

BINDING FINANCIAL AGREEMENTS

HOW BINDING ARE THEY?

(in light of recent Family Court Decisions?)

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Some interesting statistics... *ABS 12/06

- Crude marriage rate (*3.8/1000 in 2005) is on the decline and defacto relationships are on the increase
- Almost 1/3 of marriages involve one party who has previously been divorced and 76% lived together prior to marriage
- Median duration of marriage is 11 – 13 years
- There is a trend toward older age marriages

- Males	1971 = 23.8	2002 = 29.2005 = 32	
- Females	1971 = 23.8	2002 = 27.1	2005 = 29.7
- 46% marriages end in divorce
- Age at which divorced

- Males	1971 = 37.9	2001 = 41.8	2005 = 43.5
- Females	1971 = 34.4	2001 = 39.2005 = 40.8	
- Between 1996 and 2006 (5yrs) there was a 28% increase in defacto relationships

Pre-nuptials – Do they need them?



David Reardon



Dama Edna

HELLO POSSUMS!!!

Changing Times

- Introduction of Part VIIIA to the *Family Law Act 1975* (FLA)
- Effective 27 December 2000
- Represents a continuing trend towards Private Ordering.
- Uses contractual principles in a family law context.

Introducing the financial agreements...

1. Section 90B – before marriage (commonly referred to as “pre-nuptial agreement”)
2. Section 90 C – during marriage
3. Section 90D – after divorce

Section 90B

- **Section 90B(1):** If:
 - (a) people contemplating entering into a marriage with each other make a written agreement with respect to any of the matters mentioned in subsection (2); and
 - (aa) at the time of the making of the agreement, no other agreement (whether made under this section or section 90C or 90D) is in force between the parties with respect to any of those financial matters; and
 - (b) the agreement is expressed to be made under this section; the agreement is a *financial agreement*.

Section 90B

- **Section 90B(2):** The matters in (1)(a) are:
(a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of them at the time when the agreement is made, or at a later time and before the dissolution of the marriage, is to be dealt with;
(b) the maintenance of them:
(i) during the marriage; or
(ii) after the dissolution of the marriage; or
(iii) both during, and after the dissolution of, the marriage.
- **Section 90B(3):** A financial agreement made as mentioned in subsection (1) may contain matters incidental or ancillary

Policies behind the change

- Give parties greater control over property.
(*Implication? Court's control diminished*)
See Ju v Ju and compare Black v Black
- Give parties greater choice about their own financial affairs.
(*Effect? Less Court discretion to intervene*)
- Reduce conflict on the breakdown of relationships.
(*Assumes Parties will not dispute the application of their agreement*)

What? Who? How? Why?

- Legally binding agreement entered into before parties marry, about the property and financial resources in the event of their separation.

What can they cover?

- Property distribution, financial resources and payments, spousal maintenance (before, during and after marriage – s90B(2)(b) and superannuation (s90MH(1)).
- Can include incidental/ancillary matters including lifestyle clauses etc (s90B(3)).

What? Who? How? Why?

- Can't contract out of Part VII FLA (parenting orders) nor the provisions of the *Child Support (Assessment) Act* unless by means of a binding Child Support Agreement.
- Any releases under the Family Provisions Act or the equivalent State legislation should also be included in a separate document that makes reference to the Financial Agreement.

Jurisdiction & Application of Part VIII subject to meeting the strict requirement

- A financial agreement ousts the Courts jurisdiction to financial matters and resources expressly dealt with in the Agreement
- Section 71A : provides that Part VIII (re: property/spousal maintenance rights) no longer applies to:
(a) Financial matters to which a financial agreement that's binding on the parties applies; or
(b) Financial resources to which a financial agreement that is binding on the parties to the Agreement applies.

What? Who? How? Why?

- Who wants pre-nuptial agreements?
 - High asset/High Debt individuals
 - Where significant disparity in wealth
 - Business Owners
 - Second, Third, Fourth & Fifth Marriages (e.g. to keep pre-marital assets)
 - Blending families
 - In-laws (e.g. to retain certain property/wealth)
 - Special circumstances in family (e.g. disability)
 - Weaker party to achieve economically sound position
 - Career minded individuals

Statutory Requirements

- **Section 90B**
- In writing (s90B(1)(a))
- Must make **express reference to section** pursuant to which it's made (i.e. pursuant to s90B) (s90B(1)(b))
- Content - how in the event of the breakdown of the marriage, **how all or any of the property or financial resources of either or both of the parties, at the time of the agreement, at a later time or before the dissolution of the marriage is to be dealt with** (s90B(2))
- NB: s90B(1)(aa) – at the time of making the agreement there **must be NO OTHER agreement** (whether under s90B, s90C or s90D) in force between the parties

Section 90E

Requirements with respect to provisions in financial agreements relating to the maintenance of a party or a child or children.

