

CPD Essentials Conference

Family Law

Television Education Network

Binding Financial Agreements: Do the Reforms Make any Difference?

From its enactment in 1975 and for 25 years thereafter the *Family Law Act 1975 (Cth)* (“the Act”) made no provision for the recognition and enforcement of agreements made by parties to a marriage outside the provisions of s.79 of the Act¹ or s.86 and s.87.²

On 27 December 2000 there came into operation a new part of the Act, Part VIIIA, dealing with financial agreements.³

For the first time married parties could enter into binding agreements that disposed of their property and other rights without the need for a court to determine whether the provisions of the agreement were just and equitable.

Valid arguments could be raised both for and against the reforms. On the one hand, in favour of allowing parties to make their own agreements, it may be said that this is cognate with the usual freedom to contract that marks our commercial law; that it is also

¹ The source of power for a court to alter the parties’ property interests at law.

² Section 86 allowed for maintenance agreements to be registered and s.87 allowed for such agreements as contained maintenance and property provisions to be entered into in substitution for rights under Part VIII but only subject to the approval by the court about which the maintenance agreement had no effect. Section 86 (somewhat amended) survives in the Act and s.87 applies now only to agreements made (and approved) before 27 December 2000.

³ This was effected by the *Family Law Amended Act 2000*.

appropriate for parties to achieve certainty either before, during or after their marriage (or de facto relationship) when such can be established by a comprehensive agreement. On the other hand it may be that financial agreements, particularly those entered into prior to marriage (or de facto relationship), will be drawn so as to entrench the position of the more powerful party and make permanent an inequality and inequity that would otherwise be remedied by an alteration of property interests under s.79 of the Act.

WHY HAVE A FINANCIAL AGREEMENT

In a paper he presented to the 9th National Family Law Conference in Sydney in 2000⁴, Ian Kennedy identified the following five reasons why many currently, or intending, married or cohabiting couples may have a strong desire to contract between themselves in relation to their financial affairs:

- i) The wish to have the capacity to make their own arrangements for ownership and management of their property and financial resources during and/or at the end of their relationship;
- ii) A desire for increased certainty in the event that the relationship comes to an end;
- iii) The avoidance of conflict between them in relation to financial matters, both during and after the relationship;
- iv) The avoidance of the expense, uncertainty and delay of litigation;
- v) The ability to protect assets held prior to the commencement of the relationship - or acquired during it by inheritance or otherwise - through specific individual means independent of the relationship.

⁴ Kennedy, I. "Financial Agreements Under the Family Law Act". 9th National Family Law Conference, 3-7 July 2000, Sydney.

Furthermore, for married couples Kennedy noted that self-regulation may be particularly important in a range of circumstances:

- i) In second or subsequent marriages for the protection of prior assets for the benefit of children of previous marriages;
- ii) For the preservation of multi-generational farming properties or long established family businesses;
- iii) Where there is a vast disparity in the wealth of the parties (or the anticipated wealth of one of them by way of eventual inheritance);
- iv) For persons from cultural backgrounds where marriage agreements are commonly accepted practice;
- v) To avoid family disputes on the death of a party to a second or subsequent marriage.

THE REFORMS IN A NUTSHELL: A POTTED HISTORY

On 27 December 2000, there entered into the Act a scheme which provided for the three general classes of agreement but which also provided, quite strictly, for matters of form and substance with which, to be binding, agreements needed to comply.

In its first incarnation, s.90G of Part VIIIA allowed a financial agreement to be binding if:

- (a) The agreement was signed by both of the parties; and
- (b) It contained a statement that each party had, before the agreement was signed, been provided with independent legal advice as to:
 - (i) The effect of the agreement on the rights of the party;

- (ii) Whether or not at the time the advice was provided it was to the advantage financially or otherwise for that party to make the agreement;
 - (iii) Whether or not at that time it was prudent for that party to make the agreement; and
 - (iv) Whether or not at that time and in the light of reasonably foreseeable circumstances, the agreement was fair and reasonable;
- (c) There was an annexure to the agreement containing the certificate of advice signed by the legal advisor; and
- (d) The original agreement be given to a party and a copy of it to the other.

There was an amendment which took effect on 14 January 2004 and which lived in the Act until 28 February 2009 which “softened” the strictures concerning the legal advice that was required to be given and the form of the certificate.

In this period the agreement needed to contain a statement to the effect that the relevant party, before signing the agreement, had been given independent legal advice as to:

- (i) The effect of the agreement on the rights of the party;
- (ii) The advantages and disadvantages at the time the advice was provided of the making of the agreement.

