superannuation

6.3.1 Ensure there are clauses determining how superannuation will be dealt with in the event of separation. Consider whether it would be preferable to split superannuation using a dollar figure as the base amount or to split using a percentage. Given the volatility in the share market currently, percentage splits are being preferred in financial agreements prepared post-separation so as not to unintentionally disadvantage the member of the fund

6.3.2 Ensure that procedural fairness to the Trustee of the Superannuation Fund (even if a self-managed superannuation fund) is accounted for.

Example

"Having been accorded procedural fairness, the provisions of this agreement are binding on Hemsworth & Cyrus Investments Pty Ltd A.C.N. 123 456 789 ("Trustee") as trustee of the Hemsworth Cyrus Superannuation Fund ("Fund")"

6.3.3 Make it clear in the agreement which party's lawyer will be responsible for serving the trustees with the executed agreement. If you are acting for the member, make it your responsibility and serve the agreement promptly after execution or risk the non-member benefitting from any contributions made by the member between the date the superannuation split was agreed between the parties and the split being effected by the trustees.

6.4 Spousal Maintenance - consider how any spousal maintenance will be calculated and paid. This may include payments during the relationship as well as post separation.

6.4.1 Note section 90E of the Act – 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:

6.4.1.1 The party, or the child or children, for whose maintenance provision is made; and

6.4.1.2 The amount provided for, or the value of the proportion of the relevant property attributable to, the maintenance of the party, or of the child or each child, as the case may be.

6.4.2 Having regard to section 90E include a dollar amount, e.g. $10,000 for one party and $10,000 for the other party with the amounts to offset each other.

6.4.3 Some practitioners prefer a "dollar for dollar" agreement. In *Ruane & Bachman Ruane* [2009] FamCA however, Cronin J considered the question of whether an agreement that provides for "nil" spousal maintenance complies with section 90E was not relevant to the proceedings for him but was a question for "*another day*".

6.4.4 You may wish to annexe a table or formula which sets out the calculation of maintenance.

6.5 Separation payment

6.5.1 Consider whether one party will make a payment to the other party upon separation and if so, the quantum of that payment or a formula for the calculation of that payment.

6.5.2 For the purpose of a separation payment, you may wish to include a sliding scale of cash payments to the financially inferior party which increases based upon years of marriage and/or birth of children to the marriage.

6.5.3 Have regard to the timeframe of any payment and any condition relating to the payment. For example, the separation payment may be paid upon a party vacating a home, or upon the passing of a certain timeframe post separation.

6.6 Schedules of the parties' "joint property" and "separate property"

6.6.1 These schedules should include:

6.6.1.1 Real property.

6.6.1.2 Share portfolios.

6.6.1.3 Cash in bank accounts.

6.6.1.4 Vehicles.

6.6.1.5 Superannuation entitlements.

6.6.1.6 Interests in trusts and companies.

6.6.2 At the very least these items should be listed. However, ideally, estimated or formal values should be provided for all items of property including any interests in trusts and companies.

6.6.3 If a financial agreement is drafted on the basis that the parties will be precluded from having an interest in any inheritance of the other party, and the anticipated inheritance of one or both parties is significant, you may wish to include an estimated value of that inheritance if known.

6.7 Statement of Independent Legal Advice by each party's lawyer and Acknowledgment by the client that they received the advice

6.7.1 It is important to note that the Statement of Independent Legal Advice should be noted as same and not referred to as a "certificate". The *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009 (Cth)* made it clear that this is the correct wording.

6.8 Separation declaration in accordance with section 90DA of the Act

6.8.1 Note that a separation declaration is not required if the financial agreement relates only to spousal maintenance.

6.8.2 Ensure that "separation" for the purposes of the implementation of the agreement is defined as being linked to the service or deliverance of the separation declaration.

How to Improve the Likelihood that the Agreement will be Upheld by a Court

7. It appears that most cases setting aside financial agreements pursuant to section 90G or section 90UJ are as a result of simple errors on the part of the solicitor drafting the agreement or providing advice in relation to the agreement.

8. Some examples of errors which have led to the setting aside of a financial agreement include the following:

    8.1 Including the wrong party names.

    8.2 Referring to the wrong section of the Act – e.g. is it a section 90B Agreement or a 90C Agreement?

    8.3 Although a reference to the wrong section of the Act within the agreement may be rectified, incorrectly referencing the wrong section of the Act may lead to advice being given under the wrong section which cannot be rectified.

