benchtv
a benchmark production

# Précis Paper

## Pre-Nuptial Agreements

A discussion of the recent decision of the High Court of Australia in *Thorne v Kennedy* [2017] HCA 49.

**Discussion Includes**

- Background to pre-nuptial agreements
- The facts
- Key principles from the Federal Circuit Court of Australia
- The High Court of Australia decision
- Key takeaways
- Future of pre-nuptial agreements in Australia

# Précis Paper

# Video Title

In this edition of BenchTV, Craig Cameron (Senior Lecturer – Griffith University, Gold Coast) and Geoff Wilson (Partner – HopgoodGanim Lawyers, Queensland) discuss the recent High Court decision of *Thorne v Kennedy* [2017] HCA 49, with a focus upon the implications of this decision on the future of pre-nuptial agreements in Australia.

Background to pre-nuptial agreements

1. If a party complies with all of the requirements under the *Family Law Act 1975* (Cth), in particular s 90G when we are discussing marital agreements, the agreement is binding. The courts are precluded from dealing with the property and the maintenance that is dealt with under the financial agreement.

2. For a long time these agreements were associated with high net-wealth individuals, high profile business people, celebrities, and so on, but these are also important documents for people entering into their second or subsequent relationships, where they have children from previous relationships and they wish to protect their children's interest in their estate. These financial agreements are also valuable for parties who may stand to inherit significant wealth in due time.

3. Pre-nuptial agreements have a place and purpose for anybody who is interested in protecting their privacy, where they do not want to potentially litigate their financial dispute following the breakdown of a relationship. They are a good estate planning tool, as well as being a good defence mechanism for relationship breakdown. In the commercial sphere, these agreements provide a planning mechanism to protect the business environment from a potential dispute if one of the operatives of the business is involved in a relationship breakdown.

4. Section 90K of the *Family Law Act 1975* (Cth) (the Act) sets out the grounds upon which an agreement may be set aside, covering grounds such as fraud by non-disclosure, where it is impracticable to perform the agreement, where there is a material change of circumstance that creates hardship for the carer of a child, where the agreement is void, voidable or unenforceable (which imports the common law and equitable remedies associated with contracts), and where the conduct is found to be unconscionable. Overlaying section 90K is section 90KA of the Act which provides that when the court is looking at the recognition, enforceability and validity of contracts or financial agreements, it must have regard to the laws of contract and equity.

5. For the first 12 years of the operation of this part of the legislation which was introduced for marriages in 2000, agreements were being found to not be binding, or to not be financial agreements due to non-compliance with the legislation. We are now at a stage where the courts are looking more to the substantive provisions of the agreements, and the clear message that is coming from the courts is that if you comply with the legislation, and it is a binding agreement that is entered into by parties that are on a level playing field, then absent any vitiating factors, the Court will hold the parties to that agreement, even if it is a bad bargain. There is nothing from the decision in *Thorne v Kennedy* [2017] HCA 49 that changes this position.

6. Although this case was the first case in which the High Court has really had the opportunity to look at financial agreements, it is not to say that the High Court has not actually dealt with them in the past. For example, in *Stanford v Stanford* [2012] HCA 52, the High Court recognised that parties are entitled to enter into financial agreements.

<u>The facts</u>

7. There was a significant age difference between the parties. The husband to be, Mr. Kennedy, was around 75 years of age at the time, and Ms. Thorne was 36 years of age. Mr. Kennedy was a property developer and his wealth was reputedly anywhere between $18 and $24 million. Ms. Thorne was living in the Middle East and had very modest financial circumstances at the time that she met Mr. Kennedy through an internet dating service. Mr. Kennedy made two trips to where she was, and made it quite clear at the outset that he would only marry her if she signed a document that protected his adult children's interest in his estate.

