

**FINANCIAL AGREEMENTS**

**Financial Agreements: still worth the candle?**

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Post *Thorne v Kennedy* (2017) FLC 93-807, family lawyers and clients have reconsidered the worth of financial agreements under the *Family Law Act 1975* (FLA). At the outset, it is impossible to guarantee to clients that financial agreements are binding and will not be set aside. Lawyers can, however, take steps to reduce the risks. There are also pro-active measures that can be taken to protect an agreement which is under attack or may be under attack. This paper covers:

1. What goes in and what stays out?
2. Disclosure requirements
3. Minimising the risk of equity intervening – lessons from *Thorne v Kennedy*
4. Defending a financial agreement - what weapons are available when the threat of attack is pending?
5. Preparing watertight agreements - drafting strategies to protect and deliver certainty for your client

Recent cases are discussed under the above headings.

## 1. What goes in and what stays out?

### What goes in?

1. **Technical requirements.** It sounds basic, but the case law demonstrates that it is hard to do. The agreement should be drafted to meet the technical requirements of the FLA - see s 90G(1) for Pt VIIIA FLA agreements and s 90UJ(1) for Pt VIIIAB FLA agreements. Although an agreement may be “saved” under s 90G(1A) or s 90UJ(1A), it is preferable that the technical requirements are met in the first place.
2. **Matters that can be covered by the agreement.** This depends upon which type of agreement is being entered into by the parties. Using s 90B (pre-nuptial agreements) as an example, the parties can, under s 90B(1)(a), make a written agreement with respect to any of the matters in s 90B(2). Section 90B(2) states:

“The matters referred to in paragraph (1)(a) are the following:

- (a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties at the time when the agreement is made, or at a later time and before divorce, is to be dealt with;
- (b) the maintenance of either of the spouse parties:
  - (i) during the marriage; or
  - (ii) after divorce; or
  - (iii) both during the marriage and after divorce.”

The phrase “dealt with” is defined in s 90A as including the meaning given by s 90F(2).

Section 90F(2) states:

“To avoid doubt, a provision in an agreement made as mentioned in subsection 90B(1), 90C(1) or 90D(1) that provides for property or financial resources owned by a spouse party to the agreement to continue in the ownership of that party is taken, for the purposes of that section, to be a provision with respect to how the property or financial resources are to be dealt with.”

There is no all-inclusive definition of “dealt with” in the FLA and little, if any, judicial authority on the phrase with respect to financial agreements. Presumably, it allows provisions to deal broadly with property and financial resources, not just quarantine, transfer or sell. It may be broader than the phrase “or otherwise deal with” which is often used in orders if there is not a preceding list of words such as “sell, mortgage or encumber” and limit its meaning. Options to purchase are amongst the other ways property can be “dealt with”.

The breadth of matters which can be covered by s 90B agreements is extended by s 90B(3), which states:

“A financial agreement made as mentioned in subsection (1) may also contain:  
 (a) matters incidental or ancillary to those mentioned in subsection (2); and  
 (b) other matters.”

There is very little case law on the meaning of the phrases “incidental or ancillary” and “other matters” in the context of financial agreements, but there is authority in different contexts.

#### *Incidental or ancillary*

In the context of s 90 FLA, Gibbs CJ in *Gazzo v Comptroller of Stamps* (1981) FLC 91-101 looked at the meaning of “incidental or ancillary to the subject matter”:

- “necessary to effectuate its main purpose” from *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 (at [13])
- “reasonably incidental to the complete fulfilment” of the subject matter from *Burton v Honan* (1952) 86 CLR 96 (at [14])

The cases below suggest that if a “matter” is sufficiently autonomous, important in its own right, multifaceted, self-contained, etc., then it is not ancillary or incidental. Further, if a matter is only remotely or indirectly ancillary and incidental to the specified matter, this is not enough. Matters which are merely subservient or subordinate to the specified matter, but not remotely or indirectly, are more likely to be ancillary and incidental. Many of the cases focus on whether a purpose or use is incidental or ancillary to another use or purpose, rather than looking at “matters”.

In *Rothmans v Australian Broadcasting Tribunal* [1985] FCA 91 the Full Court of the Federal Court adopted with approval the definition of “incidental” in the Oxford English Dictionary (at [29]):

- (1) *Occurring or liable to occur in fortuitous or subordinate conjunction with something else; casual . . .*
- (2) *Casually met with . . . .*

In *R v Holmes; Ex Parte Public Service Association (NSW)* [1977] HCA 70; (1977) 140 CLR 529 Gibbs J set out the test (at [17]) that it must be incidental or ancillary in a “remote and indirect way”.

In *R v McMahon; Ex parte Darvall* ([1982 151 CLR 57; \[1982\] HCA 56](#)), the High Court determined the activities of universities were not ancillary or incidental to industry on the basis that the role of the modern university was so: *autonomous; important in its own right; and multifaceted*, that its activities could not be considered ancillary or incidental to industry (at 456).

In *Enoka & Ors v Shire of Northampton* (1996) 15 WAR 483 the fact that a panel beating business could be said to be *self-contained* and *not merely subservient* to a service station on the premises deemed it was not ancillary or incidental to the service station.

In *City of Swan v Taylor* [2005] WASCA 88 Johnson J held (at [67]) that the determination of whether a particular land use is “incidental to” another land use “requires the identification of a predominant use and a determination of whether the proposed use is consequent on such a use or naturally attaching, appertaining or relating to such a use.”

It isn’t possible to predict how “incidental or ancillary to” will be interpreted in the context of financial agreements. The Explanatory Memoranda and the Minister’s Second Reading speech did not refer to the phrase.

#### *Other Matters*

The phrase “other matters” only applies to agreements entered into after 21 November 2008 under Pt VIIIA and not agreements entered into under Pt VIIIAB. Sections 90C and 90D are similarly worded to s 90B. However, sections 90UB, 90UC and 90UD, which are for de facto relationships, do not include reference to “other matters”. “Other matters” is broader than “matters ancillary or incidental to”, but there is no judicial authority on what is covered by the phrase in relation to financial agreements.

*Bloomfield & Grainger* [2018] FamCA 36

The parties and their lawyers overlooked the fundamental and preliminary point of the subject matter of the agreement in the long-running *Bloomfield & Grainger* litigation which commenced in 2014 and ended in 2018.

There were many hearings at which no issue was taken as to whether or not the litigation was about a financial agreement. In *Bloomfield & Grainger* [2018] FamCA 36, Justice Hogan finally determined that the agreement in question was not a financial agreement, because it did not deal with the subject matter set out in s 90C *Family Law Act 1975*, although it purported to be an agreement under s 90C.

The parties' intention was to transfer the wife's interest in the property to the husband prior to the wife's imminent bankruptcy. In summary the agreement provided:

1. The wife was to transfer, after execution of the agreement, her legal and beneficial interests in the T Street property to the husband to be held for the maintenance of the children during the marriage.
2. In the event of a separation the husband would assume all liability under the mortgage. The court did not consider whether this liability was "property" and therefore brought the agreement within s 90C, so that is a question for another day.
3. A recital and a substantive clause were the only paragraphs to use the words "breakdown of the marriage". These paragraphs stated that neither party was precluded from further exercising any right available to them under the FLA in relation to how any or all of the "property of the marriage" is dealt with "in the event of the breakdown of the marriage", in circumstances where the property or the needs of the parties' children have materially changed.

After executing the agreement the transfer of the property was effected and the husband relied on the financial agreement to obtain an exemption from stamp duty. Notably, the agreement did not provide for how the T Street property would be dealt with in the event of a breakdown of the marriage, but only how it would be dealt with immediately upon the execution of the agreement.

Whilst a financial agreement under s 90C **may** deal with incidental or ancillary or other matters, it **must** deal with one or both of the matters in s 90C(2).

Justice Hogan held that the agreement was not a financial agreement as defined by s 90C FLA because it did not deal with either:

1. How, in the event of the breakdown of the marriage between the parties, their property or financial resources (or the property of each of them and their respective financial resources) are to be dealt with; or
2. The maintenance of either party.

The effect of this finding was that the transfer of the wife's legal and beneficial interests in the property was not done pursuant to a financial agreement. The agreement did not need to be set aside to attack the transaction. A remedy under the relation back provisions of the *Bankruptcy Act 1966* could have been sought by the trustee in bankruptcy without the agreement being set aside. Four years of litigation was unnecessary.

#### *Child maintenance and child support*

Child maintenance and child support are not specifically referred to as matters which can be covered by a financial agreement. They appear to be able to be covered under both Pt VIIIA and Pt VIIIAB agreements as being within "matters incidental or ancillary to" as:

- Child maintenance is referred to in s 90E and 90UF. Section 90E states:

A provision of a financial agreement that relates to the maintenance of a spouse party to the agreement or a child or children is void unless the provision specifies:

- (a) the party, or the child or children, for whose maintenance provision is made; and
- (b) the amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party, or of the child or each child, as the case may be."

Section 90UF is similarly worded for de facto relationships.

- Section 84(5) of the *Child Support (Assessment) Act 1989* provides that "nothing in this Part is to be taken to prevent the same document being both a child support agreement and ... a financial agreement". For an example of a financial agreement enforced as a child support agreement, see *Huckle & Harl (Child Support)* [2018] AATA 4895. However, it seems sensible to keep them as separate documents. Child support arrangements are usually more fluid than property settlements. Although the ground for setting aside binding child support agreements because of changes in circumstances relating to parenting arrangements appears more difficult than the ground for financial agreements, it is unknown how the court will interpret this provision.
3. **Third parties** can be parties to the agreement or their rights can be protected. The rights of third parties are also discussed later in this paper, but the options include:

- Make third parties (such as parents lending money) parties to the agreement. For example, s 90B(1) states “The people may make the financial agreement with one or more other people”;
  - Make it clear in the agreement that third parties have disadvantaged themselves in reliance upon the agreement. *Abrum & Abrum* [2013] FamCA 877;
  - Annexe an agreement between the parties to the financial agreement and the third parties to the financial agreement and refer to the annexed agreement.
4. **FLA terms** - Use terms that are in the FLA to reduce the risk of uncertainty (discussed below).
  5. **Disclosure** of assets, liabilities and financial resources (discussed below).
  6. **Contingencies** - Refer to the possible contingencies which the parties have considered, such as having children, illness and bankruptcy.
  7. **Sunset/review/termination clauses** - Consider a sunset or review clause. Will it be effective? These are discussed below.
  8. **Jurisdiction clause** – Will a provision that the Australian jurisdiction applies be enough? Do the parties need an agreement in an overseas jurisdiction?

