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**FINANCIAL AGREEMENTS: BETTER OR JUST  
MORE COMPLICATED?**

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## **Introduction**

Financial Agreements have been in existence for nearly 8 years. The term "binding financial agreements" has become increasingly controversial as lawyers have realised that simply describing the agreement as a "binding financial agreement" will not make it one. In *Black and Black* (2008) FLC 93-357 the Full Court made it clear that only the Court can make the declaration that an agreement is "binding." It is not for the parties or their lawyers to declare it to be so.

After dealing briefly with the technical requirements, this paper looks at the recent legislative changes introduced by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2009* ("De Facto Act") including:

- de facto relationships
- third parties
- "other matters" including child support
- separation declarations
- when provisions take effect

More legislative change is pending. The *Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008* was, at the time of writing this paper, wending its way through Parliament. The changes in Sch 5 of the Bill loosen the requirements for a financial agreement to be binding under s 90G(i) or a termination agreement to be binding under s 90J(1).

There has been less case law on the grounds for setting aside financial agreements than might have been expected, but litigation about financial agreements is increasing. Many of the decided cases are applications for the splitting of hearings under s 90K and s 79A from the substantive proceedings, or summary dismissal applications. Some of these are dealt with in this paper as they give helpful indications as to possible pitfalls despite recent and prospective legislative changes.

## **Requirements**

A financial agreement must meet the requirements of Pt VIIIA. In summary, it must:

- be in writing
- specify whether it is made under s 90B, 90C, or 90D

- be signed by both parties
- be between parties who are contemplating entering into a marriage with each other, parties to a marriage or parties to a former marriage. Since 21 November 2008 parties other than spouse parties can also be parties to a financial agreement
- deal with property, financial resources and/or spousal maintenance of the parties or “matters incidental or ancillary” to those matters, although since 21 November 2008, “other matters” can be included. The *Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula) and Other Measures Act 2006* has, since 1 July 2008, allowed binding child support agreements
- not cover matters dealt with in a previous agreement which is still in effect
- include a statement in the agreement for each party that before the agreement was signed by that party, independent advice was provided by a legal practitioner to that party regarding:
  - the effect of the agreement on the rights of that party
  - the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement
- contain an annexure with a certificate signed by the person providing the independent legal advice to confirm that the advice was provided
- not been terminated or set aside by a court
- a separation declaration (which can, since 21 November 2008, be in the body of the financial agreement, if appropriate), is required for:
  - provisions to be binding which deal with 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 (s 90DA(1))
  - the splitting of superannuation entitlements (s 90MI). Under s 90MP(4) the declaration must state that the spouses are married, but are separated at the declaration time. Under s 90MQ, if the total withdrawal value for all the superannuation interests of the member spouse is more than the member spouse’s low rate cap amount for the income year in which the declaration time occurs (\$145,000 in 2008/9) the declaration must state that:
    - (a) the spouses are married;

- (b) the spouses separated and thereafter lived separately and apart for a continuous period of at least 12 months immediately before the declaration time;
- (c) in the opinion of the spouse or spouses making the declaration, there is no reasonable likelihood of cohabitation being resumed.

Since 21 November 2008, any of the above separation declarations can be included in the body of the agreement (s 90DA(2), 90MP(1)). A separation declaration under s 90DA(1) is unnecessary if the parties are divorced or either or both of them die (s 90DA(1A)). A separation declaration is not required for superannuation splits if there is a divorce order (s 90MI(a)(i)). If either or both parties have died, a separation declaration is still required for superannuation splits, but may be signed by a spouse's legal personal representative (s 90MP(2)).

### **Independent legal advice**

Section 90G(1)(b)(ii) requires that each legal practitioner advise their respective clients on various matters including “the advantages and disadvantages, at the time the advice was provided, to the party of making the agreement.” Until 14 January 2004 when the relevant part of the *Family Law Act 2003* commenced, the burden of advice was more onerous on the lawyer who was required to advise “whether or not, at the time when the advice was provided, it was to the advantage, financially or otherwise, of that party to make the agreement.” This was a significant barrier to lawyers making and certifying financial agreements.

To make a financial agreement binding, each party to the agreement must receive independent legal advice before signing the agreement as to:

- (i) the effect of the agreement on the rights of that party
- (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement

The lawyer is not required to certify that the advice was accepted, but only that the advice was given.

## Spousal maintenance

The best way to protect against future spousal maintenance claims in a financial agreement is to ensure that the property retained by or transferred to the possible maintenance claimant is sufficient for that party not to be eligible for Centrelink benefits and has sufficient property and/or income to support themselves. This will not always be possible. If spousal maintenance protection is required, s 90E and 90F must be addressed.

Section 90E states that a provision of a financial agreement that relates to the maintenance of a party to the agreement or a child or children is void unless the provision specifies:-

- (a) the party, 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...

Options when using s 90E include:

- Rely on s 90E and specify a large lump sum spousal maintenance
- Rely on s 90E but only specify a small sum such as \$1 on the assumption that the amount makes no difference

Section 90E appears to apply to both periodic and lump sum maintenance. Section 77A which is a similar provision in relation to s 79 orders, refers only to lump sum maintenance.

The meaning and effect of a figure specified as spousal maintenance under s 77A or s 90E is unclear. Section 90E is often interpreted differently than s 77A. Some agreements specify \$1 rather than a figure in the tens or hundreds or thousands of dollars. Is \$1 enough? Does a larger figure give greater protection? The simple, but exasperating answer is, we don't know.

The Full Court in *Caska v Caska* (1998) FLC 92-826, dealing with s 77A, said:

Obviously at some time in the future a Full Court may have to address issues relating to the true meaning and operation of s 77A.

This has not occurred. The Full Court has said that s 77A is ambiguous and obscure (Gee J in *Penza and Penza* (1988) FLC 91-949; *Dein and Dein* (1989) FLC 92-014). In *Evans and Spicer* (1992) FLC 92-320 Moss J considered (at pp 79,411-12) that the problems which arose with the interpretation of s 77A included:

- Its object (to reduce dependency on Centrelink entitlements) was outside the scope of the *Family Law Act*
- Orders purporting to be made under s 77A were not achieving the legislative purpose of the section. Wives agreed to almost any s 77A calculation in return for marginal increases in their property entitlements
- Section 77A had been widely held to be incapable of an interpretation which would enable the section to have any practical effect
- The requirement to "express" an order to be of a particular kind is not capable of being an order of the court
- What particular purpose is being referred to? Is it a subjective purpose held by one, or both, of the parties? How would this be ascertained or ascertainable? Is the "purpose" to be discerned by the court objectively, regardless of any stated intentions of the parties?

