Pre- and Post-Nuptial Agreements, Vitiating Factors, and the Role of a Trial Judge

James Edelman

Introduction

This article concerns the role and status of the nuptial agreement in Australian law and the way that it is treated in the courts. I will describe the agreements by the historic label "nuptial agreement" rather than the contemporary label of "financial agreement" used in the Family Law Act 1975 (Cth) because my coverage is not limited to financial matters. The purpose of this article is to show how the historical context of these agreements and their treatment in the courts illuminates the way that they are understood today.

This paper is not concerned with the underlying policy concerning nuptial agreements. There has long been debate about this. On one view, the regulation of marital obligations should be the exclusive role of the state with the consequences of the institution of marriage a matter for the State, once that institution is chosen by individuals. This view underpinned the approach taken to prenuptial agreements by Lady Hale of the Supreme Court of the United Kingdom in *Granatino v Radmacher*.[1] On another view, the intervention of the State in the regulation of private relationships is an inappropriate intrusion into domestic life. Cass Sunstein and Richard Thaler have thus advocated for the "privatisation" of marriage and the regulation of personal domestic relationships by the agreement of individuals.[2] On this view, marriage would exist only because of the nuptial agreement, and the obligations of marriage would only be enforceable through that agreement.

Succession (The television show, not the concept)

In season one of *Succession*, we are given brief insights into the fraught pre-nuptial negotiations between Shiv Roy, the daughter of media mogul Logan Roy, and her loyal fiancé, Tom Wambsgans. At one point, Tom queries the lack of what he describes as an "infidelity clause" in the pre-nuptial agreement. The two eventually agree, perhaps ambitiously, that infidelity is "not gonna happen". Tom's lawyer, who also happens to be his mother, says that the agreement is "a little unconscionable". Despite, or perhaps because of, his mother's advice on the potential application of equitable doctrine, Tom signs the agreement.

While the series' main focus is the future of the Roy media empire, some may have stayed as viewers of the series solely for the answer to the question: was the Roy-Wambsgans prenup valid? I will return to that question at the end of this paper.

History and Importance of Separation Agreements

Before the Reformation, marriage had quite different legal effects from today. Two historical features of the marital relationship are important for understanding the history and development of modern nuptial agreements. The first is the concept of coverture by which a husband and wife were said to become "one person in law".[3] The legal personhood of women was in part suspended during the marriage. This meant, at least in theory, that women lost the ability to own property, enter into contracts, or to bring a lawsuit.[4] The reality of coverture was different. Married women did many things characteristic of legal personhood: they bought and sold goods, ran businesses, possessed and controlled property as if it were theirs, and were the beneficiaries of trusts. Nevertheless, coverture imposed significant restraints. Coverture was only formally extinguished by the Married Women's Property Act 1870 (UK).

Another significant feature of marriage in the early 16th century was that divorce was virtually impossible without an annulment from the Pope.[5] The Ecclesiastical Court viewed marriage as a "contract of the highest possible religious obligation".[6] Even as late as 1820, when voluntary separation occurred more often, the Ecclesiastical Court referred to "separation as an illegal contract, implying a renunciation of stipulated duties".[7] Such agreements to separate were viewed as a dereliction of a contract

1 [2011] 1 AC 534.

2 Sunstein and Thaler, 'Privatizing Marriage' (2008) 91 *The Monist* 377.

3 Blackstone, *Commentaries on the Laws of England* (1765), Bk 1, Ch 15 at 430.

4 See Stretton and Kesselring (eds), *Married Women and the Law: Coverture in England and the Common Law World* (2013) at 7-8.

5 Stone, *Road to Divorce: England 1530-1987* (1990) at 1.

6 *Hunt v Hunt* (1862) 4 De G F & J 221 at 226-228 [45 ER 1168 at 1171].

7 *Mortimer v Mortimer* (1820) 2 Hag Con 308 at 318 [161 ER 753 at 756].

made "in sight of God".[8] But from the secularisation that followed the Reformation, ecclesiastical law also underwent a process of secularisation.[9] Legislative reforms subordinated the rulings of the ecclesiastical courts to common law and equity.[10] By the mid nineteenth century, the ecclesiastical jurisdiction over marriage was removed entirely.[11] These developments set the scene for the courts of common law and equity to assume oversight of marital relations.

Over the course of the eighteenth and nineteenth centuries, the courts of common law and equity slowly reflected society's greater tolerance for marital separation and private agreement. The courts of equity, particularly the Court of Chancery, recognised the enforceability of arrangements settling property on trust for the wife prior to marriage.[12] This also protected the property from the husband's creditors.[13] The courts of equity thus provided a forum for overcoming the rigidity of coverture by allowing a married woman to benefit from a trust. Trust powers could be included to allow a wife to devise property in a substantially similar manner as if she were the legal owner such as by appointing a person to receive trust property.[14]

The common law developed greater tolerance for marital separation and private agreement by gradually recognising the validity of "separation agreements" or "separation deeds". Separation agreements did not bring about the termination of the marriage. They were, instead, private agreements "to live separate and apart from each other".[15] Apart from that common feature, separation agreements took a variety of forms. In some cases, the agreement could be as simple as the husband promising not to disturb his wife or not to compel her to live with him.[16] In other cases they involved agreements about the wife's possession or use of property,[17] the husband's promise to pay maintenance of the wife or children either regularly or in lump sum,[18] or the custody of children.[19]