    8.4 Incorrect drafting or form of the Statement of Independent Legal Advice.

9. Some drafting tips for avoiding these sorts of errors and therefore reducing the risk of having the agreement found to not be binding are:

    9.1 Ensure that you do not act for both parties. Make it clear which party you act for by confirming who you are and are not acting for.

    9.2 Ensure the wording of the agreement and Statement of Independent Legal Advice reflects the requirements of section 90G/s90UJ.

    9.3 Ensure that you update your precedents to ensure compliance with amendments to the Act. In the case of *Gardiner & Baker* [2009] FMCAfam 1029 the statement of legal advice utilised wording of the former section 90G and omitted the word “disadvantages” which was fatal to the agreement.

    9.4 Have another lawyer read over the draft agreement ‘with fresh eyes’ to pick up any obvious errors.

    9.5 Retain a certified copy, if not the original, of the executed agreement on file together with a copy of the letter of advice with an acknowledgment of advice signed by the client to ensure you have evidence that the requirements of section 90G/90UJ were complied with.

10. Notwithstanding that the Family Law Courts have issued practice directions permitting parties and lawyers to electronically sign affidavits and some other court documents given the COVID-19 pandemic, financial agreements should still be signed by hand. This will likely mean that the agreement will need to be posted or couriered between

the parties and their respective lawyers until the agreement has been executed by both parties and both solicitors have signed the statements of legal advice.

TIPS AND TRAPS

The Letter of Advice

11. Under section 90G(1)(b) and 90UJ(b) of the Act, in order for a financial agreement to be binding each party to the agreement must have been provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time the advice was provided, to that party of making the agreement.

12. It is important that practitioners ensure that their client is competently advised in relation to the financial agreement including the risks of entering into the agreement. In the decision of *Cording & Oster* [2010] FamCA 511 Justice Cronin at paragraph 58 discussed the Full Court decision of *Kostres and Kostres* [2009] FamCAFC 222 in relation to the onus on the legal advisor:

> *In* Kostres*, the Full Court noted that the legislature had been careful to include strict requirements if a financial agreement was to be binding including the requirement of independent legal advice. The Full Court went on to say it was clear that the legislature envisaged, because of the nature of the agreement and the removal of the supervisory role of the Court, that parties would receive legal advice about the necessity for their intentions to be accurately and clearly reflected in the agreement. The Full Court was focussing on the importance of parties getting legal advice prior to the execution of the agreement because the advice would be expected to cover a myriad of issues. The advice referred to in s 90UJ(1)(b) refers to the effect of the agreement on the rights of that party and about the advantages and disadvantages of entering in the agreement. As the Full Court said, the object of the legislation is to remove the supervisory role of the Court.* ***The onus therefore reverts to the legal advisor, as an issue of the advantages and disadvantages for the client, to contemplate whether disclosure has been made comprehensively and sufficiently to justify that client entering into the agreement.***
>
> (emphasis added)

13. To assist practitioners in complying with these sections of the Act we suggest the following be consulted as a guide:

    13.1 The advice should be given in writing. It is not sufficient to provide verbal advice to a client without specific details of what advice was given. A letter of advice should therefore be provided to the client as long-term evidence of the advice that was given.

13.2 The letter of advice should be prepared once the terms of the agreement have been finalised. i.e. your advice must be referrable to the final version of the agreement – if the agreement is amended, the letter of advice will also need to be amended prior to execution.

13.3 The letter of advice should be issued to the client prior to their attendance at your office to execute the agreement allowing sufficient time for them to digest the contents of the letter and ask you any questions before they sign the agreement. In the COVID-19 world, if you have resumed meeting with clients face to face ensure that you maintain the recommended 1.5 metres apart. If your office remains closed to clients and you are working from home, consider conducting your conference via video conferencing software such as Zoom or Microsoft Teams rather than by telephone.

13.4 The letter of advice should clearly state that you cannot guarantee that the agreement will be upheld by a court if the other party were to seek to have the agreement set aside.

13.5 The letter of advice should explain:

13.5.1 The section 90G/90UJ requirements for an agreement to be binding.

13.5.2 The effect of the agreement on the client's rights, including reference to any provision made in the agreement for property settlement and/or spousal maintenance.

13.5.3 The grounds on which a party could seek the financial agreement be set aside pursuant to section 90K/90UM. Any grounds of particular relevance to a party's circumstances should be identified and advice should be given as to how to mitigate such risk including any suggested changes to the terms of the financial agreement.

