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Family Law: Binding Financial Agreements (‘BFA’)

The end of pre-nups?

by Rohan McAdam

At some point or another we've all heard of the term 'pre-nuptial agreement' (or pre-nups for short). In Australia, these documents are called Binding Financial Agreements and in essence are private agreements between de facto or married couples with the intended purpose of providing a clear understanding of how their assets are to be divided upon the breakdown of a relationship.

On nearly a daily basis, I meet with clients who are asking me to prepare a BFA. However, more regularly I am being asked to prepare one in circumstances where the client has 1) just recently separated from their wife of thirty plus years and 2) are now engaged to a 'thirty something' year old that they met online.

Now the problem is not that they are in this relationship, it's the way they want the BFA drawn up. More and more, clients with this particular factual background are asking that a BFA be prepared however that they will wait until just prior to a key event (i.e. relocation of their partner to Australia, the Wedding day) to have their 'wife to be' sign it. That way they can use the timing to their advantage to get what they want, namely the ability to protect their assets. Sounds like a great plan, right?

This was an issue which was recently addressed in the High Court of Australia in the matter of *Thorne & Kennedy* [2017] HCA 49.

The facts

In or around 2006, Mr. Kennedy, a 67 year old man worth \$18-24 million met Ms. Kennedy, a 36 year old woman from Eastern Europe via a bride website. Ms. Thorne was living overseas and spoke very little English. She had no children and no assets of any substance. Mr. Kennedy was divorced from his first wife and had three adult children.

Shortly after meeting online, Mr. Kennedy travelled overseas to meet Ms. Thorne in person. After a short period of courtship Mr. Kennedy brought Ms. Thorne to live with him in Australia and 7 months later they marry.

However, 11 days before the wedding, Mr. Kennedy informs Ms. Thorne that he is taking her to see a lawyer to sign a document. He also informs her that if she does not sign it, the wedding is off. The next day Ms. Thorne reads the agreement with her lawyer for the first time. In essence the agreement provided:

1. Accommodation and a monthly sum during the parties' marriage and on Mr. Kennedy's death (provided they were still together).
2. If the parties separated within 3 years of marriage, Ms. Thorne received nothing (with or without children born to the relationship).
3. If the parties separated after 3 years with a child born of the relationship, Ms. Thorne received \$50,000.

Despite legal advice not to sign the agreement, Ms. Thorne signs it and signs a second (somewhat identical) agreement 5 days later.

Approximately 4 years after the first agreement was signed, Mr. Kennedy informs Ms. Thorne that the relationship is over and demands that she vacate their residence.

As a result, Ms. Thorne commenced proceedings in the Federal Circuit Court seeking that the Financial Agreements she signed be declared not binding and/or set aside and sought orders for a property settlement and spousal maintenance for the entirety of the property pool.

Outcome

This case made its way to the highest Court in the land and ultimately all seven Judges concluded the Agreement(s) had been vitiated on the ground of unconscionable conduct on the part of Mr. Kennedy. The High Court concluded that Ms. Thorne was subject to a special disadvantage that Mr. Kennedy knew about and he took advantage of. She was in essence powerless to make any decisions other than to sign the agreement.

Conclusion

So does this mark the 'death knell' for BFA's in Australia? No, but it is a useful reminder that agreements may well not be enforceable if certain factors are absent such as the parties time to reflect on the agreement, their intention to make the agreement which needs to be unaffected by pressure from either side and the agreement must be a fair one, particularly for the less wealthy party.

Need or know anyone who needs help in relation to a similar issue. Get in contact with me and I'll be more than happy to help.