



ABN 81 352 236 033

Level 2, Law Society House
33 Barrack Street
Perth WA 6000
Telephone (08) 9221 9566
Facsimile (08) 9221 9585
E-mail: lmwa@iinet.net.au

Postal Address:
PO Box Z5345
St. Georges Tee
Perth WA 6831
DX 173 Perth

72 APR 2001

ALERT

PITFALLS PRE-NUPTIAL-POST NUPTIAL AGREEMENTS FAMILY LAW – BINDING FINANCIAL AGREEMENTS

Recent amendments to the *Family Law Act* allow parties intending to marry, parties already married and partners who are divorced to enter into binding financial agreements related to property and spousal maintenance. For the purposes of this alert all categories of these agreements are referred to as BFA's. The Family Court has no power to make orders in relation to property or spousal maintenance, if those matters are covered in the BFA.

S90G of *Family Law Act* requires the agreement to have annexed to it a certificate signed by a legal practitioner indicating the party has received specific independent advice. Details of the certificate are attached "Annexure 'A'".

Law Mutual (WA) considers there are substantial risks for legal practitioners in advising clients and providing the certificate. Some of these risks are:-

1. In order to provide the certificate the practitioner has to compare what the client is getting out of the agreement now and what he/she may get from a court in the event of a property settlement at some stage in the future. What parties get after separation depends on numerous factors – ANYTHING can happen in a person's life, unemployment, disability, business failure/success, number of children, length of marriage.

The advice requires 'crystal ball gazing'.

2. A solicitor has to advise whether it was prudent for the party to enter into the agreement. There may be a host of reasons why a party may want to enter into the agreement and nothing to do with financial arrangements.
3. A legal practitioner may be under pressure to advise quickly and cheaply without adequate and comprehensive instructions, especially if wedding plans are advanced.
4. Providing advice will require a comprehensive inquiry into the respective financial position of both parties and prospects in the future. Practitioners will need to take clear instructions.

5. The certificate contemplates the agreement will be to the advantage of the party. There is an implication the other party is disadvantaged.
6. The certificate deals with matters of opinion and judgement. Practitioners may not be equipped to exercise sound judgement on whether a client is advantaged 'financially or otherwise' by an agreement. What does the word 'otherwise' mean?
7. The agreement must strictly comply with the provisions of the *Family Law Act* otherwise it is likely to be set aside.

TAX IMPLICATIONS

8. Advice will need to be given regarding the stamp duty and capital gains implications of any transfer of property pursuant to a BFA. Will this agreement be exempt under Stamp Act (WA)? There is no roll-over relief under capital gains legislation as it only applies to court orders.

INSURANCE IMPLICATIONS

9. Practitioners are covered for liability 'in connection with legal practice'. In most circumstances a practitioner will be covered for any liability as a result of providing the certificate or advice. However, if the practitioner strays into areas outside the normal scope of legal practice, eg. an investment adviser he/she is unlikely to be covered. BE CAREFUL

If a practitioner decides to proceed and sign the certificate Law Mutual (WA) recommends that he/she consider the risk management steps set out in "Annexure 'B'".



Anne Durack
MANAGER

30 March 2001

“ANNEXURE ‘A’”

**S90G – Family Law Act –
Certificate**

The legislative requirements as to a certificate are the same even though the practitioner must take into account very different factors depending on whether the agreement is prior to a marriage or whether it is following separation.

The certificate has to indicate the practitioner has advised on the following:-

- the effect of the agreement on the rights of that party; (S90G (1) (b) (i))
- whether or not, at the time the advice was provided, it was to the advantage financially or otherwise, of that party to make the agreement; (S90G (1) (b) (ii))
- whether or not, at that time it was prudent for that party to make the agreement; (S90G (1) (b) (iii))

and

- whether or not, at that time and in the light of such circumstances as were at the time reasonably foreseeable, the provisions of the agreement were fair and reasonable. (S90G (1) (b) (iv))

ANNEXURE 'B'

RISK MANAGEMENT

1. If a practitioner decides to proceed and sign the certificate he/she should ensure he/she sends a comprehensive letter of advice to the client identifying his/her role and the issues considered in forming the views.
2. A practitioner will need to discuss how a court can set the agreement aside in the future and the pitfalls of entering into a BFA and provide that advice in writing.
3. Ensure that the agreement complies with requirements under the Family Law Act.
4. RETAIN his/her file INDEFINITELY – DO NOT DESTROY IT – if a claim arises in relationship to an agreement entered into before or during marriage, it will be when the marriage is over, possibly many years in the future.
5. The certification is likely to preclude the practitioner from acting for either party in the separation as he/she is likely to be a witness.
6. A practitioner should ensure that each party to the agreement supplies a declaration of their assets and resources and incorporate this into the agreement.
7. A practitioner should provide a clause in the agreement the agreement is of no effect if there has been non-disclosure.
8. A practitioner should advise his/her client of steps the client can take to protect the assets.
9. A practitioner must ensure the client is not signing the BFA under duress, has an appropriate command of the English language and is not suffering any illness, incapacity at the time. If an interpreter is required, ensure he/she is independent.
10. A practitioner should not see the client with his/her spouse or intended spouse.
11. A practitioner should seek account, tax and stamp duty advice where appropriate.
12. A practitioner must ensure one party receives the original BFA and the other party a copy.
13. A practitioner should keep up to date with developments in this area. There have been many articles published on this topic in family law bulletins and the Family Law Practitioners Association is conducting CLE seminars on this topic.