“ A provision of a financial agreement that relates to the maintenance of a 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.”

Section 90F – Certain Provisions in Agreements

- s90F(1): “No provision of a financial agreement excludes or limits the power of a Court to make an order in relation to the maintenance of a party to a marriage if ss(1A) applies”
- s90F(1A): “This subsection applies if the Court is satisfied that, when the Agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself/herself without an income tested pension, allowance or benefit.”

When are financial agreements binding – Formal Requirements

Section 90G – If and only if the following are complied with:

- Signed by both parties (s90G(1)(a));
- Compulsory independent legal advice given prior to signing and certified so in an annexure certificate (s90G(1)(b) & s90G(1)(c)) (see next slide);
- When agreement has not been terminated and has not been set aside by a Court (s90G(1)(d));
- Original of signed agreement given to one party and a copy given to the other party (s90G(1)(e));

Ju v Ju

(29/03/06) Collier J - Family Court Parramatta)

- Wife sought S90C Agreement to be enforced as an order of court.
- Lawyers Certificate provided was out of date and level of compliance to make it binding was inadequate.
- Compliance must be full compliance to satisfy S90F statutory requirements (which came into effect 11/04).
- Did not oust court's power to make adjustive order

Black v Black

(15/09/06 J Benjamin) [2006] FamCA972

- complied with S90G or set aside under S90K as Wife's conduct unconscionable, void for uncertainty.
- 18 month marriage and no children. Pool assets \$347,760
- Husband wanted S90C Agreement set aside to share Wife's motor vehicle compensation claim. Wife received \$41000.
- Previous extensive negotiations and court inferred Husband seeking any available avenue to avoid agreement/consequences.
- Judge preferred objective approach and purposive construction.
- Form should not defeat the substance otherwise cost puts agreement outside the financial means of the general community.
- Constructive rather than strict approach.
- Parties had acted substantially in its terms.

Black v Black (cont.)

- No finding of duress or undue influence on Husband and he knew proceeds of MVA were unascertained at time he signed.
- Consequently held agreement binding.
- On appeal held:.....

Ruzic v Ruzic [2007] FAM CA 473 (1 April 2007)

- HH Justice Stevenson held BFA dated 27/02/06 existed between parties.
- Solicitors had signed certificate under old 2000 form of legislation which did not meet requirements of 2003 legislative amendments.
- Applicant's solicitor following decision in J v J wrote to Husband's forwarding fresh certificate. Wife's solicitor signed certificate and Husband's solicitor substituted second certificate for original agreement and dated 22/02/06 date parties signed agreement.
- Wife submitted agreement did not comply with s90G(1)(b) and (c) and sought to have it set aside. (Husband sought to enforce as Order)
- HH held nothing in the Act expressly requires necessary advice and certification by lawyers must be contemporaneous events.
- HH satisfied certificate complied with s90G(1) and persuaded by remedy of rectification under s90KA.

Ruzic v Ruzic [2007] FAM CA 473 (1 April 2007)

- HH referred to **Australasian Performing Rights Assn Ltd v Austarama Television Pty Ltd**.
- *"It seems rather that the true principle involves finding an identical corresponding contractual intention on each side, manifested by some act or conduct from which one can see that the contractual intention of each party met and satisfied that of the other. On such facts there can be seen to exist objectively a consensual relationship between the parties."*
- HH satisfied that original certificates were rectified by second certificates as annexures to agreement.

Independent Legal Advice...

- Certificate has to confirm that advice has been given on following matters:
- *Effect of the agreement on the rights (e.g. pursuant to s79(4) and 75(2) FLA) of that party (s90G(1)(b)(i)); and*
- *The advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement (Part VIII, Part VIIIA, Part VIIIAA, Part VIIIB (superannuation), Family Provision Act (NSW), Succession Act (QLD)).*

Terminating a Financial Agreement (by parties themselves)

- Section 90J(1)
- Making a **new financial agreement containing a provision** specifying that the previous agreement has been terminated (see s90B(4)(a) and 90J(1)(a))
- Making a **written (termination) agreement** clearly stating termination of previous agreements(s90B(4)(b) and s90J(1)(b)).