It can be seen that the requirements of the advice that go to questions of advantage, financial or otherwise, of prudence and of fairness and reasonableness in the light of reasonably foreseeable future circumstances were eliminated.

(One wonders whether any of the certificates supplied up to 14 January 2004 were in the affirmative.)

There was further change made by an amending Act in 2008 having operation between 1 March 2009 and 3 January 2010. Again it went to the requirement for independent legal advice and confined the necessity for the giving of advice, and for the statement concerning the giving of the advice, to be confined to a “spouse party” there having been the possibility that persons not spouses might be parties to the agreement. The restrictions in the legislation attracted judicial comment that most noticeably in the case of *Black & Black*⁵.

In *Black* the parties had been in a relationship for some 18 months, separating in May 2003. Some five months into the marriage the parties entered into a financial agreement intending it to be binding pursuant to the provisions of s.90G of the Act. (At that time s.90G stood as it had been originally enacted.) The agreement dealing with their fairly modest assets provided for the contribution by the husband of the value of a house that he had owned and ultimately a contribution by the wife of an anticipated personal injuries payout. With their combined funds following the sale of the husband’s house the parties would acquire another property and if their relationship broke down that would be sold and the proceeds divided equally.

⁵ *Black & Black* (2008) 38 Fam LR 503.

In fact the wife did not receive anything like her anticipated damages and on the breakdown of their marriage, the husband sought to set aside the financial agreement. He failed at first instance notwithstanding that, following alterations to the agreement he was not given a new certificate. On appeal, the Full Court observed that, to that time there had been few decisions dealing with the interpretation of s.90G but that one, *J & J* [2006] Fam CA 442 was particularly instructive. There Collier J in considering the wording of s.90G said as follows:

“[19] To my mind, the words that appear in section 90G(1) “if and only if”, are words of real significance. They have a meaning. They import a requirement for a level of compliance, if the agreement is to be binding, that is clearly a standard or level above and beyond what might be described as substantial compliance. Those words “if and only if” make it clear that each of the parties must ensure that that which is required to be contained and dealt with in the agreement, and the annexures to it, is in fact contained, appropriately and completely. Compliance must therefore be a full compliance, satisfying the statutory requirements.

[20] Something approaching full compliance, or something that if looked at in a less than strict light, might come close to establishing compliance, is not enough. Clearly, the legislation intended that if this method of parties resolving their differences was to be used without any supervisory power of a Court, in a situation where parties’ rights were to be affected, then that which was to be done had to be done fully in compliance with that which the statute set out and required.”

Their Honours also considered a decision to the contrary effect by O’Ryan J in *Australian Securities and Investments Commission v Rich* (2003) 31 Fam LR 667. His Honour, dealing with the strict approach, said that it “*takes away from the legislative meaning and the better approach is the objective approach, which has been the subject of consideration by the High Court in a number of decisions.*”

In *Black* the Full Court determined that the stringent approach was correct.

In dealing with the certificate of advice the court said “*These statements did not meet all of the requirements set out in section 90G(i)(b), particularly there was no reference to advice in relation to whether the agreement was fair or prudent. In our view, such an omission meant that the agreement did not comply with the provisions of section 90G and was not binding upon the parties.*”⁶

Their Honours concluded their observations in this regard by saying “*We are of the view that strict compliance with the statutory requirements is necessary to oust the court’s jurisdiction to make adjustive orders under section 79*”.

Though, as observed, the requirements for certification and for relevant legal advice were modified, the application of *Black* meant that even after 14 January 2004 and again after 1 March 2009⁷ the requirement for strict compliance remained.

When *Black* was decided no doubt many parties, perhaps regretting a decision to enter into a binding financial agreement or otherwise uncertain about whether an advantageous agreement would survive no doubt looked hard at the certificate and the nature of the advice given. Accordingly, the Federal Government was moved to consider whether it might yet again amend s.90G. A Bill was prepared that ultimately became the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009*. The Act had a number of purposes (including others outside family law) but relevantly it was to amend

⁶ *Black*, supra, page 511.

⁷ As already observed these are amendments to the section.

further s.90G. The second reading speech by the Attorney-General upon the introduction of the Bill included this:

“Importantly the Bill responds to the decision of the Full Court of the Family Court of Australia in the matter of Black and Black.

In that case the court found that a binding financial agreement (commonly known as a prenuptial agreement) made under the Family Law Act 1975 was invalid because it did not strictly comply with certain technical requirements set out in the Family Law Act.