Doesn't most of this apply to s 90E too?

The ability of parties to contract out of spousal maintenance or oust spousal maintenance rights was restricted retrospectively to 27 December 2000 by the introduction of s 90F(1A) in December 2003. Under s 90F(1), a financial agreement cannot exclude or limit the power of a court to make an order in relation to the maintenance of a party to a marriage:

if the court is satisfied that, when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit.

There was considerable doubt over the interpretation of s 90F, particularly as to when the agreement came into effect. Some of these uncertainties were removed on 21 November 2008. Since that date the requirement for a separation declaration under s 90DA(i) to make spousal maintenance provisions in financial agreements was effectively removed.

In *Millington* [2007] FamCA 687, Carter J said that even if she was satisfied that there was a binding financial agreement excluding spousal maintenance claims (and there was not such an agreement), the wife could rely on s 90F and claim spousal maintenance. The wife lived in a house worth about \$1.5 million but her mortgage payments were greater than her income. Her income included the New Start Allowance which had a generous means test. Her Honour said that the wife may not ultimately be successful in her spousal maintenance claim as s 75(2)(b) might require her to re-arrange her affairs but she received an income tested benefit within s 90F.

### **Child support**

Until 1 July 2008 it was unlikely that child maintenance or child support could be dealt with in a financial agreement. However, since the commencement of the relevant part of the *Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Act 2006*, binding child support agreements are permissible. The *Family Law Act* was not changed, but to the extent that the *Child Support Assessment Act* previously prevented a financial agreement under Pt VIIIA *Family Law Act* from covering child support agreements, s 84(5) 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 under the *Family Law Act 1975*.”

After the commencement on 21 November 2008 of Sch 3 of the De Facto Act, the *Family Law Act* was amended so that financial agreements can include “other matters” such as child support.

Although there are no legislative barriers to child support provisions in a financial agreement with property and spousal maintenance provisions, it seems sensible to keep them separate. There is a risk that if the child support provisions are set aside everything may be re-negotiated. The risk is compounded by the disparity in the wording upon which financial agreements and binding child support agreements can be set aside in relation to changes in circumstances relating to children.

Binding child support agreements can be set aside on different grounds to financial agreements. For financial agreements, the ground relating to the care of children, is s 90K(1)(d):

since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside.

For limited child support agreements, the relevant ground is s 136(2)(c):

- (i) that because of a significant change in the circumstances of one of the parties to the agreement, or a child in respect of whom the agreement is made, it would be unjust not to set aside the agreement; or
- (ii) that the agreement provides for an annual rate of child support that is not proper or adequate, taking into account all the circumstances of the case (including the financial circumstances of the parties to the agreement)

For binding child support agreements the ground is in s 136(2)(d) and, similarly to s 79A, use the words “exceptional”:

in the case of a binding child support agreement – that because of exceptional circumstances, relating to a party to the agreement or a child in respect of whom the agreement is made, that have arisen since the agreement was made, the applicant or the child will suffer hardship if the agreement is not set aside.

### **Third parties**

Financial agreements, particularly under s 90B (before marriage) and 90C (if made prior to separation), are probably used more frequently where one or both parties have significant assets. These parties may want to include third parties such as companies or parents as parties to the agreement. A separate collateral contract between one or both of the parties to the marriage and the third parties is a complicated way to deal with the problem. Until 21 November 2008 often consent orders were used instead.

Amendments to s 90B, 90C and 90D commencing on 21 November 2008 enabled the parties to a marriage or proposed marriage to make a financial agreement with one or more other people. This rectified a past problem with financial agreements that only parties to a marriage or a couple contemplating marriage can be parties to a financial agreement. Sections 90B, 90C and 90D only referred to financial agreements being made by parties who are contemplating marriage, married or formerly married.

Prior to 21 November 2008, third parties could apply to set aside a financial agreement and the effect of a financial agreement on creditors could be a ground to set one aside under s 90K(1)(aa). As a result of *ASIC v Rich & Rich* (2003) FLC 93-171, the *Family Law Amendment Act 2003* expanded the jurisdiction of the court to deal with applications by third party creditors to set aside financial agreements. A financial agreement can be set aside if it was entered into for the purpose of defeating or defrauding a creditor of either party or with reckless disregard for the interests of a creditor of either party.

Amendments to the *Bankruptcy Act 1966* commenced in March 2005 which were made to prevent the misuse of financial agreements as a means of avoiding payment to creditors. Financial agreements were excluded from the definition of “maintenance agreement” in the *Bankruptcy Act* to ensure that trustees can use that Act’s “clawback” provisions to recover property transferred prior to bankruptcy pursuant to such an agreement. A new act of bankruptcy was introduced and occurred when a person was rendered insolvent due to assets being transferred under a financial agreement. This allows the trustee to claim property transferred under the agreement as divisible property in the bankrupt’s estate.

The Family Law Section of the Law Council noted that the wording in s 90K(1A)(aa) *Family Law Act* is wider than s 121 *Bankruptcy Act* which renders transfers unstable if the “main purpose” of the transfer is to prevent, hinder or delay the transferred property from being divisible among the transferor's creditors. Under s 90K(1)(aa), “creditor”, in relation to a party to the agreement, is not limited to existing creditors. It also includes a person who could reasonably have been foreseen by the party as being reasonably likely to become a creditor of the party. Further, the definition of “matrimonial cause” in s 4(1) was extended to include “third party proceedings ... to set aside a financial agreement.”

The Family Law Section submitted to the Federal Government that the amended s 90K tipped the scales in favour of creditors and did not allow parties to a marriage sufficient protection. Perhaps the amendments went too far?

### **Pt VIIIAB Financial Agreements**

Part VIIIAB financial agreements between de factos, which will be possible from 1 March 2009, have slightly different requirements than financial agreements under Pt VIIIA. For example, two or more people can make a Pt VIIIAB financial agreement under s 90UB, 90UC or 90UD only if the spouse parties are ordinarily resident in a participating jurisdiction when they make the agreement. Western Australia and South Australia are not participating jurisdictions.

