

FINANCIAL AGREEMENTS

# The ever changing landscape of financial agreements

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# **The Ever Changing Landscape of Financial Agreements**

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In the last couple of years the earlier enthusiasm of legal practitioners for financial agreements has waned. A steady stream of reported cases has alerted legal practitioners to the technical difficulties of meeting the requirements of the *Family Law Act 1975* ("the Act"), the broad grounds upon which agreements can be set aside, and the realisation that agreements may be found not to be binding for issues outside of a legal practitioner's control.

The attraction of financial agreements for legal practitioners has waxed and waned. When they were introduced in December 2003, the requirement for legal practitioners to give financial advice was an insurmountable barrier. The significant changes to the Act in 2004 and 2010 created greater opportunities, but increased the confusion. Many of the reported cases where agreements have been challenged involve agreements drafted using old precedents based on earlier versions of s 90G(1).

Since *Parker & Parker* (2012) FLC 93-499 and *Hoult & Hoult* (2011) FLC 93-489 the popularity of financial agreements amongst legal practitioners has understandably hit a new low. An agreement is at risk of being found not to be binding if a party was not properly advised. This risk is compounded by the uncertainty following the High Court decision in *Stanford v Stanford* (2012) FLC 93-495. The High Court appeared to reject the "four step process" to determining applications under s 79 and s 90SM and it is unclear what process has taken its place. What advice should a legal practitioner give as to the likely s 79 or s 90SM entitlements of a party if it was not for the agreement? What advice do you give about the rights of a party to a marriage to claim under s 79 if the parties are not separated or are separated involuntarily?

## **Requirements of s 90G(1)/s 90UJ(1)**

A financial agreement must meet the requirements of Pt VIIIA (or similar provisions in Div 4 of Pt VIIIAB). When drafting a financial agreement or giving advice as to whether an agreement is binding, it is important to refer to the precise wording of the Act as it existed (or it was deemed to have existed) when the agreement was entered into by the parties.

The *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* ("2010 amendments") commenced on 4 January 2010. Sections 90G(1)(b) and 90UJ(1)(b)

currently require that before executing a financial agreement, each spouse party is provided with independent legal advice from a legal practitioner about:

- the effect of the agreement on the rights of that party;
- the advantages and disadvantages, at the time the advice was provided, to that party of making the agreement.

In addition:

- the legal practitioner providing the advice must, before or after signing the agreement, sign a statement that the advice was given. The statement does not need to be annexed to the agreement;
- a copy of the statement provided to the spouse party must be given to the other spouse party or to a legal practitioner for the other spouse party.

Failure to comply with s 90G(1)(b), (c) or (ca) or 90UJ(1)(b), (c) or (ca) may not be fatal to the binding nature of the agreement. Under s 90G(1A) or 90UJ(1A) the court can declare that the agreement is binding on the parties if it is satisfied that it would be unjust and inequitable if the agreement were not binding on the parties to the agreement (disregarding any changes in circumstances from the time the agreement was made). This means that despite non-compliance with the advice and certificate requirements, the court can declare an agreement to be binding.

Section 90G currently reads as follows:

- (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.*  
*Note: For the manner in which the contents of a financial agreement may be proved, see section 48 of the Evidence Act 1995.*
- (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 agreement; 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.
- (1B) For the purposes of paragraph (1A)(d), a court may make an order declaring that a financial agreement is binding on the parties to the agreement, upon application (the **enforcement application**) by a spouse party seeking to enforce the agreement.
- (1C) To avoid doubt, section 90KA applies in relation to the enforcement application.
- (2) A court may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary.

### Definition of “legal practitioner”

The legal advice must be provided by a legal practitioner. The term "legal practitioner" is not defined in the Act although "lawyer" is defined in s 4(1) as a person enrolled as a legal practitioner of a federal court or the Supreme Court of a State of Territory of Australia. The term was interpreted by Coates FM in *Murphy & Murphy* (2009) FMCAfam 270 as requiring that the legal practitioner has the right to practice in the Australian federal jurisdiction under s 55B *Judiciary Act 1903*. The agreement in *Murphy* did not comply with s 90G(1)(b) and (c) as the wife's certificate was signed by a lawyer who had the right to practice in the Philippines rather than in Australia. Coates FM said (at para 50) that even if he was wrong:

“That does not escape the fact that legal advice is advice about the law and that must be with regard to the law of a particular jurisdiction...”

In *Ruane & Bachmann-Ruane* [2009] FamCA 1101 Cronin J agreed with Coates FM and held that if the statutory requirements of Pt VIIIA are to be strictly followed, it mattered that the certificate of independent legal advice given to the husband was not given by an Australian legal practitioner. The agreement was not binding because it did not comply with s 90G(1).

### Black & Black: strict interpretation approach

The Full Court in *Black & Black* (2008) FLC 93-357 adopted a very strict interpretation of the version of s 90G(1) which applied prior to 14 January 2004. The strict interpretation approach appears to have survived the 2010 amendments, subject to the ability of a Court to save an agreement under s 90G(1A) or s 90UJ(1A).

