

Are pre-nuptial agreements worth the effort?

There are a variety of financial arrangements under the Family Law Act 1975 (Cth) (**'the Act'**). These agreements are not unique to married couples, and can be undertaken by those who are in a de facto relationship. Agreements can be made any stage of the relationship, including before marriage and after separation. A "prenuptial agreement" is the term used to describe agreements entered into before marriage. Parties entering such agreements do so for a variety of reasons, but parties entering such agreements should be concerned about their validity and enforceability.

What can pre-nuptial agreements cover?

Those considering marriage may wish to create a financial arrangement to protect their interests. Pre-nuptial agreements can cover topics with respect to:

- How **property** or **financial resources** of either party be dealt with after marriage; or
- The **maintenance** of either party during and/or after the dissolution of marriage; or
- Any other **incidental or ancillary matters**

Quite importantly, "incidental or ancillary matters" are not defined in the Act, though it is commonly accepted that a matter is incidental were it has a "sufficient connection" with either the property or spousal maintenance. This will be a question of degree and fact based on the circumstances of the case.

What requirements must be met for the pre-nuptial agreements to be valid?

As per s 90G of the Act, the pre-nuptial agreement must satisfy all of the below requirements to be valid and binding:

- Agreement must be **signed** by both parties and both parties must enter the Agreement voluntarily
- The agreement must contain a statement that each party obtained **independent advice** from a legal practitioner as to the following matters:
 - The effect the agreement on the rights of that party;
 - Advantages and disadvantages to the party of making the agreement;
 - Whether it is prudent for that party to make the agreement; and
 - Whether the terms of the agreement are just and equitable
- An annexure to the agreement contains a **certificate signed by the legal practitioner** stating that such on the above matters was provided
- The agreement has **not been terminated** or set aside by a court of law
- Upon signing, the **original agreement** is given to one of the parties, and a **copy** is given to the other

If these requirements are met, the court may make any necessary orders for the enforcement of the financial agreement.

How can the pre-nuptial agreement be terminated?

As per s 90J of the Act, financial agreements can be terminated by including a termination provision in another financial agreement, or making an individual written termination agreement.

Can the Court intervene?

The Court can nonetheless intervene despite a valid termination agreement. If either party, or any other interested party, makes an application to the Court, the Court can make orders that preserve the financial agreement.

Further, as per s 90K of the Act, the court can set aside a financial or termination agreement in the following circumstances:

- Agreement was obtained by fraud; or
- Agreement is void, voidable or unenforceable; or
- Circumstances have arisen making it impracticable for the agreement to be fulfilled (e.g. having children or one party has become incapable of working); or
- There has been a material change in circumstances since the agreement was made
- A party to the agreement engaged in unconscionable conduct in the process of developing the financial agreement or has exerted undue influence on the other party
- Failure to provide full and frank disclosure of a party's financial position

Moreover, as per s 90KA, the Court has the power to determine the validity and enforceability of financial agreements according to principles of contract law and equity. This confers the power to:

- To make an order for interest on an amount payable under the agreement
- To award damages, order bankruptcy or termination of the financial agreement
- To order that the all or part of the financial or termination agreement be enforced as if it were an order of the court

Concluding remarks

There is a common misconception that pre-nuptial agreements are easy to execute. However, based on the stringent requirements outlined above, one can appreciate that such agreements are not so simplistic. The number of requirements that have to be met, alongside the extensive powers of the Court, means that in practice such agreements are often set aside if they have been improperly prepared or have been tainted by unconscionable conduct or undue influence.

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(The law as it stands in August 2015)

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