13.5.4 The advantages and disadvantages to a party of entering into the agreement.

13.6 It is <u>not</u> sufficient to merely state in the letter that you provided the requisite advice to the client verbally in conference.

13.7 The letter of advice should include an acknowledgement of receipt of advice by the client in the wording of section 90G/90UJ. The client should be required to sign the acknowledgement after you have discussed any questions they might have and prior to executing the agreement.

Example

"I received independent legal advice from my lawyer about the effect of the agreement on my rights and about the advantages and disadvantages, at the time that the advice was provided, of making the agreement.

13.8 The advice should be specific to the parties' circumstances and the terms of the agreement. This advice should include a comparison of the party's entitlement under the agreement and otherwise at law having regard to how a court deals with property applications under section 79/90SM of the Act. A "cookie cutter" template letter of advice as to the advantages and disadvantages of financial agreements generally is unlikely to provide advice to the standard that is required.

13.9 Ensure that the letter of advice is in plain English.

13.10 Have the letter of advice translated into your client's native tongue if English is not their first language.

14. The use of the wording "binding financial agreement" which is often used by practitioners, means that clients may be under the disillusion that the agreement cannot be set aside.

15. To avoid clients making any assertion that they were unaware that an agreement may be set aside in the future and accusing the lawyer who drafted it of failing to inform them of this, ensure this is addressed clearly in your letter of advice.

16. Ultimately if you are of the view that the disadvantages outweigh the advantages and that the client should not sign the financial agreement, this should be set out clearly within the letter of advice.

When is the Court Likely to Set Aside a Financial Agreement?

17. Section 90K (in the case of financial agreements between married parties) and section 90UM (in the case of financial agreements between de facto parties) of the Act set out the circumstances in which a court may set aside a financial agreement.

18. Considering the circumstances set out in section 90K/90UM, practitioners drafting or advising in relation to, a financial agreement should have particular regard to:

    18.1 Whether either party has engaged in fraud, including non-disclosure of a material matter.

    18.2 Whether either party has engaged in conduct which would render the Agreement void, voidable or unenforceable having regard to the general common law and equitable principles of contract relating to vitiating factors.

    18.3 Circumstances which are likely to arise in future which may render the terms of the agreement impracticable.

19. As the provisions of section 90K(1)(e)/90UM(1)(e) of the Act invoke the principles of equity as factors vitiating the agreement, practitioners should have regard to any circumstances which may resemble duress, undue influence or unconscionability. Practitioners should be equipped to advise their client in relation to these issues and how to best mitigate the risk of the agreement being set aside on one of these bases.

To disclose or not to disclose?

20. Sections 90K(1)(a)/90UM(1)(a) of the Act provide that the court may set aside a financial agreement if the court is satisfied that the agreement has been obtained by fraud (including non-disclosure of a material matter).

21. This leads to the question of whether a party is required (or should) give disclosure of their financial position when entering into a financial agreement. And, if so, to what extent a party is required to give disclosure of their financial position to best prevent the setting aside of a financial agreement in accordance with paragraph 90K(1)(a) or 90UM(1)(a).

22. There are ultimately two schools of thought when negotiating and drafting a financial agreement.

    22.1 The first approach is that you ought provide the other party with, at the very least, some disclosure so that they have at least a general idea of the composition and value of the assets held by the party whom is in the financially stronger position. However, on one view providing only minimal disclosure may in fact increase the risk that the agreement will be set aside on the basis that the party provided disclosure <u>but still</u> failed to disclose a material fact.

22.2 The second approach is to provide no estimates of the value of that party's interest in those company or trusts, perhaps only listing the companies and trusts in which they have an interest, and to provide no financial documents which would enable the other party to attribute a value or obtain an expert valuation in relation to the other party's interests.

23. In relation to the issue of the extent to which a party is required to disclose their financial position for the purpose of a financial agreement, the Full Court in the decision of *Kennedy & Thorne* [2016] FamCAFC 189 noted:

> *the obligation of parties to provide full and frank disclosure in financial proceedings occurs in a context where a court is required to make findings about the assets, liabilities and financial resources of the parties, and where the court is also required to be satisfied that it is just and equitable to make orders*

24. In contrast, the Full Court stated that:

> *a financial agreement is a private contract between parties into which there is no express statutory requirement that disclosure be made or valuations be obtained and that such an agreement is capable of being binding, with little or no knowledge of the other party's financial position*

25. That being said, the more fully a party to a financial agreement discloses their financial position, the lower the risk of that agreement being set aside on the basis of non-disclosure of a material fact.