The amendments are being made because the government is concerned about the possible consequences of that decision on the validity of existing binding financial agreements which may contain technical errors.

The Bill amends the Family Law Act to ensure that people who have made an informed decision to enter into one of these agreements cannot later avoid or get out of the agreement on a mere technicality resulting in court battles that the agreement was designed to prevent. These amendments will restore confidence and certainty on the binding nature and enforceability of financial and termination agreements under the Family Law Act”.

WHAT YOU NOW NEED TO DO TO COMPLY

The amendments to s.90G took effect on 4 January 2010. The section is now in this form:

“90G

- (1) Subject to subsection (1A), a financial agreement is binding on the parties to the agreement if, and only if:
 - (a) the agreement is signed by all parties; and
 - (b) before signing the agreement, each spouse party was 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 that the advice was provided, to that party of making the agreement; and

- (c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and
- (ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and
- (d) the agreement has not been terminated and has not been set aside by a court.”

One has to ask, does this remade s.90G actually overcome the problems identified with an earlier version by the Full Court in *Black*?

One might have thought that the opening words of the section, namely, that it was to be binding if and only if what followed in the section was complied with would suggest to any lawyer that strict compliance with the provisions of the section would be necessary and that therefore there would need to be –

- The provision of independent legal advice before signature which advice was to deal with the effect of the agreement on the rights of the party and the advantages and disadvantages of it.
- Before or after signature each spouse party was to be provided with a signed statement saying that the advice had been provided.
- The provision to the other party or their solicitor of a copy of the statement.

As the explanatory memorandum says the purpose of the amendments of s.90G is “to relax the requirements in relation to evidence that the spouse parties to the agreement

must provide in relation to the obtaining of independent legal advice when entering into a financial agreement. Spouse parties to a financial agreement will be required to obtain independent legal advice from a legal practitioner about the effect of the agreement on their rights and the advantages and disadvantages at the time the advice was provided, of making the agreement. Spouse parties will also be required to obtain a signed statement from the legal practitioner stating that the advice was given.”

However, notwithstanding that what appears to be (in subsection (i)) a requirement for strictness that is modified in subparagraph (1A), the whole of the following was inserted by the most recent amending Act:

“90G(1A)

[Binding nature of financial agreement]

- (1A) A financial agreement is binding on the parties to the agreement if:
- (a) the agreement is signed by all parties; and
 - (b) one or more of paragraphs (1)(b), (c) and (ca) are not satisfied in relation to the agreement⁸; and
 - (c) a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made); and
 - (d) the court makes an order under subsection (1B) declaring that the agreement is binding on the parties to the agreement; and
 - (e) the agreement has not been terminated and has not been set aside by a court.”

⁸ That is the provision of independent legal advice, the provision of a statement attesting to the provision of the advice; and a provision of a copy of that statement to the other side.

In *Kostres and Kostres*⁹ the Full Court made this observation:

“As this case unfortunately demonstrates agreements designed to avoid costly litigation can have expensive consequences if the intention of the parties is not readily discernable from the drafting of the agreement. This is particularly so given the recent amendments to the Act by the *Federal Justice System Amendment (Efficiency Measures) Act 2009* (Cth), which Act received Royal Assent on 7 December 2009. The amendments were designed to overcome the effect of the Full Court’s decision in *Black & Black* [2008] FamCAFC 7; where the Court applied a strict compliance test with relation to certain technical requirements for binding financial agreements made under the Act. One of effects of the amending Act is to provide additional protection for parties who enter into financial and termination agreements by enabling a court to declare, in enforcement proceedings, that an agreement is binding despite a failure to meet the procedural requirements relating to the making of the agreement if the court is satisfied that it would be unjust and inequitable if the agreement did not bind the spouse parties (disregarding any change in circumstances from the time the agreement was made). This makes it even more essential that the substantive clauses of such agreements are drafted with precision to ensure effectiveness, especially as they may be dealing with future acquired property or other interests in property.”

Thus it may be observed that the further amendment to s.90G does on the one hand require strict observation of the formalities attending certification of the agreement but on the other provides a mechanism for overcoming a want of regularity. As the facts of *Kostres* would suggest an imperfectly prepared financial agreement, perhaps failing only in the provision of the statement concerning legal advice, may, or may not, be enforced if it would be “unjust and inequitable” if the agreement was not binding. This would lead any practitioner familiar with the fairly wide discretions available under the Act to conclude that these matters are likely to follow the relatively subjective judgments that must be made at first instance of what is just and equitable.¹⁰

WHEN THE AMENDMENTS APPLY

⁹ *Kostres and Kostres* [2009] FamCAFC 222.

