

## **PREPARING FOR THE UNTHINKABLE: PROTECTING YOUR CLIENTS' INTERESTS UNDER FAMILY LAW**

(edited version of a paper delivered to 2007 FPA Queensland Planners Forum  
by James Noble)

### **Summary of Paper**

- It is possible that some of your clients will separate during the period you remain their financial adviser.
- Should that occur, your financial advice to them and structuring of their assets will need to be revised.
- It is best to plan for the possibility of your clients separating and for the redistribution of their assets should that occur, and to provide to them the most appropriate restructuring should that be necessary to enable them to maintain the maximum benefits of their investments.
- Financial agreements provide certainty and avoid the high emotional and financial costs of litigation should a separation occur.
- Financial agreements provide a relatively simple means for your married clients to share their superannuation benefits and entitlements should a separation occur in their marriage.

This paper outlines critical information about superannuation and property issues to help financial planners advise their clients.

### **Superannuation**

Superannuation for many years was not considered property under Family Law legislation. The only way the Court could deal with it was to make an adjustment to a party's interests – in some cases extreme adjustments – to compensate a party for the loss in the other party's superannuation.

In family law this has changed and superannuation is now deemed to be an asset and can be dealt with by the Court. However de facto or same sex relationships are still governed by state legislation in the *Property Law Act* 1999, which does not apply to superannuation. The Act is closely based on the Family Law Act and the principles applied by the State Courts are very similar to those applied by the Family Court in relation to marriage, apart from considerations which the Family Court can now give to superannuation.

**So how does this relate to financial planners?** There is a good chance that one in every two of your married clients will split up; even higher for de facto relationships. Even single clients need to consider how subsequent relationships will affect their assets. As Financial Advisers you give financial advice to your clients to maximise their wealth. But what happens to your client's assets if they separate? Is the careful planning of their financial structuring put asunder?

The redistribution of matrimonial assets is based on the principals setout in the Family Law Act.

There is a great uncertainty as to how the assets would be distributed on this basis. Your clients of course have little control over how the assets will be apportioned between them. On a financial planning basis this may greatly disadvantage your clients.

## **Financial Agreements: protecting your clients' assets should a split occur**

Your client can enter into a financial agreement that can change the principles under the Family Law Act. The agreements set out the basis of the distribution of the assets should there be a separation in their relationship.

Married couples and those entering into marriage are able to enter into financial agreements under section 90 of the Family Law Act. These are most common among people considering entering marriage or a de-facto relationship; particularly professional women who have accumulated assets and men who have already been through a separation or a divorce and have had a disposition of their assets to their detriment.

A financial agreement can be varied during the course of your client's relationship if circumstances change and if the terms of the agreement require variation.

Under section 90 of the Family Law Act an agreement can be entered into when contemplating marriage, during a marriage, after a separation and after divorce. The requirements of the legislation in regard to financial agreements are quite stringent. There is a high onus on the parties to make full disclosure of their assets and on the Lawyer giving advice and drafting the agreements to ensure that the parties fully understand the terms of the agreement that they are entering into.

The agreements can quite drastically change the rights the parties may have under the Family Law legislation, so the legislation has endeavoured to ensure that the parties are fully aware of the rights that they give up when entering into these agreements.

However, it is to your client's advantage to determine the manner in which they are going to maintain or divide their assets, if the unthinkable happens and they separate. Their assets can be distributed to their greatest advantage and to obtain the best taxation benefits possible.

Under the Family Law Act, agreements must have schedules attached fully detailing the assets of the parties at the time of entering into the agreement. The parties must ensure that they do make full and frank disclosure of their assets and the parties must be fully aware of each other's financial standing so that the provisions of the act can be complied with. If they are not complied with then there are grounds for overturning the agreement in which case the principles applied by the Court will apply.

## **Terms of Financial Agreements**

### ***Assets owned prior to relationship***

This deals with assets owned by the parties prior to the relationship. Normally these assets remain separate property and the dealing of the parties with that property during the relationship will not alter that ownership. The investment of funds, say on the sale of property, owned by a party will remain that party's investment unless otherwise agreed.