Whilst the matters which can be dealt with in Pt VIIIA financial agreements were extended from 21 November 2008 to cover other matters such as child support, the new s 90UB(2), UC(2) and UD(2) restricts Pt VIIIAB financial agreements to:

- (a) how all or any of the:
  - (i) property;
  - (ii) financial resources;
 of either or both of the spouse parties at the time when the agreement is made, or at a later time and during the de facto relationship, is to be distributed;
- (b) the maintenance of either of the spouse parties

Under s 90UB(3), 90 UC(3) and 90UD(3), a Pt VIIIAB financial agreement may also contain “matters incidental or ancillary to those mentioned in ss (2).” Child support and child maintenance are among the excluded matters.

### **Meeting technical requirements of s 90G(1)**

Between 2006 and 2008 there was uncertainty in the courts over whether the technical requirements of s 90G(1) were so important as to override the clear intentions of the parties who had substantially met the requirements.

*Stoddard and Stoddard* [2007] FMCA fam 735 was decided by Federal Magistrate Altobelli before the Full Court decided *Black* and is not all good law but it is still helpful, including for its discussion of earlier cases. The agreement was entered into when the marriage was in serious difficulty. The effect of the agreement was that if the parties separated they each kept what they had. The parties separated.

The husband said the agreement was not legally binding, but even if it was, it should be set aside. The wife said that the agreement should be upheld and enforced.

The Federal Magistrate said there were three questions:

1. Was the agreement dated 19 January 2004 between the husband and the wife a 'financial agreement' for the purposes of s 90G?
2. If the agreement was a financial agreement, should it be set aside under s 90K?
3. If it was not an agreement under s 90G, or if it was but should be set aside under s 90K, what just and equitable order for property settlement should be made?

The husband was 52 and a teacher. The wife was 53 and a nurse. They met in 1998 and married later in 1998. They had both been married before and owned property. They each had children, though all but one had grown up. They entered into the agreement on 19 January 2004 and separated finally in February 2004.

The certificates for each party attached to the financial agreement which the parties intended to be under the *Family Law Act 1975* referred to the *Property (Relationships) Act 1984 (NSW)*. On the face of the certificates, the agreement was intended for another purpose. The husband argued that as a matter of *form* it plainly failed to meet the requirements of s 90G of the *Family Law Act* – indeed it was not even under the Act itself.

The wife pointed to the recitals in the agreement and asserted that in *substance* it complied with s 90G, even if not in form. Recital C referred to Pt VIII *Family Law Act* and was similar to the old s 90G wording:

- (a) the effect of the agreement on the right of that party;
- (b) whether or not, at the time when the advice was provided, it was to the advantage of, financially or otherwise, of the party to make the agreement;
- (c) whether or not at that time it was prudent for that party to make the agreement;
- (d) whether or not, at that time in the light of such circumstances as were, at that time, reasonably foreseeable, the provision of the agreement were fair and reasonable.

The court accepted that the recital was an attempt to comply with s 90G(1)(b) as it was worded at the time the agreement was entered into. The section was amended after the agreement was executed. The certificate referred to the wrong legislation,

but in all other respects, it covered the matters required in s 90G(1)(b) at the time the agreement was executed.

The husband argued that Collier J in *Ju and Ju* (unreported, 29 March 2006) should be followed. Collier J adopted a strict approach to the interpretation of s 90G(1). The section states “if and only if”. This requires a level of compliance above and beyond substantial compliance. The wife argued that the decision of Benjamin J in *Black and Black* [2006] FamCA 972 should be followed. Benjamin J focused on the words “to the effect that” in s 90G(1)(b), thus favouring a less strict interpretation that, in effect, upheld the substantive agreement of the parties, notwithstanding technical defects.

In *Ruzic and Ruzic* [2007] FamCA 473, Stevenson J preferred the approach adopted by Benjamin J. In *Ruzic* the legal practitioners signed fresh certificates in April 2006, which they dated 22 February 2006, being the date upon which the parties signed the agreement. The fresh certificates were signed when the legal practitioners realised that the original ones did not comply with the 2003 amendments. They were substituted for the original certificates and attached to the agreement. Stevenson J found that the original certificates were rectified by the second certificates. The agreement was, therefore, binding.

In *Stoddard*, the court preferred and adopted the interpretation of the legislation that upheld the substantive agreement of the parties notwithstanding the technical defects.

The husband also argued that the agreement should be set aside because:

- (i) The parties had resumed cohabitation at the time the agreement was signed and, possibly at times thereafter
- (ii) The agreement did not reflect the true financial position of the parties
- (iii) The agreement could not be carried out in accordance with its terms.

The parties resumed cohabitation at around the time they executed the agreement.

This was not a ground to set aside the agreement as the agreement expressly acknowledged that should they reconcile, the agreement would continue to be in force pursuant to s 90C. At least part of the purpose of the agreement was to reassure one or both parties, should they reconcile.

The argument that the agreement did not reflect the true financial positions of the parties was based on s 90K(1)(a) (fraud including non-disclosure) or s 90K(1)(b) (voidness, voidability or unenforceability arising from misrepresentation or mistake). This claim arose from the transactions between the parties relating to a property, and the wife's withdrawals from the mortgage account. There was also an argument that the wife failed to disclose her inheritance from her late father's estate.

A property purchase referred to in the agreement was not completed. This did not, of itself, invalidate the agreement. The agreement was frustrated. The modern test for determining whether a contract has been frustrated involves considering whether a contractual obligation has become incapable of being performed without default of either party (*Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337). The court found that the likely reason why the purchase was not completed was the breakdown of their relationship – in other words it was their own default.

Mistake is a contractual concept related to frustration. If, at the time of the agreement, both parties assumed that the property purchase would be completed but it had, prior to signing the agreement, already been terminated they would have been operating under a mistake. However, even if there was a mistake, the court did not accept such a mistake would vitiate the agreement. The terms of the agreement were clear. Both parties knew what they were doing. The mistake affected them equally. Any mistake did not affect the fundamental nature of the agreement between them.

The court found that the fact that the property purchase was not completed was not a ground to set aside the agreement. It did not make the agreement void, voidable or unenforceable for the purposes of s 90K(1)(b) or make the agreement impracticable to be carried out for the purposes of s 90K(1)(c).

The husband did not know when he signed the agreement that the wife had drawn-down on the loan account thus increasing the debt secured against a certain property and reducing the wife's exposure to that debt. The husband argued that the situation amounted to either fraud (the non-disclosure of a material matter) or misrepresentation leading to voidness, voidability or unenforceability. The court

agreed. The draw-down by the wife was “a pre-emptive strike” that put her in a position of advantage over the husband. The wife manipulated the borrowings so that she was liable for less and the husband was liable for more.