### What goes out?

#### 1 **Property acquired after divorce or separation:**

- 1.1 Agreements entered into after divorce under s 90D cannot cover property of the parties acquired after divorce. Sections 90B and 90C are similarly worded. Section 90D(2)(a) expressly states that the agreement can cover “how all or any of the property or financial resources that either or both of the spouse parties had or acquired during the former marriage is to be dealt with”.
- 1.2 Agreements with respect to de facto relationships cannot cover property or financial resources of the parties acquired after separation (s 90UB(2)(a), 90UC(2)(a), 90UD(2)(a)).
- 1.3 Divorced parties who want to deal with property acquired after divorce will need to obtain s 79 orders to deal with that property rather than use a financial agreement. They can still use a financial agreement to oust rights to apply for spousal maintenance. Likewise, separated de facto parties who want to deal with property acquired after separation will need to obtain s 90SM orders for property, but can still use a financial agreement to oust rights to apply for spousal maintenance.

1.4 If the parties enter into a s 90D or s 90UD financial agreement without realising the problem, the repercussions are:

- A claim may still be able to be made under s 79 or 90SM for a property settlement or maintenance order in respect of the property or financial resources not covered by the agreement;
- Any property acquired after divorce or separation which is to be transferred between the parties will not attract capital gains tax rollover relief and stamp duty exemptions;
- The agreement may be able to be set aside as impracticable under s 90K(1)(c) or 90UM(1)(f), or void, voidable or unenforceable for uncertainty, mistake or misrepresentation under s 90K(1)(b) or 90UM(1)(e).

2 **Lifestyle clauses** – These may be able to be included as “other matters” in Pt VIII A agreements. If so they cannot be included in Pt VIII AB agreements. If they are within “matters incidental or ancillary to” they can be included in both Pt VIII A agreements and Pt VIII AB agreements, depending upon the subject matter of the clause. Prior to the referral of powers over financial matters after the breakdown of de facto relationships to the Commonwealth, in *Hagenfelds v Saffron* (1986) DFC 95-025 Powell J of the Supreme Court of New South Wales (at p 75,322) considered whether lifestyle terms in agreements between de facto parties were void for uncertainty. He said *in dicta* that:

“I would have held that promises ‘(to be) the de facto wife of the defendant’ and ‘(to) provide for the plaintiff’s material needs ... at a high material level’ were too vague and uncertain to give rise to legal objectives.”

Whether or not the FLA allows lifestyle clauses in Pt VIII A agreements but, more importantly, there may be enforceability problems. If they can’t be enforced, then they should not be included as they may put the whole agreement at risk of being set aside.

An example of a lifestyle clause arose in *Parke & Parke* [2015] FCCA 1692. The parties separated after a lengthy de facto relationship where the wife was subject to considerable family violence. They reconciled and agreed to marry.

They married 2 days after entering into a financial agreement which contained the following clause:

- “8. Both parties agree that they will not engage in any physical, emotional or financial abuse of the other and that they will each participate in relationship counselling and mediation in the event of there being any difficulties in the relationship.”



The agreement was made in 2001 and the parties separated for the second time in 2013. The wife sought that the agreement be set aside on various grounds which were successful, but she also sought that it be rescinded because the husband had breached clause 8. The trial judge accepted that the husband had breached that clause, but said (at [200]):

“Given that the respondent remained married to the applicant notwithstanding the applicant’s breach of clause 8 of the agreement – I am of the view that it is too late for the respondent to seek to rescind the contract on that basis after the end of the marriage. I consider that the respondent has waived her right to rescind on that basis.”

The husband appealed, but he died before the appeal was heard and his estate abandoned the appeal ([2016] FamCAFC 248). So, the Full Court did not have the opportunity to consider (even in dicta) whether clause 8 was an unenforceable clause. The trial judge was satisfied that the wife would not have entered into the agreement and married the husband unless she was assured of strict performance with clause 8. In these circumstances, the wife may have been able to rely on misrepresentation by the husband or unconscionability by him in the making of the agreement in an application to set the agreement aside. The difficulty of course is that the wife would have to prove that the husband knew when he entered into the agreement that he would breach that clause.

Similar causation difficulties arise with clauses which require, for example, fidelity, sharing of household labour, no swearing, no gambling, no weight gain, the frequency of visits to the in-laws, frequency of sex, and the up-bringing of children, such as choice of religion.

Whilst one view is that lifestyle clauses are not enforceable, it is possible to draft an agreement which gives different financial outcomes in the event of a separation, depending upon whether a party abided by the lifestyle clause.

However, just because clauses are valid doesn’t mean that they are easily enforced. In many cases, the complexity of proving compliance or non-compliance (particularly if there is a significant financial penalty for non-compliance) will result in lengthy litigation and thus not succeed in bringing about one of the outcomes which the agreement was intended to achieve – avoidance of litigation. There may also be reluctance by a court faced with the task of making a finding as to whether there has been infidelity, for example. Not since the *Matrimonial Causes Act 1959* was replaced by the FLA have courts had to hear evidence about whether or not there has been infidelity. Courts may decide on public policy grounds, that they are not prepared to do so, given that making such determinations is not required under the FLA and they may believe they have more important issues to determine in other cases.

- 3 **Maintenance provisions payable by a third party** during the marriage are of no force and effect (s 90DB(1)). Maintenance provisions cannot cover de factos during their relationship anyway.

#### 4 **Where a separation declaration is needed:**

- 4.1 Provisions in s 90B and s 90C agreements which are for “other matters” or “matters incidental or ancillary” are of no force and effect until the marriage breaks down (s 90DB(2)). Lifestyle clauses are therefore not enforceable during a marriage.
- 4.2 The same applies in relation to “matters incidental or ancillary” in s 90UB and 90UC agreements (s 90UG).
- 4.3 Provisions in financial agreements which deal with how property and financial resources are dealt with in the event of a breakdown of a marriage are of no force and effect until a separation declaration is made (s 90DA(1)). The situation is similar for de facto relationships (s 90UF). So, agreements cannot include provisions for how property and financial resources are dealt with during the marriage or de facto relationship.
- 5 Maintenance clauses if a party is unable to support themselves without an income-tested benefit as they will be of no force and effect (s 90F and 90UI).
- 6 **Uncertain terms** are void – The competing principles which arise when part of an agreement appears to be uncertain include:

- 6.1 Courts are reluctant to strike down an agreement which parties intend to be binding. Difficulties of interpretation and ambiguity do not necessarily render a contract void for uncertainty. Courts endeavour to uphold contracts wherever possible (*Upper Hunter CDC v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429 at pp 436–437 per Barwick CJ).
- 6.2 Courts try to objectively ascertain the parties’ intentions (*Upper Hunter CDC v Australian Chilling & Freezing Co Ltd*).

Clauses and agreements otherwise void for uncertainty may be saved by:

- 6.3 Applying an external standard such as the standard of reasonableness (e.g. *King v Ivanhoe Gold Corp Ltd* (1908) 7 CLR 617);
- 6.4 If the parties have acted on the agreement, their actions may clarify the uncertainty;
- 6.5 Severing the uncertain part from the contract if it is not an essential part (*Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60; *Whitlock v Brew* (1968) 118 CLR 445).

In *Kostres & Kostres* (2009) FLC 93-420, the Full Court found that an agreement was void for uncertainty. The agreement was entered into two days before the marriage. At the time, both parties mistakenly believed that the husband was an undischarged bankrupt. They did not tell

their lawyers this. The parties' mistaken belief about the husband's status led to them acquiring assets in the wife's name rather than in the parties' joint names. Both parties sought that words be "read into" clause 6 of the agreement.

The Full Court was not satisfied that it could read words into the agreement, saying (at [124], [129]–[131]):

"The principle that words 'may generally be supplied, omitted or corrected, in an instrument, when it is clearly necessary to avoid absurdity or inconsistency' is a well-recognised principle in the law of contract (see *Fitzgerald v Masters* [1956] HCA 53; (1956) 95 CLR 420 at 426; *Westpac Banking Corporation v Tanzone Pty Limited & Ors* [2000] NSWCA 25).

While, for the purpose of construing the agreement a court should, as in the context of a commercial agreement, apply an objective test of a reasonable bystander to the construction of an agreement, it cannot give meaning to an agreement whose terms are so imprecise or ambiguous the parties' intent cannot be discerned. ...

The differing arguments of the legal representatives in this case as to how the terms 'acquired', 'assets', 'joint funds' and 'from their own moneys' should be construed brings into sharp focus the ambiguities in those terms found in the drafting of clause 6 of the agreement.

We think it is particularly relevant that this agreement, which the parties entered into with the intention of dealing with their property and financial resources during their marriage and if it broke down, did not reflect the terms of the section (s 79) which it sought to bypass. Clause 6 does not refer to 'contributions', either financial or non-financial, nor does it, except in clause 6(d), refer to 'property' or 'financial resources'. These terms are ones which are well known and the subject of a considerable body of case law as to their interpretation."