¹⁰ See also the decision of Murphy J in *Fevia & Carmel-Fevia* [2009] FamCA 816.

Part VIIIA of the Act on Financial Agreements commenced on 27 December 2000.

Given that the amending Act took effect on 4 January 2010, an issue of when the amendments apply exists.

The transitional provisions stipulate when the amendments apply to various agreements made over time (Schedule 5, Part 1 of the amending Act, (“the Schedule”)).

For financial agreements made before 14 January 2004, the amended paragraph 90G(1)(b) of the Act does not apply. The following paragraph 90G(1)(b) of the Act is taken to apply in relation to financial agreements, as set out here:

- “(b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about:*
- (i) the effect of the agreement on the rights of that party; and*
 - (ii) whether or not, at the time when the advice was provided, it was to the advantage, financially or otherwise, of that party to make the agreement; and*
 - (iii) whether or not, at that time, it was prudent for that party to make the agreement; and*
 - (iv) whether or not, at that time and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable; and”*

For financial agreements made on or after 14 January 2004 to 3 January 2010:

- (1) Paragraph 90G(1)(b) that was in force during that period (briefly, regarding the agreement containing statements of independent legal advice, certified and annexed) is taken to be satisfied in relation to a spouse to an agreement if before signing the agreement, that spouse party was provided with independent legal advice from a legal practitioner on the terms set out above for pre-14 January 2004 financial agreements (see immediately above).
- (2) There is taken to be a corresponding change to section 90G(1)(c) where subsection (b) is mentioned, on the same terms as set out above.

For financial agreements made before 4 January 2010:

- (1) Paragraphs 90G(1)(c) and (ca) of the Act (as inserted by item 2 of the Schedule) do not apply.

Therefore, for financial agreements made before 4 January 2010, statements by legal practitioners are not required.

- (2) Paragraph 90G(1A)(b) of the Act (as inserted by item 4A of the Schedule) does not apply and the following paragraph 90G(1A)(b) of that Act is taken to have been inserted by that item and to apply instead:

“(b) paragraph (1)(b) is not satisfied in relation to the agreement; and”

Therefore, for financial agreements made before 4 January 2010, a financial agreement is binding on the parties to the agreement if before signing the agreement, each spouse party was not provided with independent legal advice from a legal practitioner about the matters set out (effect on right, advantages, disadvantages etc.). Section 90G(1A)(c), in any event, remains in force for such agreements.

WHEN THE AMENDMENTS DO NOT APPLY

The amendments do not apply to:

- (1) A financial agreement if, before the commencement of the amendments, a Court has made an order setting aside the agreement; or
- (2) Financial agreements whereby before the commencement of the amendments, a Court has made an order under section 79 or section 83 on the basis that the agreement did not bind the spouses.

COMPLIANCE IN PRACTICAL TERMS

Compliance is not so much a technical question as a practical one. The need for compliance is, as it has always been upon a proper reading of s.90G, to conform to the requirements of the section. As it now stands, there must still be the obtaining of independent legal advice from a legal practitioner about the effect of the agreement on the rights of the parties and the advantages and disadvantages at the time the advice was provided of making the agreement. Spouse parties must also obtain a signed statement from the legal practitioner who gives the advice stating that the advice was given. Thus in practical terms, there must be:

- (a) A well drawn financial agreement complying with all of the drafting rules and thus secure against deconstruction.
- (b) The provision of legal advice to each of the parties which must be:
 - Justifiable on the evidence
 - Justifiable on any construction of the agreement; and
 - Not affirmative about the agreement but neutral as to advantages and disadvantages.
- (c) A signed statement which records that the advice was given. This can be brief or it can record in writing the nature of the advice (as can the advice itself) however there is no requirement save for the provision of the signed statement that the advice itself should be in writing.

Issues remain as to the situation where a party does not receive the requisite advice under the provisions of the legislation but that the certificate says they have received it

and as to how far it is open to the Court to look at the substance of the advice given to a party in a particular case.

In *Blackmore & Webber*¹¹, the learned Federal Magistrate rejected the notion that it would be necessary to analyse the advice given to the party saying that it may involve violation of legal professional privilege and, that taken to the extreme, parties would be required to obtain further legal advice on the quality of their initial legal advice before a Court could be satisfied that an agreement entered into is valid.