Benjamin J had the husband's lawyer's file in evidence. Although a fresh certificate was not signed by the husband after the terms of the agreement were changed, Benjamin J found that s 90G had been satisfied. Benjamin J said that the purpose of the legislation was to enable people to enter into agreements easily, to avoid going to court and to avoid spending a lot of money on specialist legal advice. Benjamin J also found that the certificate was part

of the agreement and there was no requirement that the wording of s 90G(1)(b) be used again within the body of the agreement.

The Full Court allowed the appeal and set the financial agreement aside. Section 90G(1)(b) (as it was prior to the 2004 amendments) expressly required that the agreement contain a statement from each party that, before they executed the agreement, they received independent legal advice from a legal practitioner in relation to the matters referred to in (i) to (iv). The agreement did not refer to the specific requirements detailed in s 90G. It was not sufficient that the certificate did. This omission meant that the agreement did not comply with s 90G and was not binding upon the parties. The Full Court said that strict compliance with the statutory requirements was necessary to oust the court's jurisdiction to make s 79 orders.

### **Incorrect references to sections**

One of the most common errors in reported cases is that the agreement and/or the statements of independent legal advice refer to the incorrect section of the *Family Law Act 1975*. With respect to agreements under Pt VIIIA the options are:

- s 90B - Before marriage
- s 90C - After marriage but before separation
- s 90C - After marriage and after separation but before divorce
- s 90D - After divorce
- s 90H - A termination agreement
- s 90MH- A superannuation agreement

Under Pt VIIIAB, the options are:

- s 90UB - Before a de facto relationship
- s 90UC - After the commencement of a de facto relationship but before separation
- s 90UD - After separation
- s 90UL - A termination agreement
- s 90MH - A superannuation agreement

These errors appear to be made for one of two reasons:

- The agreement was drafted based on a precedent and the references to the sections were not changed or were not consistently changed;
- The agreement was drafted over a period of time and not updated for changed circumstances. For example, the agreement may have been intended to be entered into before the date of the marriage but the parties married before the agreement was executed.

Collier J held in *Balzia & Covich* [2009] FamCA 1357 (prior to the 2010 amendments) that he

could rectify the financial agreement so that it referred to s 90C rather than s 90B, but he could not rectify the certificates signed by the legal practitioner which referred to advice having been given under s 90B. The parties married just prior to the agreement being executed by them both. His Honour said (at para 33):

"I am of the view that sections 90B and 90C do not involve the same concept. I am satisfied that to properly advise their clients, the solicitors giving the advice and completing the certificates would need to approach the agreement to be made under one such section differently from the approach to be taken and the advice to be given (which is the subject of the certificate), if the agreement is to be made under a different section... It seems to me, however, fundamental that the Act draws a distinction between the two sections."

If decided now, the court could find that the agreement was binding if the court was satisfied that it was unjust and inequitable if the agreement were not binding on the parties under s 90G(1A)(c). However, Collier J considered that, as a distinction was drawn in the Act between agreements under each section, it was important for the advice to be specific to the section under which the agreement was made.

The distinction between the rights of de facto couples and married couples became less important after 1 March 2009 when the Act was amended to cover de facto couples separating after that date in most states and territories. The rights of de facto and married couples are not, however, precisely the same. For example, there is no jurisdiction under the Act for property orders to be made if de facto couples have not separated whereas there is jurisdiction in relation to married couples. Another important distinction is the complex jurisdictional hurdles which must be overcome before a s 90SM order can be made, such as geographic (s 90SK) and whether the de facto relationship lasted for a period or a total of two years, there was a child, the relationship is or was registered under a prescribed law or the relationship meets the serious injustice test (s 90SB).

In contrast to *Balzia*, Neville FM in *Ryan & Joyce* [2011] FMCAfam 225 was prepared to rectify an agreement entered into after the marriage which incorrectly referred to s 90B. He found that the husband was estopped from avoiding his obligations under the agreement.

The Full Court in *Senior & Anderson* (2011) FLC 93-470 was unanimous that references to incorrect sections were errors capable of rectification. There were errors in the agreement and the certificates. These were:

1. On both the coversheet to the agreement and the heading of the first page of the agreement, but not in the recitals, it was expressed to be a financial agreement pursuant to s 90C. The parties had divorced before the execution of the agreement but the error was repeated in the first substantive clause. The agreement should have

been entered into under s 90D.

2. The wife's legal practitioner's certificate was dated 20 July 2009 and the wife's receipt and acknowledgement of her understanding was dated 22 July 2009. This discrepancy was largely explained in the affidavit of the wife's legal practitioner.
3. The wife's certificate was inaccurate in that, having correctly identified her as the client to whom the advice was given she was subsequently identified, not by her correct name but by the name "*Patricia*" in clauses 2 and 3 of that certificate.
4. The certificate from the husband's legal practitioner correctly identified the husband but there were errors in clauses 2 and 3 of the certificate where the husband was wrongly identified by the name "*Chris*".

The trial Judge, Young J found that the agreement was binding on the parties despite the errors because (at para 94):

"On the facts of this case the parties negotiated and concluded an agreed contract for a division of their property. They were in complete agreement at the time of execution of that contract as to its terms. The mistakes were of a legal or identification issue unknown to the parties and of a kind that should have been known to their solicitors. The agreement simply does not reflect the common intention and outcome as negotiated by the parties. The subjective and common intention of the parties was properly expressed within the agreement, but save for the technical errors."