The most comprehensive judicial discussion of separation agreements is set out in *SZOXP v Minister for Immigration and Border Protection*.[20] As the Full Court of the Federal Court of Australia there explained, separation agreements began as a controversial practice which was gradually, and begrudgingly, accepted by the common law courts. One report of the 1758 case of *R v Mead* records that a husband and wife had entered into "articles of separation" by which the husband agreed "never to disturb her or any person with whom she should live".[21] The husband later attempted to enforce his wife's duty of cohabitation by issuing a writ of habeas corpus. But the Court held the husband to the agreement and denied him what was claimed to be his "marital right to seize her".[22]

Despite having developed techniques to soften the effects of coverture, progress in the courts of equity was much slower in the 19th century. This reflected the general stasis of equity in that period. The approach of the Court of Chancery to marriage is a good example of the caution that must be exercised when reading laudatory and misleading histories of equity as a species of conscience that forced the development of the regressive common law. In 1805, Lord Eldon denounced the refusal of habeas corpus in *R v Mead*, and expressed his dismay that such a ruling had "fall[en] from great men" because it "st[ood] upon no principle consistent with the law of the land".[23] Only in 1862 did Lord Westbury acknowledge that separation agreements had been recognised for "a very considerable period".[24]

In 1929, in *Hyman v Hyman*, Lord Atkin described the separation agreement as having a "chequered career at law" — enforced by the common law and eventually, but reluctantly, by equity.[25] Lord Atkin insisted that separation agreements were "to be enforced on precisely the same principles as any respectable commercial agreement".[26] That had been the widely accepted view since at least the middle of the nineteenth century, as confirmed by cases such as *Hunt v Hunt*.[27]

8 *Mortimer v Mortimer* (1820) 2 Hag Con 308 at 318 [161 ER 753 at 756].

9 See Dickey, *Family Law*, 6th ed (2014) at 3 [1.20]-5 [1.40]; see also *Mackonochie v Lord Penzance* (1881) 6 App Cas 424.

10 See discussion in *Hunt v Hunt* (1862) 4 De G F & J 221 at 227 [45 ER 1168 at 1171].

11 See discussion in *Clibbery v Allan* [2002] Fam 261 at 274 [29].

12 See, eg, agreement made before marriage in *Fletcher v Fletcher* (1788) 2 Cox 99 [30 ER 46].

13 Stretton and Kesselring (eds), *Married Women and the Law: Coverture in England and the Common Law World* (2013) at 221; see also *SZOXP v Minister for Immigration and Border Protection* (2015) 231 FCR 1 at 10 [45].

14 See, eg, *Holiday v Overton* (1852) 14 Beav 467 [51 ER 366]; *Morris v Howes* (1845) 2 Holt Eq 299 [71 ER 885]; *Archer v Kelly* (1860) 1 DR & SM 300 [62 ER 394].

15 *Sullivan v Sullivan* (1824) 2 Addams 299 at 300 [162 ER 303 at 304].

16 *R v Mead* (1758) 1 Bur 542; *Davies v Davies* (1919) 26 CLR 348.

17 *Wilson v Wilson* (1848) 1 HLC 538 at 541-542 [9 ER 870 at 871-872].

18 *Fletcher v Fletcher* (1788) 2 Cox 99 at 100 [30 ER 46 at 46]; *Sullivan v Sullivan* (1824) 2 Addams 299 at 300 [162 ER 303 at 304]; *Crouch v Waller* (1859) 4 De G & J 301 [45 ER 117]; *Davies v Davies* (1919) 26 CLR 348.

19 *St John v St John* (1805) 11 Ves Jen 525 [32 ER 1192].

20 (2015) 231 FCR 1 at 10 [44]-[45].

21 *R v Mead* (1758) 1 Bur 542.

22 ibid.

23 *St. John v. St. John* supra note 19 at 529 [32 ER 1192 at 1194].

24 *Hunt v Hunt* (1862) 4 De G F & J 221 at 228 [45 ER 1168 at 1171].

25 *Hyman v Hyman* [1929] AC 601 at 625-626.

26 ibid.

27 *Hunt v Hunt* supra note 24 at 227 [45 ER 1168 at 1171].

History and importance of maintenance legislation

A concurrent and parallel development with the law concerning separation agreements was the introduction of legislation conferring powers on courts to make orders for maintenance. "Maintenance" is a very broad term capable of embracing various forms of material provision to enable a person, including a child, to live properly, particularly in the event of marital separation or divorce.[28]

Prior to the introduction of "maintenance" by legislatures, the ecclesiastic, common law, and equitable jurisdictions provided only limited and flawed material provision for a wife. One highly flawed approach adopted by the Ecclesiastical Court, and later the courts of common law, involved an attempt to secure material provision for a wife by enforcing a duty of cohabitation. Thus a wife who, in the language of the common law, had been deserted by her husband could compel her husband to return — a remedy referred to as the restitution of conjugal rights.[29]

In England, in around the middle of the twentieth century, some judges also recognised a controversial doctrine that was described as a "deserted wife's equity". In the 1952 case of *Bendall v McWhirter*,[30] a husband had left his wife, telling her she could have the house and furniture. She later resisted an action by his trustee in bankruptcy to recover possession of the house. Denning LJ recognised that the wife had a right against her husband to stay in the matrimonial home, unless an order was made against her pursuant to legislation. Critically, that right was said to be binding on all successors in title, except a purchaser for value without notice. Denning LJ ruled that "[a] wife is no longer her husband's chattel" and was to be regarded "as a partner in all affairs which are their common concern", and thus had "as much right as he to stay there even though the house does stand in his name".[31] The basis for this "right", described by Denning LJ as a "licence", was an "irrevocable authority which the husband is presumed in law to have conferred on her".[32]