*Parke & Parke* [2015] FCCA 1692 involved two clauses in a financial agreement which created ambiguity and uncertainty. Pursuant to one clause, the respondent's half interest in a real property was excluded property which she retained in the event of a separation. However, pursuant to another clause the respondent was required to transfer her 50% share to the parties' son X within 60 days of a separation. A complicating factor which was not foreseen, at least by the applicant when the agreement was entered into, was that X refused to accept a transfer of the respondent's half interest in the property and the agreement did not have a default provision setting out what was to occur in the event that X refused to accept the transfer. The trial judge found that the clauses were essential terms of the agreement because they dealt with what was to happen in the event that the parties separated. He set the agreement aside, as the clauses could not be severed from the agreement. The husband's appeal was discontinued by the husband's legal personal representative after the husband's death.

A financial agreement was set aside for uncertainty in *Gibbs & Gibbs* [2015] FamCA 630. Justice Hogan said (at [8]–[9]):

“I am not persuaded that the uncertainty of terms as expressed in the Agreement touches upon only aspects or claims which could be severed so as to preserve the existence of the Agreement.

I think, instead, that essential terms (for example: matters such as ‘matrimonial property’; what happens to property acquired after marriage but before dissolution — to use only two examples) of the Agreement are vague.”

In *Garvey & Jess* [2016] FamCA 445, Carew J rejected the argument of the wife that the financial agreement was void for uncertainty as the parties only had an “agreement to agree”. The agreement provided that in the event of a breakdown of the relationship, the parties would “equally divide the joint assets”

### **Checklist of clauses for drafting an agreement**

#### *Recitals*

1. Details of the parties:
  - 1.1. Occupations; and
  - 1.2. Incomes
2. The parties’ current and/or future relationship
3. The type of agreement, e.g. s 90B
4. The length of time the parties have been considering the terms of the agreement, discussing and negotiating.
5. The nature of the disclosure between the parties
6. What is the agreement intended to do? E.g. oust maintenance rights only?
7. Justifications for the outcome to be delivered by the agreement such as:
  - 7.1. Initial contributions;
  - 7.2. Inheritances received or likely to be received
8. Justification for clauses used if there is external evidence such as market appraisals, bank valuations, expert valuations

#### *Operative Parts*

1. Binding on executors, administrations and assigns
2. How the agreement interacts with wills and deceased estates.
3. Compliance with s 90G(1), or equivalent provision.
4. How the breakdown of the relationship is defined.
5. How property interests are determined upon the declaration of the relationship.
6. Spousal maintenance and compliance with s 90E and s90F.
7. The contingencies which have been considered.
8. Review of the deed and/or sunset clause (with a Termination Agreement) included in the financial agreement and/or a 2-part agreement with the second part coming into effect on the occurrence of a contingency such as the birth of a child.
9. Indemnities

### *Boilerplate Provisions*

Remember that these will not all be the same in each agreement

1. Commencement of deed
2. No other financial agreements
3. No collateral agreements – entire understanding
4. Governing law and jurisdiction
5. Dispute resolution
6. Severability
7. Waiver
8. Disclosure
9. Independent legal advice
10. Reconciliation
11. Rights on death

### *Schedules*

1. Separate property of the parties
2. Property of both parties
3. Separation declaration

### *Annexures*

1. Statement of Independent Legal Advice
2. Acknowledgement by parties
3. Receipts by parties

### ***Other questions to consider include:***

1. Where should the definitions be placed? They can be in a separate section in the recitals or defined as they are used.
2. Where do you put the details of the parties' financial positions at the time of entering the agreement? For example, by detailing quarantined property in the recitals and also in the schedules, there is a risk of inconsistency and therefore uncertainty.
3. The wording of the FLA is fairly clear that a financial agreement does not need to cover all of the property and financial resources of the parties, by using the phrase "all or any of the property or financial resources of either or both of the parties" (e.g. s 90B(2)(a)). But what is the effect of this? How does a court deal with the property not covered by a financial agreement? For example, if one party's significant assets are quarantined under the agreement and not to be considered in relation to the assessment of contributions and s 75(2) factors, how will the other potentially modest property be divided between the parties at the end of a marriage of several years where the financially weaker party has the primary care of children? Is it against public policy to have an agreement which quarantines certain

property and leaves it to the court to decide how the non-quarantined property is divided without reference to the quarantined property? Is it even possible for the court to do this? How does the court ensure that the order is just and equitable, proper and appropriate?

## 2. Disclosure requirements

An explicit duty of disclosure is not set out in the FLA in relation to financial agreements. The duty is almost a negative one - if a party does not disclose their financial circumstances, the agreement is at greater risk of being set aside under s 90K(1)(a) or s 90UM(1)(a) or perhaps s 90K(1)(e) or s 90UM(1)(h).

A duty of disclosure may arise in relation to financial agreements in various ways:

- the *Family Law Rules 2004*, especially r 13.04(1) and the Pre-Action Procedures and the *Federal Circuit Court Rules 2001*, especially r 24.03
- the meaning of fraud” in s 90K(1)(a), (aa) and (ab), and 90UM(1)(a) - (d)
- the common law and equitable doctrines incorporated by s 90K(1)(b), 90UM(1)(e), 90KA, and 90UN, e.g. misrepresentation, unconscionable conduct.

Rule 13.04(1) requires that in any financial case there be a “full and frank disclosure of the party’s financial circumstances”. This suggests that silence and failure to disclose material facts amount to statutory fraud upon the court or the other party.

However, r 13.04 only applies to “a financial case” which is defined in the Dictionary to the *Family Law Rules* so as not to include the making of a financial agreement, but only proceedings to set one aside under s 90K or s 90UN. Justice Murphy said in *Hoult & Hoult* [2011] FamCA 1023 (at [126]) that there was an argument that financial agreements ought to embrace the fundamental principle in the Family Court’s Rules, namely the duty of full and frank disclosure. In any event, the FLA specifies that fraud for the purposes of s 90K(1)(a) can be constituted by material non-disclosure.

There are several ways to deal with disclosure of each party’s financial position:

1. If there are proceedings before the court, the parties can rely on their financial statements and affidavits, and their compliance with their duty of disclosure. This is ideal – provided it is accurate – as it is open, transparent and on the court record.
2. The parties can provide summaries of their financial positions in the financial agreement, either in the recitals, in schedules to the agreement or both.
3. The parties can annexe sworn financial statements to the agreement. This is rare.

4. The parties can provide full mutual disclosure, even if there are no proceedings before the court. This might include formal valuations of real estate and businesses, or at least market appraisals of real estate and an accountant's estimate of the value of businesses.
5. The parties can provide limited mutual disclosure (such as recent tax returns and assessments, recent financial statements and tax returns of entities and recent superannuation member statements) and not all other possibly relevant financial documents such as bank accounts.
6. The parties can provide no formal disclosure, but include a recital in the agreement that they waive any right to proper disclosure.
7. The parties can include a recital in the agreement that they have full or sufficient knowledge of the other party's affairs to enter into the financial agreement without formal disclosure.

Whatever approach is taken, it should be clear from the recitals how or if the parties have provided disclosure.

Difficulties can arise when one or both parties have a number of entities. The entities need to be referred to precisely, and not just as "the husband's entities" or "the Marshall group". The difficulties are exacerbated in agreements entered into before or during a relationship, as the way a business operates may change, particularly where one of the parties is involved in a business with third parties. The operations of the business may be moved from one entity to another, or a trust may be interposed, directorships and shareholdings may change, part of the business sold, a new business acquired or developed, and new entities formed. The disclosing party can't disclose a non-existent entity and it is difficult to protect an entity which doesn't yet exist. A party's interest in an entity at the end of the relationship may be different to the interest when the agreement was executed.

In *Acker & Acker* [2014] FamCA 891, the wife alleged that the agreement was obtained by fraud, by reason of non-disclosure by the husband of a material matter. He disclosed "what were described as beneficiary interests in wholly discretionary trusts" whilst the wife foreshadowed that she would contend "at all material times the property of the trusts was actually in the whole or at least partial ownership of the husband" (at [10]). There is no reported decision as to the outcome. Both parties agreed that the FLA dispute could not be determined until a tax dispute was resolved by the Administrative Appeals Tribunal. The husband in this case probably considered that he had provided proper disclosure of his interests in the trusts in the financial agreement, but he still ended up in court after separation with the nature of his interests in dispute.

Superannuation may be a problem in pre-separation agreements, because of the difficulties of identification of the fund and giving procedural fairness, working out a split, naming the fund and ensuring the terms are enforceable. Sections 90XH and 90XJ are hard to reconcile.

Tax can also be problematic in pre-separation agreements. It is impossible to predict if parties or entities will have significant liabilities and what tax consequences there may be in the future if property is to be transferred, particularly as tax laws and the parties' circumstances may change. Often the best that can be done is to advise the client that it is impossible to predict the future and that possible tax consequences on disposition and transfer should be considered when making decisions about the acquisition of property during the relationship. If the intention of the parties is that the weaker party will not have any tax consequences from the agreement or from their involvement in the stronger party's entities, then this should be clear in the agreement, and appropriate indemnities given.

### *Checking instructions*

It is important to remember that although full and frank disclosure is not a requirement for a financial agreement, establishing that there has been such disclosure is done to ward off a potential application to set aside a financial agreement under s 90K(1) or s 90UM(1).

Mistakes can be made by clients when giving instructions as to their financial positions, so it may be sensible to protect your client by:

- Obtaining ASIC searches of both parties and of any entities;
- Obtaining title searches (including index searches) of real estate of both parties;
- Having the client's accountant check that the financial position of the client is accurately described in the financial agreement.

Post-separation, lawyers are likely to do title searches and ASIC searches, but that are also important pre-separation.

There are pros and cons for detailed disclosure being provided by parties entering into a financial agreement. On the one hand, by parties providing full details of their financial positions, if there are any errors, it may be easier for the other party to successfully apply to set the agreement aside for non-disclosure, misrepresentation or other grounds under s 90K. On the other hand, if the parties do not provide full details of their financial positions in the agreement, it may be more difficult to defend an application for the agreement to be set aside for non-disclosure of a material matter.