8. The couple decided they would come to Australia where Mr. Kennedy provided for Ms. Thorne financially. In August 2007, Mr. Kennedy began to implement his plan to put an agreement in place. It was not until 11 days prior to the marriage that Mr. Kennedy took Ms. Thorne to see a lawyer, one which was recommended by his own lawyer. There was a preference noted that Mr. Kennedy wanted the agreement signed on that day. Mr. Kennedy wanted things to move quickly as the wedding day was looming, but despite the lead in time, the first time Ms. Thorne saw the agreement and had the terms explained to her was 11 days out from the wedding.

9. The next day, Ms. Thorne received a written opinion from her lawyer advising her that she should not sign the document as it was a bad agreement. Mr. Kennedy told Ms. Thorne that if she did not sign the document, that there would be no wedding. Four days before the wedding, Ms. Thorne signed the agreement after some small amendments were made to the document at the request of Sue Harrison, Ms. Thorne's solicitor.

10. At the time, Ms. Thorne was more concerned with the provisions around what would occur if Mr. Kennedy predeceased her, rather than the circumstances if they did separate because it was her belief that the marriage would last forever. The agreement provided in respect to property settlement that if they did separate within 3 years, that she was to receive nothing. After 3 years, if there were no children she would receive $50,000 indexed, and if there was children of the marriage, she would receive one of the units from his development, or a unit up to the value of $500,000. In respect of maintenance, there were provisions for maintenance during the course of the relationship that were quite generous: luxury accommodation, her family would be accommodated, she would have use of a Mercedes Benz, and she would receive $4000 per month.

11. Whatever was to happen upon separation was totally irrelevant to the mind of Ms. Thorne as her focus was upon protecting her interests in his estate, knowing Mr. Kennedy had adult children who would have a claim on his estate. The agreement made reasonable provision for her upon his death, to the extent that she would get an apartment to the value of $1.5 million, and other items such as motor vehicles.

12. The parties signed a secondary agreement on effectively the same terms following the marriage which took place in November of 2007. When advising a client who is seeking an agreement to be signed just prior to a wedding, a time in which a lot of issues and potential claims are abounding in equity such as duress and unconscionable conduct, a cautious lawyer will ensure the parties do commit to signing an agreement after the wedding to ensure both parties have the benefit of clarity of time after the wedding, and do not have the pressure of the wedding upon them. In a general sense, it is important to let the parties have an opportunity to reconsider the terms of the agreement.

13. The couple got married, signed both the pre and post-nuptial agreement, but then shortly before their 4 year anniversary the marriage came to an end when Mr. Kennedy signed the separation certificate in April 2011. This meant that if the agreement were binding, Ms. Thorne would only receive the $50,000 lump sum.

<u>Key principles from the Federal Circuit Court of Australia</u>

14. Ms. Thorne applied to the Federal Circuit Court of Australia, seeking to set aside the agreement under s 90K of the *Family Law Act 1975* (Cth) in respect of duress, unconscionable conduct, and undue influence.

15. In her 2015 judgement, Judge Demack delved deeply into the facts of the case, which was very helpful in the subsequent appeals and finally to the ultimate decision. Ultimately it was found by judge Demack that on the basis of the factual matrix there was duress.

16. Ms. Thorne had plans to have a child with Mr. Kennedy, and that was one of the issues pressing upon her in signing the agreement. Ms. Thorne had also changed her life to be with Mr. Kennedy, and was in Australia only in furtherance of their relationship.

17. Judge Demack stated that '[91] the consequences of the relationship being at an end would have significant and serious consequences to Ms. Thorne. She would not be entitled to remain in Australia, and she had nothing to return to anywhere in the world. [92] Every bargaining chip and every power was in Mr. Kennedy's hands. Either the document, as it was, was signed, or the relationship was at an end. The husband made that clear. [93] Mr Kennedy knew that Ms. Thorne wanted to marry him. For her to do that, she needed to sign the document. He knew she would do that. He didn't need to consider something different, or more favourable to Ms Thorne. If she wanted to marry him, which he knew her to want, she must sign. The situation is much more than inequality of financial position. Ms Thorne's powerlessness arises not only from her lack of financial equality, but also from her lack of permanent status in Australia at the time, her reliance on Mr. Kennedy for all things, her emotional connectedness to their relationship and the prospect of motherhood, her emotional preparation for marriage, and the publicness of her upcoming marriage'.

