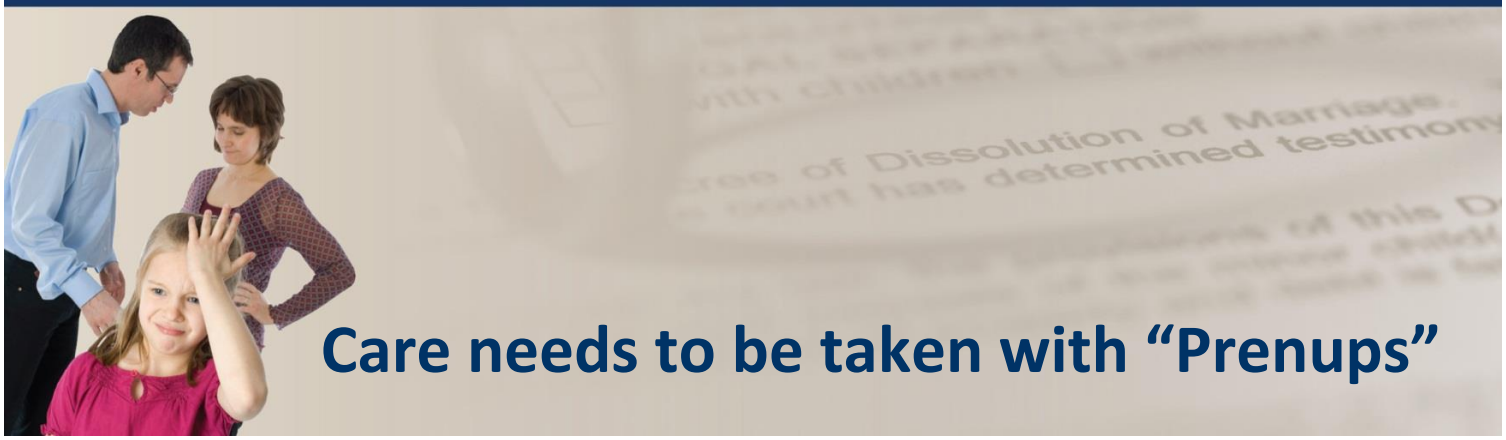
Bateman Battersby
LAWYERS



Care needs to be taken with "Prenups"

A Financial Agreement is a contract that sets out how your property and assets will be divided when your relationship breaks down, whether it's a marriage or a de facto relationship. The colloquial terms "prenuptial agreement" or "prenup" are most often used when referring to Financial Agreements of this type that are entered into at the commencement of a relationship. However, Financial Agreements can also be made during a relationship, and are most commonly used when a relationship ends, and the parties agree on the division of their assets.

Financial Agreements are regulated by the Family Law Act. A Financial Agreement is binding on the parties to it if, and only if:

- it is signed by both parties;
- each party was provided with independent legal advice about the effect of the agreement on that party's rights, and about the advantages and disadvantages of it to that party;
- each party is provided with a signed statement by a lawyer stating the advice was provided to that party, and a copy of that signed statement is given to the other party; and
- the agreement has not been terminated or set aside by a Court.

Some of the benefits of having a Financial Agreement in place include minimising future legal costs, reducing acrimony upon separation, and providing clarity and certainty when a relationship ends. However, care must be taken to ensure that the Financial Agreement is not set aside as a consequence of one party acting improperly at the time the parties enter into the agreement. A court will generally not enforce a Financial Agreement in circumstances where:

- a party did not disclose the full extent and value of their assets at the time when the Financial Agreement was signed;
- a party unreasonably pressures or coerces the other party into signing the agreement;
- if a party requires the other to sign the agreement shortly before the wedding as a condition of the wedding proceeding; or
- if an agreement is not just and equitable, or is unfair.

Many of these circumstances were evident in the recently decided High Court case of Thorne v Kennedy where the court ruled that a Financial Agreement was to be set aside even though the parties had received independent legal advice before signing it. The case involved Mr Kennedy, a then 67-year-old Australian property developer, and Ms Thorne, a 36-year-old Eastern European woman who he met online in 2006. At that time Mr Kennedy had assets of about $18 million, was divorced from his first wife and had three adult children from that marriage. Ms Thorne moved to Australia seven months after they met to marry Mr Kennedy, however less than two weeks before their wedding day he presented her with a prenuptial agreement that limited her right in any post marriage property settlement to

$50,000 if they remained married for three or more years. He also told her that if she didn't sign it he would call off their wedding.

Ms Thorne sought legal advice from an independent lawyer who advised her not to sign the agreement because it had been prepared solely to protect her husband-to-be's interests and who stated to her that it was one of the worst agreements the lawyer had seen. By this time Ms Thorne's family had arrived from overseas for the wedding and she told the Court she signed the prenup 4 days before the wedding because she was financially totally dependent on Mr Kennedy and otherwise she felt that she had little choice.

The couple separated after living together for just over four years and had no children. They were divorced in 2011, and in 2012 Ms Thorne commenced proceedings to have the prenup set aside claiming it had been signed by her under duress. Mr Kennedy argued that the prenup was binding because Ms Thorne had received the independent legal advice before she signed it. The Federal Circuit Court set aside the agreement, finding that it was signed "under duress born of inequality of bargaining power where there was no outcome to her that was fair and reasonable". On appeal the Full Family Court subsequently ruled that the prenuptial agreement was binding, and said there had not been duress, undue influence or unconscionable conduct on Mr Kennedy's part.

Ms Thorne appealed to the High Court and, in a unanimous decision, the High Court held that the prenup was unenforceable and should be set aside due to Mr Kennedy's "unconscionable conduct". The Court held that Ms Thorne was "powerless" and had little choice other than to sign the prenuptial agreement in her circumstances. More importantly, it ruled that the provision of a lawyer's certificate of independent advice did not of itself negate Mr Kennedy's behaviour and the undue influence. The High Court's decision means that parties to a Financial Agreement will not be able to rely on the fact that the other party obtained independent legal advice as an outright bar to future property settlement claims by that other party. In deciding whether a Financial Agreement should be set aside, the relevant factors to be considered include:

- whether a party was given time for careful reflection before it was signed;
- whether the agreement was said to be non-negotiable;
- the emotional circumstances when it was made including for example any threats to 'sign the prenup or the wedding's off'; and
- the independent legal advice received, and how long they had to reflect on it.

Financial Agreements can be an effective tool when planning for the future but clearly, care must be taken to ensure that the parties to them abide by accepted requirements when they are entered into to make sure it is enforceable when a relationship ends.

If you, or someone you know needs assistance or advice in preparing a Financial Agreement or needs advice regarding any property settlement or other family law issue, call one of our experienced family lawyers, Oliver Hagen or Ken Gray on 02 4731 5899 or email us familylaw@batemanbattersby.com.au.