

A TALE OF TWO FINANCIAL AGREEMENTS

24 JANUARY 2020 | PROPERTY SETTLEMENTS

Since the High Court handed down its decision in *Thorne v Kennedy* [2017] HCA 49 in November 2017, solicitors have been eager to observe and understand the courts' determination of financial agreement cases in its wake.

In *Thorne v Kennedy*, two financial agreements were set aside on the grounds of unconscionable conduct (and undue influence). The focus of this article is limited to unconscionable conduct.

WHAT IS UNCONSCIONABLE CONDUCT?

A finding of unconscionable conduct requires the “innocent party” to be subject to a special disadvantage which seriously affects their ability to make a judgment as to their own best interests. The other party must also unconscientiously take advantage of that special disadvantage, and have known or ought to have known of the existence and effect of the special disadvantage.

RECENTLY DECIDED UNCONSCIONABLE CONDUCT CASES

Chaffin v Chaffin [2019] FamCA 260 and *Delrio v Jindra* [2019] FCCA 1186 each considered the issue of unconscionable conduct in relation to whether a financial agreement entered into before marriage (otherwise known as a “pre-nuptial agreement”, or “pre-nup”) should be set aside.

A consideration of these two cases, together with the decision in *Thorne v Kennedy*, appears to demonstrate that:

1. The circumstances surrounding the drafting and execution of a financial agreement (including the timing of the agreement being signed in relation to the prospective wedding); and
2. The circumstances of the parties themselves, including the characteristics of their relationship;

are frequently determinative of whether or not a Court will exercise jurisdiction to set aside a financial agreement due to unconscionable conduct should its validity later be challenged.

The decisions of the Court in *Chaffin* and *Delrio* specifically illustrate the risk faced by couples who elect to enter into a financial agreement with their wedding “just around the corner.” In *Chaffin*, the agreement was entered into ten (10) days prior to the wedding, and when later challenged, was set aside. In *Delrio*, the agreement was entered into the day prior to the

wedding, and when later challenged, was not set aside.

Why was the agreement set aside in *Chaffin*, but not in *Delrio*? The facts of each case are contrasted in the table below.

	Chaffin v Chaffin	Delrio v Jindra
When was agreement signed?	10 days prior to the wedding	The day prior to the wedding.
Party attempting to set aside agreement	Wife.	Husband.
Ages and financial circumstances at the time the agreement was signed	Wife - 20 years of age Husband - 30 years of age. Husband in significantly superior financial position to wife. Wife financially dependent on husband.	Husband and wife both 36 years of age. Wife in significantly superior financial position to husband. Husband had own income and was not financially dependent on wife.
Children?	Wife was pregnant when agreement signed.	No children
Independent legal advice received and time to reflect on advice?	Advice received by both parties. Wife first attended upon her solicitor in 29 July 2010, received advice on 6 August 2010 (wherein her solicitor strongly advised that the wife not sign the agreement) and signed the agreement in 11 August 2010.	Advice received by both parties. Husband attended upon his solicitor to receive advice and sign the agreement the day before the wedding. Husband's solicitor advised him not to sign the agreement.
Agreement subject to negotiation?	Wife asserted that the husband said "we can't change anything on it", that all of his siblings had been required to enter into financial agreements before they married and that "anyone who marries into our family has to sign it".	Wife repeatedly encouraged the husband to seek legal advice with respect to the agreement and the evidence before the Court suggested that the wife was open to negotiation.

<p>In <i>Chaffin</i>, the Court held that the agreement should be set aside for unconscionable conduct. The wife was held to be at a "special disadvantage" (due to a combination of the above factors), and the husband acted unconscientiously when he took advantage of same.</p> <p>In <i>Delrio</i>, the ground of the agreement to co-sign was formed by the wife. The husband did not have a "special disadvantage", nor was there any evidence that he was emotionally overborne by the wife.</p> <p>The difference between the two cases was based on a myriad of factors (many of which are outlined above), which either party was at a special disadvantage.</p> <p>Parties should be aware of the risks of entering into a financial agreement where the following circumstances exist:</p>	<p><i>Chaffin v Chaffin</i></p> <p>Wedding ceremony and reception was based on a myriad of factors, (many of which are outlined above), which either party was at a special disadvantage.</p> <p>photographer and videographer organised.</p> <p>The wife was pregnant.</p>	<p><i>Delrio v Indira</i></p> <p>The Court held that the wedding was to be held at a friend's house, and the wife's mother was meeting the cost of the catering, wedding dress and wife's wedding ring. Ceremony was to be small and casual.</p>
<p>1. Pressure /and or limited time to sign the agreement such that one party feels as if they have "no choice" but to sign the agreement;</p> <p>2. A difference in "bargaining power" between the parties, such that one party is vulnerable (for example, where one party is financially dependent on the other);</p> <p>3. Where a party's solicitor has advised that they should not sign the agreement, however he was aware of the concept of the agreement months before the wedding.</p> <p>Other relevant facts known to our highly skilled team of family lawyers.</p>	<p>Husband first had the opportunity to consider the terms of the draft agreement the weekend before the wedding, however he was aware of the concept of the agreement months before the wedding.</p> <p>Husband was extremely resistant to reading the agreement, seeking legal advice in respect of the agreement and entering into the agreement in general.</p>	<p>Husband was extremely resistant to reading the agreement, seeking legal advice in respect of the agreement and entering into the agreement in general.</p>

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