The so-called "deserted wife's equity" was short-lived. Its core component — the fact that it was enforceable against third parties — was rejected in *National Provincial Bank Ltd v Ainsworth*.[33] In that case, the House of Lords unanimously held that the rights of a deserted wife were of their nature personal rights, and could not be treated as a "clog" on property or as running with land, such that they could be enforced against third parties.[34] Lord Wilberforce observed that "the doctrine of the 'deserted wife's equity' has been evolved by the courts ... in an attempt to mitigate some effects of the housing shortage which has persisted since" the Second World War.[35] Australia largely avoided this discussion, as courts generally refused to recognise rights of a deserted wife against third parties.[36]

The limited and flawed avenues through common law and equity to provide maintenance demonstrates the significance of legislative intervention in this area. The progress came in the 19th century from legislatures which required forms of maintenance that allowed women to live more independently. The nineteenth century maintenance legislation had its roots in the so-called "poor laws" of the Elizabethan era.[37] Drawing from this legislation, maintenance laws which were more specifically aimed at spouses were introduced in the United Kingdom in 1857, along with the creation of a new and specialised Court for Divorce and Matrimonial Causes.[38] In Australia, early colonial statutes providing for maintenance of "deserted wives and children" were enacted in Tasmania in 1837,[39] and in New South Wales in 1840.[40] The focus of these early laws was the maintenance of financially dependent women and children who had been, in the language of the legislation, "deserted" by the husband.

The scope of legislative interventions to provide for maintenance raised important questions: to what extent can spouses independently decide how to materially provide for one another after separation? And once the legislature had intervened, what room remained for separation agreements?

The answer is complex. As I explained earlier, separation agreements were flexible and there was no requirement that they even provide for maintenance. Their essence was an agreement to live "separately and apart". There was, accordingly, no *inherent* contradiction between a separation agreement and the provision of maintenance by legislation. But conflict often did arise where separation agreements contained clauses which covered the same subject matter as maintenance legislation. This

28 See discussion in Dickey, *Family Law*, 6th ed (2014) at Ch 27.

29 See, eg, *Hope v Hope* (1858) 1 SW & TR 94 [164 ER 644] in which a wife brought suit for restitution of conjugal rights "from absolute necessity, with a view to obtain a maintenance from her husband".

30 [1952] 2 QB 466.

31 *Bendall v McWhirter* [1952] 2 QB 466 at 475.

32 ibid at 477.

33 [1965] AC 1175.

34 *National Provincial Bank v Ainsworth* [1965] AC 1175 at 1177.

35 ibid at 1241.

36 See *Brennan v Thomas* [1953] VLR 111; *Maio v Piro* [1956] SASR 233; *Dickson v McWhinnie* [1958] SR (NSW) 179.

37 See *An Act for the Relief of the Poore & Impotent 1572* (14 Eliz c 4, 5); *An Act for the setting of the Poore on Worke 1576* (18 Eliz c 2, 3); *The Poor Relief Act 1601* (43 Eliz c 2).

38 *Matrimonial Causes Act 1857* (UK); see also *Granatino v Radmacher* supra note 1 at 545 [17].

39 *Maintenance Act 1837* (Tas).

40 *Deserted Wives and Children Act 1840* (NSW).

development is critical to understanding the history of nuptial agreements because the interventions of legislatures, and the principles of family and child welfare embedded in those interventions, shaped how the general law could treat private agreements that otherwise purported to divide property.

In 1929, the issue arose in the House of Lords in *Hyman v Hyman*.[41] That case dealt with statutory provisions which were effectively re-enactments of the original 1857 maintenance legislation, and which empowered a court to order a husband to "secure to the wife such gross sum of money" as it "deem[ed] to be reasonable".[42] *Hyman v Hyman* involved a shift from treating a separation agreement as a *contract* to treating it as a *relevant fact* in the discharge of a statutory maintenance power. As Lord Hailsham said:[43]

> In my opinion, the fact that the deed of separation has been entered into by both parties, the fact that it was executed by the wife voluntarily and upon independent legal advice, the fact that the wife was prepared to accept the provision then made as adequate at the time ... all form part of that conduct of the parties which by the express terms of the statute is to be taken into account by the Court in determining what it thinks reasonable.

The holding in *Hyman v Hyman* was that a "wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction".[44] In 1969, the High Court of Australia approved *Hyman v Hyman* in *Brooks v Burns Philp Trustee Co Ltd*.[45] The High Court found by majority that a covenant by a wife to her husband that purported to oust the jurisdiction of the Court to award more than the amount agreed by way of settlement was void as against public policy. Although Menzies J and Windeyer J dissented on the construction of the deed in question, it was accepted that a promise by a wife not to invoke the jurisdiction of the courts was either void or otherwise could not be enforced.[46] But despite some differences in reasoning, most members of the Court also appeared to accept that a separation agreement could be given some degree of evidentiary weight in the determination of an application for spousal maintenance.[47]

Maintenance laws were modernised in the United Kingdom in the 1960s and 1970s in parallel with the shift towards no fault divorce. Courts were granted broad powers to order a spouse — that is, not just a husband — to make payments to the other spouse, or for the benefit of children, among other things.[48] At around the same time, in Australia, the Commonwealth Parliament was in the process of assuming control over, and consolidating, the law of spousal maintenance in Australia. This was achieved in part by the Matrimonial Causes Act 1959 (Cth) and, eventually, by the Family Law Act, after which spousal maintenance became almost exclusively a matter of Commonwealth law. An important part of these reforms was the conferral of power on courts to approve separation agreements in lieu of an order for maintenance.