The court used the definition of “fraud” in *Green and Kwiatek* (1982) FLC 91-259 at 77,456. The essence of fraud is a false statement of fact made by one party to another knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false, with the intent that it should be acted on by the other party and which was in fact so acted on. However, the court considered that it was possible that, in the context of s 90K(1)(a), “fraud” has a broader meaning. It may be constituted by non-disclosure of a material matter. Whereas fraud at common law may require a representation, fraud under s 90K(1)(a) may be constituted by omission i.e. non-disclosure of a material matter.

In any event, if a representation was needed, the court found that the wife made two false representations. The first was to the effect that the one property had “been purchased wholly with funds brought to the relationship by the wife”. This was false because the wife’s actions meant that joint funds were used to increase the equity in her property. The second was that the debt on one property would be shared equally. This was false because the effect of the wife’s actions was to shift a greater burden of the debt on the husband. The wife’s actions amounted to ‘non-disclosure of a material matter’. The court concluded that there had been a misrepresentation entitling the husband to have the contract voided or set aside under s 90K(1)(b).

The agreement was set aside under s 90K(1). There was no need to consider other aspects of the husband’s argument in relation to the validity of the agreement. As the agreement was set aside, Pt VIII of the Act applied to the dispute.

The court found that the parties’ contributions were equal. The wife had already paid to the husband \$49,505 of the \$83,934 she withdrew from the loan account. The husband said that a further payment should be made to him of \$100,000. The wife said that the metaphorical “books” were balanced.

The court found that no further payment should be made to the husband. It was just and equitable for each to keep what they had, being an equal division of the assets. The uncertainty as to whether *form* or *substance* is more important was resolved, at least until there is legislative change to overrule it, by *Black and Black* (2008) FLC 93-357. The Full Court upheld the strict interpretation of s 90G(1), saying (at paras 44 - 45):

The agreement entered into by the parties in this case did not refer to the specific requirements detailed in s 90G, although the certificate did.

Recital R and clause 29 of the agreement... dealt predominantly with advice in relation to the legal implications of the agreement and each party's rights and obligations. These statements did not meet all the requirements set out in s 90G(1)(b), particularly there was no reference to advice in relation to whether the agreement was fair or prudent. In our view, such an omission meant that the agreement did not comply with the provisions of s 90G and was not binding upon the parties. It follows that we prefer the approach taken by Collier J in *J and J ...* to that taken by the trial Judge in this case. We are of the view that strict compliance with the statutory requirements is necessary to oust the court's jurisdiction to make adjustive orders under s 79.

### **Proposed legislative changes**

The Federal Government has legislative change pending which, if passed, will result in a less strict interpretation of s 90G(1) than the Full Court took in *Black*. The changes are in Sch 5 *Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008*. The main purpose of the amendments is to reduce the impact of *Black* by relaxing the technical requirements for a financial agreement to be binding under Pt VIIIA *Family Law Act*. The Bill has been referred to the Senate Standing Committee on Legal and Constitutional Affairs.

The Bill proposes that the requirement for a clause in the agreement which contains the words in the current s 90G(1)(b) be removed. In relation to both financial and termination agreements, the requirement under s 90(G)(1)(e) and s 90(J)(2)(e) for one party to have an original and the other a copy agreement will also be removed.

Section 90G(1)(b) and (c) currently provides:

- (c) the agreement contains, in relation to each party to the agreement, a statement to the effect that the party to whom the statement relates as been provided, before the agreement was signed by him or her,

as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:

- (i) the effect of the agreement on the rights of that party;
  - (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and
- (c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided.

It is proposed that these sections be repealed and replaced with s 90G(1)(b):

- (b) before signing the agreement, each spouse party was provided with:
- (i) independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the that advice was provided, to that party of making the agreement; and
  - (ii) a signed statement by the legal practitioner stating that this advice was given to that party.

If the Bill is passed in its current form, it appears that other problems will be created, such as:

1. The independent legal advice must be provided before the agreement is signed by that party. How will this be proven?
2. A statement by the legal practitioner stating that the advice was given must be signed before the agreement is signed by that party. How will this be proven? How will a lawyer acting for a client who is signing the agreement ensure that the statement is in relation to the correct version of the agreement?
3. There will no longer be a requirement for one party to retain the original agreement and copy to be provided to the other party. All parties can sign original documents
4. The amendments are retrospective and apply to financial agreements and termination agreements made on or after 27 December 2000 if they have not been set aside. Between 2000 and 2003 the wording of s 90G(1) was different to the wording assumed by the Bill. Will agreements made during this period be invalid?

Legal practitioners may prefer the known problems of a strict interpretation of s 90G under *Black and Black* to the new problems and uncertainties which the proposed Bill may bring.

In relation to termination agreements, s 90J(2)(b) and (c) will similarly be replaced with s 90J(2)(b).

Ian Kennedy, in a paper for the March 2009, Television Education Network video program “De Facto Relationships and the *Family Law Act* – Financial Agreements” discussed the submission of the Family Law Section of the Law Council of Australia on the requirements under s 90G (and s 90UJ of the de facto legislation). He considered that it was likely that the formal requirements would be further amended as a result of recommendations made by the Senate Standing Committee.

The Family Law Section identified three additional areas where inherent drafting defects or unintended consequences of the existing legislation tended to undermine the effectiveness of the financial agreements provision. They are:

1. *Section 90K(1)(g) - Unsplittable Superannuation Interests*
  - Under s 90K(1)(g) the court can set aside a financial agreement or termination agreement if a court is satisfied that the agreement “..covers at least one superannuation interest that is an *unsplittable interest for the purposes of Part VIII B*.”
  - An "unsplittable interest" is defined under s 90MD and regs 11(1A) and 11(1B) *Family Law (Superannuation) Regulations 2001* to include:
    - A lifetime pension or fixed-term pension that the member is no longer able to commute;
    - A lifetime annuity or fixed-term annuity;
    - An interest with a withdrawal benefit in relation to the member spouse of less than \$5,000; or an annual benefit of less than \$2,000.

- Financial agreements often provide for each party to retain their own superannuation interests. Those interests may include unsplitable interests which have been overlooked.
- The Family Law Section recommended that s 90K(1)(g) be repealed and, if necessary, a provision be inserted to provide that a provision of a financial agreement which purports to split an unsplitable superannuation is unenforceable but does not otherwise affect the validity or binding nature of the agreement.

