

## **Financial Agreements in Family Law**

### **By Kate S. Graham**

The Family Law Amendment Act 2000 was passed on 27 November 2000. Part VIII A of this Act provides for Financial Agreements to be made in three different sets of circumstances:

- ✂✂ Between parties who are contemplating marriage
- ✂✂ Between married couples; and
- ✂✂ Between divorced couples

In most circumstances, Financial Agreements have the potential to allow parties to exercise more control over their property and financial matters as provided they are well drafted, the Family Court is prevented from deciding matters to which the Financial Agreement relates. Financial Agreements do not require approval of, nor registration with, the Family Court. Provided the formal requirements of Part VIII A of the Family Law Act are complied with, and there is no ground under Section 90K of the Family Law Act to set the agreement aside, Financial Agreements are binding on the parties even if the Agreement is not fair and equitable.

### **Before the Amendment Act**

Before the recent amendments to the Family Law Act, some couples did enter agreements prior to marriage (pre-nuptial agreements), however the Family Court did not consider these agreements to be binding as the Court's obligation when making a decision was to consider the relevant factors specified in Sections 75 and 79 of the Family Law Act and not agreements between the parties. Pre-nuptial agreements were just another factor for the Court to take into consideration when reaching a decision.

Agreements made by couples during or after marriage were again only matters for the Court to take into consideration when reaching a decision, unless the agreement was prepared as a consent order or an agreement pursuant to Section 87 of the Family Law Act.

### **Amendments Made to the Family Law Act to Accommodate Part VIII A**

A new paragraph (eaa) has been inserted in Section 4(1), giving the Family Court jurisdiction over Financial Agreements.

The new Section 71A states that Part VIII of the Family Law Act, dealing with property, spousal maintenance and maintenance agreements, no longer applies to matters which are covered by Financial Agreements made under Part VIII A. If a Financial Agreement does not cover financial matters or resources, then Part VIII will continue to apply.

Pursuant to new paragraph (p) in Section 75(2), Financial Agreements are now matters to be taken into consideration in relation to spousal maintenance. This provision must be read subject to Section 90F, which is discussed below.

### **The Status of Sections 86 and 87 of the Family Law Act**

Agreements can no longer be made pursuant to Sections 86 or 87 of the Family Law Act, although those entered into prior to commencement of the Amendment Act remain enforceable.

## **Part VIII A**

### **S90B - Financial Agreements Before Marriage**

Financial Agreements before marriage may be made only by parties contemplating entering into a marriage. Agreements made pursuant to Section 90B therefore cannot bind third parties and any agreement which purports to do so may not be a binding Financial Agreement. Such agreement would, however, retain the status of a contract between the parties and be a matter to be taken into consideration by the Family Court in reaching a decision.

Pursuant to Section 90B(2), the Financial Agreement can make provision for how, in the event of the breakdown of the marriage, the property or financial resources of either or both parties is to be dealt with and the maintenance of either of the parties during the marriage, after dissolution of the marriage, or both during and after the dissolution of the marriage. Well drafted Financial Agreements made pursuant to Section 90B should make provision for what is to occur if the marriage does not take place.

Certain property can be excluded from the operation of the Financial Agreement. For example, the Agreement may make provision for, in the event of the breakdown of the marriage, the division of that property owned by each party at the time of marriage but may remain silent on how property acquired during the marriage is to be divided. In this example, the Family Court will only have jurisdiction over that property acquired by the parties during the marriage.

Agreements made pursuant to Section 90B will allow parties to enter the marriage certain of their maintenance obligations if and when the marriage breaks down. Provided any provision for spousal maintenance is specified as such, the parties cannot make a claim against each other for spousal maintenance either during the marriage or when the marriage breaks down or is dissolved.

### **S90C - Financial Agreements During Marriage**

Pursuant to Section 90C, a Financial Agreement made during marriage can make provision for how, in the event of the breakdown of the marriage, the property or financial resources of either or both of the parties at the time the agreement is made or at a later time before the dissolution of the marriage is to be dealt with and the maintenance of either of the parties during the marriage, after dissolution of the marriage or both during and after dissolution of the marriage.

It is anticipated that Financial Agreements made pursuant to Section 90C will be regularly used in cases where the parties wish to achieve finality with respect to spousal maintenance. Provided the Agreement is signed prior to divorce, neither party can seek maintenance from the other in the future.