The problem of disclosure may also arise in relation to the advice requirement under s 90G and 90UJ. In *Abrum & Abrum* [2013] FamCA 897, Aldridge J was not satisfied that the wife had received the requisite advice because the legal practitioner did not ask for, make or see a list of the parties' assets and liabilities. There were numerous other issues with the advice to the wife, but the failure to take instructions as to the parties' financial positions led to a concern that if the advice was given by a legal practitioner where there was inadequate disclosure, the advice might not be "real or meaningful". Justice Aldridge said at [38]-[43]):



“Nonetheless, when s 90G(1)(b) speaks of “rights” it must be speaking of the entitlement to bring a case under s 79 and the factors that weigh in favour of that person’s case under ss 79(4) and 75(2) otherwise it would have limited meaning.

In order to give advice about the effect of an agreement on the rights of a party, that is their rights under the Act in relation to property, a legal practitioner must establish what those rights are at the time the advice is provided. This is because s 90G(1)(b) requires advice to be given on the effects of the agreement upon the rights of that party and the advantages and disadvantages of the agreement. If their rights are not known then it is impossible to advise as to the effect of the agreement on them.

It is unhelpful to advise a person that a financial agreement might adversely affect his or her rights if those rights are not identified. A party must know more than some unknown or undefined right is being given up. He or she must have some idea, at least in general, of his or her present entitlements or rights (to use the words of the section) with which he or she may compare the provisions of the proposed financial agreement. It is only in that way that there can be actual advice about the effect of the agreement on those present rights.

It is quite clear that a person may choose to enter into an agreement where he or she may very well be much worse off than if he or she were left to rely on their rights under s 79 of the Act. Thus, there is a requirement for specific legal advice to be given. That is the safeguard the legislature imposes when it permits the parties to deal with their property by agreement and without possible interference from a court.

Accordingly, the advice must be real and meaningful. It must be directed to the parties’ circumstances and their present rights.

Proper identification of a parties’ rights can only be done by identifying the property of the parties then held and a consideration of the parties contributions (financial and non-financial) to the acquisition of that property and to the welfare of the children. Any other relevant factors under s 79(4), including s 75(2), would then need to be considered. Only by doing so can advice be given that complies with the terms of s 90G(1)(b).”

The agreement was not set aside for other reasons. The position taken by Aldridge J in *Abrum* is, however, contrary to the position taken by Murphy J who was the trial judge in *Hoult & Hoult* (2011) FLC 93-489. Justice Murphy considered that whilst it might be prudent for a legal practitioner giving advice about a financial agreement to have a list of assets and liabilities, it was not a requirement of s 90G.

Besides fraud, there are other possible grounds for an agreement to be set aside where disclosure has been inadequate, such as unconscionable conduct, misrepresentation and mistake. It is beyond the scope of this paper to discuss these principles.

### **3. Minimising the risk of equity intervening – lessons from *Thorne v Kennedy***

Following the High Court judgment in *Thorne v Kennedy*, there are lessons for legal practitioners negotiating and drafting financial agreements:

1. The High Court listed six factors (which were not intended to be exclusive) which will have prominence in assessing where there has been undue influence in the particular context of

pre-nuptial and post-nuptial agreements. They need to be considered when taking instructions, negotiating, drafting and advising on financial agreements. They are repeated here because of their importance:

- 1.1. Whether the agreement was offered on a basis that it was not subject to negotiation;
  - 1.2. The emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement;
  - 1.3. Whether there was any time for careful reflection;
  - 1.4. The nature of the parties' relationship;
  - 1.5. The relative financial positions of the parties; and
  - 1.6. The independent advice that was received and whether there was time to reflect on that advice.
2. An agreement which is not a “bad bargain”, but is instead fair and reasonable and perhaps close to a party's s 79 entitlements, is more likely to be upheld.
  3. Don't include general statements in the agreement which are not true – e.g. mutual disclosure has occurred, party able to support themselves without Centrelink.
  4. Ensure there is mutual disclosure.
  5. Accept that the advice requirement in s 90G(1) is important and if there is a "bad bargain", the absence of advice may mean that it cannot be "saved" under s 90G(1A).

Whilst *Thorne v Kennedy* considered undue influence in particular, there is likely to be further development of the case law in relation to undue influence, unconscionable conduct and duress. The High Court was not required to consider whether “lawful act” duress is a vitiating factor nor whether unconscionable conduct in s 90K(1)(b) was the same as in s 90K(1)(e).

There was a useful discussion of the concepts of “unconscionability” in s 90K and whether there is a distinction between unconscionability under s 90K(1)(b) and (e) in *Weldon & Asher* [2014] FCW 11. Some of the points made by Thackray J were:

1. Section 90K(1)(e) was introduced in Parliamentary debates about the Bill introducing financial agreements to the FLA and although the then Attorney-General, Darryl Williams QC, considered it to be surplus, the intention of the Democrat amendment was to broaden the grounds for exemption in s 90K(1)(b), albeit “just a little”.

2. The use of the word “unconscionable” in the *Trade Practices Act 1974* (Cth) (TPA) (now known as the *Competition and Consumer Act 2010* (Cth)) was referred to in the Senate debate. Section 51AA of the TPA qualifies the word “unconscionable” by stating “unconscionable within the meaning of the unwritten law from time to time, of the States and Territories”. Section 51AA of the TPA and s 90K(1)(e) of the FLA do not have the same qualification. Justice French in the Federal Court in *ACCC v CG Berbatis Holdings Pty Ltd* (at [26]) and the High Court in the appeal reported as *ACCC v Berbatis Holdings Pty Ltd* [2003] HCA18; (2003) 214 CLR 51 where Gleeson CJ (at [7]) and Cummins and Hayne JJ (at [32]) made remarks which Thackray J said (at [19]) “may be seen as providing support for the proposition that the absence of any words of qualification to the word ‘unconscionable’ in s 90K(1)(e) may have significance”.

Professor Dal Pont in *Equity and Trusts in Australia* 5<sup>th</sup> Ed observed at 9.170 that had s 51AA “been intended to apply to unconscionable conduct generally, it could have ended with the word ‘unconscionable’”. As Thackray J pointed out, this is “precisely what has occurred with s 90K(1)(e)”.

As the husband did not adduce sufficient evidence to satisfy s 90K(1)(b), Thackray J thought it proper to consider (at [94]) whether s 90K(1)(e) had “some independent application and that relief might therefore potentially be available in circumstances where equity would not intervene”.

Justice Thackray concluded (at [95]):

“However, given what I perceive to be the manifest differences in factors underpinning commercial contracts and those underpinning agreements between prospective spouses, it may well be entirely appropriate for the grounds for relief to be “just a little” wider than those applying in the commercial sphere, as the Democrats intended.”

#### **4. Defending a financial agreement – what weapons are available when the threat of attack is pending?**

If faced with the possibility that a financial agreement will be attacked, which your client wants to enforce or otherwise withstand attack, is there anything that can be done to pre-empt the attack?

##### **1. Gather evidence**

1.1 This is stating the obvious, but the earlier the search starts for evidence the better. Look for diaries, emails, text messages, letters and other documents which may show:

- 1.1.1 The states of mind of the parties;
- 1.1.2 The nature of the negotiations about the agreement;
- 1.1.3 The surrounding circumstances;
- 1.1.4 That s 90G(1) or 90UJ(1) was complied with.

1.2. Obtain statements from family members and close friends as to their recollections.

1.3. Obtain the file from the legal practitioner who signed the Statement of Independent Legal Advice on behalf of your client.

## 2. ***Consider the rights of your client under the agreement***

There may be circumstances where the respondent to an application to set aside an agreement or an application that it be held not to be binding, may prefer that this occur. It is important before deciding to oppose one or both of these applications, that the respondent has advice as to their rights and entitlements under the FLA if the agreement was set aside. The respondent to what they would be under the FLA, perhaps with greater knowledge than the applicant of the respondent's financial circumstances, may be better off if the agreement was set aside or found not to be binding. Alternatively, their entitlements may be so close under the FLA to those under the agreement, that the costs of litigation mean that opposing the application is not worthwhile.

## 3. ***Implement the agreement***

An agreement may be able to be implemented, or only partially implemented, without a formal application to the Court. If the agreement has been implemented the other party may be estopped from applying to set it aside so it may be sensible for your client to take steps to implement the agreement. For example, in *Chalker & Laine* [2011] FMCAfam 506 the parties acted on the agreement for 5 or 6 years before the husband took action to have it found not to be binding. The court found it was unjust and inequitable if the agreement was not held to be binding under s 90G(1A).

Similar contractual principles to estoppel which may apply and may prevent the agreement being enforced are:

- Waiver. The other party has not insisted on their strict rights under the agreement.
- Election. A party may have elected to affirm a contract after a serious breach. The election must be by unequivocal words or conduct by a party with full knowledge of the facts.
- Laches. A party loses the right to insist on performance of a contract due to unreasonable delay or negligence. It is an equitable defence rather than the basis of a claim. By delaying the institution of proceedings the party may have caused the party in default to alter their position relying reasonably on the other party's acceptance of the status quo.
- Acquiescence. Involves delay or refraining from proceedings for a sufficient time that those rights have been abandoned.

- Part Performance. This is an equitable doctrine which allows a party who has partly performed an oral contract to either obtain an order for specific performance or to claim damages. It does not mean that the agreement itself will be enforced but the equities arising from the acts of part performance can be enforced (*McBride & Sandland* (1918) 25 CLR 69). The use of this doctrine may be useful where the parties have a collateral agreement despite the financial agreement stating that there are no collateral agreements.

#### 4. ***Apply to enforce the agreement***

Whilst applying to enforce the agreement might bring on a formal application to set it aside, there may be strategic reasons to do this. For example, the application might be made before the other party has properly resolved their legal position so as to be able to rely on an *Anshun* estoppel. It may be better to be proactive so that the weaker party has less time to sort out their case and obtain funding for litigation. See *Anshun* estoppel below.