2. *Potential conflict between s 90K(3) and s 79:*

- Subsection 90K(3) provides that:  
“A court may, on an application by a person who was a party to the financial agreement that has been set aside, or by any other interested person, make such order or orders (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that financial agreement and any other interested persons.”
- If a financial agreement is set aside, a court may make such orders “...as it considers just and equitable”. By contrast, if orders are set aside under s 79A(1), a court may vary or set aside a property settlement order and “make another order under s 79 in substitution for the orders so set aside.”
- The Family Law Section submitted that s 90K(3) should be in the same terms as s 79A(1) so that later orders should rely on s 79, rather than broad undefined equitable considerations.

3. *Quantification of Maintenance*

- Sections 90E and s 90F (like s 77A and 75(3)) were inserted to protect Government revenue and to ensure that the value of any maintenance provision in a financial agreement was taken into account in assessing eligibility for an income-tested pension, allowance or benefit.
- Section 90E(b) provides that a provision in a financial agreement relating to maintenance is void unless it specifies “the amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party.”

- A potential problem with s 90E(b) is that the value of the proportion of the relevant property may not be known or be able to be specified at the time the agreement is entered into, particularly in a pre-nuptial or mid-nuptial agreement. It may not be possible to quantify “the value of the portion of the relevant property” until the occurrence of a later event (although the value will then be able to be ascertained) and therefore to comply with s 90E(b). This creates uncertainty as to the binding effect of the agreement.
- The underlying policy objective can be satisfied by calculating the value of the portion of the property attributable to maintenance at the appropriate time. It is unnecessary, and impractical, to require it to be quantified in the agreement itself provided that the agreement contains a mechanism by which it can be calculated.
- The Family Law Section recommended that s 90E(b) be redrafted to read:
  - (b) the amount provided for, or the value or 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.

### **De Facto Act**

Schedule 3 of the De Facto Act brought changes to Pt VIIIA with respect to financial agreements between married couples, which commenced on 21 November 2008. Financial agreements under the *Family Law Act* before, during or after a de facto relationship will be possible from 1 March 2009 when Sch 1 of the De Facto Act commences and a new Pt VIIIAB is inserted in to the *Family Law Act*.

The changes which commenced on 21 November 2008 included:

- Third parties can be parties to financial agreements along with spouse parties
- “Other matters” (in addition to those incidental or ancillary to property and maintenance) can be included in agreements
- A separation declaration can be included in a financial agreement (rather than in a separate document) and it is unnecessary if the parties divorce or one

party dies to have one unless there is a superannuation split if the parties divorce or one or both parties die

- A legal personal representative can sign a separation declaration for a deceased spouse to ensure superannuation provisions are effective (s 90MP(2))
- An additional ground for setting aside an agreement under s 90K is if the purpose of the third party entering the agreement was to defeat a creditor (s 90K(1)(aa))

Financial agreements for de facto couples are covered by the new Div 4 Pt VIIIAB. It is very similar to Pt VIII A (financial agreements for married people). The main sections of Pt VIII A with the corresponding sections in Div 4 Pt VIIIAB are:

<b>Topic</b>	<b>Legal Marriages</b>	<b>De facto Relationships</b>
Financial agreements	Pt VIII A	Div 4 Pt VIIIAB
Financial agreements before marriage/cohabitation	s 90B	s 90UB
Financial agreements during marriage/cohabitation	s 90C	s 90UC
Financial agreements after divorce/breakdown	s 90D	s 90UD
Formal requirements	s 90(G)(1)	s 90UJ(1)
Setting aside	s 90K	s 90UM
Termination agreements	s 90J	s 90UL
Validity, enforceability and effect	s 90KA	s 90UN
Orders and injunctions binding third parties	Pt VIII A A	Div 3 Pt VIIIAB
Spousal maintenance – specification	s 90E	s 90UH
Spousal maintenance – pensions	s 90F	s 90UI
Death	s 90H	s 90UK
Separation declaration – property	s 90DA	s 90 UF
Separation declaration - superannuation	s 90MP(1) to (7)	s 90MP(7) to (12)

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Sub-section 90K(1)(aa) is a new ground for setting aside a financial agreement. It aims to stop a married person from defrauding or defeating a claim of a de facto partner. The de facto partner needs to show that the married person entered into the agreement:

- with the purpose or for purposes which included to defraud a party in a de facto relationship with a spouse party; or
- had the purpose or for purposes which included to defeat the de facto party's interest; or
- with reckless disregard for the de facto party's interest

A similar provision, s 90UM(1)(d), applies if a de facto couple enters into an agreement with the intent of defrauding or defeating a claim of a party who was once married to one of the de facto parties.

Agreements validly entered into under state or territory law of referring jurisdictions (ie all except Western Australia and South Australia) are recognised, although the strict requirements of s 90UJ(1) have not been met.

State or territory agreements that do not meet the formal requirements of a financial agreement under the new legislation, but which meet the requirements under old state law, are recognised as being able to exclude jurisdiction, and can be set aside and enforced under the *Family Law Act*.

Section 90UE recognises agreements entered into under state law in non referring states if parties have a geographical connection with a referring state.

Section 90UM(1)(k) is an important addition to the grounds upon which a state or territory de facto agreement can be set aside. His Honour Justice Watts in a paper entitled "De Facto Property under the *Family Law Act*", dated 19 December 2008 said that s 90UM allows a retrospective challenge to the effect of otherwise valid agreements in Queensland, the Northern Territory and possibly South Australia if injustice and inequity are found.

Section s 90UM(5) provides that a state or territory agreement can be set aside if:

- at least one of the spouse parties to the agreement was not provided with independent legal advice from a legal practitioner before signing the agreement, about the effect of the agreement and the rights of the parties and the advantages and disadvantages at the time the advice was provided to the party making the agreement; or
- the advice was provided but a certificate signed by the lawyer was not included in or attached to the agreement or given to the party;

and it would be unjust and inequitable not to set the agreement aside.

The following table in Justice Watts' paper, indicates whether or not s 90UM(1)(k) is likely to be attracted because the State or Territory law does not require the specified advice and a certificate:

NSW	Not likely to be affected
Queensland	Likely to be affected. Queensland agreements do not require legal advice or a certificate
Victoria	Has not had provision for agreements but will have from December 2008. Any agreements entered into in Victoria between December 2008 and the commencement of the Federal Law are not likely to be affected.
Tasmania	Not likely to be affected.
Northern Territory	The Act does not require independent legal advice and the provisions of the section are likely to be attracted.
ACT	Arguably not likely to be affected although the wording of the certificate is the same as the original wording of s 90G in 2000 and so does not directly deal with "disadvantages".
South Australia	Likely to be affected. The South Australian legislation requires lawyers to have "explained the legal implications". This falls short of the provisions in s 90UM(1)(k).
Western Australia	Financial agreements under the <i>Family Law Act</i> after 1 December 2002 are not likely to be affected. Former financial agreements (common law agreements) entered into prior to 1 December 2002 are likely to be affected.