Setting Aside Financial & Termination Agreements

- Section 90K – upon application of party to the agreement or other interested person
- Section 90K(1) (setting aside) or s90G(2) (enforcement)
- NB: Even if one of the following grounds are established the Court still has a **discretion** as to whether to set the agreement aside – see **Ju v Ju** and **Black v Black**
- Federal and Family Court has a broad discretion under s79 to make orders and alter interests of parties in property and in considering what orders to make it must be satisfied that it is just and equitable to do so.

Grounds for Setting Aside Financial Agreement - Section 90K

1. Fraud (s90K(1)(a))
2. Purpose of agreement includes defrauding, defeating or having reckless disregard for interests of creditors or creditors of the party (commenced on 17 December 2004 after decision in *ASIC v RICH(2003)FLC 93-171*) (s90K(1)(aa))
3. Agreement void, voidable or unenforceable (s90K(1)(b)) (e.g. misrepresentation, mistake, duress, undue influence, uncertainty etc.)
4. Change in circumstances arising since creation of the agreement that make it impractical (s90K(1)(c)) (e.g. property no longer exists)

Setting Aside Financial & Termination Agreements (cont.)

5. Material change in circumstances (relating to the care of a child) and as a result the child or a party to the agreement will suffer hardship unless set aside (s90K(1)(d))
6. Unconscionable conduct (s90K(1)(e))
7. Payment flag operating on a superannuation interest covered by the agreement and no reasonable likelihood that operation of the flag will be terminated (s90(1)(f))
8. Agreement covers one superannuation interest that is unsplitable under Part VIII B (s90K(1)(g)).

Section 90 KA – Validity, Enforceability and Effect of Financial Agreements

- s90KA:
- "The question whether a financial agreement or a termination agreement is valid, enforceable is determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts, and, in proceedings relating to such an agreement, the court:

2. Protection to 3rd party creditors

- S4 definition of "matrimonial cause" includes:
 - "*third party proceedings to set aside financial agreements*" s4(eab)
- s4A "Third Party proceedings to Set Aside Financial Agreements":
 - i.e. proceedings between:
 - (a) either or both parties to the financial agreement;
 - (b) creditor or government body acting in interests of a creditor.

2. Protection of 3rd party creditors (cont.)

- s90K(1)(aa) (commenced. 17/12/03):
- Court may set aside a financial agreement if, and only if, the Court is satisfied that either party entered into the agreement for the purposes of
 - (i) defrauding, defeating creditors
 - (ii) reckless disregard of the interests of creditors

Superannuation Interests - Part VIII B Family Law Act

- s90MH(1) - superannuation agreement to be included in financial agreement
 - Financial agreement under Part VIII A may include agreement dealing with super interests of either/both parties as if those interests were property - applies despite whether interest existed at time of agreement
- s90MH(4)
 - Superannuation agreement included in a financial agreement under s90B has NO effect unless and until the parties marry

“Just and equitable”

- s90K(3) - Party or interested person may apply for Orders; and a
- Court may, on application by a person who was a party to the financial agreement that has been set aside, or *other interested person*, make such orders it considers just and equitable for the purpose of preserving or adjusting the rights of parties and *any other interested persons*.
- Cases applicable under previous s86 and 87 w.r.t the “just and equitable” discretion still relevant (s79(2)).

Further changes...

- *Bankruptcy and Family Law Legislation Act 2005 (introd. 15/04/05)*
- Section 71A: Reverses the protection given to assets in a BFA when the trustee is involved in proceedings.
- Section 75(2)(o) : Can argue creditors interests to be considered as part of other factors in this section

Section 90DA Family Law Act

- Effective 15 April 2005
- Pre-nuptial (or any other BFA) not effective unless “separation declaration” made
- s90DA(1): “A financial agreement between 2 people, to the extent to which it deals with:
 - (a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of them at the time when the agreement is made, or at a later time and before the termination of the marriage by divorce, is to be dealt with; or
 - (b) the maintenance of either of them after the termination of the marriage by divorce;is of **no force or effect** until a separation declaration is made.”

Changes (cont.)