The takeaway from this history is that separation agreements have had a complex life in the eyes of the law and that their role and influence have been shaped in significant part by statutory developments. Though they were initially treated just like any other contract, the overlay of spousal maintenance legislation largely relegated separation agreements to one of potentially many factual circumstances which informed the exercise of the court's discretion. The weight to be attributed to a separation agreement depended on a range of factors, such as the conduct of the parties, the presence of exploitation, and the availability and quality of legal advice, among other things.[49] The facts and circumstances were crucial. That core element has remained the essence of the informing interpretive principle.

Recognition of pre-nuptial agreements in the United Kingdom and Australia

The history discussed so far is that of *post*-nuptial separation agreements. The idea of a *pre*-nuptial agreement was, until relatively recently, far more controversial. In England, until very recently, agreements providing for the division of property in the event of a future separation of a married couple were considered void as contrary to public policy.[50] They could only be given evidentiary weight in subsequent proceedings for divorce or for the determination of ancillary relief, but even then were given little weight.[51] The same was true of Australian law.[52] More recently, however, both English and Australian law have recognised pre-nuptial agreements, albeit in different ways.

In England, the greater recognition of pre-nuptial

41 [1929] AC 601.

42 *Supreme Court of Judicature (Consolidation) Act 1925* (UK), s 190; see *Hyman v Hyman* [1929] AC 601 at 607.

43 *Hyman v Hyman* supra note 25 at 608-609.

44 ibid at 614. See also at 629.

45 (1969) 121 CLR 432.

46 *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at 445-446, 459.

47 ibid at 441-442, 446, 460, 479.

48 See *Granatino v Radmacher* supra note 1 at [19]-[20].

49 See, eg, *Edgar v Edgar* [1980] 1 WLR 1410 at 1417, discussed in *Granatino v Radmacher* [2011] 1 AC 534 at 551 [37].

50 See Dickey, *Family Law*, 6th ed (2014) at 685.

51 See discussion in *Granatino v Radmacher* supra note 1 at 553-555.

52 See *Wallace v Stelzer* [2013] FamCAFC 199 at [22], citing *Fender v St John-Mildmay* [1938] AC 1 at 44. See also Fehlberg and Smyth, "Pre-nuptial agreements for Australia: why not?" (2000) 14 *Australian Journal of Family Law* 80 at 82-83.

agreements came with the famous 2010 case of *Granatino v Radmacher*.[53] In that case, a French investment banker and his German partner decided to marry. At the time, the investment banker was earning around £120,000 a year at JP Morgan, and his German partner was from an extremely wealthy family from which she derived "substantial unearned income".[54] At the insistence of her father, and upon the threat that she would not receive any further family assets if she failed to do so, the couple were encouraged to enter into a pre-nuptial agreement. By that agreement, the two agreed to renounce any interest in the property of the other during the marriage or in the event of its termination. The agreement was prepared by a notary in Germany, and the husband did not obtain independent legal advice before signing it.

The husband later became disillusioned with investment banking. A few years into the marriage, following the birth of their two daughters, he abandoned his banking career and pursued doctoral studies at Oxford in biotechnology.[55] When the couple divorced a few years later, the husband sought ancillary relief in the courts. At first instance, the judge considered that the pre-nuptial agreement was very one-sided, and awarded the husband almost £5 million in lump sum payments. But a majority of the Supreme Court of the United Kingdom held the husband to the agreement, subject only to an order that the wife make provision for the needs of the children while they resided with him. The majority considered the old rule, by which pre-nuptial agreements were considered void as against public policy, was "obsolete".[56] While the Court would retain final say over any grant of ancillary relief, the effect of the decision was to significantly restrain the role of courts in second-guessing pre-nuptial agreements.

The majority of the Supreme Court ruled that a pre-nuptial agreement may carry decisive weight where the parties enter into it of their own free will, free of undue influence or pressure, and fully informed of its implications.[57] This was unless, in all the circumstances, it was found to be unfair to hold the parties to the agreement. The Court considered that the differential treatment between pre- and post-nuptial agreements, by which the latter were far more readily accepted, was no longer tenable. The majority reasoned that it should make no difference to the legal status of, or weight to be given to, an agreement whether it is entered into a day before, or a day after, the marriage.[58]

Lady Hale, at the time the only woman on the Supreme Court of the United Kingdom, delivered a strong dissent. For Lady Hale, the question of the enforceability or weight to be attached to pre-nuptial agreements raised "profound questions about the nature of marriage in the modern law". It required the law to identify the "irreducible minimum" of the marriage relationship from which individual couples were not free to depart by agreement. That minimum was, in Lady Hale's view, the mutual duty of support for one another and children. The differing roles in a marriage — which often split along gendered lines — ought to be afforded equal esteem.[59] Her Ladyship made no secret of the role of gender, stating that "there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman".[60] If the legal treatment of pre-nuptial agreements were to change, she said, this ought to be done through the democratic process.[61]

Legislative reform in Australia

By the time Lady Hale criticised her colleagues for judicial overreach in rewriting the laws of nuptial agreements, Australia had already taken her proposed pathway through the introduction of legislation. Throughout the 1980s and 1990s, there were various calls to make pre-nuptial agreements legally binding, including by the Australian Law Reform Commission and a parliamentary committee.[62]

