What has love got to do with it?:
When personal relationships are built on commercial contracts
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More and more it seems love has less to do with it!

In 2003, I had a marked increase in the number of clients seeking advice prior to committing themselves to a potential long-term personal relationship. Clients seem to have a heightened interest in the possibility of protecting their pre-relationship assets in the event of untimely death or early separation.

The most obvious category of client who now seeks this advice is the mature client upon re-partnering. Usually he, but sometimes she, seeks to protect the assets accumulated during the first marriage or defacto relationship for the sake of the children of the first relationship. The pain of the first marriage property split is often the trigger to seek legal advice before re-partnering to avoid a repeat performance.

Almost as prevalent, however, is the client who has accumulated significant assets before considering settling down, the 30-something bachelor! Parents who have amassed substantial assets, often a family business including trust entitlements for their children, also encourage the young adults to consider protecting their assets before committing to a long term relationship or marriage.

"Well, is it better to marry or live defacto?" I am often asked.

For a start, if you wish to enter a gay or lesbian relationship, in South Australia only the common law and equitable rights assist you.

In South Australia the current law which governs the property split of a relationship between a man and a woman who either live defacto or marry is complex and spans the State and Federal jurisdiction with the Defacto Relationships Act 1996 (SA) ("DRA"), the Family Relationships Act 1975 (SA), common law, equity and the Family Law Act 1975 ("FLA") as amended. Advising clients with any certainty in the area is like running through a minefield.

Why, as a society in the 21st century, are we artificially distinguishing between heterosexual couples who live together unmarried and those who marry? The discrimination against gay couples is not the subject of this article but needs urgent legislative amendments. The number of divorces of first time marriages is now at 50%, the breakdown of second marriages is even higher. No statistics are kept of breakdowns in defacto relationships but there is no reason to expect the figures would be less. They are probably significantly more. Mobility in relationships is a reality of today's society, for better or worse.

All disputes regarding children of a relationship, married or defacto, are now heard by the Family Court of Australia. Why has the property jurisdiction been left behind?

I find myself having to do mental gymnastics when it comes to advising on property division to cover all the potential strengths and weaknesses of marrying or remaining defacto to protect property. We work our way through the *Defacto Relationships Act* and the choice of "winging it" without agreement, entering into a cohabitation agreement or a certificated cohabitation agreement as compared to "winging it" during marriage and submitting to the *Family Law Act* property and spousal maintenance entitlements in Part VIII of the Act. Then, of course, there is the new option of a binding financial agreement (BFA) pursuant to the *Family Law Act*.

Having done this a few times now, the advice is; - if it's merely a question of protection of assets, stay defacto but enter into a certificated cohabitation agreement at the commencement of the relationship, if you can find a lawyer to certify it.

The Law Society of South Australia, through their proactive risk management section, have rightly warned lawyers to be extremely cautious in certifying either a CCA or a BFA. This has certainly deterred many practitioners from advising in the area. This is particularly the case where one party in the relationship seeks to sign away for a significant period of time, all potential claims for property and, often, spousal maintenance. I have regularly been confronted with tears from a female client on the eve of marriage when I have refused to certify that it was prudent for her to enter into the agreement. The emotional blackmail being exhibited by some parties on their prospective spouse to sign these agreements prior to marriage should make every lawyer extremely cautious.

What, then, are the various options open to a heterosexual couple as they consider their future?

Since December 1996, if couples choose to remain defacto they have been able to avail themselves of the *DRA*. To come within the Act, they must have lived in a defacto relationship on a genuine domestic basis as husband and wife. This Act seeks to regulate the division of property and to enable the creation of cohabitation agreements. Property is defined in its broadest sense to include prospective entitlements to superannuation, property held under a discretionary trust and property over which the person may have only an indirect power of disposition.

In the event of a relationship breakdown, if the parties can agree their division of property, a post-separation certificated cohabitation agreement can be entered into to finalise the matter. If no agreements can be reached the Court can determine the division of property pursuant to s.11 *DRA* based on the financial and non-financial contributions made directly or indirectly to the acquisition, conservation, or improvement of property of either or both partners, or the financial resources of either or both. The Court must also consider the homemaker and parenting contributions and any other relevant matter. For those familiar with the s.75 factors in the *FLA* there is no equivalent in this legislation. The Judge has total discretion within the s.11 *DRA* parameters in how he/she determines a just and equitable division. It is interesting to note no claim can be made pursuant to s.11 unless one of the parties is at the time of the application resident in South Australia, and the parties were resident in South Australia for a substantial part of the relationship.

Most important of all, they must have been living defacto for at least three years or have a child of the relationship. It is this criterion that leads to further discussion as to the timing of any cohabitation agreement. If there is no child, the party with assets has his/her assets protected for the first three years of any defacto relationship without any cohabitation agreement. A claim for property division must be made within 12 months of separation; a very short time considering DCR R6A requires that an offer to settle should be forwarded 90 days prior to this.

There are a growing number of decided cases in this area, but the law is clearly still very much in a stage of evolution and is difficult to give definitive advice on likely outcomes of claims. Matters are decided on a case-by-case basis. Some of the reported decisions worth reading are *Germinario v Pinkerton* (2000) 209 LSJS 419, *Bozo v Krylyszen* (2002) 218 LSJS 302, *Love v Chidley* (2002) 219 LSJS 287 and *Dalton v Arnold* [2001] SADC 84.

However, if the parties' relationship ended prior to December 1996 or they do not fulfil the criteria of the *DRA*, they are unable to use the Act. They must resort to the various common law and equitable relief available, including express, implied and constructive trusts. There have been several major High Court decisions in recent years which assist in advising likely outcomes of defacto property disputes which do not come within the *DRA*, including *Calverley v Green* (1984) 155 CLR 242, *Muschinski v Dodds* (1984-1985) 160 CLR 583, *Baumgartner v Baumgartner* (1987) 164 CLR 137 and *Guimelli v Guimelli* (1998) CLR 101.