Young J, distinguished the facts from *Balzia*, saying (at para 55):

"that the errors upon the Certificate(s) can and should be corrected, that they were unintended errors and they should not and do not negate the professional legal advice given to each of the parties. They are not errors that are fatal to the binding nature of the agreement and...are different to the facts of *Balzia & Covich*."

The majority upheld the appeal against the trial judge's finding that the agreement was binding but for different reasons.

In the light of later cases such as *Parker & Parker* (2012) FLC 93-499 and *Hoult & Hoult* (2011) FLC 93-489, the result in *Senior & Anderson* may have been different if the agreement was challenged on the basis that the advice given to the parties was incorrect.

Since the 2010 amendments there is greater scope for an agreement to be binding even if technical errors are made because they may be "saved" under s 90G(1A) or s 90UJ(1A). For example, in *Wallace & Stelzer* [2011] FamCA 54, Benjamin J was prepared to use s 90G(1A) to find that the agreement was binding in circumstances where the incorrect statement was annexed to the agreement. In other cases a distinction has been drawn between "technical" errors and more substantive errors.

### Does the advice need to be given and must it be correct?

The advice required is more than an explanation of the meaning of the agreement. It should include:

1. Assessment of the client's entitlements under the Act. This is particularly difficult as there is uncertainty following the High Court's decision in *Stanford v Stanford* (2012) FLC 93-495 as to whether the "four step" approach used in cases such as *Hickey & Hickey and Attorney-General for the Commonwealth* (2003) FLC 93-143 still applies and the approach to s 79 generally. A court must determine that it is just and equitable to make an order before embarking on the rest of the s 79 process. It is no longer the fourth step, but a threshold or preliminary issue. The extent to which it is relevant to the rest of the s 79 process is unclear. For example, following *Stanford* what advice do you give to your client as to their likely entitlements if:
  - the parties have overseas assets?
  - the parties keep significant assets in their personal names?
  - there are inheritances or are likely to be inheritances?
  - one of the parties applies for a property settlement in circumstances where the parties are legally married but separate voluntarily rather than by intention?
  - one party has significant superannuation?
2. Weighing up your client's entitlements under the Act against other considerations which may justify other arrangements.
3. Explanation of the meaning of the agreement as a whole and its parts.
4. Recommendations or otherwise as to whether the client should execute the agreement.

The effect of inadequate or incomplete advice is uncertain. There have been conflicting decisions. In *Senior & Anderson* (2011) FLC 93-470 Strickland J, in dicta, said the advice did not need to be correct for the agreement to be binding. In *Ruane & Bachmann-Ruane* [2009] FamCA 1101 Cronin J found that the requirement was simply for the parties to obtain legal advice. This did not mean that the advice had to be accepted and followed, or even that it had to be correct.

In *Parker & Parker* [2010] FamCA 664 the trial Judge, Strickland J, dealt with an agreement with handwritten amendments. The wife was advised by her legal practitioner not to sign the agreement. She decided to sign it and met with her legal practitioner about three weeks later to do so. At that meeting, handwritten changes were made to the agreement by her legal practitioner. The agreement was executed and sent to the husband's legal practitioner. A further handwritten amendment was made requiring the husband to pay \$10,000 and the wife to pay \$60,000 in reduction of a joint liability if they resumed cohabitation. The

agreement was executed by the husband and sent back to the wife's legal practitioner. The wife and her legal practitioner initialled the change but the certificate was not amended.

On 16 September 2009, Strickland J reserved his judgment. He listed the matter for delivery of reasons in December 2009. The husband sought an adjournment until after 4 January 2010 when the relevant provisions of the 2010 Amendments commenced. This was opposed and further argument was heard on an adjourned date. Ultimately, Strickland J delivered his reasons after 4 January 2010 and applied the 2010 Amendments.

The wife's application to set aside the agreement was opposed by the husband. Strickland J found:

- When the wife initially signed the agreement, the wife received advice on it. The legal practitioner's file note recorded that the wife's legal practitioner went through the agreement with the wife and discussed the implications with her;
- No advice was given to the wife on the husband's amendment. The wife said she initialled the amendment in a short meeting at which no advice was given. The wife's legal practitioner said she gave the advice she was required to give. However, her file note was less detailed than the file note of the previous meeting, stating only that the amendments were discussed, agreed to by the wife and initialled;
- No further certificate of a legal practitioner was given nor was the previous one amended;
- Neither the relevant terms of the agreement nor the certificate of the husband's legal practitioner positively indicated that he received the necessary legal advice *before* signing the agreement.

There was a dispute between the parties as to whether the *Black & Black* "strict compliance" test had survived the 2010 Amendments. Strickland J said that advice of a general nature was insufficient and found that the s 90G(1) requirements were not met.

With respect to whether the agreement could be "saved" under s 90G(1A), the parties had opposing views of s 90G(1A). Strickland J's view of s 90G(1A) was (at para 109):

"In my view, s 90G(1A) therefore contemplates the court looking at the nature of the non-compliance with s 90G(1), and determining whether, in the circumstances, it would be unjust and inequitable if the agreement was not binding on the parties due to the failure to comply with a "technical" requirement".