These recommendations were generally said to be informed by notions of freedom of contract, equality, and the importance of finality and certainty in marital relations.[63] Whether the recognition of pre-nuptial agreements achieves these ends, particularly that of equality, is a matter of ongoing debate. Research conducted in the United States suggests that there is often a significant imbalance in the bargaining power of parties to pre-nuptial agreements, and that husbands who are parties to these agreements often have significantly more wealth than wives.[64] Other research conducted in Australia suggests that pre-nuptial agreements find favour with those who seek to protect their own or their family's wealth, as well as those who are entering a second or later marriage and who may want to protect their assets for the benefit of their children.[65]

53 [2011] 1 AC 534.
54 *Granatino v Radmacher* supra note 1 at 544 [13].
55 ibid at 568 [93].
56 ibid at 558 [52].
57 ibid at 561-562 [68].
58 ibid at 559 [57].
59 ibid at 575-576 [132].
60 ibid at 577 [137].
61 ibid at 576-577 [134]-[135].
62 Australian Law Reform Commission, *Matrimonial Property Report* (1987); Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act 1975* (Cth), *The Family Law Act 1975 Aspects of its Operation and Interpretation* (1992).
63 Sarmas and Fehlberg, 'Equity, the Free Market and Financial Agreements in Family Law: *Thorne v Kennedy*' (2019) 8 *Family Law Review* 16 at 28-29:
64 Leeson et al, 'Prenups' (2016) 45(2) *Journal of Legal Studies* 367.
65 Kaye et al, 'Prenuptial agreements – What's happening?' (2023) 36 *Australian Journal of Family Law* 38 at 47.

In any case, calls for reforms culminated in amendments to the Family Law Act in 2000[66] which recognised the validity of nuptial financial agreements subject to conditions.[67] As the Commonwealth Attorney-General said at the time, the reforms were intended to give married couples autonomy over their affairs in the event of a marital breakdown.[68]

The centrepiece of these reforms was the introduction and recognition of "financial agreements" under what is now Part VIIIA of the Family Law Act. Financial agreements are broadly defined as agreements made before, during, or after marriage, which stipulate how property or financial resources of either or both parties are to be dealt with in the event of separation. A financial agreement may also deal with the maintenance of either party during or after marriage, and any "other matters".[69]

One key provision of Part VIIIA, s 90G, provides that a financial agreement is binding on the parties to it, provided five conditions are met. Those conditions are as follows: (1) the agreement is signed by all parties; (2) each party has received independent legal advice; (3) each parties' solicitor has provided a signed statement stating that the advice was provided; (4) a copy of that statement is exchanged between the parties; and (5) the agreement has not otherwise been terminated or set aside by a court.[70] In the event that the parties fail to satisfy any of the requirements relating to the provision of legal advice, a court may still order that the agreement is binding if satisfied that it would be unjust and inequitable not to hold the spouse parties to the agreement.[71]

However, there remain a broad range of circumstances in which a court may set aside a financial agreement, or otherwise render it unenforceable. These include instances of fraud, the impracticability of carrying out the agreement, material changes of circumstances leading to hardship to a spouse party, among others. And the Family Law Act preserves the jurisdiction of common law and equity to invalidate, refuse to enforce, or render ineffective, the financial agreement.[72]

The provisions of Part VIIIA of the Family Law Act significantly changed the legal treatment of nuptial agreements. Under the general *Hyman v Hyman* approach, it was the courts that retained ultimate say over the division of property in the exercise of their statutory powers and nuptial agreements had a largely evidentiary role which, in the case of pre-nuptial agreements, had historically been given very little weight. But the financial agreements scheme in the *Family Law Act* means that such agreements are legally binding in their own right, provided the relevant statutory criteria are met. The focus of the inquiry thus changes: where disputes arise, the focus is not so much on the weight to be attributed to the agreement, but rather whether the agreement can be set aside.

Avoiding agreements in common law and equity

As alluded to above, Part VIIIA of the Family Law Act provides a number of statutory bases upon which a financial agreement may be set aside. It also preserves the operation of common law and equitable doctrines. Section 90KA provides, in effect, that the question of whether a financial agreement or a termination agreement is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in the law of contracts. Two important equitable grounds, which were considered by the High Court of Australia in 2017, are undue influence and unconscionability. I will focus on those two grounds and the case which considered them solely as an illustration of how financial agreements might be set aside.

Undue influence

Perhaps the most important thing to understand about the doctrine of undue influence is that it is not concerned with wrongdoing. It is a doctrine that focuses upon the state of the plaintiff's mind, involving a serious vitiation of the ability to make decisions, rather than upon whether the defendant has acted in any way wrongfully. An example is the classic case of *Allcard v Skinner*[73] in which a novice nun donated all of her belongings to the sisterhood. There was no suggestion that the Mother Superior had acted, in any way, wrongfully. Another illustration is the case of *Bridgeman v Green*.[74] In that case, Bridgeman, as a result of the undue influence of his butler, made gifts to people including the butler, the butler's brother, and the butler's wife. There was no suggestion that the butler's wife or brother, who were defendants to Mr Bridgeman's action for restitution of the gifts, had any undue influence over Mr Bridgeman. But they could not retain the gifts.[75] Putting to one side issues concerning the presumptions in this area, with its focus on the mind of the plaintiff, undue influence essentially requires the proof of only two things. First, that the plaintiff was under excessive influence in the sense that the plaintiff's will is subordinated to that of another person. Secondly, that the subordination caused or contributed to the transaction about which the plaintiff complains.

As to the first element, the excessive influence that

66 Family Law Amendment Act 2000 (Cth).

67 See Sifris et al, *Family Law in Australia* (10th ed, 2021) at [16.8].

68 Australia, House of Representatives (Hansard), 22 Sep 1999 at 10151.

69 Family Law Act 1975 (Cth), ss 90B-90D.

70 ibid s 90G(1).

