

Extract from James White's Presentation at the Brisbane West Chamber of Commerce on 3 September 2003

Financial Agreements

The Family Law Act 1975 was amended in December 2000 to provide separating married couples to enter into enforceable financial agreements prior to, during and after marriage which are legally enforceable and binding on the parties. These agreements can be entered into either in conjunction with or instead of Consent Orders, which were the traditional way matrimonial property settlements can be resolved where the parties have agreed.

The ability to enter into agreements rather than having to go to the Family Court is a significant advance in the resolution of matrimonial property settlements. They provide parties with the ability and opportunity to enter into pre nuptial agreements, although such agreements are not fashionable in Australia at the present time. Time will tell if they become more popular in the future.

Defacto couples can also enter into Recognised Financial Agreements under the Queensland Property Law Act 1974, which was amended on 21 December 1999. These agreements provide an alternative to court proceedings being instituted, similar to the agreements under the Family Law Act, to which I have referred above. If the parties agree to split their property after a relationship, they can now enter into agreements, which are legally enforceable.

The defacto type agreements can also be used as cohabitation agreements. They can set out how property will be divided should they later separate.

The effect of the amendments to the Family Law Act and the Queensland Property Law Act is that couples who have agreed on the way in which they wish to live during their marriage or relationship and how property will be divided should they separate, can now simply write up an agreement, rather than go through court.

There are a number of procedural requirements when drawing up the agreement and both parties need to obtain independent legal advice at the time of entering into the agreement.

Superannuation

On 28 December 2002 the Family Law Act 1975 was amended to provide for the splitting of superannuation as part of a matrimonial property settlement. In effect, the value of superannuation will now be deemed to be property and included as an asset in the total pool of matrimonial assets under the Act. Previously, superannuation was not treated as an asset, but only as a future financial resource, which would affect the percentage division between the parties.

What these amendments mean is that the matrimonial pie has increased and provide more options to the parties when they package their property settlement. They can for example divide the matrimonial home, cash and car but now apportion part of the

superannuation. There are ways to ensure that both parties are not disadvantaged. Previously many property settlements end up with one party cash poor, asset rich and vice versa. Now the pool of assets can be shared around far more creatively. Women especially can negotiate the creation of a superannuation interest for their retirement, something that they never have been able to do previously. Men can receive some of the cash resources rather than just be left with their superannuation which they have to wait for until they retire, which could be many away.

One of the difficult issues which has been overcome is the calculation of the superannuation interest/entitlements. Through complex actuarial formulae, superannuation trustees can, upon request, certify to the value of the superannuation interest. Both parties have the right to seek a valuation from their spouse's superannuation trustee. The valuations can be obtained within a couple of weeks.

These amendments together with the financial agreement amendments have impacted on the practice of family law. When used appropriately by separating couples they can bring about a prompt resolution of matrimonial and defacto property settlements.

James White