Strickland J noted that the legislature deliberately chose the words “unjust and inequitable” rather than “just and equitable” as in s 79. He said (at para 110) that he was required:

“to determine whether, given the circumstances surrounding the making of the financial agreement in this case, it would be unjust and inequitable for the agreement not to be binding on the parties.”

The husband submitted that the wife should not be able to avoid the terms of the agreement being binding on the basis of a technicality and should not be able to rely on her own legal practitioner’s omission. Strickland J said (at paras 114–5):

"In these circumstances, I am not satisfied that it would be unjust and inequitable if the financial agreement was not binding. If the only issue of non-compliance with s 90G was that, for example, one of the parties had not been provided with a copy of the relevant statement from their solicitor or a copy of the statement from the other party’s solicitor, the court may indeed be satisfied that it would be unjust and inequitable in such circumstances for the parties to not be bound by the agreement due to a so-called ‘technical’ omission.

However, the receipt of independent legal advice by all parties to a financial agreement is an essential requirement. Indeed, it could well be unjust and inequitable to the wife if she was bound by the financial agreement in circumstances where I have found she was not fully advised of the implications of the amendment.”

His Honour declared that the agreement was not binding on the parties within the meaning of the Act. The husband appealed. Coleman and May JJ in *Parker & Parker* (2012) FLC 93-499 allowed the appeal and remitted the matter for rehearing. In three separate judgments the Full Court judges gave very different reasons, which makes it difficult to predict the future of the interpretation of s 90G(1) and s 901G(1A). In summary:

- Coleman J seemed to accept that the agreement did not comply with s 90G(1) but found that Strickland J took an overly narrow interpretation of s 90G(1A);
- May J said that Strickland J was entitled to find that the wife had not been properly advised and therefore the agreement was not binding under s 90G(1). Strickland J should have considered s 90G(1A), but he was hindered in doing so by the manner in which the case was presented;
- Murphy J, dissenting, found that it was not possible to find that an agreement ever existed. He also found (at para 215) that:

"the issue joined before the trial judge was not whether advice was given or whether advice was given that fits a particular description; in issue was whether the advice *actually given* was compliant with s 90G. The trial Judge found, in my respectful view correctly, that there as *an insufficiency* of evidence about the very matter that His Honour was required to determine on this issue".

He said that the trial Judge correctly concluded that s 90G(1A) could not be used to

find the agreement was binding. Relying on *Senior & Anderson* (at paras 121-2 per Strickland J with whom Murphy and May JJ agreed on this point) he rejected the argument (at para 230) that s 90G(1A) only applied to "technical" non-compliance. He dismissed the appeal.

In *Pascot & Pascot* [2011] FamCA 945 the advice given to the wife by her legal practitioner was incorrect. The wife was told that the agreement would not be binding. The wife argued that as she had been given the incorrect advice that meant that the advice had not been given to her at all and the s 90G(1) requirements were not met. Le Poer Trench J said (at para 325):

"The point at issue in this case is that the legal advice was not only incorrect as to the fairness of the agreement, it was wrong as to the major and pivotal effect of the agreement, namely that the wife was surrendering her rights to seek any order under Pt VIII of the *Family Law Act*. That is a substantially different circumstance to one where the party entering an Agreement understands that the agreement may be important in proceedings between the parties under Pt VIII of the Act as opposed to excluding the courts ability to consider any application under that Part."

However, he declined to set aside the agreement on this ground as the husband was unaware of the erroneous advice and said (at para 243):

"The provision of the independent legal advice was a matter completely out of his control. It seems to me to be completely unfair to the husband to set the Agreement aside for a reason which is completely outside his control. To take that action would, it seems to me, potentially make s 90G and the whole intention of creating 'binding financial agreements' unworkable and give rise to uncertainty."

Le Poer Trench J set aside the agreement on other grounds.

In *Sullivan & Sullivan* [2011] FamCA 752 Young J was faced with a financial agreement signed by the wife prior to the marriage and by the husband subsequent to the marriage. The agreement referred to it being entered into under s 90B. The husband sought to rectify the agreement and the wife sought to set it aside.

Young J found that the wife received the advice required by s 90G(1) regarding a s 90B agreement but the husband did not receive the requisite advice. He concluded that the agreement was not a "financial agreement" under the Act, that it was not enforceable, that it was not binding and it was not able to be rectified.

In *Omar & Bilal* [2011] FMCAfam 1430 an agreement entered into by the parties during the marriage was set aside as Henderson FM was not satisfied that the wife had been properly advised. The wife had left school at age seven and was illiterate in her native language,

Arabic, which she spoke with a Lebanese accent. Her legal practitioner spoke Arabic with an Egyptian accent. The wife said she had difficulty understanding her legal practitioner. Henderson FM said this was unsurprising given her limited education. Her legal practitioner referred her to an interpreter to translate and explain the agreement without the legal practitioner being present. Henderson FM was very critical of this process. She said (at paras 65, 68–71):

“Under s 90G of the Act an interpreter has no status to explain the legal ramifications of a Deed other than through a solicitor who is present with the client when words are being translated ... It is the duty of a solicitor giving independent legal advice to explain the legal ramifications of a Deed to a client directly or through the use of a translator. Not the other way around...