71 ibid s 90G(1A)(c).

72 ibid s 90KA.

73 (1887) 36 Ch D 145.

74 (1757) Wilm 58 [97 ER 22].

75 (1757) Wilm 58 at 65 [97 ER 22 at 25].

involves subordination of the will in relation to a particular transaction may be inferred from the history of a relationship with a track record of excessive influence. An example of proof of undue influence by the history of a particular relationship is the decision of the English Court of Appeal in *Bank of Credit and Commerce International v Aboody*.[76] In that case the question was whether a guarantee could be enforced by the bank against Mrs Aboody who had, upon request by her husband who was acting as the agent of the bank, guaranteed Mr Aboody's debts. The English Court of Appeal found that the history of their relationship was such that Mrs Aboody had acted as "a mere channel through which the will of [Mr Aboody] operated".[77]

As to the second element required for proof of undue influence, that the excessive influence caused or contributed to the entry into the transaction, the phrase "caused or contributed to" is deliberately ambiguous because it avoids any expression of a view as to the required causal link for undue influence to be established. Let me give an example to illustrate the point. In *Bank of Credit and Commerce International v Aboody*, the English Court of Appeal held that Mrs Aboody was subject to the undue influence of her husband. However, the Court of Appeal held that the transaction would not be set aside for undue influence because, *but for* the undue influence, Mrs Aboody would have signed the guarantee anyway. In other words, the undue influence did not cause her entry into the guarantee even though it was a contributing factor to her decision.[78] By contrast, other English decisions have held that it is enough that the undue influence is a contributing factor to the decision to enter the transaction. It need not be a causal or "but for" reason. Australian law is not yet settled on the answer to this question. It was adverted to in the recent case of *Thorne v Kennedy*,[79] to which I will turn shortly, but not resolved.

Unconscionable conduct

Another example of when equity will set aside an agreement is the doctrine of unconscionable conduct. Where the doctrine of undue influence looks to the subordination of one person's decision-making capacity to another person's will, the equitable doctrine of unconscionable conduct looks to the conduct of the stronger party in attempting to retain the benefit of a dealing with a person under a special disability.[80]

The principles of unconscionable conduct were set out by the High Court in *Commercial Bank of Australia Ltd v Amadio*.[81] In that case, two elderly Italian migrants who had difficulties understanding written English were asked by their son to execute a mortgage over land they owned in favour of a bank, so that the son could secure an overdraft for his company. The couple executed the deed thinking that it was limited to a $50,000 cap and a six month duration. But what they did not know was that the deed also contained a guarantee securing all amounts owed by the company or which might become owed for an unlimited period. The bank manager was present when the deed was signed and was aware that the couple had been seriously misinformed as to the nature of their liabilities. The company later went into liquidation owing the bank $239,000, which the bank demanded the parents pay under the guarantee.

A majority of the High Court held that the instrument should be set aside on the basis of the bank's unconscionable conduct. Justice Deane, with whom Mason and Wilson **JJ** concurred, stated that an agreement may be set aside where (1) a party to a transaction is under a "special disability" in dealing with the other, such that there was no "reasonable degree of equality between them"; and (2) that the disability was sufficiently evident to the other party, such that it would be prima facie unfair or "unconscientious" that the other party procure or accept the weaker party's agreement.[82]

Thorne v Kennedy

The latest and most detailed consideration of undue influence and unconscionable conduct in relation to financial agreements in the High Court is the decision in 2017 in *Thorne v Kennedy*.[83] Ms Thorne, a pseudonym, was a 36-year-old divorcee from Eastern Europe who was living in the Middle East. She spoke Greek and only a little English. She had no substantial assets. She placed an advertisement on a website for prospective brides saying that she wished to marry and to have a good life.

Mr Kennedy, also a pseudonym, was a 67-year-old, wealthy property developer with assets of around $20 million. He met Ms Thorne online and travelled to the Middle East to meet her. He told her that if he liked her that he would marry her. He took her on an extended holiday around Europe and met her family. He bought her expensive jewellery. Ms Thorne had a strong desire to get married and to have a child with Mr Kennedy. But Mr Kennedy said that his money was for his children so if she married him then she would have to sign a paper. He did not say anything about what such a prenuptial agreement might include.

Mr Kennedy and Ms Thorne moved to Australia and lived in Mr Kennedy's expensive penthouse for seven

---

76 [1990] 1 QB 923.

77 *Bank of Credit and Commerce International v Aboody* [1990] 1 QB 923 at 940.

78 ibid at 970-971.

79 (2017) 263 CLR 85.

80 *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 at 474.

81 (1983) 151 CLR 447.

82 *Commercial Bank of Australia v Amadio* supra note 80 at 474.

83 (2013) 263 CLR 85.

months. They planned a wedding. Eleven days before the wedding, Mr Kennedy told Ms Thorne that he was taking her to a solicitor's office for the signing of an agreement. Ms Thorne asked Mr Kennedy whether he required her to sign the agreement. He replied that the wedding would not proceed unless she signed it. The next day, Mr Kennedy drove Ms Thorne to see an independent solicitor. The solicitor told Ms Thorne not to sign the agreement. The solicitor gave oral advice which Ms Thorne understood to mean that it was the worst agreement that the solicitor had ever seen.

Broadly speaking, the agreement contained provisions including a monthly allowance of $4,000 for Ms Thorne during the marriage. But if they separated during the first three years then that allowance would cease and Ms Thorne would be evicted from the penthouse where they lived and would get nothing. She would be unable to support herself. If they separated after 3 years, then she would get what her solicitor described as a "piteously small" amount. Ms Thorne ignored the solicitor's strong advice and signed the agreement. She also signed a substantially identical post-nuptial agreement but the trial and appeals were conducted on the basis that the same considerations applied to both.