**Other recent cases**

*Yardley and Yardley* [2007] FamCA 64, similarly to *Stoddard*, reminds lawyers, that even if there may be a ground to set aside a financial agreement, the outcome may be no different, particularly after taking into account the risks and costs of litigation. Careful consideration must be given as to whether any s 79 orders will depart from the settlement achieved under the financial agreement. Orders were made by consent in relation to non-superannuation property on 27 April 2005. A financial agreement was used to split superannuation.

At the time the property orders and superannuation agreement were made, the three children of the marriage were living with the husband. The husband retained the former matrimonial home and the wife received \$50,000 together with a split of superannuation of \$55,000. By the time of the hearing A was aged 17, L aged 16 and N aged nearly 15. In July 2005, within one month of the wife vacating the home in favour of the husband, A moved back with the wife. N moved back with the wife in August 2005.

The wife sought to set aside the court orders and the financial agreement and thereafter a rehearing of all property and financial issues.

The wife had used her \$50,000 cash to purchase a small one bedroom unit. This property was later sold, with the net result that she had almost \$21,000 left. The payment of legal fees or other expenses further reduced the wife's funds. Both parties were in full-time employment. The wife lived in rented accommodation with two of the three children.

The matrimonial home had an agreed value of \$365,000. The mortgage was \$265,000 as the husband had increased it by \$50,000 to make the earlier payment to the wife. He was solely responsible for the mortgage. The other assets and liabilities were furniture, chattels and a modest investment sum. The liabilities were largely legal expenses and credit card debts. If the wife's application was successful, a sale of the

home would be necessary. Real estate agent and other expenses would total about \$10,000.

Young J noted that the court had to examine the evidence and make findings as to whether or not there were exceptional circumstances, or the other circumstances required by s 90K. Thereafter issues of hardship and the whole issue of the exercise of court discretion was a live issue. At the outset of the case he directed the attention of the parties and the wife's legal advisers to the actual available pool of assets and requested that some common sense, pragmatic and commercial approach be considered.

The parties settled with the minutes of consent orders providing that the husband pay to the wife \$22,500. The husband otherwise retained the home and its equity.

*Phillips & Phillips* [2008] FamCA 158 also reinforces the obligation on lawyers and parties to fully investigate the claim before initiating proceedings seeking that a financial agreement be set aside. If possible, there should be informal negotiations and disclosure. These are sensible steps as well as being required by the Family Court's Pre-Action Procedures.

Barry J was determining the husband's Application in a Case for orders that the wife's application be struck out or in the alternative, the wife file and serve within 14 days full particulars of her claims that the consent orders and the financial agreement be set aside.

Barry J said he assumed, when adjourning the matter three months earlier, that the particulars sought by the husband would have been forthcoming by the adjourned date. On the earlier day Barry J commented:

I find it staggering that she would have instituted these proceedings without obtaining the valuation evidence to back it up first. She would have had to produce that evidence at some stage. Counsel replied, "Yes, your Honour, and she's received advice - right, she's received valuation advice".

Nothing was done by the wife until two days prior to the adjourned hearing date. The wife's valuer wrote to the husband's solicitor advising that he could not progress his valuation methodology until he was supplied with relevant documentation. The husband said that at all times he was willing to supply relevant documentation.

In response to the valuer's letter, the husband obtained, at extremely short notice, a report from an accountant who noted that as he was not a registered land valuer he could not offer any opinion of real estate values, but on the information available to him, he considered there would be no value for goodwill for the company as at January 2002.

Barry J somewhat reluctantly acceded to the wife's request for more time. He agreed with the husband that the wife should supply further particulars of her application. Counsel for the wife did not challenge this with the caveat that it not occur until the documents requested had been provided.

Barry J observed that the conduct of the wife's case appeared to be in the nature of a fishing exercise. It seemed the husband was confident there were no fish in that particular pond and was not opposed to providing informal disclosure.

Although *M v D* [2007] SADC 123 is a decision of Beazley J of the District Court of South Australia under the *De Facto Relationships Act, 1966 (SA)*, it covers issues such as unconscionable conduct, change of residence of children and the ongoing reasonableness of an agreement.

Approximately 20 months after the end of the relationship, the parties executed a written agreement, purportedly under the *De Facto Relationships Act 1996 (SA)*. The defendant argued that the agreement was unenforceable having regard to the circumstances leading to its execution by the defendant. He argued that:

- His execution of the agreement was procured by the unconscionable conduct of the plaintiff in taking advantage of his alcohol dependency and depression. He had independent legal and accounting advice but this was irrelevant, as he was effectively deprived of an independent and voluntary will in making an improvident agreement. He had minimal assets and was burdened by debt when he executed an unfair, if not improvident, agreement.

- The subject matter of the agreement was the provision of ongoing maintenance and could not have been the subject of a Court order under the Act. Accordingly, the agreement was not a “cohabitation agreement”. The parties made a mutual false assumption that the agreement was within s 5(1) of the Act. Alternatively, the obligation to pay maintenance was of moral and not legal force or there was no consideration for the agreement.

The defendant consulted a psychologist on eight occasions ending in 2002. He continued to work as a medical registrar approximately 50 hours per week. He increased his alcohol intake to about two bottles of wine per day. He had difficulty sleeping, and was losing weight. The plaintiff was aware that he was depressed, drinking heavily and emotionally exhausted.

In August 2002 the plaintiff’s solicitors sought further amendments to the draft agreement including that payments continue until she was 60 years of age; and that payments otherwise “cease only upon her marriage, and not upon her commencing or remaining in a de facto relationship”. The defendant rejected the proposed amendments.

In the six-month period leading up to the execution of the agreement, the plaintiff directly contacted the defendant “imploring him to sign the agreement”. By about 4 September 2002, the defendant was anxious to finalise the agreement. The Judge accepted that the defendant was concerned to avoid hostility with the plaintiff. He told the plaintiff on 8 to 10 occasions between April 2001 and December 2002 that he was having trouble maintaining two houses because of his debt level. She responded with words to the effect: “You earn heaps, you can pay, live up to your responsibilities.”