#### 5. ***Discretion whether to set aside or find it not to be binding***

The court has a discretion under s 90K(1) and 90UM(1) to set aside a financial or termination agreement. It may refuse to do so even where a ground under s 90K(1) and 90UM(1) is established. The first part of the section reads that a court “may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied” of a particular circumstance.

Factors which might influence a court not to exercise its discretion to set aside are probably similar to the factors which could influence a court as to whether or not to order revocation of a contract. The following examples arose in or were considered in cases dealing with the revocation of s 87 maintenance agreements which are no longer available under the FLA:

- The agreement had been in effect for a substantial time since the grounds for revocation arose (see *Leaf v International Galleries* (1950) 2 KB 86).
- The applicant delayed (*Fryda and Johnson (No 2)* (1981) FLC 91-058).
- The rights of bona fide third parties had intervened. All the property dealt with under the agreement was disposed of leaving nothing about which a court could make any orders under s 78 or 79 after revoking the approval.
- The applicant had acted unconscionably or did not have “clean hands” (Windeyer J in *Smith v Jenkins* (1970) 119 CLR 397 at 414-417).
- Other factors in the overall position of the parties such as the ages of the parties, the arrangements for the children and the respective financial circumstances of the parties (*Fryda and Johnson (No 2)*).

There is very little case law where a ground to establish the setting aside of a financial agreement was established, but the court exercised its discretion not to set the agreement aside. Arguably, *Nyles & Nyles* [2011] FamCA 565 is an example, although it is also an example of where the applicant was found not to have relied on the non-disclosure. Justice Mushin held (at [194]-[195]):

“The wife failed to make a full and frank disclosure in accordance with the requirements of the law. Further, in some instances she has acted fraudulently within the meaning of that word in the relevant legislation. Accordingly, the husband has established a *prima facie* ground for the setting aside of both the consent orders and the BFA.

However, the husband did not rely on either the wife's failure to make a full and frank disclosure or any misrepresentation, whether fraudulent or otherwise, made by her. At all relevant times, he had competent and experienced family law solicitors acting for him and was also represented by senior counsel with a highly specialised practice in family law. The ultimate advice received by the husband was the letter dated 9 March 2004 which was extremely detailed, articulate and most competently written. The husband chose to ignore that advice.”

In *Abrum & Abrum* [2013] FamCA 897, Justice Aldridge found that the agreement did not meet the s 90G(1) requirements because:

- (a) The wife was not given the advice required by s 90G(1)(b);
- (b) The certificates did not comply with s 90G(1)(b);
- (c) A copy of the agreement was not given to the wife until five years after it was signed and five months after separation;
- (d) A copy of the statement required to be given by s 90G(1)(ca) was not given to the wife until the copy of the agreement was given. Although the FLA does not give a time-frame, Aldridge J considered that the better view, but not a concluded view, was that a prompt exchange was necessary.

The wife's entitlements under the agreement were limited to 5/44ths of the value of a waterfront property transferred by the husband's parents to the husband at under-value.

Justice Aldridge said that the lack of proper advice to the wife was significant and constituted a very substantial failure to comply with s 90G(1)(b). However, he found that the agreement was binding, persuaded by the following factors (at [103]-[104]):

“On the other hand, it is clear that the gift of the property would not have occurred but for the wife entering into the Binding Financial Agreement along with the Deed of Family Arrangement and the Contract to Make Mutual Wills. These agreements not only involved the parties to the marriage but the paternal grandparents. It is more likely than not that the gift would not have taken place without those agreements being entered into. The husband's parents acted to their detriment in reliance on the Binding Financial Agreement.

Also to be taken into account is the fact that the agreement does not oust all of the wife's property rights but only those against this specific property. This carries less weight in this case because the evidence does not suggest that there were other assets of substance, or of the magnitude of the waterfront property, available

against which property orders could otherwise be made. The only asset to which the evidence referred as being owned in February 2007 was the Suburb E property.”

Justice Aldridge did not look at the unfairness of the bargain for the wife (which a court might have felt justified in doing post *Thorne v Kennedy* despite the majority in *Hoult* saying it was irrelevant), but was persuaded by the fact that the parties acted in reliance on the agreement and in accordance with its terms and that the husband’s father had also complied with the agreement by transferring a waterfront property at gross undervalue, thereby effecting a gift of 39/44ths of a waterfront property of \$1.7 million to the husband and the husband’s parents moved out of that property. Third parties, being the husband’s parents, acted to their detriment in reliance on the financial agreement. It was unjust and inequitable for the agreement not to be binding.

#### 6. ***Discretion whether to enforce***

Even if the court finds that an agreement is binding and/or that it should not be set aside, the court still has a discretion as to whether to enforce the agreement and the court “may order that the agreement, or a specified part of the agreement, be enforced as if it were an order of the court”. Section 90KA(c) states that the court “may order that the agreement, or a specified part of the agreement, be enforced as if it were an order of the court”.

In *Fan & Lok* [2015] FamCA 816 the wife’s deceased estate sought to enforce a financial agreement. In earlier proceedings, *The Estate of the late Ms Fan & Lok* [2015] FamCA 300, the husband was unsuccessful in his applications to either have the agreement set aside or have it found not to be binding. The two decisions raised the question of the distinction between seeking that an agreement be set aside or declared not to be binding and an application opposing its enforcement. This arises particularly where there is a determination in the earlier proceedings that it would be unjust and inequitable for the agreement not to be binding.

The power of the court to enforce orders is discretionary rather than absolute, and the husband sought that the court exercise its discretion in his favour.

Although not expressly referred to in the judgment, the court is directed by s 90G(2) and 90UJ(4) that it “may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary”, reinforcing the discretionary nature of enforcement in s 90KA.

A pre-nuptial financial agreement (under s 90B) provided that in the event of separation a property at suburb C was to be sold and the proceeds used to discharge a mortgage for which one of the security properties was a property in the name of the wife in suburb G. The wife died shortly after separation. The husband arranged for the suburb C property to be transferred into his sole ownership by right of survivorship.

The applicant was the executrix of the wife's estate and was one of the wife's children. She sought orders to enforce the agreement.

In the first case, the husband sought to set the agreement aside. He unsuccessfully argued that either the agreement was impracticable to be carried out or that there had been a material change in circumstances.

The certificates of advice set out that the parties received advice in relation to a s 90B agreement when in fact it was a s 90C agreement. Rees J did not deal with the argument that the agreement may have still been valid (eg *Wallace & Stelzer* (2013) FLC 93-566), but exercised her discretion under s 90G(1A)(c) and made a declaration that it would be unjust and inequitable if the agreement was not binding on the husband.

In the second case, the husband sought that the application for enforcement be dismissed. He submitted that the court should exercise its wide discretion and find that it was not just and equitable to enforce the financial agreement by requiring him to sell his property at suburb C as the agreement envisaged that he would retain that property.

Justice Rees noted that the contention made by the husband, that it was not just and equitable to enforce the terms of the agreement, was the subject matter of the determination she had made in the earlier proceedings. She found (at [22]) “. . . that *res judicata* estoppel arises in relation to the submission that it is not just and equitable to enforce the agreement”.

In case she was wrong about issue estoppel, Rees J dealt with the husband's other arguments and dismissed them.

Justice Rees found that she could enforce the agreement. She considered that an order which provided for the sale of the suburb C property, in the event that the husband failed to comply with his obligation to pay the amount owing under the mortgage, was available to the court in the exercise of its wide powers pursuant to s 90KA. If she was wrong about this, she was also satisfied that the court had an inherent power, as stated by the Full Court of the Family Court in *Molier & Van Wyk* (1980) FLC 90-911, to impose consequential provisions for the sale of the suburb C property to ensure that the orders made requiring the husband to discharge the mortgage were carried into effect.

In addition, Rees J relied on r 20.05(a) of the *Family Law Rules 2004* which expressly provides that the court may make an enforcement order, in relation to an obligation to pay money, for the seizure and sale of real property.



## 7. ***Try to set up an Anshun estoppel***

In *Jess & Garvey* (2018) FLC 93-827, the Full Court considered whether *Anshun* estoppel applied where the wife had not raised causes of action at an early stage in proceedings issued by the husband to enforce a s 90B financial agreement. The agreement was signed and the parties married in 2006.

After the parties' separation in 2015, the wife's solicitors reserved the wife's position with respect to the financial agreement. On 11 March 2016, the husband filed an Application in a Case seeking that the financial agreement be enforced as if it were an order of the court and specifically sought orders as to how the agreement should be enforced. The husband's solicitors wrote to the wife's solicitors, and this was considered to be important by the Full Court (at [95]):

"In the event that your client contends that the agreement is one other than one binding upon the parties, this is not a matter that your client has sought to put in issue to date, notwithstanding prior requests seeking to ascertain your client's position. If your client contends, would you advise by reply both as to the same and provide particulars as to the legal and/or financial basis for any such contention."

On 12 April 2016, the wife filed a Response to the husband's Application in a Case, seeking that the husband's application be dismissed or, in the alternative, if the court determined to enforce the agreement, that it be enforced in a particular manner as set out in the wife's Response.

At the hearing of the parties' respective applications on 27 May 2016, the wife's position was that there was no agreement, because the purported agreement was void for uncertainty. No other grounds were raised by the wife as to why the agreement should not be enforced. This aspect of her Response was dismissed.

Five months later, on 1 November 2016, the wife filed an Amended Initiating Application seeking:

"That pursuant to s 90K of the *Family Law Act (Cth)*, or alternatively pursuant to s 90KA, the Court order that the Financial Agreement entered into between the parties on 3 August 2006 be set aside or alternatively a declaration be made that the said Financial Agreement is not valid, enforceable or effective."

In the alternative, she sought that the agreement be enforced in a particular manner. The wife was ordered to provide particulars of the grounds on which she sought that the agreement be set aside or declared to be not valid, enforceable or effective. They were:

- a. Section 90K(1)(d) - there has been a material change in circumstances since the agreement was entered into and as a result the children or the respondent will suffer hardship if the agreement is not set aside;
- b. Section 90K(1)(b) or (e) - the agreement should be set aside as a result of unconscionability at the time of entering into the agreement;
- c. Section 90K(1)(a) - the agreement should be set aside as a result of the non-disclosure of a material matter amounting to fraud;
- d. The agreement was abandoned;
- e. The agreement was a sham.