### ***Superannuation***

This deals with superannuation and employee benefits. Normally under the terms of the agreement, the party who has those entitlements will maintain those entitlements. It is more beneficial now under the new legislation for your clients to maintain their superannuation interests. Of course, the parties can, if they wish, divide their superannuation by superannuation agreements in whatever manner they deem fit. One party may acquire an interest in the other party's superannuation fund. Of course, the legislation does not allow any payment out of the entitlements or benefits unless the parties are entitled because of age or otherwise to such payments.

### ***Property acquired after commencement of relationship***

The Parties may acquire property based on your advice. No doubt you would advise your clients on the best means of doing this bearing in mind taxation implications and structuring. Normally the Agreement states that, where property is acquired jointly and where there is no specification as to how that property is held or what the parties' interests are in that property, the parties will hold an equal ownership of such property. If realty is acquired, parties can purchase it as either joint tenants, which gives them an equality of an interest in that property and which passes upon the demise of a party to the other party, or as tenants in common where it can be specifically stated how the interests of the parties are held and in what percentages.

There is normally a specific term under this section of the agreement allowing the parties during the relationship to alter or vary their ownership in property held by them allowing the other party to acquire an interest in such property. Such alteration or variation will be set forth in writing and signed by the parties, in which case the parties will hold an interest in such property in accordance with the terms of the subsequent agreement signed by them. Any subsequent agreement must be evidenced by the parties in writing.

### ***Liabilities***

Each party's liabilities normally remain that party's responsibility now and in the future. Again this can vary. There may be guarantees or taxation implications which could vary this situation.

### ***Other provisions***

The parties if they so wish can include in the Agreement any lifestyle provisions such as:

- a) Maintaining separate bank accounts and not intermingling their investments in those accounts;
- b) The sharing of the household expenses and how they are to be paid;
- c) Any other such provisions that they feel are necessary.

The parties can include terms in the agreement if they so wish, that upon the birth of children, the wife will be entitled to and acquire a greater interest in the property than that set out in the initial agreement. There may be a provision in the agreement, subject to the qualification of the legislation which I will deal with, enabling the wife to receive financial assistance or spousal maintenance from her spouse during the period of her pregnancy and the caring of the child prior to the wife returning to the work force. Again, as financial advisors, you would need to give a lot of consideration to this to ensure that the provisions are best suited to your client and again taking into consideration taxation implications and so forth.

### ***Division of assets and liabilities***

The agreements normally then deal with the division of property and liabilities upon the termination of the relationship and/or divorce. Normally the property will be

divided in accordance with the ownership of the parties in the assets as stated in the body of the agreement. However, should it be better on your advice, for say the husband to acquire the full shareholding in a company and to continue the management of the company, then that can be dealt with under this section of the agreement. In those circumstances, of course, there may need to be some consideration for compensating the wife for the loss of an interest in that entity and again ensuring that the division of the assets are to the best financial advantage of the parties concerned. There are taxation implications which arise, for example where company property is transferred to a party such as a motor vehicle or other assets owned by the company. In these circumstances there could be significant fringe benefit taxes which apply.

### ***Sale of property***

Under the provisions for the division of property, there is normally a provision for the sale of property so that one party can not unreasonably refuse such sale should it be in the best interests of the parties to sell such property.

### ***Taxation Implications***

It may be in the interests of the parties to obtain advice on the taxation implications which may arise on the division of property after a divorce. These must be considered at the time of entering into the agreement. As the taxation implications vary from time to time, your clients will need ongoing advice in regard to this and perhaps the terms of the agreement will need to be varied to fit in with those changes.

### ***Spousal Maintenance***

The agreements can deal with spousal maintenance. However the legislation is not clear as to whether or not a party is prevented from applying for spousal maintenance after entering into a Financial Agreement. Section 90F of the *Family Law Act* allows the Court to order maintenance upon separation if a party would not be able to support himself or herself without an income tested pension allowance or benefit.

### ***Child Maintenance***

In regard to child maintenance (child support) terms can be inserted in a Financial Agreement for this but such terms must meet the requirements of division 2 of part 6 of the *Child Support (Assessment) Act 1989*. Effectively a child support provision in a Financial Agreement can only set out on a temporary basis the child support obligation of the payer. Once a child support assessment is made, any child support provision in a Financial Agreement ceases to have effect and is unenforceable.