It is inconceivable that [the wife’s solicitor] believed the wife understood his interpretation of the Deed when he then sent her to an Arabic translator to re-explain in Arabic the effect of the Deed.

It was his duty to ensure that the wife understood his explanation of the effect of the Deed as he is the solicitor. He cannot abrogate this duty to an interpreter. Had the interpreter been at the [wife’s solicitor’s] office with the wife and the 3 together had had a meeting for one hour regarding the Deed then my decision may well have been different. I could have found that the wife had been informed of the effect and advantages and disadvantages of the Deed by a solicitor through the use of an interpreter, not as I now find, explained by an interpreter.

I could have made such a finding even in the absence of a certificate of translation because I could have found that the Deed had been explained to her by a solicitor through the use of an interpreter and the lack of a note or certificate of translation to be a matter of procedure and not substance.

It is improper for a lawyer to certify ‘*I informed and gave legal advice to this person*’ if that person did not understand due to a language difficulty or some other impairment what was being said to them.”

Henderson FM found that the requirements of s 90G(1) had not been met as the legal practitioner did not give the wife the requisite advice. She also found that there was unequal bargaining power, but this was not the ground on which the agreement was set aside.

*Hoult & Hoult* (2011) FLC 93-489 was decided by Murphy J, who was later the dissenting judge in the Full Court in *Parker & Parker*. The wife argued that she did not have independent legal advice. She did not call her legal practitioner to give evidence but the husband did. Murphy J was critical of the wife’s legal practitioner’s evidence (at paras 43–44, 48, 50):

“The solicitor’s evidence was unsatisfactory in many respects. Not least of the concerns about her evidence was her admission that her file contained no diary notes, statements, correspondence or anything else in writing to which reference could be made in respect of the advice given to the wife. With respect, this seems to me extraordinary — not least because of the necessity dictated by

s 90G for the solicitor to provide a signed statement as to the giving of the required advice and the litigation which has surrounded Part VIIIA of the Act (and s 90G in particular) and the potential for consequences for the solicitor personally.

The solicitor said...that she intended to write a letter of advice to the wife after the agreement had been signed...and the agreement had been returned to her. It is by no means clear to me why a solicitor would do that; I would have thought there would be some anxiety to record the advice given as soon as possible and, preferably, before the client signed the agreement. The solicitor did not do so...because...'I think time just got away from me'. ...

I am, of course, conscious that some years have elapsed since the consultation, lasting some 50 minutes which was, it seems, the only consultation between the solicitor and the wife. Plainly enough, the solicitor has seen many clients since. (Of course, it might be observed that it is just such factors — among other things — that dictate the prudence of comprehensive diary notes or other memoranda or, for example, a contemporaneous letter of advice. It might also be observed that not only might any or all of those documents have assisted recall but, of course, they might, of themselves, have been evidence).

The absence of notes or other documents, the gaps in the solicitor's recall, the total failure to recall anything of important matters (for example, what advice was given about the disadvantages of the agreement) and the patchiness of recall of other aspects of the consultation with the wife (for example, exactly what advice was given as to the wife's rights) cause me to have significant concerns about the reliability of the solicitor's evidence."

The wife alleged that she did not receive a copy of the Schedules to the agreement (setting out the husband's asserted assets and liabilities) and that a legal practitioner providing s 90G advice needed to have details of the assets and liabilities of the parties. Murphy J was not persuaded that the absence of a list of assets and liabilities at the time of giving advice *necessarily* meant that the advice *required by s 90G* was not given or could not be given because it was the first step of the four step process under s 79. He said (at para 66):

"A practitioner providing the required advice might, of course, feel more comfortable, or consider it prudent, to have a list of assets and liabilities so as to give the client examples of the permutations that *might* be possible and what may, or may not, be seen as 'advantages' or 'disadvantages' as a result. In addition, it might well be that advice which can be seen to be comprehensive in terms of a solicitor's duties, or that which is desirable in light of s 90G's ramifications, might have many components to which a list of assets and liabilities might pertain. The issue is not what prudence or practice might dictate, but what s 90G *requires* of any advice."

The wife's legal practitioner did not, to the best of the wife's recollection, give any explanation to her about the law relating to the agreement or ask her any questions about the history of their marriage. The wife said that she did not receive advice about her rights under the agreement, nor the advantages or disadvantages arising from the agreement.

Murphy J found the certificate was insufficient to satisfy the onus of establishing that the

relevant s 90G requirements had been met, as it appeared that the wife had not been given the requisite advice. Murphy J adjourned the matter for submissions as to whether the agreement could be “saved” under s 90G(1A).

In *Hoult & Hoult* [2012] FamCA 367 Murphy J found that under s 90G(1A)(c) it was unjust and inequitable if the parties were not bound by the agreement. He said (at para 57):

“It seems to me that the enquiry required of s 90G(1A)(c) is a wide-ranging one that might include considerations such as:

- The facts and circumstances surrounding the particular s 90G requirement not being met;
- What the parties themselves said and did, if anything, so as to render the agreement not binding;
- The circumstances within which the parties bargain was concluded;
- The length of time between the signing of the agreement and the decision as to whether the parties are to be held to it;
- What the parties said and did in reliance upon the agreement being binding subsequent to the signing of the agreement;
- Whether the terms of the bargain itself offend ordinary notions of fairness or plainly fall markedly outside any reasonable broad assessment of the s 79 discretion.”