The husband sought that the wife's Amended Initiating Application be summarily dismissed. Justice Carew in *Garvey & Jess* [2017] FamCA 783 dismissed the wife's application to set aside the agreement or declare it to be not valid, enforceable or effective. Justice Carew found "much force" in the husband's argument that it was "too late for the [wife] to raise fresh grounds upon which to attack the financial agreement" (at [43]) and said, at [71]:

"The [wife], despite 'notice, invitation and opportunity', elected to limit her [previous] challenge to the financial agreement to one of uncertainty. The [husband] invited the [wife] as early as August 2015 to indicate her position in relation to the financial agreement. Her position, both in her filed Response to the Application in a Case and articulated by her Queen's Counsel at the hearing on 27 May 2016 made her position abundantly clear, namely, if she lost on her argument as to uncertainty the next step would be how the agreement should be enforced and the [wife] had set out the order she would seek in that event."

There were no special or exceptional circumstances which would cause the application of the *Anshun* principle to be unjust.

The wife had two arguments on appeal:

1. There were different causes of action before the court on 27 May 2016 and 17 July 2017. The cause of action before the court in May 2016 was (at [117]) "whether the essential terms of the agreement were so lacking or uncertain that there was in fact no agreement". However, the cause of action before the court in July 2017 was "a claim to set aside the financial agreement pursuant to s 90K (and/or s 90KA) of the Act for reasons that had nothing to do with any claim of uncertainty". Entirely different questions were raised, and the resolution of the earlier proceedings could not prevent the pursuit of the later proceedings.
2. The earlier proceedings were interlocutory so the *Anshun* principle did not apply.

The Full Court found (at [121]) that the manner in which the wife framed her case in May 2016 was that there was no impediment to the agreement being enforced as a "financial agreement" under the FLA. In fact, she advanced the very opposite position; she argued that it *should be* enforced, if it was not void for uncertainty. The Full Court agreed with the trial judge (at [122]) "that the wife had 'notice, invitation and opportunity' to argue her case that the agreement should not be enforced" in the 2016 proceedings. The Full Court held (at [123]):

"Thus it was not open to the wife to subsequently pursue a claim to set aside the agreement for reasons that could, and should have been put before the court previously, in the context of determining the issue of enforceability."

The issue before the court in May 2016 (at [125]) was whether the agreement should be enforced, and the wife had been put on notice by the husband that she should bring forward all arguments that went to that issue, and plainly that included any claim to set aside the agreement pursuant to s 90K (and/or s 90KA). The court had also ordered that the wife respond to the application for  
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enforcement, and the wife clearly had the opportunity to present all her arguments as to why the agreement should not be enforced. Nevertheless, she chose to limit her challenge to a claim that the agreement was void for uncertainty, and she went further and set out how the agreement should be enforced if it was not void for uncertainty. Moreover, shortly after filing her Response the wife filed an Initiating Application predicated upon the financial agreement being enforceable and seeking an adjustment of any property of the parties not caught by the financial agreement.

The Full Court (at [127]) held that the claims pursuant to s 90K and/or s 90KA were -

“so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding”.

The relevance of an earlier order being “interlocutory” as opposed to “final” is to differentiate between when an issue had been finally determined between the parties and when it has not. In this case, the Full Court held (at [134]) that the issue of the enforceability of the agreement was finally determined.

An application for special leave to appeal to the High Court was refused in *Jess & Garvey* [2018] HCASL 202 on the ground that the appeal did not "enjoy sufficient prospects of success".

The lessons from *Jess & Garvey* are:

1. A party may be estopped from raising other grounds upon which an agreement should not be enforced, where one ground has already been raised and dismissed;
2. The party seeking enforcement of an agreement should, at an early stage, invite the other party to raise all possible arguments. This forces the other party to set out their case, locks them in, and once these arguments are determined means that it is likely that different arguments cannot be raised later;
3. The party seeking to enforce the agreement may be advantaged by an early application to enforce the agreement before the other party has properly formulated the causes of action which are likely to be successful, bearing in mind the risks of a costs order will deter the raising of all vaguely possible arguments.

An *Anshun* estoppel was applied in *Caitlin & Caitlin* [2017] FamCA 818, which was an application to enforce a financial agreement.

In *Selkirk & Caporn and Anor* [2016] FCWA 26 Walters J was dealing with a s 86 maintenance agreement. These can no longer be made but the decision was only in 2016 and raises relevant issues. It provided for the payment of child maintenance, but the parties were able to apply for a child support assessment. The wife took steps to register the s 86 deed with the Deputy Child

Support Registrar and the parties treated this registration as recasting the obligation to pay child maintenance as a child support obligation.

Although Justice Walters considered that the majority of the elements of *res judicata* estoppel had been established, he was not persuaded that he should apply the doctrine. He was satisfied “that the child maintenance provisions of the Section 86 Deed were never validly recast as child support obligations.” (at [350]).

In relation to an *Anshun* estoppel, Walters J said (at [361], [362], [365]):

“I recognise the potentiality of serious injustice arising as a result of an inappropriate application of *Ashun* estoppel, and that it should only be applied “in the clearest of cases”. I am satisfied, however, that the husband could have and should have raised (and pressed) in the earlier proceedings the questions or issues to which I have referred above, namely:

- a. the validity and enforceability of the child maintenance provisions of the Section 86 Deed; and
- b. whether those provisions were ever validly recast as enforceable child support obligations.

It does not matter whether the husband failed to raise these questions or issues as a result of negligence, inadvertence or even accident. They were so relevant to the subject matter of all the various proceedings in this Court in which the husband was a party over the years (and, indeed, to the subject matter of the proceedings in the Federal Magistrates Court of Australia before the Lucev FM, as his Honour then was) that it would have been plainly unreasonable not to raise them for consideration by the relevant judicial officer. Indeed, they were intimately connected with the subject matter of the various proceedings. In my opinion, all parties would have had an expectation that the husband would raise these questions or issues to enable them to be determined within and as an integral part of whichever proceeding he was then involved. That the husband may have assumed (erroneously) that the child maintenance provisions of the Section 86 Deed had been validly recast as enforceable child support obligations is of no consequence. He has had ample opportunity over many years to raise the relevant arguments....”

Justice Walters referred to the discretion he had as to whether or not to apply the principles of *Ashun* estoppel once he had found it was established. He took into account the long history of the litigation in the Family Court and the Federal Magistrates Court and the lack of a satisfactory explanation for failing to press the questions or issues earlier.

#### 8. ***Consider what your client needs to disclose, and whether your client should disclose***

If a threat is made against a financial agreement, should a party defending a financial agreement provide disclosure which might fill in the gaps in the other party’s knowledge? It is possible that the party defending a financial agreement is not required to provide financial disclosure, unless and until the agreement is set aside. However, there is contrary authority.

The situation is similar to where there is a challenge to the jurisdiction of a court in relation to a de facto relationship. The Full Court of the Family Court held in *Norton & Locke* (2013) FLC 93-567 that it did not have the power to grant an interlocutory injunction under s 114(2A) of the FLA as a

“de facto financial cause” had not been established which was (at [42]) “dependent upon the establishment of facts central to jurisdiction which are bona fide in dispute and which have not been established”.

*Norton & Locke* was followed in *Holden & Wolff* (2014) FLC 93-621. The Full Court held that the trial judge erred in requiring the appellant to file an updated financial statement and provide financial disclosure before determining whether or not there was a de facto relationship which ended after 1 March 2009 as a jurisdictional fact. The only disclosure required was that relevant to the determination of the issue of whether there was jurisdiction.

So, what is the situation where there is an application to set aside a financial agreement? In *Higgins & Moruba* [2018] FamCA 467 the wife sought broad disclosure akin to an application under s 79. She relied on *Fewster & Drake* (2016) FLC 93-745 in support of her argument for full disclosure. Justice Thornton rejected the wife’s submissions about the extent of disclosure required by the husband because she did not accept the interpretation of the wife’s counsel of *Fewster & Drake*. Counsel for the wife in *Higgins* submitted that the court, in determining hardship under s 90K(1)(d), was required to embark on a comparison between the likely outcome of an application under s 79 and the circumstances in existence in the absence of such an application.

Justices Aldridge and Kent said in *Fewster & Drake* (at [67]):

“We turn now to the second aspect of this challenge. The concluding words of s 90K(1)(d) are ‘if the court does not set the agreement aside’. Logically and inevitably those words require the court to undertake some comparison between the position of the child, or the person with caring responsibility, if the agreement remains in place and the position of that child or person if the agreement is set aside. It is only by doing so that the court can place itself in a position to determine whether there will be hardship if the agreement is not set aside. The primary judge did not undertake such a comparison.”

The wife asserted in *Higgins & Moruba* that the hardship to her was:

- The very different outcome pursuant to s 72 and s 79 as compared with the financial agreement;
- The husband made representations to the wife and the Commonwealth of Australia that they proposed to share their financial resources once they married and the husband ought not be able to evade those representations;
- The extent of the husband’s wealth was not known and the hardship was the loss of opportunity for the Court to determine her application for a property adjustment.

Justice Thornton concluded (at [81], [82], [84], [85]) that:

“I accept the submission of counsel for the husband that neither the terms of the legislation nor the judgment in *Fewster & Drake* provide authority for the proposition that either a detailed examination of the financial circumstances of the husband or an assessment of the likely outcome of any potential s 79 application under the Act is required for the determination of an application to set aside a financial agreement on the basis of s 90K(1)(d) of the Act.

In the event that this interpretation is not correct, in my view the husband has made the concession that his wealth is in excess of \$20 million which should be sufficient for the court to make some comparison....