On 11 November 2002 the defendant’s father died and the defendant attended the funeral in New Zealand. When he rang the plaintiff to tell her what had happened, she told him “you need to get a grip and get on and sign the agreement.”

On about 17 December 2002 the agreement was signed by both parties and certificates in the form required by the Act were signed by their respective solicitors.

The Judge accepted that the defendant read the agreement before he signed it, and that he understood the document, and its legal effect. It was substantially in the same form as it had been for many months, and involved payments no greater than he had made since separation on 12 April 2001. The Judge accepted his evidence that he felt pressured to execute the agreement, as he interpreted the plaintiff's telephone calls as questioning his morality.

The significant difference was that the prior voluntary arrangement was to be replaced by a legally enforceable agreement with commitments for approximately 14 years, with no mechanism to allow for changed circumstances. At all times the defendant was advised by both his accountant and his solicitors that he ought not sign the agreement because he could not afford to do so.

Until March 2005 the defendant made the payments required under the agreement. In October 2004, the two younger children went to live permanently with him. The plaintiff described having an operation and that she was "gravely ill". In February 2005, the defendant enrolled the children in less expensive schools. He moved to cheaper but larger rental accommodation.

On 21 February 2005, the defendant's brother wrote to the plaintiff alleging that the defendant's personal debts had reached a level of \$135,000, and that he could no longer maintain payments under the agreement. An offer of a modest interim monthly payment for two years was made with the intimation that the defendant might be obliged to petition for his own bankruptcy.

In March 2005, the defendant ceased making full payments to the plaintiff. In July 2005 the plaintiff became obliged to pay child support at \$9.97 per fortnight to the defendant from her Centrelink payments. She didn't incur any accommodation or utility expenses after March 2005 because she stayed with friends.

By 30 June 2006, the defendant's financial position had improved substantially.

With respect to the uncertainty as to whether spousal maintenance arrangements could be dealt with in a certificated agreement, the Judge accepted that they could, but said (at para 111):

Even if I am in error in that construction, and maintenance payments do not fall within the scope of s 5(1)(b) of the Act, the agreement would in my opinion remain enforceable at common law. The making of such an agreement following the termination of a de facto relationship would not constitute an immoral purpose in breach of public policy for the reasons expressed in *Seidler's* case. The Act itself has not in my opinion become a code so as to oust common law contracts. It is to be contrasted in that respect from provisions similar to that in s 27 of the *Property (Relationships) Act* 1984 (NSW) which specifically exclude a claim for maintenance at law, other than pursuant to that Act. The concept of maintenance in de facto relationships is now recognised in statutes in other States throughout Australia.

However, with respect to the defendant's complaint that the agreement was unfair, the Judge found (at paras 129, 134, 136 and 137):

There can hardly be any doubt that the terms of the agreement were objectively one sided, and unfair to the defendant. At the time he executed the agreement, he was not in a financial position to meet his commitments without incurring escalating debt. Thereafter he was committing himself to payments for 14 years without any legal obligation to do so and without any corresponding concessions by the plaintiff, even if his finances would be expected to improve. ...

There is no doubt that the defendant had a great deal of time to reflect on the ultimate agreement. He had made payments for almost 20 months before he signed the agreement. The cohabitation agreement is not legally or conceptually difficult to comprehend. He had taken an active part in the negotiations over those 20 months. ...

The defendant was undoubtedly severely depressed; suffering from low esteem and alcohol dependent. He undoubtedly felt guilty, and blamed himself for the breakdown in the relationship. While the death of his father occurred about one month before the agreement was executed, he had already determined to sign it in September/October of that year.

While the agreement was improvident from his viewpoint it reflected his desire to ensure that his de facto of 14 years was adequately maintained. He knew precisely what he was doing when he signed the agreement. There is no comparable legislation in this State similar to the *Contracts Review Act* 1980 (NSW), where contracts which, may not be unconscionable, may yet be held to be unjust.

The Judge found that the agreement was enforceable against the defendant.

The plaintiff's claim including interest was \$73,223. However, events had changed dramatically since the termination of the relationship. The plaintiff's ongoing expenses were reduced because of the change in responsibility for the children.

Further, her reasonable accommodation requirements were reduced for the same reasons. It was obvious that the terms of the agreement relating to the “reasonableness” of expenses could give rise to future disputes. The next due date for the payment of the monthly sum of \$1,300 in advance, and the other verifiable expenses, was 15 December 2007. The Judge said it was in the interests of both parties that they avoid ongoing disputes as to the reasonableness of expenses. They ought reflect again on the benefits of mediation to allow for the payment of a satisfactory lump sum to resolve any ongoing problems.

In *Cole and Cole* [2008] FMCA fam 664 the Court considered the mental capacity of one of the parties after the agreement was entered into. The husband sought to set aside a financial agreement on the basis of his mental incapacity. Wilson FM said (at paras 5 – 6):

A person who lacks the mental capacity to understand the consequences of entering into a contract may avoid it. ... The contract is voidable at the instance of the disadvantaged party: *Gibbons v Wright* (1954) 91 CLR 423.

The Laws of Australia ... summarises the position as follows:

*“In order to rescind on the ground on incapacity, the onus is on the incapacitated party to establish certain elements. They are:*

- (1) *He or she was unable, due to mental impairment, to understand the contract at the time of formation; and*
- (2) *That the other party knew or ought to have known of the impairment. ...”*

The husband suffered from a number of psychiatric conditions, including bipolar disorder. There was a dispute as to the husband’s mental state when he executed the agreement on 25 August 2005. On 31 December 2004 he was admitted as an inpatient to the Mental Health Unit of a hospital suffering from major depression, dysthymia, narcissistic personality disorder, epilepsy and asthma. The husband said he had severe depression due to the breakdown of his marriage.

The husband’s treating psychiatrist made no mention of any manic behaviour on 19 August 2005, but he was plainly hypomanic by 19 October 2005.

The husband's former solicitor gave evidence. He received instructions on 26 July 2005 to transfer the house from the parties' joint names into his wife's sole name. The husband contacted the solicitor's office again on 1 August 2005. The solicitor's file note said that the husband gave clear instructions that he wished to transfer the home to his wife for no consideration. The solicitor explained the options and the drawbacks of the proposal. At the conclusion of the file note the solicitor said:

he seemed quite aware and lucid and seemed to have given the matter some considerable thought.