18. The above mentioned factors were the distinguishing factors that the judge found supported a finding that the agreement was entered into under duress. The action by Ms. Thorne was successful in the Federal Circuit Court. The matter was then appealed to the Full Court of the Family Court. The Full Court of the Family Court assessed duress, unconscionable conduct and undue influence.

19. The Full Court of the Family Court relied upon a decision of *ANZ v Karam* [2005] NSWCA 344 which provided that in Australia, the principle of duress only goes so far as it can arise where there is an illegitimate threat of an unlawful act that causes a person to enter into the agreement. In the current case, the Court found that the original decision was made on the basis of a wrong principle, being that there had been no unlawful act, and to that extent the appeal was upheld.

20. On the issue of unconscionable conduct and undue influence, the Full Court of the Family Court examined both of these principles and found that there was no basis for claiming either of these principles as Ms. Thorne had longstanding knowledge that she was required to enter into an agreement – Mr. Kennedy had made that quite clear early in their relationship.

21. The fact that she was not concerned about her separation entitlements because she believed the marriage was to last forever worked against her on the grounds of unconscionable conduct and undue influence. The Court also mentioned Mr. Kennedy

agreeing to the minor amendments that were suggested, which was important because they considered that Ms. Thorne had received independent legal advice, and as a result amendments were made to the agreement. The fact Ms. Thorne had opportunity to make amendments, and did so, regardless of how minor these amendments were, suggested that she was entering into the agreement with free will and without any pressure.

The High Court of Australia decision

22. Ms. Thorne then took the matter to the High Court, making this the first case in which the High Court has had the opportunity to consider binding financial agreements. A special leave application was made, and the Court was really only interested in two aspects of the matter from a public policy point of view. They were interested in the development of the law of duress and lawful act duress, and whether these marital/relationship agreements should be differentiated from commercial types of agreements.

23. Counsel for the Appellant attempted to develop a thesis that there is a need to put the equitable and common law principles in the context of the statutory provisions, that somehow marital agreements ought to be treated differently to commercial agreements. Keane and Edelman JJ did not want to go down the line of reviewing a decision that was based on the law of general orthodox principles.

24. When the matter was eventually dealt with by the Full Bench of the High Court, those two matters did not seem to be considered by the Court. They did not deal at any length with the issue of duress, therefore not considering lawful act duress. The Court properly decided the matter on the basis of principles of law and equity, applying those to the facts of the case.

25. The High Court did not change the longstanding law on the equitable principles, and the Full Court, Family Court, and Federal Circuit Court have been routinely considering the principles of duress, undue influence and unconscionable conduct. Nevertheless, the appeal was allowed and the matter proceeded to the Full Bench of the High Court.

26. There was nothing that came out of the High Court judgement that has changed the law in respect of the principles of duress, undue influence or unconscionable conduct. The High Court merely applied the longstanding principles to the findings of the factual matrix of the particular case, and found that what Judge Demack had found was not duress per se, but was actually unconscionable conduct.

27. The High Court held that because of the decision in *ANZ v Karam* [2005] NSWCA 334, there was no evidence supporting any illegitimate pressure or conduct on the part of Mr. Kennedy. It was held that Ms. Thorne was quite submissive and she did want the agreement, on the back of her own concerns regarding her position if Mr. Kennedy predeceased her.