THE RELEVANCE OF EXISTING CASELAW

It is contended that the fairly small body of case law will have continuing application. For example the Full Court in *Kostres* ranged widely though relevantly over matters including the rules of interpretation, references to the common intention of the parties, the meaning of terms in a contractual document, and the *contra proferentem*¹² rule. It is submitted that in a case either seeking to overcome the financial agreement or seeking that it be set aside there will be a need to examine its construction as a legal document.

Case law does not yet extend to the new s.90G(1A) (where a court may enforce an imperfect financial agreement if it is unjust and equitable not to do so) and until authorities

¹¹ *Blackmore & Webber* [2009] FMCA FAM 154

¹² "This rule, which may be applied where there is ambiguity in the terms of a contract, is resolved against the party seeking protection where that is appropriate." *Kostres* at paragraph 115 (see footnote 9)

emerge on the effect of this provision it must be merely submitted that courts are likely to be inclined to give effect to financial agreements unless the circumstances concerning the failure to give legal advice or the failure to provide a statement that it has been given signals some fundamental miscarriage of justice. This may indicate that a party has been overborne or induced to sign under unconscionable pressure (the categories of which are not closed).

Section 90G is now in its fourth incarnation. For such amendments to have occurred in a single decade is indicative of some innate weakness in the provision itself.

It can be suggested that there is perhaps an unconscious reluctance on the part of legislators to allow parties merely to contract with one another concerning the disposal of matrimonial property and thus simply opt out of the adjustive jurisdiction provided by s.79. At first this new provision was reflected in a form which was highly specific and which, at post *Black* was subject to the most strict construction. (In fairness this was determined by a Full Court that had closely drafted legislation to examine and, it is submitted, little room to find that strict compliance was not necessary).

But as has been earlier pointed out it could be argued that s.90G contains a contradiction in that its strictness remains (though not as to so many matters) but that lapses may be forgiven. It is as if slowly, through constant recasting, the Act is coming to the position that financial agreements ought to be easier to enforce than to avoid.

For a discussion on fraud, duress and unconscionability as grounds for setting aside an agreement, see *Blackmore & Webber* (footnote 11).

BFAs USED AS PRENUPS

There are essentially three types of binding financial agreements:

- (a) Those entered into before marriage (strictly prenuptial agreements);
- (b) Agreements entered into during the marriage; and
- (c) Agreements entered into after the marriage has ended.

There are three corresponding agreements for de facto relationships.

It is submitted that prenuptial agreements are in character and purpose quite unlike agreements entered into during a marriage or de facto relationship, or after the marriage or de facto relationship has ended.

A prenuptial agreement must deal with future events and as the future is contingent and almost always unforeseeable, a prenuptial agreement needs to be very carefully drawn.

One might have anticipated, but not yet seen, applications brought to set aside otherwise binding financial agreements on the basis that the eventualities that confronted the parties were not wholly foreseeable or alternatively, that the parties elected to live otherwise than

in conformity with the financial agreement and that therefore there should be implied a consent to the determination of the agreement.¹³

As Professor Patrick Parkinson noted in the preamble to his paper, “*Setting aside financial agreements*”, presented to the 2001 Queensland Law Society Family Law

Residential:

“Any law giving effect to prenuptial agreements should also take account of the particular vulnerability of those who are asked to enter such agreements. Infatuation as the High Court acknowledged in *Louth v Diprose* (1992) 175 CLR 621, can be a source of considerable vulnerability. Love is often blind. Such factors give reason for caution about applying the contract analogy too readily to pre-nuptial agreements.”

BFA’S USED IN LIEU OF CONSENT ORDERS

Binding financial agreements are generally the alternative to consent orders under s79 of the Family Law Act. They can also be used however as an adjunct to consent orders.

The advantage flowing from the making of consent orders under s79 arises because of the limited circumstances under which a final order for property settlement under s79 can be varied or set aside under s79A of the act.

With the risks associated with the making of binding financial agreements, it is likely in our view that where agreement is reached, it will generally be cheaper for parties to proceed by way of consent orders particularly where proceedings are already on foot. Even if proceedings have not been initiated, it is likely to be cheaper for parties to file a simple

¹³ This argument would not be unlike that sometimes raised in s.79A proceedings where it may be asserted that a consent to the variation of a regularly obtained order under s.79 should be implied through the conduct of the parties. See *McCabe* (1995) FLC 92-634 and *Sommerville* (2000) FLC 93-042.

application supported by a short affidavit and statement of the financial circumstances of each party, than it is to prepare a binding financial agreement which one or other or both practitioners is trying to make bulletproof.

Stamp duty exemptions and rollover relief from capital gains tax will generally apply equally to both consent orders and binding financial agreements.