At around 4 years after marriage, Mr Kennedy separated from Ms Thorne. Mr Kennedy died a few years later. Ms Thorne sought to rescind the pre-nuptial and post-nuptial agreements under the Family Law Act. Ms Thorne alleged that the pre-nuptial agreement should be avoided for (i) unconscionable conduct, (ii) duress, or (iii) undue influence. The primary judge held that the agreements should be set aside for duress or undue influence, treating the two vitiating factors as functionally identical under a heading "Matters of Duress or Undue Influence". The Full Court of the Family Court of Australia reversed this decision. The High Court reinstated it.[84] The High Court did not reach a conclusion on duress. The difficulty for the submissions concerning duress was that there had been very little argument about the correctness of a decision of the NSW Court of Appeal[85] that duress required threatened or actual unlawful conduct. There was no finding that anything that Mr Kennedy had done was unlawful.[86]

The joint judgment of five members of the Court held that what was required for undue influence was, in short, a sufficient absence of free will. In other words, the issue is whether a claimant was under such influence from another as to allow the other person substantially to make the claimant's choices.[87] The claimant need not have been reduced to the status of an automaton but there needs to have been a substantial degree of subordination of their own choices to those of the influencer. The joint judgment made a further point about how influence might arise and, in particular, how undue influence is not wholly independent of pressure.[88]

Ms Thorne's argument was that in the particular circumstances of the pre-nuptial agreement and with the pressure on her, it was open to the trial judge to conclude that she had been the subject of the undue influence of Mr Kennedy. The joint judgment accepted that argument. There were several key findings by the trial judge which assisted the conclusion that the finding made was one that was open. First, the only conversation in evidence between Ms Thorne and Mr Kennedy about the pre-nuptial agreement was that Ms Thorne had asked Mr Kennedy whether she would have to sign the agreement, to which he responded that she would have to, otherwise the wedding would be called off.[89] Secondly, Ms Thorne had no assets in Australia, she did not own the house in which she lived, she had no community in Australia and the trial judge found that Ms Thorne was reliant on Mr Kennedy for all things.[90] Thirdly, the trial judge also found that Ms Thorne did not even consider the consequences of the agreement, including the effect of it, if Mr Kennedy left her. She simply signed. She was told by her solicitor that it was the worst agreement that the solicitor had ever seen. But she paid no attention to that advice because, as the trial judge found, she did not exercise any real choice about whether or not to sign the agreement.[91]

As to unconscionable conduct, the joint judgment also concluded that the findings of fact by the primary judge had satisfied the requirements of the equitable doctrine of unconscionable conduct. Ms Thorne's vulnerability was her powerlessness in the circumstances. That vulnerability, as found by the trial judge, was known to Mr Kennedy and had been found to have been created by him, including with the urgency with which he had required the pre-nuptial agreement to be signed.[92] The gross inequality of the agreement involved a taking advantage by Mr Kennedy of Ms Thorne's special disadvantage.

The role of the trial judge

I now turn to the role of the trial judge, which is critical for an understanding of the operation of the principles in this area. Each of the vitiating factors I have just outlined depend heavily on findings of fact about circumstances and states of mind. The facts of undue influence cases, for example, are inescapably tied up in matters of human relationships, which are infinitely various and

84 *Thorne v Kennedy* (2017) 263 CLR 85 at 90-91.

85 *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149 at 168 [66].

86 See *Thorne v Kennedy* supra note 84 at 97-99.

87 ibid at 99-102.

88 ibid at 99 [30].

89 ibid at [48].

90 ibid at [91].

91 ibid at [97].

92 ibid at 112 [65].

are not amenable to the application of cold logic. That is essentially why the resolution of such cases depends upon, as Lord Scarman said in *National Westminster Bank v Morgan*,[93] a "meticulous examination of the facts" by the trial judge.

What this means is that, where a transaction appears suspicious, it can be very hard to predict in advance how the story will play out in a courtroom. Most importantly, as I will explain, when it does play out, the decision of the trial judge will be very difficult to overturn. The trial judge has the best vantage point from which to assess the dynamic of the relationship between the parties and to evaluate whether the will of one party was so subordinated to the other that undue influence was at play. The trial judge alone can observe the demeanour of the witnesses first-hand to judge their credibility and gain an impression of the nuances of the circumstances as between the parties, in a way that no appellate court could. This reality is often forgotten or ignored when critics assail the outcomes of undue influence cases.

The leading example is *Louth v Diprose*.[94] Mr Diprose had met Ms Louth in Tasmania in 1981. They became friends. Mr Diprose was infatuated with Ms Louth. He proposed marriage but was rejected. Ms Louth was in financial straits, so she moved to Adelaide to live with her sister and brother-in-law. Mr Diprose followed her there. Mr Diprose paid many of her bills and showered her with gifts. Ms Louth manipulated Mr Diprose by manufacturing what Deane J described as an atmosphere of crisis. She lied to Mr Diprose and said that she was going to be evicted. She also told Mr Diprose that she would commit suicide if she had to leave the home. So Mr Diprose, who had very little money of his own, spent $58,000 – which was a large part of his entire net worth – on buying a house in the name of Ms Louth. A few years later, he and Ms Louth fell out. Mr Diprose asked Ms Louth to transfer the house back to him. She refused. He claimed that she held the land on trust for him. The trial judge held that the transaction was so improvident from Mr Diprose's perspective that it was explicable only on the basis that he was so emotionally dependent upon Ms Louth that he was prepared entirely to disregard his own interests. His Honour decided the case as one involving unconscionable conduct but also said that it could equally be supported on the basis of undue influence. An appeal to the Full Court of the Supreme Court of South Australia and a further appeal to the High Court of Australia were dismissed.[95]