Recitals regarding disclosure

26. The issue of disclosure can be addressed in the body of the financial agreement using detailed recitals. Some examples of recitals that address disclosure are as follows:

Examples of recitals

26.1 Each party relies upon their personal knowledge of the affairs of the other party.

26.2 The Agreement has been reached by compromise.

26.3 Jane is the owner of, or potentially has an entitlement to, the Property and Entities, and has the financial resources and liabilities, described in Schedule A hereto.

26.4 In relation to Schedule A, Jane confirms: -

26.4.1 it accurately discloses the identity, nature and estimated value of her present and potential Property, Entities, financial resources and liabilities as at the date of this Agreement;

26.4.2 the estimate of values referred to therein is indicative and her best estimate;

26.4.3 the Entities listed in parts 1 and 3 of Schedule A are those which exist at the date of this Agreement.

26.5 Jane may also be entitled to inheritances or gifts of which she is presently unaware, and the parties intend that such inheritances and gifts shall be Excluded Property.

26.6 John acknowledges that Jane's financial position, including her financial resources, has been disclosed to his satisfaction.

26.7 Jane is the owner of, or potentially has an entitlement to, the Property and Entities, and has the financial resources and liabilities, described in Schedule A hereto.

26.8 In relation to Schedule A, Jane confirms: -

26.8.1 it accurately discloses the identity, nature and estimated value of her present and potential Property, Entities, financial resources and liabilities as at the date of this Agreement;

26.8.2 the estimate of values referred to therein is indicative and her best estimate;

26.8.3 the Entities listed in parts 1 and 3 of Schedule A are those which exist at the date of this Agreement.

26.9 John may also be entitled to inheritances or gifts of which he is presently unaware, and the parties intend that such inheritances and gifts shall be Excluded Property.

26.10 Jane acknowledges that John's financial position, including his financial resources, has been disclosed to her satisfaction.

26.11 Jane and John acknowledge that they have not independently assessed the value of the other's Property, Entities, financial resources and liabilities, and acknowledge that, although they have each had the opportunity of valuing same, they have elected not to do so.

26.12 Each party acknowledges that they have not undertaken due diligence, although they acknowledge that they were at liberty to do so and they have elected not to do so.

Does a Financial Agreement need to be fair?

27. As stated above, a party may be successful in an application to set aside a financial agreement on the basis that it is found to be void, voidable or unconscionable. This principal invokes common law and equitable principles as factors vitiating the agreement.

28. Simply because one of the parties made a bad bargain does not mean that it would be unconscionable for the other party to enforce the agreement. The agreement does not need to be just and equitable and generally, one party is disadvantaged by entering the financial agreement having regard to their likely entitlements at law.

29. However, the High Court decision of *Thorne v Kennedy* gives some suggestion that practitioners may wish to counsel any client seeking to enter into an agreement which would render one party grossly disadvantaged.

30. A financial agreement which makes a reasonable provision for the financially disadvantaged party may be less likely to be considered the subject of unconscionable conduct or undue influence.

WHEN THE DRAFTING GOES ASTRAY

31. Practitioners drafting financial agreements should know how to identify a "red flag", being circumstances that would greatly increase the risk of having the agreement set aside.

32. Some key tips to practitioners drafting agreements to reduce the risk of having an agreement set aside include:

32.1 Avoid “ink on the tuxedo” or “ink on the wedding dress” cases which carry increased risks that a party will allege undue influence or duress due to the proximity of the wedding.

32.2 Parties to a financial agreement should have time to properly contemplate and negotiate the terms of the agreement.

32.3 As agreements can be set aside on the basis of circumstances arising that render them impracticable, practitioners should have regard to any foreseeable future circumstances when drafting the agreement and when advising their client. For example - are the parties planning on having children? What happens if an asset referred to in the agreement is sold?

32.4 Be conscious of any client who wants the agreement drafted “quickly” or “cheaply”. The client needs to be made aware of the risks involved in a financial agreement being set aside and appreciate that the process takes time and is costly.

32.5 Be wary of a party expecting that they can receive comprehensive drafting of the agreement from you but send the other party to a “cheap” lawyer to get the requisite advice to keep costs down. It is important that both parties attend upon lawyers who are experienced in family law and financial agreements, such as an Accredited Family Law Specialist.

32.6 If you are unsure about any aspect of the financial agreement or your advice to your client, consider briefing specialist counsel to provide advice in relation to the agreement.

32.7 The practitioner advising the other party should be contacted by yourself or their intended client. Ensure that your client does not contact or initiate the appointment on the other parties’ behalf.

