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Marriage and Cohabitation Contracts

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Introduction

Hollywood films and movie stars sometimes mention ‘pre-nups’ or ‘marriage contracts’. What are these mysterious documents? One description is that a marriage or cohabitation agreement is a written record of the expectations of a married or cohabitating couple in relation to lifestyle and finances which is entered into before and sometimes during marital cohabitation. In limited circumstances, certain parts of such agreements are legally enforceable. In some countries and cultures, including South Africa and Quebec, marriage contracts are common amongst the wealthy.

At present, in Australia, these agreements are rare. At a guess, less than one percent of married or cohabiting couples have such a marriage contract. Why is this so?

If 50% of cohabiting couples separate and more than 40% of marriages end in divorce, why not make fair financial arrangements early rather than late? Less than one percent of Australian homes burn down in a decade but over 90% of home owners have fire insurance. Why contract for an unlikely life event and not for a likely life event?

‘Popularity’ with whom?

Anecdotally, the writer has observed people from the following five groups who enquire about, or actually use, marriage or cohabitation contracts:

- *The very wealthy* who want their assets to stay with the individual who brings wealth to the marriage – for example, the wealthy female entrepreneur who cohabits with a fascinating, but poverty-stricken, artist.
- *Australian males who import brides from Asia* and hope to restrict these young women from leaving the marriage with any or much property. This practice begins to introduce one of the dark and exploitative sides of marriage contracts.
- *The previously married and divorced* who are still carrying scars from a bitter first separation and ‘don’t want that to happen again.’
- *‘Older’ couples (say over 50 years of age)* who want to enter a new relationship yet also want to keep their assets separate so that their separate wealth can be inherited by their own children (from previous relationships) and grandchildren.
- *Counter-culture couples* who live in alternative communities and do not want their assets divided under the principles of the *Australian Family Law Act 1975 (Cth)*,² which they may consider to reflect the values of a capitalist, greedy or sexist society.

Despite this large ‘market’ for the ‘pre-nup’ product in Australia, marriage and cohabitation agreements remain

rare. It is unlikely that you are friends with even one family which has such an agreement in place. Why?

Legislation in Australia

The current legislation in Australia which governs the formalities, finality and effect of marriage contracts (known as ‘financial agreements’) is the *Family Law Act*.³

The *Family Law Act* now also applies to couples who live together without being formally married, whether same sex or different sex couples.⁴ This inclusion of ‘de facto couples’ was only possible in 2009 after the State governments (except for Western Australia) ‘referred power’ over such topics to the Federal Parliament under section 51 (xxvii) of the *Australian Constitution*.

The *Family Law Act* enables a married or de facto couple’s contract about finance and property to be legally binding, rather than the broad statutory discretion of a court to apply to the division of the property. For example, a couple could contract that all their property be divided 70:30, whereas after a long relationship a court might divide their property 50:50.

Delicate balances in law and policy

The legal rules in Australia under part VIII A of the *Family Law Act* and the various State de facto relationships acts about marriage and cohabitation contracts try to strike delicate balances between competing values. This is also true in other countries which recognise such agreements, even for rich and famous Californians. These balances include:

i. *Finality versus flexibility*

The couple wants certainty, but also the ability to change the agreement if a business collapses, or a child is born, or one person is badly injured. How many other life events should justify a legal rule to alter a ‘contract’?⁵

ii. *Finality versus children’s interests*

Clearly, an adult couple should not be permitted to enter into a financial agreement which restricts income to their children, who did not know about the contract, consent to it, or probably even exist when it was signed.⁶

iii. *Haste versus thoughtfulness*

Some wealthy couples want to sign up these agreements quickly and cheaply, just days before a wedding – or quickly ‘before (s)he finds out just how wealthy I am.’ Passion, haste and ignorance do not lead to ‘informed consent.’ Therefore legislation, such as the *Family Law Act* contains complex (and expensive) procedural go-slow requirements which require two independent lawyers,⁷ full documented disclosure of assets⁸ and mellow reflection.⁹

iv. *Individual freedom of contract versus support by the taxpayer*

Predictably, legislators are nervous when they suspect that marriage or cohabitation contracts will be used to leave women impoverished and therefore dependent on social security or to transfer assets between family members and thereby avoid paying State stamp duty. Stamp duty is a tax payable on ‘ordinary’ transfers of things such as cars, houses, businesses or paintings.

v. *Support of family versus payment of creditors*

When a family member has large debts to a bank, a hire purchase company, the taxation office, or to the butcher, baker and candlestick-maker, who should be paid first –



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his/her long list of creditors or the beneficiaries under his/her marriage or cohabitation contract? No one has ever been able to find the right legal rules to balance these two sets of 'legitimate' claims.

vi. *Encouraging marriage breakdown versus encouraging orderly planning*

Some people have argued that if a contract provides for the possibility of marriage breakdown, somehow it encourages less commitment and more marriage breakdown (like insurance contracts encourage fires?) Australian legislation and case law have rejected this proposition in favour of the policy that married or cohabiting couples should be able to plan in an orderly fashion for an almost 50% chance of marriage or relationship breakdown.¹⁰

Whatever balances are struck between these six sets of competing interests, certain lobby groups will always be unhappy. The law will always be too rigid, too flexible, too expensive, too delayed, too lawyer-inhabited or too exploitative of the ignorant. That is, every possible reform of these balances has predictable advantages and disadvantages.