The use of binding financial agreements however offers some distinct advantages over consent orders. For one the agreement, unless challenged, is not subject to scrutiny or oversight by a court. It also offers the advantage of privacy if this is a priority for one or other or both parties. If effectively entered into then the binding financial agreement ousts the jurisdiction of the court and its power to make orders for property settlement between the parties.

There are some differences in the provisions whereby consent orders or binding financial agreements can be set aside so you need to carefully examine the legislation in terms of how consent orders and financial agreements can be set aside. For example the grounds for setting aside a consent order for non-disclosure are less stringent for consent orders than binding financial agreements. For binding financial agreements the non disclosure must amount to fraud but for consent orders to be set aside the non-disclosure does not need to be fraudulent.

Certainly the entry into consent orders places less onerous responsibilities on solicitors than binding financial agreements.

A binding financial agreement if properly entered into can extinguish a party's ability to apply for maintenance unless at the time the agreement was made the party could not have supported themselves without an income tested pension allowance or benefit.

Financial agreements, formalized so as to be binding, and achieving their end, will dispose of property interests just as consent orders made under s.79 do. However a consent order must still be approved by a judicial officer as just and equitable and proposed consent property orders are refused routinely by the courts and registrars on the basis that they are not.

Thus if s.90G can be permitted to stop evolving, and if perhaps through mere statutory interpretation or otherwise through the cases the profession can become comfortable with such things then they may become more routine and be a common substitute for a consent order.

BEST PRACTICE GUIDELINES

The Best Practice Guidelines for lawyers doing family law work were revised by the Family Law Council and Family Law Section of the Law Council of Australia as at October 2010. The section on Financial agreements whilst brief is informative and helpful and reads as follows:

“5 Financial Agreements

5.1 When advising a client in relation to entering into a Financial Agreement the lawyer should ensure that the relevant provisions of the Act are explained to the client in all necessary detail.

5.2 The lawyer should also advise the client of the potential consequences of the client failing to make full and frank disclosure of their financial position.

5.3 It is good practice to record the advice in writing and have the client sign an acknowledgment of having received that advice.

5.4 The lawyer should ensure that the provisions of the Family Law Act have been complied with to ensure enforceability of the agreement.

5.5 The lawyer should explain to the client options available for the recording and storage of the agreement in particular and whether the client requires a copy of the agreement to be retained.”

EXECUTING THE BFA: PRACTICAL ORDER

In light of the above, it may be prudent for legal practitioners to implement a system at their office whereby binding financial agreements are executed in a consistent manner.

To ensure your compliance with the legislation, a suggested method to execute binding financial agreements may be as follows:

1. Give your client independent legal advice as set out in the Act.
2. Have your client sign each page, with you to witness each signature immediately after the client.
3. If you are the last party to sign the agreement, date the agreement.
4. Sign and date your Statement of Independent Legal Advice.
5. Make three (3) copies of the signed Statement of Independent Legal Advice.
6. Hand to your client the originally signed Statement of Independent Legal Advice.
7. Annex a copy of the Statement of Independent Legal Advice to the agreement and retain the remaining copy for your file.

8. Have your client sign and date an Acknowledgement of Receipt of Statement of Independent Legal Advice. This one document can make provision for the other party or their legal representative to also sign a similar acknowledgment that they have received a copy of same. You will need one document for each party to sign and reciprocate.
9. Make a full copy of the agreement for your client, and for your file.
10. Have one party keep the originally signed agreement in their legal practitioner's safe custody, or retain in their own safekeeping. This may be the legal practitioner or the client of same who substantially drafted the agreement, or as agreed between the parties.
11. Keep detailed file notes about every aspect of your advice to your client and the above matters. You never know when you may be called upon to give evidence as to the part you played in executing a binding financial agreement.
12. Finally, it is prudent to write to your client confirming your advice to them. If your client acts against your advice, ask them to sign an acknowledgment on the bottom of the letter setting out the advice and their instructions to you.

For a detailed discussion of the various steps necessary to achieve compliance and timing aspects, see the judgment of Murphy J in *Fevia v Carmel-Fevia* (see footnote 10).

SOME COMMON SCENARIOS YOU WILL ENCOUNTER AND HOW TO RESPOND

- 1) We are familiar with each other's financial circumstance and don't need any disclosure.