In *Sawyer & Sawyer* [2011] FMCAfam 610 the court accepted that as the wife received advice on the agreement after she signed it, rather than before she signed it, the requirements of s 90G(1) were not met.

In an earlier case, *Kostres & Kostres* [2008] FMCAfam 1124, the factual basis of the advice was in dispute. The husband argued that the financial agreement ought to be set aside on various grounds, including that the certificates provided by the legal practitioners did not comply with s 90G(1)(b), as they were given when both parties believed that the bankrupt was an undischarged bankrupt. However, there was no evidence that the legal practitioners had this belief. Furthermore, Wilson FM said (at para 24–25):

“The difficulty with the husband’s argument is that s 90G does not, by its terms, place any relevance on the quality or correctness of the advice given to a party. All that is required is that the party receives advice, a certificate to that effect is provided, and the party acknowledges receiving the advice.

In my opinion, s 90G deals with the formal requirements of a binding financial agreement. It is not open to a party to argue that the substance of the advice given was incorrect, or given on a false premise (unless perhaps, this was known to the other party to the marriage, who could be said to have acted unconscientiously in reliance on the mistaken belief of the other. That however, is a different matter, and is best addressed when consideration is given to s 90K of the Act). If the advice was wrong (in the sense of being given negligently, or in breach of retainer) the party to the marriage has rights elsewhere. If the advice was correct, then it is difficult to see how the party has been disadvantaged. That is particularly so where, as here, the husband gave evidence that he would still have signed the agreement.”

On appeal, in *Kostres & Kostres* (2009) FLC 93-420, the grounds relied on by the parties did not include this issue. The outcome of the trial in *Kostres* might be different now, given the emphasis on the accuracy of the advice. It is a useful reminder of the necessity for accurate recitals as to the factual background to the agreement.

The particular difficulties of giving advice about pre-nuptial agreements were discussed by Murphy J in *Hoult & Hoult* (2011) FLC 93-489 (at para 65):

“How is the justice and equity (in s 79 terms) of the agreement to be determined at the time it is signed if it does not become operative until separation occurs? If advice as to ‘the advantages and disadvantages’ is not to be given by reference to prospective s 79 entitlements, what criteria or reference point or points are the measure of ‘advantage’ or ‘disadvantage’? The terms of an agreement might be seen to be wholly just (or ‘advantageous’) if separation was to occur a week later and wholly unjust (or disadvantageous) if separation was to occur 25 years later. The terms of an agreement may be seen to be wholly just (or advantageous) if the parties have modest assets at the time it is made but be seen to be wholly unjust (or disadvantageous) should, 20 years later, one of the parties acquire very significant wealth. Permutations are innumerable.”

### **Verbal vs written advice**

Written advice is preferable to verbal advice, particularly if it confirms verbal advice given before the agreement was signed by the client. Important points to note are:

- Written file notes may be insufficient to show that the advice was fully explained;
- It can be difficult to accurately record the conversation in handwritten file notes;
- A party may forget or may not properly hear or understand the advice;
- Advice may be so general that it is misleading or it may be later alleged to be so;
- A party may enter into an agreement despite advice not to do so. There may be many reasons for this including depression or guilt about a marriage breakdown, or personal or family pressures to marry. Verbal advice may not be properly heard or recalled.

A legal practitioner giving a statement of independent legal advice is not required by the Act to give a letter of advice. It is, however, highly recommended that this occur to:

- Avoid any misunderstandings about the advice;
- Protect the legal practitioner if the client claims the legal practitioner was negligent;
- Ensure that there is evidence that the s 90G(1) advice requirement has been complied with (subject to any difficulties associated with waiving legal professional privilege).

It might be wise to only accept instructions on condition that the client pays for comprehensive written advice and acknowledges that advice.

### Was the advice independent?

The circumstances in which the legal advice given by a legal practitioner lacks independence are unclear. Obviously, each party must each have their own legal practitioner and they cannot be from the same law firm. Circumstances in which the advice may arguably be considered to be tainted are if the legal practitioner is:

- Selected by the other party;
- Selected and paid for by the other party;
- Paid for by the other party; or
- Paid for by the other party on condition that the costs do not exceed a certain amount.

In *Logan & Logan* [2012] FMCAfam 12, Terry FM found that the wife had independent legal advice although there were indications that it was not. Arguably, another court might decide this case differently. Arguments against the advice being independent despite the Federal Magistrate's finding that it was, were:

- The parties jointly attended three of the wife's four meetings with the wife's legal practitioner without the husband's legal practitioner being present;
- The wife's legal practitioner had prepared wills for both parties;
- The wife's legal practitioner effected the transfer of the home to the husband at the husband's request;
- The only conference the wife had with the legal practitioner without the husband being present was the last of the four conferences, when she executed the agreement;
- The wife's legal practitioner's file note did not contain any reference to advice being given to her at the last conference and the husband did not contend that it was given at any of the previous three meetings;
- The husband ultimately paid the wife's legal practitioner's account;
- The wife's legal practitioner told her when she sought parenting advice after the agreement was signed, that he could not assist her because he had acted for both parties in the property matter.