'Lifestyle' and financial clauses

Some couples include in their agreements 'lifestyle' clauses which set out their mutual expectations. These are not legally enforceable. For example:

- 'We agree to encourage one another in our separate careers and separate spiritual development.'
- 'We plan to give financial and emotional support to our aging parents and, if necessary, care for them in our home.'

Financial clauses need to be long and detailed in order to be clear enough to be legally enforceable. For example:

- 'If the parties are ever divorced Bill will pay to Margaret, within 30 days of the decree absolute of divorce, the sum of \$100 000 (AUD) for each and every anniversary of their wedding day which has passed between the date of their wedding and the decree absolute of divorce.'

Limited future – why?

Marriage and cohabitation contracts will probably continue to be used by only a tiny minority of couples in Australia (and elsewhere) for the following reasons:

- i. These contracts are very stressful to negotiate. A couple

in love is attempting to put monetary values on each other and discuss the possibility of separation. Tears and tissues abound. Family members hover in the background and exert unwelcome pressure to promise more or less dollars. The writer has seen a number of couples split up during the pressures of negotiating these contracts. They have always been thankful that the negotiation process identified early that the cracks in their relationship were chasms.

- ii. Following the first point, each of the couple need to be mature and articulate. Few of us have competent and visible role-models of couples who have negotiated a marriage contract.
- iii. These agreements are very expensive for the poor and middle class as they require two lawyers, complex wording, precise drafting and re-drafting, time and reflection.
- iv. For the wealthy, marriage contracts provide a degree of certainty on how assets will be divided at a relatively low financial (but sometimes high emotional) cost. However, specialised family lawyers are always nervous about their wealthy clients. This is because the lawyers must explain very carefully in writing about the long list of uncertain exceptions to the finality of marriage contracts as contained in sections 90F-90K of the *Family Law Act*, and elsewhere. The list is so long and uncertain that the majority of wealthy clients say ‘what’s the point.’ Moreover, ‘love is blind and marriage is a magnifying glass.’ Thus starry-eyed wealthy couples rarely understand the lengthy written list of exceptions to the finality of their agreement. Instead, years later when they separate, one or both sues his/her lawyer for being ‘misleading.’ ‘You told me that this pre-nup was binding. Now I find that I will have to pay out much more to my ne’er-do-well partner. It’s all your fault.’ This dangerous pattern of blaming the lawyer means that astute suburban or commercial lawyers will not draft marriage or cohabitation contracts for the wealthy.
- v. The long list of uncertain legislative exceptions to the finality of marriage contracts and cohabitation agreements will take decades of litigation and interpretation to give those words a degree of certainty.

Conclusion

In Australia, marriage and cohabitation contracts will remain of interest to the rich and famous and to a small minority of other couples. Such contracts will continue to provide interesting twists to murder mysteries, Hollywood films and emerging law reports.

References

- ¹ John Wade is also a mediator and has practised law since 1970. John has published more than 100 books and articles on conflict management, family law and legal education. He has won many teaching awards, including Best Law Teacher in Australia in 1998.
- ² Following referred to as the *Family Law Act 1975* (Cth).
- ³ *Family Law Act 1975* (Cth) ss 90A-90L.
- ⁴ *Family Law Act 1975* (Cth) (as amended in 2009) ss 4AA, 90SA, 90UA-90UN.
- ⁵ See, *Family Law Act 1975* (Cth) ss 90E, 90F, 90J, 90K.
- ⁶ See, *Family Law Act 1975* (Cth) s 90E.
- ⁷ *Family Law Act 1975* (Cth) s 90G.
- ⁸ *Family Law Act 1975* (Cth) s 90K.
- ⁹ *Family Law Act 1975* (Cth) s 90K(1)(b), (e).
- ¹⁰ *Family Law Act 1975* (Cth) ss 90B, 90UB.

Exercises for your class

Divide into pairs or groups A and B.

1. Individual or group A draft a lifestyle clause(s) for a marriage contract which specifies how A and B will share:

- cooking
- cleaning
- washing and ironing.

Individual or Group B draft a lifestyle clause(s) for the same marriage contract which specifies how A and B will:

- discipline their children (if any)
- encourage their children
- encourage one another in work and/or study.

Swap draft clauses and negotiate the clauses to mutually satisfactory wording. After the negotiation time is complete, write out in two columns:

- (a) what you learned from that drafting/ negotiation exercise; and
- (b) what you would do differently if you tried a similar exercise again?

2. Your future spouse wants a marriage contract about how to divide assets if you should ever separate and some separate lifestyle clauses. You do not want any marriage contract. Draw a line down the middle of a page and write out a list of advantages and disadvantages of having a marriage contract. Be prepared to debate either side in class or in fours, or in pairs – 4 minutes each side. Any listeners vote at the end in favour or against a marriage contract.

3. You work for the Australian Law Reform Commission.

- a) Write out a list of ‘life events’ (eg birth of a child, long term unemployment, etc) which you think should allow a marriage contract about money to be automatically ‘avoided’ or ‘set aside’ by a court.
- b) Interview your neighbour about his/her list then agree upon a single list. (Perhaps write your list on a whiteboard or flip chart paper.) Circle the items on the list which use vague words (eg ‘injustice’, ‘serious hardship’) and which leave uncertainty for a couple whether their marriage contract is legally binding or not.
- c) Now compare the list of ‘life events’ which would allow a court to ignore the marriage contract with the current list in the *Family Law Act* ss 90UJ, 90UL, 90UM and 90UN.
- d) Try to explain this current technical list of exceptions to ‘finality’ of marriage contracts in the *Family Law Act* to your neighbour in clear and simple language.