### ***Estate Rights***

The agreements normally state that the parties forego any claim in the estate of the other party. The agreement does not prevent either party from making any voluntary disposition to or for the benefit of the other party if they wish to do so, as long as that disposition is recorded in writing, say for instance in a will.

### ***Primary Dispute Resolution***

The agreements normally require the parties to attend primary dispute resolution prior to taking any legal action under the terms of the agreement.

### ***Statements of independent legal advice***

As stated the parties are required to sign statements of independent legal advice stating that they were provided with full advice from a legal practitioner on the effects of the agreement and their rights under the agreement. The legal advisor is also

required to sign a certificate of independent legal advice saying that he has fully advised the client's in regard to these matters.

### **De facto relationships**

In the case of de facto relationships clients can enter into a cohabitation agreement under the Property Law Act. The agreements are basically the same as those under the Family Law Act except that they can not deal with dividing or splitting preferred superannuation benefits as there is no provision in the state legislation to enable agreements to be reached.

There are certain requirements which must be met before a party is entitled to make a claim against another party as a result of a de facto relationship if the parties have not entered into a binding agreement.

- a) The relationship must be for two years;
- b) There is a child of the relationship; or
- c) It would be unjust and inequitable of the Courts not to allow a party to make a claim, for instance, where one party has applied monies towards the acquisition of jointly owned assets.

### **Setting aside agreements**

A financial agreement can only be set aside under Section 90K of the *Family Law Act* if and only if the Court is satisfied 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 the circumstances that have arisen since the agreement was made it is impracticable for the agreement or part of the agreement to be carried out; or
- (d) Since the making of the agreement a material change in circumstances had 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 responsibilities for the child as defined in sub-section 2 of the Act, a party to the agreement will suffer hardship if the Court does not set the agreement aside; or
- (e) In respect of the making of a financial agreement a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable.

If there has been full disclosure and honesty by the parties in entering into the Agreement then it would be extremely difficult for the agreement to be set aside.

### **Termination of a Financial Agreement**

Parties can terminate a financial agreement either by including a clause to that effect in another financial agreement they enter into or making a written agreement known as a termination agreement.

### **The role of financial planners**

Financial planners should make their clients aware of:

- the possibility of their clients' relationship ending
- the consequences should that occur
- the benefits of entering into a financial agreement to best protect their interests.

## **Mediation in Family Law**

I have found in my practice as a lawyer over the last 30 years or so that the most effective means of resolving a dispute which may arise between parties is by way of mediation. Mediation is a voluntary process and involves the willingness of the parties to participate. Should issues arise which the parties cannot resolve by themselves then, before considering other forms of resolution, the parties should participate in mediation.

Mediation can deal with all issues and in particular a resolution of the division of financial assets if there is no formal agreement in place.

### ***What is mediation?***

It is the process of family dispute resolution in which the parties involved, together with the assistance of the family dispute resolution practitioner or mediator:

- a) isolate issues in dispute
- b) develop and consider offers to resolve those issues ; and
- c) If appropriate -- attempt to agree to one or more of those options; and
- d) attempt to agree options that are in the best interests of all concerned.

### ***More on Mediation***

It is not the role of the mediator to provide the parties with legal advice. Mediation is conducted with a high degree of confidentiality. The mediator AND the parties can not disclose any information which may be provided to each other during the course of mediation.

Mediation takes place over a relatively short period of time and is very cost effective.

In my experience as a mediator, because the parties are willingly participating in the process, agreements are reached between the parties in it least 70 to 80% of the time.

If agreement can be reached the mediator draws up the terms of the agreement which can then be given legal sanction by the Family Court and thus become binding agreements.

*About the author: James Noble is an Accredited Family Law Specialist with more than 30 years experience as a solicitor and mediator specialising in relationship law. His firm, James Noble Family Law, specialises in family and relationship law, advice and mediation.*

### ***Disclaimer***

The information provided does not constitute legal advice but rather general information. Changes to law and practice occur from time to time. Please consult a lawyer for advice related to your specific circumstances.

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