After 23 years of marriage the wife received 15% of the pool, but in upholding the agreement, the court seemed to be swayed by a finding that the wife was not under any special disability, felt guilt about ending the marriage and that the initial approach to the legal practitioner was made by the wife.

The wife unsuccessfully argued that her legal advice was not independent in *Balzia & Covich* [2009] FamCA 1357. She was taken by the husband to see the legal practitioner and she asserted that the legal practitioner was mainly her husband's legal practitioner. Collier J

accepted that the husband was told to go away on the first occasion she saw the legal practitioner and that the husband had his own legal representation. The agreement was found not to be a valid agreement on other grounds.

In *Vance & Vance* [2012] FMCAfam 599, Baumann FM was satisfied that the wife received independent legal advice in circumstances where:

- The legal practitioner had acted for the husband five or six years beforehand and they fell out over fees;
- The legal practitioner had previously practised in family law but had spent the past 8 years concentrating on commercial, conveyancing, wills, estates and aviation law.

Baumann FM found that the legal practitioner was not required, nor was he able to assess all the future financial permutations that this couple's financial journey could take. He agreed with Murphy J in *Hoult* (at para 63) that the legislation does not prevent parties from being "perfectly free to make a bad bargain."

Baumann FM concluded (at para 48):

"I am satisfied that Mr King was both independent and a legal practitioner ... I see nothing in a requirement prescribed by the relevant section to impose any obligation on the legal practitioner to have either specialist or other qualifications in family law. The section requires, by inference, some knowledge of this area of law otherwise it would be hard to be satisfied that the practitioner could be able to articulate the "*advantage and disadvantages*" of the agreement or the effect of the agreement on the rights of the party being advised. Mr King did have some experience in family law over many years."

In *Moreno & Moreno* [2009] FMCAfam 1109, the issue of the limitations placed on the wife's legal advice by the husband was not considered. Demack FM noted that the husband told the wife he would only pay for one hour's advice. The wife was advised that it was not to her financial advantage to sign the agreement. The legal practitioner recognised the reasons she might do so anyway. In the face of sensible advice (which the wife did not follow) and the fact that the agreement was set aside on other grounds, the limitation placed by the husband on legal advice was not important. However, in other circumstances it might arguably have assumed greater importance.

### **Questions to ask yourself before advising on an agreement**

Matters to consider before giving legal advice include:

- Do you have sufficient experience to give the advice? If not, the client (and your professional indemnity insurers) may be better protected by a referral to a more experienced legal practitioner;

- How do you ensure that the other party, if without the resources to pay, is provided with “independent legal advice”?
- How do you ensure that the other party receives legal advice compliant with s 90G(1)?
- Can your client understand your advice? Does your client speak a different language? Is your client sufficiently literate to read the agreement and your letter of advice?
- Can the paying party put a maximum “cap” on costs to be incurred by the other party’s legal practitioner? Does this amount to, or can it be a factor in, establishing duress or unconscionable conduct?

The drafting of pre-nuptial agreements is risky work for a legal practitioner. As with wills, negligence claims may still be made years later. Also like wills, there are pressures from clients to do them quickly, cheaply and without comprehensive instructions. Clients request “a simple will” or “a simple agreement” when in reality these do not, or only rarely exist.

Ideally, legal practitioners should observe higher standards than the minimum requirements. The amount of litigation to date regarding the interpretation of Pt VIIIA suggests that the best way to achieve a binding financial agreement is to strictly follow the requirements of s 90G(1) or 90UJ(1) and have evidence to support this. However, the best way to avoid a professional negligence claim is to avoid advising on financial agreements altogether.

### **Duty to third parties**

It is possible that a legal practitioner acting for one party may have a duty of care to the other party to the agreement. The situation may be analogous to the preparation of a will and a duty of care may be found to exist.

This question arose in *Noll & Noll* [2011] FamCA 872. The wife applied to set aside a s 90C agreement on the basis that she did not receive independent legal advice. The husband applied to the Court to join the wife’s legal practitioners to the proceedings. If the financial agreement was declared not to be binding or set aside, the husband wanted the wife’s former law firm to be liable for any loss suffered by him. The trial judge refused the husband’s application as the case did not fit the Full Court’s guidelines in *Warby & Warby* [2002] FLC 93-091 in relation to accrued jurisdiction. The husband’s appeal was reported as *Noll & Noll* (2013) FLC 93-529. The Full Court did not decide whether the husband’s claim against the wife’s legal practitioners had merit but found that accrued jurisdiction was not attached. Apparently, the husband sought leave to appeal to the High Court but the parties resolved the dispute on a final basis by consent.

The contrary position regarding accrued jurisdiction was taken in *Ruane & Bachmann-Ruane* [2012] FamCA 369. The Full Court in *Noll* distinguished *Ruane* (at para 55):

"The factual difference between that case and the present is that in that case a financial agreement between the parties had already been declared to be non-binding. We make no comment as to the correctness or otherwise of his Honour's decision, other than to observe that whether or not accrued jurisdiction is attracted in a particular case, will very much depend on the facts of that case."