- *Family Law Amendment Act 2003 (commenced December 2004)*
- **Part VIIIAA - Orders & Injunctions Binding 3rd Parties**
 - s90AA allows the Court in proceedings under s79 or injunction under s114 to make an Order directed to alter the rights/liabilities/property interest of a third party
 - s90AC provides this part overrides other laws, trusts, deeds etc

Tips to avoid Traps

- Refer to document “Drafting section 90B agreement”
- Ensure S90G requirements strictly complied with and no other agreement in place
- Have both parties swear a list of documents and financial statement AND/OR attach schedules of assets/liabilities of each and any jointly held property and record how values arrived at/include Disclosure provision
- Include recitals to the effect that the parties have contemplated the possibility that they will have children etc and might separate and/or reconcile and define permanent separation
- Include provision for in the event the parties don’t marry but live together – (intended to then be a cohabitation agreement)
- Ascertain tax liabilities and those at large
- Properly record any parent/third party loan/s and future gifts and inheritances and if applicable it’s exclusion from asset pool

Tips to avoid traps (cont.)

- Any maintenance provisions must comply with section 90E (otherwise void) specifying the party/child/children and amount provided for or portion of property attributable to maintenance
- Include s90E & s90F provisions and s90DA Separation Declaration
- Refer to/acknowledge future exigencies and contingencies
- Ensure wills do not have conflicting clauses and include possible wills provision
- If business/company involved consider contingencies such as resignations, transfers, shares, loan account assignments, disclaimer of interests in Trusts and release from personal guarantees, indemnities
- Include Definitions, Recitals, History, Contributions, Terms, Severance clause
- Terms of the agreement and letter of advice prior to signing are documented and preserved – ensure file destruction policies reflect

Examples

" *This Agreement does not govern the support of C1 or C2 or any other child or children who may be born to the Partners or accepted into their household, and does not affect, increase or diminish the responsibilities and liabilities which each Partner otherwise has in respect of the support of such children.*"

Disadvantages of Agreements

- No procedure of acceptance under Act – no longer requirement of "approval" (as in s87 provision)
- Agreements only filed in registry when application made to enforce (s90KA) or set aside (s90K)
- Difficulty in foreseeing/predicting and adequately incorporating future contingencies
- Provisions may not adequately address issue of vulnerability of women in entering such agreements
- Subject to Court's discretion as to whether to set aside pursuant to s90K or enforce it pursuant to s90G(2) and then to make just and equitable orders pursuant to s79(2) – See **Ju v Ju and Black v Black**

Can we learn anything from overseas jurisdictions (e.g. USA)

- Introduction of *Uniform Premarital Agreement Act, Family Code s1610 et seq.* has meant states now uniformly enforce agreements subject to State statutory (contract law) restrictions
- **Issues they cover:**
 - rights and obligations of each of the parties in any of the property of either or both of them acquired before/after/during the marriage
 - the disposition of property upon separation, divorce, or death
 - making of a will, trust or other arrangement to carry out the provisions of the agreement
 - the ownership rights in and disposition of the death benefit from a life insurance policy
 - the choice of law governing the construction of the agreement
 - spousal maintenance
 - any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty
- **NB:** can't contract out of right of child to child support

US cases – what their antenuptial agreements provide for

- **Favrot v Barnes 332 So.2d 873**
 - provision included that limited "sexual intercourse to about once a week"
- **Koch v Koch 232 A.2d 157**
 - provided that the husband's mother would live with the couple in their home
- **Kilgrow v Kilgrow 107 So.2d 885**
 - provided that the children attend the school that the husband desired
- **Cowan v Cowan 75 NW.2d 920**
 - provision that if either party should remarry before their youngest child reached the age of majority(21), the marrying party would pay the other \$10,000.00

Why many lawyers don't want to draft these agreements? (cont.)

- Reluctance to commit to an indefinite contingent liability (20 years down the track)
- Issue of statute of limitations (see *Gillespie v Elliot (1987) QLR 24* – where Full Court held that a plaintiff's cause of action accrued from when they suffered damage, not from when the damage was discovered)
- Fee charged must reflect risk involved
- one size does not fit all
- professional indemnity insurance may not cover the 'gap' in large multi-million dollar property cases
- Inaccuracy ascertaining at large future or contingent liabilities and claims (e.g. tax)
- Uncertainty in recent decisions – see **Ju v Ju** and **Black v Black**

Should Be Binding If...

- All the requirements are met under:
 - section 90B, S90C, S90D
 - section 90E
 - section 90F
 - section 90G
 - section 90DA
- and if applicable:
 - section 90J
- and if not set aside under
 - section 90K

NB: Must note it is still subject to the Court's discretion