32.8 Discuss with your client the risks associated with placing pressure on the other party. It is best practice to ensure that your client is essentially leaving any conversations about the agreement to be had by lawyers to avoid any influence or pressure being exerted.

32.9 If you act for a party who is not proficient in English, arrange for them to bring an interpreter (who is not the other party) with them to their conferences with

you and have the agreement and your letter of advice translated into their native language.

32.10 Carefully check the agreement to ensure it complies with your client's instructions. In particular, review the schedules and road test any formulas.

FORCE MAJEURE AND FRUSTRATION

33. Family law matters have not escaped unscathed from the devastating and widespread impact of the COVID-19 pandemic. Most, if not all, family law practitioners will currently be dealing with clients who have been or are now at risk of being disadvantaged in their property settlement by falling property or business values or who are facing unemployment. Some family lawyers are now looking into whether their client can avoid complying with their obligations pursuant to a financial agreements by invoking the doctrine of frustration and whether force majeure clauses may be something we can include in financial agreements as a means of offering some protection to clients from experiencing the full effects of other unforeseen economic crises.

Frustration of Agreements

34. The common law doctrine of frustration operates to automatically discharge a contract when circumstances have arisen which have made it impossible to perform the contract or performance would be "radically different" to that contemplated by the parties at the time of entering into the contract. It is not sufficient that the contract has simply become more difficult to perform or that there will be a delay in an obligation being performed.

35. The circumstances must be such that neither party is at fault and the standard of proof is high. If a contract is taken to have been frustrated it will be terminated and all outstanding contractual obligations will be discharged. The losses will 'lie where they fall' and any expenses incurred, or costs paid in preparation for performance of the contract will not be recoverable.

36. Section 90K(1)(c) essentially codifies and extends the common law concept of frustration as it applies to financial agreements by enabling a Court to set aside a financial agreement if it is satisfied that *"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"*. Thus, the case law will

Force Majeure

37. 'Force majeure' clauses are a creature of contract. They are used to overcome the otherwise limited scope of the common law doctrine of frustration. They often form part of the 'boilerplate' clauses inserted into commercial contracts.

38. A 'force majeure' clause operates operate to exclude or limit a party's liability in the event of non-performance of their contractual obligations if such failure is caused by defined 'force majeure' events beyond their control, such as natural disasters, 'acts of God', government action, national emergencies, riots or war.

39. Force majeure clauses have not been widely used in standard financial agreements, likely because it would introduce a level of complexity and uncertainty which is generally not desired by either of the parties at the time of entering into the financial agreement. For example, some of the issues which practitioners and their clients will need to turn their minds to before deciding to include a force majeure clause in a financial agreement include:-

    39.1 What will constitute a force majeure event for the purposes of the agreement?

    39.2 What will happen to each party's contractual obligations if a force majeure event can be established? Which obligations of the impacted party will be affected by the force majeure event? Will there be an obligation of mitigation? Will the non-performing party be entitled to delay or completely avoid performance of their obligations?

    39.3 Will there be a notice period? How will the party seeking to rely on the force majeure clauses prove that their ability to perform their obligations pursuant to the terms of the agreement has been impacted by the force majeure event, i.e. how will they establish causation?

    39.4 If the effect of the force majeure clause will be to entitle the affected party to avoid performance of their obligations with respect to property settlement, what will be the effect on the provisions of the agreement which terminate spousal maintenance rights?

40. Whether a force majeure clause should be included in a financial agreement and the terms and impact of the clause upon the financial agreement will depend upon the facts of the situation (and likely which party you are acting for).

41. Alternatives to attempting to draft a wide 'catch all' force majeure clause are to:-

    41.1 draft specific clauses which alter the affected party's obligations in the event of circumstances out of their control. For example, in the case of the loss of employment or decreased income, the affected party's obligation to pay maintenance might be reduced or suspended for an appropriate period of time;

    41.2 invoke section 90K(1)(c) and have the agreement set aside in an appropriate case if compliance with the agreement (or a part of it) has become impracticable.

42. In short, it is unlikely that force majeure clauses will quickly become standard practice when drafting financial agreements, although they may be useful in an appropriate case, in which case family law practitioners who are inexperienced in drafting force majeure clauses should consider briefing counsel to assist.