The solicitor said that the husband proposed the transaction with a view to reconciling with his wife. The husband pursued the solicitor on several occasions to complete documentation. The solicitor did not detect any abnormal behaviour in the husband although he described him as eccentric. This seemed to have been the husband's demeanour generally throughout the dealings that the solicitor had with him and not particularly just on the day the financial agreement was signed.

The Federal Magistrate found that, on the balance of probabilities, the medical evidence did not show that the husband suffered from mental incapacity on the day he signed the financial agreement. The lay evidence of his former solicitor and his wife did not assist him either.

The Federal Magistrate also said even if he was wrong, and the husband was under an incapacity at the time he made the financial agreement, that agreement was voidable by him. The wife argued that he was obliged to avoid the contract within a reasonable time of regaining capacity. He said he had capacity in 2006 yet his Application was not filed until 9 May 2007.

The Federal Magistrate found that the wife's submission had merit. The husband should have, within a reasonable time, elected whether to avoid a contract that he said was made whilst he was mentally impaired. A delay of 12 months was not acting within a reasonable time. The wife was entitled to assume that the financial agreement was in force and conduct her affairs accordingly.

In *Kostres and Kostres* [2008] FMCA fam 1124 the husband unsuccessfully applied for the court to exercise its powers under s 79 despite a s 90B financial agreement

having been executed by the parties. The parties were aged 55 and 63 and had been married for 4½ years. The financial agreement was signed 2 days prior to the marriage but this does not appear to have been an issue in this case.

The husband's major arguments were:

1. Both parties mistakenly believed that the husband was an undischarged bankrupt. The court said (at paras 37 – 38):

...There was a mistake as to the bankrupt status of the husband. The wife did not deliberately set out to ensure that the husband laboured under his mistake, for her own benefit. Both parties laboured under the same mistaken belief. If anything, it was the husband who created the confusion by failing to make any enquiry as to his bankrupt status before signing the financial agreement, and before properties were purchased.

Further, the husband's evidence was that if he was aware of his true status as a discharged bankrupt he would still have signed the agreement in the same terms. His complaint is that he allowed subsequent purchases to be put into his wife's sole name because of his mistaken belief. In my view, that is not sufficient to render the agreement voidable or unenforceable. The wife did nothing to contribute to the husband's ignorance of his correct legal status. She did not unconscionably, as that term is properly understood.

2. It was unconscionable conduct for the wife to seek to rely on the agreement because after the agreement was made, both parties contributed to the capital of the properties. The court found that there was no unconscionability with respect to the "making" of the agreement as required by s 90K(1)(e).
3. The certificates provided by the solicitors did not comply with s 90G(1)(b) as they were given when both parties believed that the bankrupt was an undischarged bankrupt. However, there was no evidence that the solicitors had this belief. Furthermore (at paras 24-25):

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

In my opinion, s 90G deals with the formal requirements of a binding financial agreement. It is not open to a party to argue that the substance of the advice given was incorrect, or given on a false premise (unless perhaps, this was known to the other party to the marriage, who could be said to have acted unconscientiously in reliance on the mistaken belief of the other. That however, is a different matter, and is best

addressed when consideration is given to s 90K of the Act). If the advice was wrong (in the sense of being given negligently, or in breach of retainer) the party to the marriage has rights elsewhere. If the advice was correct, then it is difficult to see how the party has been disadvantaged. That is particularly so where, as here, the husband gave evidence that he would still have signed the agreement.

4. Half of the assets of the two family trusts should be transferred to him. This required an interpretation of clause 6(c) of the financial agreement which provided that “any assets of whatsoever kind or nature acquired during the relationship from joint funds shall be divided equally between the parties.” There was a dearth of information before the court about the trusts. The court concluded (at paras 54-56 and 60):

It would only be impracticable for the financial agreement to be carried out if the trust property was “an asset acquired during the relationship from joint funds”.

In my view, the better construction of clause 6(c) of the financial agreement is that to be caught the asset should be personally acquired by one or other or both of the parties to the agreement. In those circumstances, it would not extend to cover assets purchased by one of the parties in their capacity as a trustee. Accordingly, I would conclude that the assets of the [Z] Family Trust are not captured by the terms of the financial agreement. The trustee will continue to hold that asset on the terms of the trust.

Even if I were unsure of that outcome, the Property P property was not acquired using the joint funds of the parties. It was accepted during argument that “joint funds” should be construed to mean funds to which each party made a contribution. It was accepted that there was no need for their contribution to be equal. The purchase of the Property P property was wholly financed by a loan from the National Australia Bank. Clause 6(c) of the financial agreement focuses on how the particular asset is ‘acquired’. The P Property was ‘acquired’ on its purchase from the previous owners. The husband made no contribution to the purchase of the asset. It is beside the point that the loan repayments were made from the business of the aged care facility to which the husband made an undoubted contribution. If it was found that part of those funds was contributed by the husband (due to his efforts in assisting to run the business) they were not contributed to the acquisition of the asset, but rather to the repayment of a loan...

Can I separately make orders with respect to the Property P property? As the mere expectations of the parties under the [Z] Family Trust are not ‘property’ there is no property left to be adjusted under s 79 of the Act. In those circumstances, although each party may have a financial resource available to them, it is of no consequence, if there is no property to adjust. If the financial agreement applies, there is no property left for me to make orders in relation to.

5. No separation declaration had been made so the financial agreement could not be relied upon by the wife. The court found that the existence of a separation declaration was a procedural matter and made the enforcement of his orders contingent upon the filing of an Affidavit by the wife exhibiting a separation declaration. Orders were made which dealt with the two assets capable of division between the parties as being caught by clause 6(c). The wife also had to pay one half of their net value being a cash sum of \$123,985.48 and the wife retained the properties as they were registered in her name either in her own right or as trustee of the family trust. The wife conceded that in respect of the property owned by the family trust that the husband was entitled to half of the property.

### **Conclusion**

Financial agreements have grown up and matured. As they have aged, they have become more flexible, more useful and a more viable post separation alternative to consent orders. It is, however, important to remember that they have only just started school. They have not finished important subjects like spousal maintenance, contract law and bankruptcy law. They have been wary of third parties but are now trying to embrace them. The rules have changed along the way and the commencement dates of various amending Acts will be very important, particularly when retrospective changes have been made. Better or just more complicated?

The complexity of the transitional provisions with respect to agreements between de facto spouses made before 1 March 2009 are a new challenge.

The courts have not yet fully determined the skills, weaknesses and strengths of financial agreements, so they should be used cautiously and drafted with care. Over the next few years, we will have greater opportunity to see them operate under test conditions in trials and appeal Courts.

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