Comment:

One or other or both parties will present with an air of confidence and accomplishment and indicate that they have reached an agreement and it will simply be a matter of putting a document together and having it signed. When you attempt to slow them down, suggesting that it is often more complicated and there are matters to explore such as full disclosure of each parties financial circumstances so that they are each on a level playing field and in a position to negotiate, you are often met by a response to the effect "Don't worry about that, we both have full knowledge of each other's affairs and simply need the agreement to ensure it is all final and watertight". In this situation you need to carefully explain that while what they are saying may well be so, it is necessary to ensure that proper disclosure is provided and is shown to be provided, so that one party can't use any lack of disclosure to get out of the agreement or have it set aside at a later date. The parties are usually amenable to a suggestion that proper disclosure is necessary to ensure that the agreement holds up and that while the parties are co-operative at this stage and it is difficult to envisage any later challenge to the agreement, circumstances may change and one party may later seek to rely on a lack of full disclosure to challenge the agreement and for this reason, it is imperative that there be full disclosure at the time of entry into the agreement so that "justice appears to be done".

In *Suiker & Suiker*¹⁴ at paragraph 84, 471 the Full Court said:

¹⁴ *Suiker & Suiker* [1993] FLC 92-436

“In our opinion, the necessity for full and frank disclosure of financial matters to the Court and to the other party are basic to the process of the Court and the fundamental aims of the financial legislation contained in section 79 of the Family Law Act.”

- 2) It is an amicable separation and we have sorted our affairs and just want you to record it in an agreement that we both can sign and which will be binding.

Comment:

This has largely been dealt with in the comment immediately above. Again it is important to ensure that steps are taken to provide and obtain full disclosure and independent advice so as to maximize the chances of the agreement holding up if challenged down the track.

- 3) My husband has had an agreement prepared dividing up our assets and just wants me to sign it. Although I have always left the finances to him, he has always been fair and I can't see any reason why he would do the wrong thing by me so I just want to sign it and get it over with.

Comment:

Sometimes people forget that they have come to the agreement in the context of separation and the other party is no longer necessarily on “their team” or has the same interests to consider. Whilst it is understandable, particularly in a longstanding relationship, that one party might consider that the other has always been fair and not think that he or she would do the wrong thing by them, it is important to point out that the other party has his or her own agenda to consider and that while the party may be fair in negotiating the agreement, this can no longer be assumed and experience

shows us that in these situations a party is more likely to put his or her interest first rather than equally considering the other's interest.

- 4) We don't have much in terms of assets and don't want to go to too much expense.

Comment:

From our experience, parties are always concerned about the costs of the agreement, and often have quite unrealistic expectations in relation to the costs involved. Whilst on one hand they want the agreement to be watertight or "bulletproof" and would be happy to complain or perhaps sue you if it isn't, they are often surprised when you tell them how much it is likely to cost to do it properly. Part of this flows I think from a lack of knowledge about what is involved and the significance of reaching an agreement that if effective, ousts the jurisdiction of the court to determine financial matters arising on separation. Part also no doubt reflects the general reluctance of parties to "waste" money on legals. Parties tend to see their issues as relatively straightforward, particularly if they have reached agreement and cannot understand why there would be significant costs incurred in putting the agreement in place. The best way to deal with this is to carefully explain the importance of the agreement they are entering into and the implications of same and why they would want it to be binding and the consequences for them if the agreement were to be set aside. When it is explained in terms of the importance for them of the agreement not being set aside and the steps that can be taken to maximize the chances of this then it is easier for the client to appreciate the costs said to be involved and to be prepared to pay same to achieve the desired outcome.

- 5) I have read over the agreement prepared by my husband's solicitor and am happy with it so just want you to witness my signature.

Comment:

This scenario is again a clear warning bell to the practitioner who should avoid the pressures that the comment entails by carefully explaining to the client the risks and dangers that may arise if the legislation is not complied with and the level of detail required. If the client insists on a rush, "drive through" approach, then the solicitor would be well advised to decline his or her instructions. In the long run the client is likely to have little sympathy for a solicitor who accepts abridged instructions and then "botches" the job.

SOME USEFUL TIPS TO OBSERVE

- 1) Take clear and precise instructions and record these in writing. Try to be as clear as possible in relation to what the client is trying to achieve and draft the agreement as precisely as possible to reflect the mutual intention of the parties and seek feedback to confirm the accuracy of your understanding.

As the Full Court said in *Kostres* (see footnote 9):

"A Court's power to adjust property under s79 is exercised using well defined guidelines to ensure the resulting order is just and equitable, and any order made may be subject of the safeguard of appellate review. That is not the case with property dealt with under a financial agreement. Thus care in establishing the mutual intention of the parties, and drafting the terms of the financial agreement with precision assume the utmost importance."