Further in her Summary of Argument document filed 20 February 2017 the wife submitted that the only way to undertake the comparison of the positions required by the Full Court in *Fewster & Drake* was to establish the current legal and equitable interests of the parties, to establish a "pool" and to then attempt to demonstrate the comparison that underpins the claim for hardship.

The interpretation contended for by the wife would defeat the major purpose of Part VIIIA of the Act which is to enable parties to avoid extended litigation as to their s 79 entitlements under the Act by entering into financial agreements, unless and until such agreements are set aside. I accept the submission of counsel for the husband that the test under s 90K(1)(d) of the Act is concerned with whether a hardship will be suffered, and not whether the party with caring responsibility for the child will be in a worse position than that in which she would have been but for the existence of the financial agreement. The interpretation contended for by the wife has the effect of substituting such a test for the one which in fact appears in the statute."

In *Frederick & Frederick* (2019) FLC 93-900 the Full Court accepted that some disclosure by the husband was necessary as to his current financial position so that there could be a comparison between the wife's entitlements under the agreement and what they would be if the agreement was set aside. The Full Court rejected the wife's argument that the husband was required to call evidence as to the current values of his assets, but he was required to do what he had done, which was to disclose his assets and his view of their worth. He had done this in a financial statement.

There is, however, no clear determination by the Full Court of the Family Court on disclosure and there may be circumstances where the case of the party seeking to set aside the agreement is so clearly flawed that the voluntary provision of disclosure by the respondent may assist in convincing the applicant not to issue proceedings under other grounds in s 90K(1) besides s 90K(1)(d).

It may also be important to consider whether or not disclosure may be required in another proceeding (e.g. enforcement proceedings) or in a child support dispute which may be able to be used by the applicant despite the *Harman* rule (*Harman v Secretary of State for the Home Department* [1983] 1 AC 280; *Hearne v Street* [2008] HCA 36; (2008) 735 CLR 125). See also *Pedrana & Pedrana & Anor* [2012] FamCA 348 and [2015] FamCA 134, where documents disclosed in financial proceedings in the Family Court were allowed to be disclosed to the Child Support Registrar. Strategic steps may need to be taken with respect to the other matter (eg settling it) so that the applicant does not obtain documents which might be used against the respondent in the financial agreement proceeding but which are not subject to the duty to disclose in the proceeding.

#### 9. ***Restricting the financial ability of the applicant to instigate proceedings***

Interlocutory applications in relation to limited and relevant disclosure can be made, but what about the applicant's ability to seek litigation funding? Will the applicant have the funds to make an

application in relation to the financial agreement? If the applicant has scarce resources, will they be prepared to make a risky application to the Court?

In *Teh & Muir* (2015) FLC 93-680; *Abati & Cole* [2014] FamCA 60 and *Commissioner of Taxation & Hong* [2016] FamCA 438 the courts were prepared to make orders to preserve certain assets pending the determination of issues concerning the validity of the agreement. Justices Finn and Strickland said (at [29]) in *Teh & Muir*:

“It has long been recognised that while the Family Court is exercising its power (which if not expressly provided for in the Act, must necessarily be implied) to determine whether or not it has jurisdiction in a particular case, it can be appropriate for it to preserve the status quo (in this case the disputed half share of the sale proceeds) by the grant of an interlocutory injunction (see *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 202, and *Yunghanns & Yunghanns and Ors* (1999) FLC 92-836).”

In *Chatterjee & Woodby-Chatterjee* [2016] FamCA 486, an order for the sale of the former matrimonial home was made in circumstances where the wife conceded that she could not retain it. The sale was made on conditions which the husband’s father had an opportunity to consent to or object to, including the payment of \$50,000 to the wife from the net proceeds of sale.

A later order was made in *Chatterjee & Woodby-Chatterjee* [2017] FamCA 537 for \$70,000 under s 117(2) *FLA* for litigation funding “to ensure a level playing field”.

At the trial, reported in *Chatterjee & Woodby Chatterjee and Anor* [2018] FamCA 930, it was found that the wife’s entitlements were not sufficient for the second order to be enforced. The husband’s father had a cost order against the wife in the Court of Appeal of the Supreme Court of New South Wales, following a successful appeal against an order that was in the wife’s favour. By the time of the trial, the wife had debts which were greater than the balance of her entitlements under the financial agreement.

The outcome illustrates the risk of making partial property orders or litigation funding orders which may not be able to be claimed back (*Zschokke & Zschokke* (1996) FLC 92-693). It is likely that the 2 earlier *Chatterjee* cases were incorrectly decided.

Making an order to give a party access to funds, thereby depleting the pool, is very different from preserving the pool, but even if the applicant is entitled to those funds under the terms of the agreement, the applicant cannot seek to enforce their rights under the agreement and, at the same time, seek to have the agreement set aside or found not to be binding. If the applicant has sought to implement the agreement, this can be a bar to it being set aside.

#### 10. ***Waiver of legal professional privilege***

Whilst not a separate step to take, this is an important matter to consider. Can your client obtain an advantage if privilege is waived by the other party? Legal professional privilege protects communications between a lawyer and a client. Disclosure is not required if the dominant purpose of  
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the advice is for use in existing or anticipated legal proceedings. The privilege is that of the client and the privilege can be expressly or impliedly waived.

The risk of inadvertently waiving legal professional privilege is high in applications to set aside financial agreements, particularly those made on the grounds that:

- “(a) the agreement was obtained by fraud (including non-disclosure of a material matter); or ...
- (b) the agreement is void, voidable or unenforceable; or ...
- (c) in respect of the making of a financial agreement — a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable ...”

Traditionally, there were two types of waiver: disclosure waiver and issue waiver. “Disclosure waiver” arises if a part of a privileged communication has been disclosed. “Issue waiver” is when the holder of the privilege has put the contents of a privileged communication in issue. The tests for each category are the same (*Commissioner of Taxation v Rio Tinto Ltd* [2006] 151 FCR 341).

Disclosure waiver arises when a party refers to the advice they received. Examples of financial agreement cases where disclosure waiver occurred include *Bell & Bell* [2009] FMCAfam 595 and *Bilal & Omar* (2015) FLC 93-636.

Issue waiver arises where the state of mind of the party when the financial agreement was executed has been put in issue, such as the party being under undue influence.

In either case, it may be useful for the party seeking to defend the agreement to call for the file of the legal practitioner acting for the other party when the agreement was entered into. If court proceedings are on foot, the full file including file notes, can be subpoenaed. If proceedings are not on foot, the legal practitioner will not have to hand over file notes.

### 11. ***Applying for summary dismissal***

These applications are difficult and need to be cautiously undertaken. Section 45A(1) and (2) of the FLA allow the court to make a summary decree in favour of one party, in relation to the whole or part of a proceeding, if satisfied that a party has no reasonable prospect of successfully:

- prosecuting the proceedings or part of the proceedings, or
- defending the proceedings or part of the proceedings.

In determining whether a defence or proceeding has no reasonable prospect of success, proceedings need not be hopeless or bound to fail (s 45A(3)).

A court can, as under the previous s 118, “dismiss all or part of proceedings at any stage if it is frivolous, vexatious or an abuse of process” (s 45A(4)).



The *Family Law Rules 2004* provide in r 10.12 that a party may apply for summary orders in relation to an application or a response where:

- (a) the court has no jurisdiction
- (b) the other party has no legal capacity to apply for the orders sought
- (c) it is frivolous, vexatious or an abuse of process, or
- (d) there is no reasonable likelihood of success.

An alternative to r 10.12 is r 10.13 which allows a party to apply for a decision on any issue, if the decision may:

- “(a) dispose of all or part of the case;
- (b) make a trial unnecessary;
- (c) make a trial substantially shorter; or
- (d) save substantial costs.”

See also r 13.07-13.10 of *the Federal Circuit Court Rules 2001*.

The principles governing an application for summary relief were stated by Kirby J in *Linden v The Commonwealth (No 2)* (1996) 80 ALJR 541 at 544–5 (references omitted) and quoted in *Korsky & Bright* [2007] FamCA 245:

“The approach to be taken by the court to the Commonwealth’s application for summary relief is not in doubt:

1. It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against government and other powerful interests. This is why relief, whether under [the Rules] or in the inherent jurisdiction of the court, is rarely and sparingly provided.
2. To secure such relief, the party seeking it must show that it is clear, on the face of the opponent’s documents, that the opponent lacks a reasonable cause of action or is advancing a claim that is clearly frivolous or vexatious.
3. An opinion of the court that a case appears weak and such that it is unlikely to succeed is not, alone, sufficient to warrant summary termination. Even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.
4. Summary relief of the kind provided for by [the Rules] for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer. If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do so in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.
5. If, notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a court will ordinarily allow that party to reframe its pleading. A question has arisen as to whether [the Rule] applies to part only of a pleading. However, it is unnecessary in this case to consider that question because the Commonwealth’s attack was upon the entirety of Mr Lindon’s statement of claim.

6. The guiding principle is, as stated in [the Rules], doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit.”

## 12. **Security for costs**

Applications for security for costs are even less likely to be successful than applications for summary dismissal. Impecuniosity is a factor to be considered, but not the only factor. The court must find that it is “just” under s 117(2) to make an order. The court does not want to stifle litigation, but also wants to prevent abuses of process. The court needs to take into account the matters set out in s 117(2A):

“In considering what order (if any) should be made under subsection (2), the court shall have regard to:

- (a) the financial circumstances of each of the parties to the proceedings;
- (b) whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party;
- (c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;
- (d) whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;
- (e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;
- (f) whether either party to the proceedings has made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer; and
- (g) such other matters as the court considers relevant.”