RECENT CASES[2]

Thorne v Kennedy[3]

43. The plurality of the High Court provided a non-exhaustive list of matters relevant to the assessment of undue influence in relation to BFAs:

    43.1 whether the agreement was offered on a basis that it was not subject to negotiation;

    43.2 the emotional circumstances in which the agreement was entered, including any explicit or implicit threat to end a marriage or engagement;

    43.3 whether there was any time for careful reflection;

    43.4 the nature of the parties' relationship;

    43.5 the relative financial positions of the parties; and

[2] The author gratefully acknowledges that the case summaries and case studies as well as the second and third case studies in this paper are the work of Johannes Schmidt, Foley's List, with whom the author co-presented an earlier version of this paper.
[3] (2017) 263 CLR 85.

43.6 the independent advice that was received, and whether there was time to reflect on that advice.

44. There is no longer a presumption in Australia that a fiancé has undue influence over a fiancée.

45. Duress may arise out of conduct which is lawful but illegitimate and improper.

46. Unconscionable conduct occurs where one party has a special disadvantage which affects their ability to make a judgement as to their own best interests, and the other party knowingly takes advantage of that situation. The unconscionable conduct need not be unlawful.

Frederick & Frederick[4]

47. The Full Court determined that, in the circumstances of the case:

> *Taking into account the other findings of the primary judge as to the application of s 90K(1)(d) of the Act, we are satisfied that the wife would suffer hardship if the Agreement is not set aside. The contributions made by her and the considerations mandated by s 75(2) of the Act to the care of* [a child with special needs] *in particular, and the further considerations that flow from that care, cannot, in our view, be adequately satisfied out of the smaller pool, whether it be the greater or lesser value. Thus, hardship has been established.*[5]

48. In applying s 90K(1)(d), a Court must determine hardship by some comparison between the position of the child, or the carer of the child, in circumstances where the BFA remains in place, and that person's position if the BFA were set aside.[6]

49. That undertaking is somewhat analogous to the determination of the existence of a *prima facie* case in an application to commence property proceedings out of time pursuant to s 44(3).[7]

50. Applications for property adjustment and applications for spousal maintenance are not a substitute for each other. Therefore, whether or not a party has applied for spousal

[4] [2019] FamCAFC 87.
[5] At [98].
[6] At [24], [42].
[7] At [43].

maintenance does not impact the assessment of hardship for the purposes of s 90K(1)(d).[8]

51. The position with respect to child support is irrelevant to determining the hardship of a carer of the relevant child, as child support is directed at the support of the child, not the carer.[9]

CASE STUDIES

Scenario: The Mail-Order Groom

52. It's 2013. Stanislav is a 26-year-old, incredibly handsome, Ukrainian man, living in Kyiv. He has been working as a driver for a private car service, catering primarily to German businessmen visiting Kyiv. He has no property of any significant value.

53. Stanislav has never travelled outside Ukraine. He completed secondary school, but has no higher education. He is fluent in Ukrainian and Russian, and has enough German to communicate basically with his clients. However, he has only the most basic command of English.

54. Wanting more from his life, Stanislav posts an ad on a dating website used to link eligible men from the former Eastern Bloc with Western women.

55. Sharon finds Stanislav on the website, and makes contact. They communicate through the website, which provides an automatic translation service, enabling Sharon to write to Stanislav in English, and Stanislav to write to Sharon in Russian, with each having a reasonable idea of what the other is saying.

56. Sharon, 59, owns and operates three successful franchises of a major fast-food chain, and has two adult children. Her net worth is somewhere in the vicinity of $12 million.

57. Sharon invites Stanislav to visit her in Melbourne. He accepts the invitation. Within a matter of weeks, Stanislav travels to Melbourne, with Sharon paying for his flights. Stanislav immediately moves in with Sharon.

58. Stanislav and Sharon have very limited capacity to communicate with each other, given his very limited English, and that Sharon is monolingual. Neither of them really minds,

[8] At [53] – [54].
[9] At [52].

though. Sharon sees Stanislav as a sexy toy-boy, and doesn't much care what he might have to say. Stanislav enjoys the comfortable lifestyle that Sharon is able to provide to him.

59. Both are so happy with their arrangement that, within a matter of months, they become engaged. They begin the process of applying for a partner visa for Stanislav. He is granted a bridging visa while his application is processed.

60. The wedding is scheduled for 8 November 2014. In the lead-up to the wedding, they send out invitations, including to Stanislav's family in Ukraine. By late September 2014, several members of Stanislav's family, including his parents, siblings, some aunts and uncles, and his 80-year-old Baba (grandmother), have all arrived in Melbourne in anticipation of the wedding.