- 2) Be clear in your advice to the client as to the limitations of the agreement particularly where there are significant changes of circumstances and reality test and seek feedback to check whether your client understands your advice.
- 3) Confirm your advice in writing and again, make it as clear as possible (see 22 below).
- 4) Take comprehensive file notes and record instructions taken and advice given at all attendances in writing;
- 5) Ensure that there is plenty of time between the entry into the agreement and significant events such as a wedding. At all costs avoid any semblance of the “drop in to the lawyer on the way to the wedding scenario”.
- 6) Note that section 90G has mandatory requirements for strict compliance. Ensure that the requirements of the section and indeed the legislation, are both carefully noted and fully adhered to.
- 7) The financial agreement must be “expressed to be made under” the relevant section. This requires a specific statement in the financial agreement (either in the recitals or the operative provisions or both as follows:

“This is a Financial Agreement made pursuant to (*insert the relevant section*)”.
- 8) Ensure that you follow the very detailed Lexon protocol for binding financial agreements. In Queensland and possibly elsewhere, substantial additional excesses already apply to professional indemnity insurance in the areas of personal injury and conveyancing and these apply unless there is a genuine effort to comply with the protocol. There is no real reason to believe that in time similar provisions will not apply to binding financial agreements as well so

practitioners would be very well advised to comply with the protocol in each and every respect;

- 9) Explain the need for full and proper disclosure and do your best to have this occur.
- 10) Ensure that each spouse party is provided with a signed statement by a legal practitioner stating that the party was provided with the independent advice stipulated by the legislation. It is prudent to have the client sign a receipt acknowledging that he or she has been given such signed statement.
- 11) Ensure that each spouse party is given a copy of the signed statement by the legal practitioner for the other party. This can be given either to the spouse party or to his or her legal practitioner.
- 12) Ensure that the legal practitioner who provides the certificate of independent legal advice is a person currently enrolled as an Australian legal practitioner.
- 13) Ensure that the agreement is not entered into by an exchange of counter-part Financial Agreements.
- 14) Ensure that a “copy” of the Financial Agreement shows the signatures of all parties. To be a “copy” the agreement needs to be a photocopy of the original showing the signatures of all of the parties.
- 15) If reliance is placed on a statement of independent advice being provided to a party after signing the agreement then ensure it is provided as soon as possible and that there is no undue delay in providing the statement.

- 16) Even though the requirement for the inclusion of a statement of independent legal advice within the body of the Financial Agreement has been removed it is still prudent to insert one.
- 17) Whilst not required, it is no doubt still prudent to annex a certificate of independent advice to the agreement with such certificate being signed by the lawyer who provides the advice.
- 18) Have a receipt signed by each party to the agreement acknowledging receipt of an original or copy of the signed agreement and other aspects they are required to receive under the legislation.
- 19) Include a schedule of assets and liabilities in the agreement and do everything you can to ensure that the schedule is as up to date and accurate as possible.
- 20) Explain carefully to clients that as with all aspects of life circumstances change and encourage them to undertake reviews of their BFA every few years;
- 21) Explain to clients that the law regarding BFA's has been the subject of considerable change over the years and may well be the subject of further change and that you can in no way guarantee that the law will remain the same.
- 22) Provide your client with a letter of advice in relation to the BFA and the relevant law. Ensure that your letter contains advice as to the uncertainties surrounding the legislation and how it is interpreted by the courts. Send them a further copy of the advice and request their confirmation of receipt by signing the copy advice and returning it to you.

- 23) Keep the BFA as simple as possible (within the limit of your instructions). Don't confuse the issue by including provisions about child support or adult child maintenance.
- 24) Don't be part of any attempt by your client to defraud creditors or others and explain that in any event following the Rich case, the law has changed and third parties can intervene and seek to have the agreement set aside.

CONCLUSION

It may be that clients more so than practitioners favour financial agreements. In them they sense immediacy (and of course consent property orders are not available prenuptially nor, in any practical sense during a marriage). However legal practitioners, in our opinion, are justifiably concerned about the longer term ramifications not only of drafting what may be intricate provisions in a binding financial agreement but in then providing advice and keeping perhaps forever a proper record of the entire matter. Furthermore, legal practitioners might well be concerned for future amendments that might either make more formal the provisions for such agreements or may have the contrary effect.

It would seem no one can say that we have seen the end of legislative change in the area of financial agreements. If developments over the last 10 years are any indication, then clearly the law will continue to evolve and present challenges for practitioners.

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