When I was a student at Oxford, this case was held up as an example of undue influence being taken too far. It was pointed out that Mr Louth was a solicitor. It was said that if lovesickness amounted to undue influence then transactions could be set aside as a consequence of many of the ordinary incidents of everyday life. The problem with this criticism is that it misunderstands the advantages and wide discretion of the trial judge. Putting to one side the fact that the focus of the argument and the decision of the High Court was upon the ground of unconscionable conduct, the High Court was right to assume that Mr Diprose would also have succeeded on the ground of undue influence. On this point, Deane J (with whom Mason CJ agreed) emphasised the great reluctance that appellate courts have before disturbing finding of facts made by a trial judge, particularly where that finding is based upon evidence that is given by the parties. This reluctance is given particular weight where ultimate appellate courts, such as the High Court, are asked to disturb concurrent findings of fact or evaluative inferences made by a trial judge and affirmed by an appellate court below.

Several reasons contribute to this reluctance. First, the trial judge has a feeling of the case, based upon hearing and seeing the witnesses, that cannot be replicated by reading a transcript. Secondly, the appellate court is almost never taken to the whole of the transcript. It will never see the entire picture of the case. Thirdly, an appeal is always heard over a much shorter period than a trial and usually involves a shorter period of reflection. Fourthly, to quote from a point made in *Louth v Diprose* by Deane J, reiterating a point his Honour made in an earlier case:[96]

> In a context where the cost of litigation has gone a long way towards effectively denying access to the courts to the ordinary citizen who lacks access to government or corporate funding, it is in the overall interests of the administration of justice and of the preservation of at least some vestige of practical equality before the law that, in the absence of special circumstances, there should be an end to the litigation of an issue of fact at least when the stage is reached that one party has succeeded upon it both on the hearing before the court of first instance and on a rehearing before the court of first appeal.

Each of these reasons for appellate reluctance to overturn the exercise of a trial judge's evaluative judgement also explains why it is difficult to predict in advance whether a transaction which is not usual will be one which, when all the evidence is seen and heard, is found to be the product of undue influence.

The same is true of *Thorne v Kennedy*. You will recall, from my earlier summary, just how fact-dependent the ultimate finding of undue influence was. The presence of this sort of degree of evaluation emphasises the latitude that a trial judge has in making decisions in this area. As was observed in the joint judgment in the High

[93] [1985] AC 686 at 709.

[94] (1992) 175 CLR 621.

[95] *Louth v Diprose* (1992) 175 CLR 621 at 633.

[96] ibid at 634.

Court, "[a]n assessment of the will-power of a person is not an exercise of mathematical precision".[97] The trial judge must assess, evaluate, and characterise all of the circumstances before reaching a conclusion as to the presence or absence of undue influence. The trial judge had done so, and with all the advantages of the trial, she had concluded that undue influence was present. Hence, it was held in the High Court that the Full Court of the Family Court were wrong to overturn that conclusion.[98]

Conclusions

In conclusion, it is necessary to return to the burning question of the validity of the Roy-Wambsgans prenup in the HBO series *Succession*. More specifically, if the prenup had been made in Australia, and in the (not unforeseeable) event that Shiv and Tom's marriage did not survive the constant corporate intrigue to which *Succession's* writers subject the Roy family, would the prenup be binding under the Family Law Act?

As a starting point, it might be assumed that the Roy family's high-flying lawyers would have ensured that the relevant formalities, such as those in s 90G of the Family Law Act, were met. In light of the comments by Tom's lawyer, his mother, concerning the unconscionable nature of the agreement, Tom might seek to have the agreement set aside on the basis of undue influence or unconscionable conduct. Tom might argue by analogy to *Louth v Diprose* that his devotion to Shiv was so strong that his will was subordinated to hers at the time of signing the prenup for the purposes of the equitable doctrine of undue influence or that he was suffering from a special disability for the purposes of the doctrine of unconscionable conduct. Or Tom might contend, by analogy to *Thorne v Kennedy*, that he had no choice in signing the agreement, as Shiv was unwilling to negotiate and that, by the time of the agreement, his livelihood and career had become so intertwined with the fortunes of the Roy family that he had no choice but to accept Shiv's terms.

Both of Tom's arguments might be thought to involve a difficult hurdle for Tom as a well-educated, well-connected businessman, presented as a conniving and manipulative man with good career prospects, even absent Logan Roy's patronage. Nevertheless, a diligent trial judge would have to carefully examine the evidence of the surrounding circumstances and carefully consider the oral testimony of Tom and Shiv explaining their conduct at the time of entering into the agreement. The trial judge would have to make findings of fact based on that evidence, including findings as to Tom's state of mind at the time of the signing of the agreement. What is the answer, then, to the question of whether the agreement would be valid?

The disappointing truth is that the answer would depend on the precise evidence led at trial and the findings of fact made by the trial judge.

[The Hon James Edelman is a Justice of the High Court of Australia. This article is based on the Peter Nygh Memorial Lecture delivered by him at the 20th National Family Law Conference held in Perth on 1 November 2024. The author wishes to thank Andrew Foster, Julian O'Donnell, and Jack Townsend for their assistance.]

97 *Thorne v Kennedy* supra note 84 at 111.

98 ibid at 112-113.