The matters to be considered were listed in *Luadaka & Luadaka* (1998) FLC 92-830 (at [59]):

- “(1) the circumstances of those behind the proceedings and whether it is reasonable for those persons to satisfy an order for security;
- (2) the bona fides and prospects of success of the proceedings;
- (3) whether the plaintiff is impecunious and whether the defendant’s conduct has caused or contributed to this impecuniosity.
- (4) whether the plaintiff is in effect a defendant because, for example, it has been forced to litigate to halt self-help measures by the defendant;
- (5) whether it will be oppressive to order security for costs or such an order will prevent the plaintiff from pursuing the proceedings;
- (6) whether the proceedings raise a matter of public importance;
- (7) whether there has been an admission, offer or payment into court;
- (8) whether there has been any delay in bringing the application for security which has occasioned prejudice;
- (9) the cost of enforcement;

(10)the costs of the proceedings.”

In *Atkins & Atkins (Security for Costs)* [2015] FamCAFC 66; (2015) FLC 93-646 and *Bhatt & Acharya* [2018] FamCAFC 230, as well as the matters in s 117(2A), the following matters were required to be considered under s 117(2A)(g):

- “(a) the financial circumstances of each of the parties to the proceedings;
- (b) whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party;
- (c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;
- (d) whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;
- (e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;
- (f) whether either party to the proceedings has made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer; and
- (g) such other matters as the court considers relevant.”

See also *Woodby-Chatterjee & Chatterjee (No 2)* [2018] FamCAFC 265, noting that security for costs orders are more commonly made in appeals than in trial litigation.

### 13. ***Proceedings in other courts or otherwise protecting third party rights***

Prior to the trial in *Chatterjee & Woodby-Chatterjee and Anor* [2018] FamCA 930, the husband’s father was successful in Supreme Court proceedings against the husband and the wife and had obtained a significant costs order against the wife. Those proceedings established that the wife’s entitlements under the financial agreement were modest.

In *Abrum & Abrum* [2013] FamCA 877 a financial agreement was saved under s 90G(1A) as if it was not held to be binding, because the husband’s parents acted to their significant detriment in reliance upon the parties entering into the financial agreement.

## 5. Preparing watertight agreements - drafting strategies to protect and deliver certainty for your client

A financial agreement is a contract. To draft a contract, it is necessary to look at what the client wants to achieve. The following questions must be considered first:

- What is the goal?
- How is it to be done?
- Who is to do it?
- When is it to be done?
- How is it to be enforced if it is not done?

The agreement also needs to be enforceable as a contract, not as a set of orders. The clauses of the agreement should be drafted as a contract and not just copied from precedent orders. The style is different and if the terms of the agreement are drafted in the same form as orders they may not be enforceable as they may lack clarity and certainty. Precedent clauses can help with the first draft of an agreement but the draft agreement must be checked carefully and altered to fit the precise and unique facts of the particular case.

### *Matters to be covered*

What clauses should be included in an agreement? As a starting point:

1. What property is excluded?
  - 1.1. Define the excluded property;
  - 1.2. Are there any circumstances where the financially weaker party will receive some of the otherwise quarantined property?
2. How will other (joint and separate) property be dealt with?
  - 2.1. Who retains the house or will it be sold?
  - 2.2. When will the other party vacate the home?
  - 2.3. How will property be valued?
  - 2.4. The arrangements for any sale;
  - 2.5. How will the net proceeds of sale be distributed?
  - 2.6. How will liabilities be dealt with (including tax)?
3. Will superannuation be split?
  - 3.1. If so, how?
  - 3.2. How will procedural fairness be given?
  - 3.3. Who will retain any self-managed superannuation fund and clauses to give effect to this? What if parties don't have one when the agreement is entered into but create one later?
  - 3.4. The operative time for a payment split is the beginning of the 4<sup>th</sup> business day after the day on which a copy of the agreement is served on the trustee accompanied by the other documents specified in s 90XI(1).

4. Spousal maintenance
  - 4.1. Is the right to spousal maintenance ousted?
  - 4.2. Will one party receive maintenance for a fixed period?
  - 4.3. How will the requirements of s 90E be met?
  - 4.4. Can the requirements of s 90F be met?
5. What contingencies have the parties considered?
6. Recitals – give sufficient background;
7. Schedules of the parties' assets and liabilities;
8. Statements of Independent Legal Advice;
9. Separation declaration (if applicable).
  - 1.1 *Using FLA terminology*

The terms used in the FLA should be used where possible. Examples of terms which a court has found difficult to interpret because they were ambiguous or did not reflect the wording of the FLA are:

- “acquired”, “assets”, “joint funds”, “from their own money”. *Kostres* (2009) FLC 93-420 discussed above.
- “matrimonial property”. *Gibbs & Gibbs* [2015] FamCA 630

## 2. *The pros and cons of a complex agreement*

A simple agreement is easier to draft, but it may be too simple to cover all possible contingencies. To avoid the risk of an agreement being set aside because of one of these contingencies, many agreements include a recital to confirm that the parties have considered those contingencies.

An example of a recital of drafting for contingencies is:

*Before executing this Financial Agreement, each party has had regard to the possibility that one or both of them may be subject to a change of circumstances including any or all of:*

1. *The birth of a child or children or adoption of a child or children;*
2. *Serious illness or injury of one of the parties or a child;*
3. *Death of one of the parties;*
4. *A significant increase or decrease in the value of the property and financial resources set out in Schedules A, B and C;*
5. *The bankruptcy of one of the parties.*

A formula which gives cascading entitlements with the effluxion of time, the number of children or some other factor, is more complex to draft and implement.

The reason for including a cascading formula is to more closely match the increased property entitlements of a party under s 79 (or s 90SM) in longer relationships where there will almost certainly have been greater contributions (parenting, homemaking, financial and non-financial) of the

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financially weaker party to at least partially offset the greater initial financial contribution of the financially stronger party, than in a short relationship. If the agreement does not adequately provide for the other party in the event of one of the contingencies, then there may be a greater risk of the agreement being set aside or, at the very least, an application being made with all the associated financial and emotional stress. It may be better to provide for the contingency, but more complex and lengthy agreements are more likely to have inconsistencies in their drafting.

Simpler agreements set out clearly the respective entitlements of the parties, with perhaps a payment or transfer of property calculated as a percentage of certain property or a defined lump sum. If a percentage, the property of which the party receives a percentage needs to be described.

Sometimes, agreements are drafted so as to oust the jurisdiction of the court to deal with property but allow maintenance claims to still be made. Of course, the weaker party must still establish a need for maintenance, but allowing the weaker party the right to apply for maintenance may mean that the agreement can be more simply drafted and is not as much at risk of being considered a bad bargain (and set aside if there are vitiating factors, such as undue influence), than if the right to apply for spousal maintenance is ousted.

Including a right to seek maintenance may help establish that the parties did consider possible contingencies, such as childbirth, care of children, injury and ill-health, and not merely state these possibilities in a recital may help uphold the agreement.

However, a financially weaker spouse with the primary care of the children who is in employment, may not be able to make a successful maintenance claim. This means that more consideration maybe should be given to ensuring that the weaker party is left with a greater share of the property than otherwise, so that there is less motivation to attack the agreement.

Another option is to include a sunset clause so that the agreement no longer operates if the parties, for example, have a child. The difficulty with these is that they have not been tested and non-compliance with s 90J(1) may be a problem. Section 90J(1) states:

- “(1) The parties to a financial agreement may terminate the agreement only by:
- (a) including a provision to that effect in another financial agreement as mentioned in subsection 90B(4), 90C(4) or 90D(4); or
  - (b) making a written agreement (a **termination agreement**) to that effect.”

A termination provision included in the original agreement can therefore be effective but advice must be given on the agreement as a termination agreement as well as, for example, a s 90B agreement. If advice is not given on the termination agreement under s 90J(2), the termination agreement part of the agreement will not be binding. To achieve a similar outcome, a financial agreement could also be drafted carefully with two parts:

1. The first part applies until a certain event occurs or does not occur;

2. After that time, the second part of the agreement applies. The parties' rights under Pt VIII or Div 2 of Part VIIAB of the FLA could be restored, unaffected by the agreement. Alternatively the parties' rights after that time are affected to a lesser extent than in the first part.

A requirement that the parties review an agreement if they have a child is almost certainly unenforceable if the intention is that the parties are forced to enter into a new agreement in different terms. It may encourage the parties to do it, but does not force them to do it.

### 3. *The problem of false recitals*

Recitals are statements at the beginning of a contract which set out preliminary matters, such as factual background and the reasons for the contract.

The false recitals which are most commonly problematic include:

1. Recitals which set out the financial positions of the parties or refer to schedules which do, may not accurately set out the true position. On the one hand, by parties providing full details of their financial positions, if there are any errors it may be easier for the other party to successfully apply to set aside under s 90K(1)(a) or 90UM(1)(a) because "the agreement was obtained by fraud" (including non-disclosure of a material matter). On the other hand, if the parties do not provide full details of their financial positions in the agreement, it may be more difficult to defend an application for the agreement to be set aside for non-disclosure of a material matter.
2. In *Thorne v Kennedy*, the agreement included an "acknowledgement" that the wife was able to support herself without an income tested pension, allowance or benefit, taking into account the terms and effect of the agreement when the agreement came into effect. This statement was designed to ensure that the agreement, in compliance with s 90F, ousted the jurisdiction of the court to make an order for spousal maintenance.

As the plurality in the High Court said, this statement was made (at [20]) despite the wife's "extremely limited personal means". The plurality made no findings on whether the s 90F declaration was effective, as submissions were not made with respect to it – either in the Full Court of the Family Court or in the High Court – but the plurality appeared to express doubt as to whether the wife was bound by her "acknowledgement". The High Court drew the attention of the parties to the issue, but because of the way the case was presented it was significant only (at [20]) "as a matter of contextual construction", which suggests that the incorrect statement may have assisted the plurality to reach the conclusions it made that there had been undue influence and unconscionable conduct.

3. If there are recitals which indicate that there has been a mutual exchange of disclosure when there has not been or state that there has been a mutual waiver of disclosure, particularly where there is unequal bargaining power, it may be easier for the court to find that there was undue influence or unconscionable conduct.

**May 2019**

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