### **S90D - Financial Agreements After Dissolution of Marriage**

Pursuant to Section 90D, parties who have been granted a decree nisi of dissolution of marriage may enter into a Financial Agreement making provision for how all of the property or financial resources that either or both of them had or acquired during the marriage is to be dealt with and the maintenance of either of them. As with all other Financial Agreements, those made pursuant to this section may contain matters which are incidental or ancillary to the matters relating to property, financial resources or maintenance.

Whilst Agreements made pursuant to Sections 90B and 90C can finalise spousal maintenance issues, Agreements made pursuant to Section 90D do not always have this same effect. If, at the time of signing the Agreement, a party to a marriage would have been unable to support themselves without an income tested pension, allowance or benefit, then that party is not prevented from seeking spousal maintenance in the future, notwithstanding the fact that they have signed a Financial Agreement.

To ensure maintenance issues are finalised between the parties, it will therefore be imperative that Financial Agreements are signed prior to the parties being divorced.

When Will a Financial Agreement Be Binding on the Parties?

Each agreement must be in writing and specify the section pursuant to which the agreement is made. At the time of making the agreement, there must be no other Financial Agreement in force between the parties. Section 90G sets out the formal requirements for all Financial Agreements. To be binding, Financial Agreements must:

- ✍✍ Be signed by both parties;
- ✍✍ Contain a statement to the effect that both parties have, before signing the agreement, received independent legal advice on the following issues:
  - the effect of the agreement of the rights of the party;
  - whether the agreement is to the advantage (financially or otherwise) of the party;
  - whether or not, at that time, it was prudent for that party to make the agreement;
  - whether or not, at that time and in light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable;
- ✍✍ The annexure to the agreement must contain a certificate from the legal adviser stating that the above advice was provided;
- ✍✍ The agreement has not been terminated or set aside by a court; and
- ✍✍ After the agreement is signed, the original is given to one of the parties and a copy is given to the other.

If the formal requirements are not satisfied, the agreement will not be a binding Financial Agreement but will retain the status of a contract between the parties and will be a matter for the Family Court to take into account when considering the matter.

As the requirements of Section 90G require the parties to be advised of the financial implications of the Financial Agreement they intend to sign, lawyers would be

prudent to recommend to their clients that they also seek the advice of an accountant in cases where the parties financial affairs are complex.

### **When Will a Financial Agreement Be Set Aside by the Court?**

Section 90K sets out the circumstances under which the Family Court may set aside a Financial Agreement. The circumstances include:

- ~~§§~~ When the agreement is obtained by fraud, is void, voidable or unenforceable;
- ~~§§~~ When, in the circumstances that have arisen since the agreement was made, it is impracticable for the agreement or a part of it to be carried out;
- ~~§§~~ Where a material change of circumstances relating to the care, welfare and development of a child of the marriage has occurred, resulting in one party to the agreement suffering hardship if the agreement is not set aside; and
- ~~§§~~ When a party to the agreement has engaged in unconscionable conduct

The above are all circumstances in which arguments as to each of the grounds under Section 90K would have to be presented to the Family Court and a legal determination made.

### **Termination of Financial Agreements by the Parties**

Pursuant to Section 90J, a Financial Agreement can be terminated by the parties entering into a new Financial Agreement which specifically terminates a previous Financial Agreement or by simply entering into a Termination Agreement if the parties do not require a new Financial Agreement. To be binding on the parties, the Termination Agreement must contain the same information as required by Section 90G.

Whilst Financial Agreements can only be made between parties to a contemplated marriage, current marriage or dissolved marriage, interested third parties can also apply to the court for an order under Section 90J(3) to have their interest preserved or adjusted in the event of a party to the Financial Agreement making an application under the section.

### **Stamp Duty Implications**

Pursuant to Section 90L of the Family Law Act, Financial Agreements are exempt from stamp duty. However a Deed or Instrument executed pursuant to the terms of a Financial Agreement is only exempt from stamp duty if executed in accordance with an Order of the Family Court. It has been suggested that this was not the intent of the legislature but to remedy this situation, the Act will again require amendment.

### **Conclusion**

It is expected that clients, now more than ever, aware of their rights, will be requesting Financial Agreements with increasing regularity. Financial Agreements are the only means available to provide parties with control over how their financial and property affairs are to be dealt with in the event of a breakdown of their relationship.

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