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John Wade

Bond University, john_wade@bond.edu.au

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Marriage and **Cohabitation Contracts**

Professor John Wade Faculty of Law Bond University

Introduction

Hollywood films and movie stars sometimes mention "pre-nups" or "marriage contracts". What are these mysterious documents? One description is that a marriage or cohabitation agreement is a written record of the expectations of a married or cohabitating couple in relation to lifestyle and finances which is entered into before and sometimes during marital cohabitation. In limited circumstances, certain parts of such agreements are legally enforceable. In some countries and cultures, including South Africa and Ouebec, marriage contracts are common amongst the wealthy.

At present in Australia, these agreements are rare. At a guess, less than 1% of married or cohabitating couples have such a marriage contract. Why is this so?

If 50% of cohabitating couples separate, and more than 40% of marriages end in divorce, why not make fair financial arrangements early, rather than late? Less than 1% of Australian houses burn down in a decade, but over 90% of house owners have fire insurance. Why contract for an unlikely life event, and not for a likely life event?

"Popularity" with Whom?

Anecdotally, the writer has observed people from the fol-Iowing five groups who enquire about, or actually use marriage or cohabitation contracts:

The very wealthy who want their assets to stay with the individual who brings wealth to the marriage – for example, the wealthy female entrepreneur who cohabits with a fascinating, but poverty-stricken artist.

Australian males who import brides from Asia and hope to restrict these young women from leaving the marriage with any or much property. This practice begins to introduce one of the dark and exploitative sides of marriage contracts.

The previously married and divorced who are still carrying scars from a bitter first separation. "I don't want that to happen again".

"Older" couples (say over 50 years of age) who want to enter a new relationship yet also want to keep their assets separate so that their separate wealth can be inherited by their own children (from previous relationships) and grandchildren.

Counter-culture couples who live in alternative communities and do not want their assets to be divided under the principles of the Australian Family Law Act, which they may consider to reflect the values of a capitalist, greedy or sexist society.

Despite this large "market" for the "pre-nup" product in Australia, marriage and cohabitation agreements remain rare. It is unlikely that you are friends with even one family which has such an agreement in place. Why?

Wade: Marriage and cohabitation contracts **Legislation in Australia**

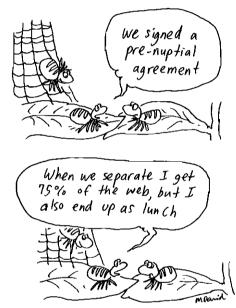
The current legislation in Australia which governs the formalities, finality and effect of marriage contracts (known as "financial agreements") is the Family Law Act 1975, sections 90A-90L.

The law relating to cohabitation agreements varies slightly between each state and territory and is governed by seven different state and territory acts.

All state acts provide different procedural requirements and have different but overlapping exceptions to finality for cohabitation agreements.

These procedural and finality variations between states may be simplified if all states refer power over de facto couples' property division to the Federal Parliament.

All of these acts enable, in limited circumstances, the couple's contract about finance and property to be legally binding, rather than the broad statutory discretion of a court to apply to the division of the property. For example, a couple could contract that all their property be divided 70:30, whereas after a long relationship a court might divide their property 50:50.



Delicate Balances in Law and Policy

The legal rules in Australia under part VIIIA of the Family Law Act and the various state de facto relationships acts about marriage and cohabitation contracts try to strike delicate balances between completing values. This is also true in other countries which recognise such agreements, even for rich and famous Californians. These balances include:

- Finality versus flexibility
 - The couple wants certainty, but also the ability to change the agreement if a business collapses, or a child is born, or one person is badly injured. How many other life events should justify a legal rule to alter a "contract"?
- Finality versus children's interests Clearly, an adult couple should not be permitted to enter into a financial agreement which restricts income to their children, who did not know about the contract, consent to it, or probably even exist when it was signed.
- Haste versus thoughtfulness Some wealthy couples want to sign up these agreements quickly and cheaply, just days before a wedding – or quickly "before (s)he finds out just how wealthy I am".

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Passion, haste and ignorance do not lead to "informed | Limited Fu consent". Therefore legislation, such as the Family Law Act (s.90G), contains complex (and expensive) procedural go-slow requirements which require two independent lawyers, full documented disclosure of assets (s.90K) and mellow reflection (s.90K(1)(b), (e)).

In Queensland, the Property Law Act 1974 s.266 reduces the procedural and expense requirements for a cohabitation contract to only one lawyer as a "witness", but thereby dramatically increases the risks of pressure and uninformed consent.

Individual freedom of contract versus support by the taxpayer

Predictably, legislators are nervous when they suspect that marriage or cohabitation contracts will be used to leave women impoverished and therefore dependent on social security; or to transfer assets between family members and thereby avoid paying state stamp duty. Stamp duty is a tax payable on "ordinary" transfers of things such as cars, houses, businesses or paintings.

Support of family versus payment of creditors When a family member has large debts to a bank, a hire purchase company, the taxation office, or to the butcher, baker and candlestick-maker, who should be paid first? - his/her long list of creditors, or the beneficiaries under his/her marriage or cohabitation contract? No one has ever been able to find the right legal rules to balance these two sets of "legitimate" claims.

Encouraging marriage breakdown versus encouraging orderly planning

Some people have argued that if a contract provides for the possibility of marriage breakdown, somehow it encourages less commitment and more marriage breakdown (like insurance contracts encourage fires?). Australian legislation and case law have rejected this proposition in favour of the policy that married or cobabitating couples should be able to plan in an orderly fashion for an almost 50% chance of marriage breakdown.