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There appears to be no possible claim for defacto maintenance either at common law or pursuant to the *DRA* unless s.11(1)(d) – "other relevant matters" – can be interpreted very broadly. In *Love v Chidley* (2002) SADC 47, Smith J said "It is tempting to reason that s.11(1)(d) *DRA* empowers the Court to make orders akin to maintenance but silence on a topic of such paramount importance must indicate Parliament did not intend to provide for it." This is at variance with NSW and ACT defacto legislation which both have limited maintenance provisions.

This alone is a major reason to advise clients who wish to protect assets to remain defacto rather than marry. Married couples are able to claim spousal maintenance in certain situations under the *FLA*. It may be possible to exclude a claim for spousal maintenance with a BFA, however in limited circumstances. It is safer however never to marry.

Defacto couples may, at the commencement of cohabitation, choose to enter into a cohabitation agreement. This agreement is enforceable under the law of contract. The State civil jurisdiction can intervene to set aside or vary these agreements on its own initiative, or on application by the defacto, if it is satisfied that to enforce the agreement would result in serious injustice.

What constitutes serious injustice? There are no reported cases in South Australia on this issue. However in the Supreme Court of the Northern Territory in *Van Jole v Cole* (2000) DFC 95-228, a Magistrate's decision in setting aside a separation agreement was upheld because the defacto wife "received far less than she should have under an equitable distribution" and "there would be a serious injustice unless the separation agreement was set aside." The defacto husband had retained all the major assets because he had agreed not to contest custody of the children. Other courts interstate have refused to uphold agreements due to wrong legal advice (*Russell v Quinton* (2000) NSWSC 322) and set aside an agreement because the defacto wife did not understand the nature of the document due to poor English (*Lesiak v Foggenberger* (1996) DFC 95-167).

Couples, however, have another more binding option to the cohabitation agreement and can choose to exclude the courts power to set aside or vary the agreement by having it certified by a lawyer and by signing a warrant of asset disclosure, creating a Certificated Cohabitation Agreement ("CCA") pursuant to the *DRA*. Each party must warrant that he or she has disclosed all relevant assets to the other. While not a requirement of the Act, parties generally annex a schedule of assets to the agreement. A lawyer's certificate is endorsed on the agreement certifying the lawyer has explained the legal implications of the agreement to one party in the absence of the other and that the party assured the lawyer he/she was not acting under coercion or undue influence and the lawyer saw the party sign the agreement.

The Court has no power to set aside or vary a CCA unless, subject to the law of contract, there has been misrepresentation, duress, undue influence or unconscionability. Kitto J in *Blomley v Ryan* (1954) 99 CLR 362 states that an unconscionable transaction in equity applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances which affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity this placed in his hands." Whether the agreement is just and equitable is not a factor. There are no decided South Australian cases attempting to set aside a CCA.

In December 2000 the *FLA* was amended to include a new Part VIIIA allowing Binding Financial Agreements ("BFA") to be made before or during marriage or after dissolution of marriage. These agreements are conditional upon marriage. In practice parties wanting to protect assets or regulate their property would enter into a CCA during cohabitation, and a BFA upon marriage. A CCA ceases on marriage.

The BFA is a powerful document for protection of assets. Once certified by lawyers acting for both parties, the jurisdiction of the Family Court is ousted except for the ability of the Court to

enforce the agreements or set them aside pursuant to s.90K of the *FLA*. UNLIKE CONSENT ORDERS RE PROPERTY MADE IN THE FAMILY COURT, The court does not scrutinise these BFAs to ensure they are just and equitable and, at the present time, may never see them. Like CCAs, there is no registration process.

BFAs are currently being used extensively in an attempt to prevent claims in the Family Court for spousal maintenance. The Family Court cannot finalise spousal maintenance claims at the time of property settlements. The wealthy party may be at risk for many years to come in relation to spousal maintenance without a BFA.

However, the possibility of setting aside BFAs remains untested. The grounds in s.90K to allow the Family Court to set aside a BFA are where it was obtained by fraud (including material non-disclosure) or where the BFA is void, voidable or unenforceable, where impracticable to carry it out, where hardship would result in the care of a child, or where one party has engaged in unconscionable conduct when making the BFA.

The role of the legal practitioner in certifying BFAs may have a significant impact on whether a party is able to later set the BFA aside. The lawyer must certify that they have advised the party on the effect on the rights of the party, whether it was to the advantage financially or otherwise to make the agreement, whether at the time it was prudent for the party to make the agreement, and whether at that time and in the light of such circumstances as were at that time reasonably foreseeable the provisions of the agreement were fair and reasonable. This creates a huge burden and responsibility on the lawyer.

Finally, my trawl through the minefield of legislation must include the potential claims for spousal maintenance and property division pursuant to the *Family Law Act 1975* as amended. Pre-marriage assets are recognised if they can be clearly established and valued. A pre-marriage schedule of assets and values at the time of marriage is invaluable. However, the return of these assets to their owner at the time of separation is not guaranteed. It is at the Judge's discretion what weight he/she will place on the contribution of these assets. The length of the marriage, children, and the partner's needs for the future (s.75 factors) may well result in no recognition of initial contributions.

Not so many years ago, cohabitation agreements and BFAs would have been considered void because they offended some perception of public policy. Legislation has now legitimised these agreements. Legislation and a heightened public acceptance of their use is forcing many of us who may have hoped that love ought to be enough to realise building personal relationships in our current times now also involves commercial arrangement. And it is better not to marry! Is this where we expected the law to be in 2004?

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