61. On 11 October 2014, Sharon tells Stanislav "I will need you to sign a prenup before we can get married". She hands him a document which her solicitor has prepared, and tells him that, before he signs it, he needs to see his own lawyer. She gives him a list of three solicitors which have been suggested by her own solicitor, and tells him to contact one of them. She says that she will pay for his solicitor.

62. Sharon tells him that she will look after him during the marriage, and that she will make sure that, when she dies, he has a bit to live on.

63. However, she says, her primary obligation is to her adult children, and, if she and Stanislav separate, she needs to protect her wealth for her children. She tells him that, unless he signs the prenup, the wedding is off.

64. Stanislav broadly understands what Sharon has told him. He is madly in love with Sharon (or, at least, the lifestyle that Sharon is able to provide for him), and does not see himself ever leaving Sharon.

65. Stanislav contacts one of the solicitors on the list, and, on 16 October 2014, goes to see her. The solicitor is fluent in Ukrainian.

66. Upon reviewing the draft BFA, the solicitor sees that it provides, inter alia, that:

    66.1 Stanislav is to receive a weekly allowance of $1,500 for the duration of the marriage;

66.2 if the marriage ends within three years, Stanislav is to receive no property settlement;

66.3 if the marriage lasts at least three years, Stanislav is to receive a property settlement of $100,000;

66.4 if the parties are married at the time of Sharon's death, Stanislav is to receive $800,000 from her estate; and

66.5 neither party will, in the event of separation, be required to maintain the other.

67. The solicitor advises Stanislav that the draft BFA is very unfavourable to him, and suggests that they propose some changes.

68. Stanislav believes that Sharon's biggest concern is what might happen if the marriage breaks down. He remains confident that the marriage will last, as he has no intention of leaving Sharon, and can't imagine that she would leave him. He wants the wedding to proceed, and tells the solicitor "don't try to change the separation stuff; if you do, Sharon won't marry me."

69. However, he would like a higher allowance during the marriage, and to be able to at least buy an apartment if, and when, Sharon dies.

70. After the conference, the solicitor makes handwritten amendments to the draft BFA, changing the weekly allowance to $2,500, and changing the sum payable on Sharon's death to $1,300,000. After obtaining Stanislav's instructions, the solicitor sends the marked-up draft to Sharon's solicitor on 20 October 2014.

71. On 22 October 2014, Sharon tells Stanislav that she will agree to the changes.

72. On 27 October 2014, each of them informs their respective solicitor that the terms of the draft BFA are agreed.

73. At about 4:00 PM on 31 October 2014, Stanislav receives an email from his solicitor, attaching a detailed letter of advice in relation to the draft BFA. The letter, the advice in which covers all that is required by the legislative provisions, confirms his solicitor's advice that the draft BFA is to Stanislav's disadvantage, and that he should not sign it. The letter, which is in English, is accompanied by duly certified translations of both the draft BFA and the letter of advice into Ukrainian.

74. The letter also advises that arrangements have been made for Sharon to first sign the document with her solicitor, and for it to then be sent to Stanislav's solicitor. The letter proposes that Stanislav attend at his solicitor's office on 4 November 2014 if, despite the advice, he intends to sign the BFA.

75. Sharon also receives advice from her solicitor as required under the legislation.

76. The settled BFA meets all of the legislated technical requirements.

77. Both parties sign the BFA the following week, with Sharon signing on 3 November and Stanislav signing on 4 November. The BFA complies with all technical requirements, including appropriate Statements of Legal Advice.

78. Over the next few years, Stanislav is happy in the marriage, enjoying the lifestyle funded by his allowance. By agreement, he does not work or study. Instead, he is a devoted husband, looking after the household and accompanying Sharon to corporate functions. Sharon is happy to show him off to her friends and her professional network.

79. In early 2018, Sharon is hospitalised after a heart attack. Soon after she is discharged from the hospital, she tells Stanislav that she wants him to move out. The next day, she hands him a signed Separation Declaration, which she has photocopied from the BFA.

Discussion Points

80. Is the BFA binding?

81. Would the Court set aside the BFA?

82. What factors are relevant to the above questions?

83. Are there any issues of duress, undue influence or unconscionable conduct?

84. Can the provisions as to what happens on Sharon's death be binding?

Scenario: The Unforeseen Special-Needs Child

85. It's 2008. Ross and Rachel have been in a de facto relationship for three years. They have a two-year-old child, Chandler, and Rachel is pregnant with their second child.

They are engaged to marry and have planned a small registry wedding in six months' time.