Whatever balances are struck between these six sets of competing interests, certain lobby groups will always be unhappy. The law will always be too rigid, too flexible, too expensive, too delayed, too lawyer-inhabited or too exploitative of the ignorant. That is, every possible reform of these balances has predictable advantages and disadvantages.

"Lifestyle" and Financial Clauses

Some couples include in their agreements "lifestyle" causes which set out their mutual expectations. These are not legally enforceable. For example:

- "We agree to encourage one another in our separate careers, and separate spiritual development."
- "We plan to give financial and emotional support to our aging parents and if necessary, care for them in our home."

Financial clauses need to be long and detailed in order to be clear enough to be legally enforceable. For example:

"If the parties are ever divorced, Bill will pay to Margaret within 30 days of the decree absolute of divorce the sum of \$100,000 (Australian) for each and every anniversary of their wedding day which has passed between the date of their wedding and the degree absolute of divorce."

Limited Future – Why?

Marriage and cohabitation contracts will probably continue to be used by only a tiny majority of couples in Australia (and elsewhere) for the following reasons:

- These contracts are very stressful to negotiate. A couple in love is attempting to put monetary values on each other, and discuss the possibility of separation. Tears and tissues abound. Family members bover in the background and exert unwelcome pressure to promise more or less dollars. The writer has seen a number of couples split up during the pressures of negotiating these contracts. They have always been thankful that the negotiation process identified early that the cracks in their relationship were chasms.
- Following the first point, each of the couple need to be mature and articulate. Few of us have competent and visible role-models of couples who have negotiated a marriage contract.
- iii These agreements are very expensive for the poor and middle class as they require two lawyers, complex wording, precise drafting and re-drafting, time and reflection.
- For the wealthy, marriage contracts provide a degree of certainty on how assets will be divided at a relatively low financial (but sometimes high emotional) cost. However, specialised family lawyers are always nervous about their wealthy clients. This is because the lawyers must explain very carefully in writing about the long list of uncertain exceptions to the finality of marriage contracts as contained in sections 90F - 90K of the Family Law Act, and elsewhere.

The list is so long and uncertain that the majority of wealthy clients say "what's the point". Moreover, "love is blind, and marriage is a magnifying glass". Thus starryeyed wealthy couples rarely understand the lengthy written list of exceptions to the finality of their agreement. Instead, years later when they separate, one or both sues his/her lawyer for being "misleading". "You told me that this pre-nup was binding. Now I find that I will have to pay out much more to my ne'er-do-well partner. It's all your fault." This dangerous pattern of blaming the lawyer means that astute suburban or commercial lawyers will not draft marriage or cohabitation contracts for the wealthy.

The long list of uncertain legislative exceptions to the finality of marriage contracts and cohabitation agreements will take decades of litigation and interpretation to give those words a degree of certainty.

Conclusion

In Australia, marriage and cohabitation contracts will remain of interest to the rich and famous, and to a small minority of other couples. Such contracts will continue to provide interesting twists to murder mysteries, Hollywood films, and emerging law reports.

(Article appeared also in Verdict – Queensland Law Society Publication.)

- Property (Relationships) Act 1984 (NSW); Property Law Act 1974 (Qld); 1958 (Vic); De Facto Relationships Act 1996 (SA); 1991 (NT); De Facto Relationship Act 1999 (Tas); Domestic Relationship Act 1994 (ACT).
- See Family Law Act, s.90E, 90F, 90J, 90K.
- See Family Law Act, s.90E
- Family Law Act 1975, s.90B.

 E.g., "fraud", "voidable", promissory estoppel, "impracticable", "hardship", "serious mistake", "reckless disregard", "just and equitable", "defrauding " see Family Law Act s.90F 90K; and state family provision legislation; and state De Facto Relationship Acts.

Questions and Exercises

1. Divide into pairs or groups A and B. Individual or group A draft a lifestyle clause(s) for a marriage contract which specifies how A and B will share: i cooking

ii cleaning

iii washing and ironing

Individual or Group B draft a lifestyle clause(s) for the same marriage contract which specifies how A and B will:

i discipline their children (if any)

ii encourage their children

iii encourage one another in work and/or study Swap draft clauses and negotiate the clauses to mutually satisfactory wording.

After the negotiation time is complete, write out in two columns

- (a) what you learned from that drafting / negotiation exercise?
- (b) what you would do differently if you tried a similar exercise again?
- 2. Your future spouse wants a marriage contract about how to divide assets if you should ever separate; and some separate lifestyle clauses. You do not want any marriage contract. Draw a line down the middle of a page and write out a list of advantages and disadvantages of having a marriage contract.

Be prepared to debate either side in class or in fours, or in pairs – 4 minutes each side. Any listeners vote at the end in favour or against a marriage contract.

3. You work for the Australian Law Reform Commission.

Write out a list of "life events" (e.g. birth of a child, long term unemployment, etc) which you think should allow a marriage contract about money to be automatically "avoided" or "set aside" by a court. Interview your neighbour about his/her list; then agree upon a single list. (Perhaps write your list on a whiteboard or flip chart paper.) Circle the items on the list which use vague words (e.g. "injustice", "serious hardship") and which leave uncertainty for a couple whether their marriage contract is legally binding or not.