### **How to avoid a claim**

1. Simple! Do not act for clients entering financial agreements.
2. Before deciding to act, weigh up the risks including the potential size of the claim. Is it more than your top-up insurance?
3. At the end of a relationship, use consent orders in preference to financial agreements.
4. Refer to the Act assiduously.
5. If the agreement is altered after the advice is given, updated written advice should be given. Avoid handwritten amendments. The whole agreement should be amended and reprinted. Fresh advice should be given and documented, preferably by letter.
6. Although there is no current requirement that each party be given a copy of the agreement (only copies of the two Statements), each party should promptly receive one to reduce the risk of allegations of duress and unconscionable conduct.
7. Signing the Statements of Independent Legal Advice and exchanging copies of the Statements before the Agreement is executed, may assist in proving later that the advice was provided to each party before they signed the agreement rather than after. This procedure should be documented in a file note.
8. As there may be an application to set aside the agreement and a legal practitioner may be a witness, it is important to:
  - Keep accurate, detailed contemporaneous file notes of instructions and advice;
  - Ask standard questions of the client (in addition to questions which are particularly relevant to an individual client);
  - Write a letter of advice which meets the requirements of s 90G(1) or 90UJ(1).
9. Advise the client that the terms of the agreement must be followed. If the parties do not abide by the agreement, the court may refuse to enforce it. If it becomes difficult or impracticable to follow the agreement or the parties change their minds, the agreement should be reviewed.

10. Precedents should not be followed blindly. They are only a guide. Each client will have different goals and different personal and financial positions. The agreement must fit the parties' circumstances and goals, not the other way around.
11. Advice must be both comprehensive and comprehensible. It must meet the requirements of the Act. At the same time, it must not be so complex that it is difficult for a client to understand or so simple as to be misleading.
12. Keep a copy of the agreement to ensure that a copy is available if the client cannot find a copy when it is needed. It may be prudent to keep a certified copy of the original agreement. The agreement, letters of advice and file notes of instructions should not be destroyed even if the file is destroyed. They may need to be referred to many years later. It may also be important to have evidence of efforts to obtain full disclosure of the other party's financial position, and the details of disclosure which was provided.
13. The letter of advice and final draft of the agreement should be sent to the client at least several days before the client executes the agreement. Although there is very little case law in Australia about signing an agreement close to the date of the marriage, it is best to avoid the "ink on the wedding dress" or "ink on the tuxedo" situation.
14. The estimate of costs for the work done should take into account the complexity of the task and the risk of a later professional negligence claim. Do not under-estimate the work involved. If the client does not want to pay for the work to be done properly, you are better off not doing the work.
15. A legal practitioner acting for a female of child-bearing age should seriously consider advising the client (and negotiating accordingly) to insert in the agreement that either the agreement terminates on the birth of a child or that different provisions in the agreement apply.
16. If the parties do not marry, the status of the agreement should be clear in the agreement. The agreement may not be able to act as both a pre-nuptial agreement and a de facto cohabitation agreement although Cronin J in *Cording & Oster* [2010] FamCA 511 found that it could. The intentions of the parties should be clear in the agreement so that the parties are not misled.

### **Don't forget the drafting**

It is easy to be distracted by the plethora of cases dealing with the technicalities of whether a financial agreement complies with s 90G(1) and s 90UJ(1) and forget the importance of

drafting the agreement properly. Common mistakes in drafting agreements include:

- Relying excessively on precedents;
- Not giving sufficient background in the recitals;
- Drafting clauses as if they were orders;
- Omitting assets;
- Not providing for reasonably likely contingencies;
- Other gaps which could lead to an agreement being found to be uncertain.

As the Full Court said in *Kostres & Kostres* (2009) FLC 93-420 (at para 165):

"As this case unfortunately demonstrates agreements designed to avoid costly litigation can have expensive consequences if the intention of the parties is not readily discernible from the drafting of the agreement...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."

## Conclusion

Financial agreements were intended to provide spouses with certainty when sorting out their property and spousal maintenance disputes after separation or to cover the possibility of a separation. This has not been the case. Consent orders, at least for spouses at the end of their relationship, look to be a much more secure option. The interpretation of s 90G and 90UJ remains unclear, the wording is complex and although the Federal Government, by enacting the 2010 Amendments tried to move the courts away from the strict compliance interpretation of *Black & Black* (2008) FLC 93-357, that approach was not expressly rejected. Instead, the 2010 Amendments appeared to:

- (a) Save many agreements through the introduction of transitional provisions;
- (b) Change the requirements for an agreement to be binding, attempting to make them easier to meet;
- (c) Allow agreements which did not meet the requirements of the Act to be held to be binding under s 90G(1A) or s 90UJ(1A) if the court is satisfied that it is unjust and inequitable if the agreement is not binding on the spouse parties.

If in doubt about whether an agreement is advantageous to your client or you consider the agreement too advantageous to the other party, let another legal practitioner bear the risk.

The Full Court delivered judgment in *Hoult and Hoult* (2013) FLC 93-546 on 26 July 2013. The law in this paper is correct as at 25 July 2013.

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