28. The majority decision of the High Court found that there was both unconscionable conduct and undue influence. Undue influence is found from the facts of the case, or there can be presumed undue influence. Presumed undue influence is presumed on the basis of certain sub-classes that are known to be rebuttable. Counsel for the Appellant argued that the fiancé relationship is one of those classes, but the Court was quick to disavow that view. The Court found that on the facts, in essence the pressure had been created by Mr. Kennedy that caused Ms. Thorne to act in a way that she was not operating with free will,

29. Gordon J took a more robust approach and found that this was a woman who knew what she was doing and that she did have other opportunity, although it was not a savoury position, i.e. she did not have to sign the document, it just meant the wedding would not proceed. Gordon J focused upon what was operating upon her at the beginning of her relationship with Mr. Kennedy, and the information that she had been given that she knew Mr. Kennedy wanted her to sign an agreement. The majority were more concerned about what was operating on Ms. Thorne at the time she was entering into the agreement, and the situation of urgency that Mr. Kennedy had created. Ultimately it was found that there was unconscionable conduct as Ms. Thorne suffered a special type of disadvantage and Mr. Kennedy knew this, and took unconscionable advantage of this.

30. As a result of the High Court decision, the application for property settlement and maintenance has now been sent back to the Federal Circuit Court. Ms. Thorne is seeking an order that she receive $1.1 million by way of property settlement, and a lump sum maintenance amount of about $110,000. The estate of the now deceased Mr. Kennedy is sizeable, but whether in fact Ms. Thorne is entitled to a substantial amount by way of contribution and s 75(2) *Family Law Act 1975* (Cth) factors remains to be seen. In the recent decision of *Strahan* (No 4) [2017] FamCA 949, it was held that in that case it was not appropriate to apply a percentage. Whether Ms. Thorne is entitled to either a percentage or a lump sum in property settlement remains to be seen.

<u>Key takeaways</u>

31. Despite all of the negative media about these agreements and the future of financial agreements, these agreements will continue to be prepared. A lot of the media was driven on the back of naysayers who, for whatever reason, do not like these agreements, but this should not be a basis to not prepare an agreement if you feel confident enough to do so.

32. It's important when you are looking at the advantages and disadvantages that you take your client through what a potential entitlement could look like over various scenarios - all of the relevant factors need to be laid out to the client so that they can make an informed decision. The fact that Ms. Thorne was quite clearly told not to enter into the agreement, but did so

anyway against the background of the various facts that were found by the judge, was indicium of undue influence.

33. In the current case, the problem was that the agreement was delivered to the wife just 11 days prior to the wedding, and she was required to sign it just 4 days prior to the wedding. Clearly in this case there was a timing problem. If you are a practitioner preparing these agreements, you ought to carefully consider whether you would take on preparing an agreement on the shortest of notice prior to a wedding. If you do, then there is the provision spoken about earlier which involves doing a section 90C *Family Law Act 1975* (Cth) agreement, but you must be very cautious and ensure that your client is fully apprised in the risk of doing so.

34. The reality is with these agreements is that if they are properly prepared, they may have a lead time of at least 4-6 weeks. It take times to prepare the agreement, to discuss and negotiate with the other party's lawyer, and to provide the necessary detailed legal advice.

35. In other jurisdictions, there are rules of thumb about when you should enter into an agreement, particularly in the United States. There exists a rule of thumb which says that you should not enter into an agreement after the wedding invitations have been sent out. In Australia, on the other hand, there have been a number of decisions where the courts have permitted, absent any vitiating factors, agreements that have been entered into just prior to the wedding.

36. Following the UK Supreme Court decision in *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, the Law Reform Commission was engaged to look at legislating financial agreements, because in the UK there are no statutes in respect of pre-nuptial agreements. This Supreme Court decision opened the gates for pre-nuptial agreements in the UK, but there was a suggestion in the proposed Bill that the agreement needs to be finalized at least 28 days prior to the wedding for the agreement to be valid.

37. One principle that may be argued to come from this decision is that there needs to be fair and reasonable provision made in the agreements. Currently in the *Family Law Act 1975* (Cth) there is no requirement that the provisions be fair and reasonable. The Full Court in *Holt* [2013] FamCAFC 109 made the point that the agreement does not and should not reflect what the party would otherwise be entitled to if they did not have an agreement under the law. Those who properly prepare the agreements have always advocated that the person who is the financially advantageous person ought to make additional provision. The clear message coming from this decision is that you must redress the imbalance in the agreement.