86. Ross came into the relationship with property to the value of around $3 million. He is in a senior position with a major bank, earning $250,000 per year.

87. Rachel came in with no property of significance. Prior to Chandler's birth, Rachel worked as a receptionist earning about $40,000 per year.

88. The home in which they are living is registered in joint names. Ross had funded the deposit from his pre-cohabitation property, the balance having been funded by a joint mortgage.

89. Rachel has been a stay-at-home mum since Chandler was born, as a consequence of which Ross's income solely has been applied to the mortgage repayments since that time.

90. At this time, six months before the wedding, Ross wants Rachel to enter into a BFA to quarantine his pre-cohabitation property in the event of a marriage breakdown.

91. The draft BFA, prepared by Ross's solicitor, provides that:

    91.1 all of his pre-cohabitation property forms part of his Excluded Property, to which Rachel will have no entitlement if they separate; and

    91.2 the matrimonial home, as well as any other property which the parties acquired jointly during the marriage, will form part of the Shared Property, which (or the value of which) is to be divided equally upon separation.

92. The draft BFA is (intentionally) silent with respect to spousal maintenance.

93. Rachel engages a solicitor and, after a short period of negotiation, the draft BFA is amended such that any increase in value to Ross's Excluded Property is to form part of the Shared Property.

94. The parties enter into the BFA, with all technical requirements as to both the BFA, and the related advice, being met.

95. Five months later, Ross and Rachel marry. Another month later, their second child is born. They name him Joey.

96. Over the next few years, it becomes apparent that Joey is developing atypically. In due course, he is diagnosed with a number of conditions the effect of which is that Joey will require a higher-than-usual level of care and supervision, will require significant ongoing health care (including frequent appointments), and will not be able to attend a mainstream school.

97. Throughout this time, Rachel continues the role of stay-at-home mum, and primary carer to Chandler and Joey. As a consequence of Joey's condition, and that the family relies on Ross's full-time income, there is no prospect of Rachel engaging in employment or study.

98. After 10 years of marriage, Ross and Rachel separate.

99. Ross applies to the court to seek a declaration that the BFA is binding. Rachel responds, seeking that the BFA be set aside pursuant to section 90K(1)(d), which provides that a financial agreement may be set aside if

> *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 …, a party to the agreement will suffer hardship if the court does not set the agreement aside.*

100. Rachel's Response does not seek an order for spousal maintenance. Rachel has not applied for child support (whether administratively or otherwise).

101. Assume that:

101.1 at the time of the execution of the BFA, Ross's Excluded Property was valued at $3.8 million; and

101.2 at the time of the trial:

101.2.1 Ross is still in a senior position with a major bank, and now earns $350,000 per year;

101.2.2 Ross's Excluded Property is valued at $4 million (the increase, which forms part of the Shared Property, therefore being $200,000);

101.2.3 the equity in the matrimonial home is $150,000; and

101.2.4 the parties otherwise have not acquired any property together.

Discussion Points

102. Is there a basis for the BFA to be set aside pursuant to s 90K(1)(d)?

103. Can, or should, the facts that:

103.1 the BFA does not oust the court's jurisdiction with respect to spousal maintenance; and

103.2 Rachel has not applied for spousal maintenance,

impact the application of s 90K(1)(d)?

104. Can, or should, the fact that Rachel has not applied for child support impact the application of s 90K(1)(d)?

105. Would the application of s 90K(1)(d) be affected by the inclusion or exclusion of a recital in the BFA as follows?

> *Before, and in, executing this Agreement, Ross and Rachel have each had regard to the possibility that one or both of them, or one or more of their children, might suffer serious injury, serious illness, or death.*

106. Is there anything that can be done at the drafting stage to protect against an application to set aside a BFA pursuant to s 90K(1)(d)?

107. How do we, as legal practitioners, protect ourselves against being sued by our clients in the event that a BFA is set aside pursuant to s 90K(1)(d)?

Further reading:

108. Burreket, J, Thorne v Kennedy – a Family Law Case Note [2017] HCA 49, Australian Family Lawyer 26(3), December 2017.

109. Campbell, J, Thorne v Kennedy – Has the High Court hung financial agreements out to dry?, Law Chat Blog, Wolters Kluwer Central.

110. Damon, S, *Recent Case Updates in Family Law*, 2019 Foley's List Family Law Breakfast, 1 August 2019.[10]

[10] (Free) Available at https://foleys.com.au/resources/Recent%20Case%20Updates%20in%20Family%20Law_Damon_190801.pdf.