38. Another key takeaway from this case is the importance of detailed legal advice. Ms. Thorne's lawyer at the initial stages provided clear, detailed, written advice, followed by oral advice to ensure that the client understood the agreement. In *Pascot and Pascot* [2011] FamCA 945, Le Poer Trench J describes at length what ought to have been covered in the agreement and in the advice given.

39. The High Court set out (at [60]) factors of undue influence in the context of binding financial agreements which included the following: (i) whether the agreement was offered on a basis that it was not subject to negotiation, (ii) the emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement, (iii) whether there was any time for careful reflection, (iv) the nature of the parties relationship, (v) the relative financial positions of the parties, (vi) the independent advice that was received and whether there was time to reflect on that advice. This is not an exhaustive list, but it is a helpful checklist to consider when signing off on these agreements.

Future of pre-nuptial agreements in Australia

40. All this decision did was address one aspect of the law that has been long standing, being a protection for vulnerable parties where there has been vitiating factors that may see an agreement set aside. This case did not address the validity or enforceability of these agreements, and it does not seek to change any of the law that has gone before it.

41. In *Stanford v Stanford* [2012] HCA 52, the High Court acknowledged that these agreements are valid and will be enough to prevent the court from making a just and equitable adjustment to property settlement. The judgement provided in *Thorne v Kennedy* [2017 HCA 49 will not change the way things are done in respect of pre-nuptial agreements.

42. As the High Court held, unlike in the UK in cases such as *Radmacher,* where they had no statute to protect the individual, in Australia we have a set of rules in the *Family Law Act 1975* (Cth) that aim to do so. The provisions of s 90K and 90KA of the Act are there to protect the vulnerable, and this case was simply about properly applying the principles of s 90K and 90KA to the particular facts.

## BIOGRAPHY

Craig Cameron

Senior Lecturer – Griffith University, Gold Coast

Craig is a Senior Lecturer in Corporations Law at Griffith University and Corporate Counsel for the Dental Services Network. Craig has more than 10 years' experience as a legal practitioner, advising on corporate and employment issues in various jurisdictions. In terms of research, Craig has multiple publications in the labour law, teaching and work-integrated learning fields on topics including: labour regulation, risk management; generic skills development and self-efficacy of business students; the impact of flipped and blended learning environments; and corporate villainy and storytelling. His expertise in teaching and professional skills development has been recognised by three national industry and higher education awards.

Geoff Wilson

Partner – HopgoodGanim Lawyers, Queensland

Geoff co-manages HopgoodGanim Lawyers' Family Law practice, one of the largest in Australia. He is a Queensland Law Society Accredited Family Law Specialist and has practised in family law for over three decades. Geoff was a lecturer at the Queensland University of Technology from 1993-2005. He has prepared over 100 papers on family law topics throughout his career and has been a contributing author to the CCH Loose-leaf Services, Australian Family Law and Practice, Australia De Facto Relationships Law, Matrimonial Property Guide and to the Queensland Law Handbook. Geoff authored the Australian chapter of the leading international text, *International Pre-Nuptial and Post- Nuptial Agreements* by London based published Jordans in 2012. Geoff is a fellow member of the International Academy of Family Lawyers (IAFL). Geoff is a past parliamentarian of IAFL, chair of the International Dispute Resolution Committee of IAFL, as well as Secretary of the Asia-Pacific Chapter of the IAFL.

## BIBLIOGRAPHY


Focus Case

*Thorne v Kennedy* [2017] HCA 49

Benchmark Link

*Thorne v Kennedy* [2017] HCA 49

Judgment Link

*Thorne v Kennedy* [2017] HCA 49

Cases

*Stanford v Stanford* [2012] HCA 52

*Thorne v Kennedy* [2015] FCCA 484

*ANZ v Karam* [2005] NSWCA 334

*Carmel-Fevia & Fevia (no 3)* [2012] FamCA 631

*Strahan* (No 4) [2017] FamCA 949

*Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42

*Holt* [2013] FamCAFC 109

*Pascot and Pascot* [2011] FamCA 945

Legislation

*Family Law Act 1975* (Cth)