The need for pre-and post-nuptial agreements ("PNAs"). Can you trust trusts in international divorce cases?

TRUSTS

1. A trust is an arrangement whereby the owner of an asset often referred to as the settlor passes complete legal ownership of the asset in question to a trustee which can be a company or an individual. That trustee then becomes the legal owner of and the administrator of that asset. The trustee must administer, invest and distribute any assets within the trust according to the terms of a key document known as the trust deed as well as according to the governing law of the trust deed or in terms of the jurisdiction in which the trust is established. The trustee acts on behalf of the beneficiaries of the trust who can compel the trustee to comply with the terms of the trust deed and the general law. The beneficiaries can include the settlor although this potentially may reduce or negate specific tax benefits flowing from establishing the trust. The beneficiaries are said to hold an equitable interest in property the subject of the terms of the trust. The assets in the trust and any payment received from them are often described as the trust "fund". Trusts exist primarily in common law countries having grown up in England. Trusts are predominately used to transfer or gift assets for succession and tax planning and asset protection purposes. The trustee must operate the trust according to the terms of the trust and the general law. The trustee must act with prudence, take advice on technical matters and otherwise act in the best interests of all of the beneficiaries. The trustee must exercise such care and skill as is reasonable in the circumstances having regard to any special knowledge or experience that the trustee holds and if acting as a professional trustee to any special knowledge or experience that it is reasonable to expect of such a trustee. The standard of care is not simply by reference to what an ordinary man of business would do if he had only himself to consider but what he would do if he was under a moral obligation to provide for others and that standard is set higher for a professional trustee.
2. In international divorce cases, particularly those involving foreign trusts, one has to determine whether the Court in Australia, being the Federal Circuit and Family Court of Australia (or the Family Court of Western Australia for matters in that state), has jurisdiction under the *Family Law Act 1975* (Cth) ("**the Act**"). In that regard, the Court, itself, determines whether it has jurisdiction and can consider a range of factors including whether a foreign jurisdiction would be able to determine the case better (and whether there are more advantages of the case being heard in a jurisdiction outside of Australia), whether the

Australian Court order will be enforced in the international country where the assets are and whether multiple jurisdictions are able to determine the matter. The Court is able to make an order compelling or directing one party to deal with a specific asset, whether that be foreign or not, or comply with directions. However, it may lack the ability to enforce such orders overseas. In that regard, it would be a question for the foreign jurisdiction to decide whether it would recognise the Australian judgment or order and enforce it.

3. In *Kent & Kent* [2017] FamCAFC 157, the parties were Australian citizens and moved to Papua New Guinea after getting married. The wife came back to Australia and both parties visited each other. The parties held real estate in Australia. The husband's business assets were in Papua New Guinea. One party to the marriage commenced proceedings by way of a Petition for Decree of Dissolution of Marriage in the National Court of Justice in Papua New Guinea, the other for settlement of property in the Family Court of Australia. Both parties sought anti-suit injunctions against each other. The party in Papua New Guinea sought a stay of the Australian proceedings. The matters to be taken into account to determine whether Australia was a "clearly inappropriate forum" were extracted from *Henry* in *Whung v Whung and Ors (2011)* 45 Fam LR 269 at [43]. The non-exhaustive list includes:
    a. Whether the courts have jurisdiction.
    b. If both have jurisdiction, whether each will recognise the other's orders and decrees.
    c. Which forum is able to offer a final resolution.
    d. The order of which proceedings were instituted.
    e. The stage the proceedings have reached.
    f. The costs incurred.
    g. The connection of the parties and their marriage with each jurisdiction, considering the issues which the relief might depend on.
    h. Whether the parties are able to participate in the proceedings on an equal footing.
    i. The general circumstances of the case, including the true nature and full extent of the issues.
4. The High Court of Australia referenced *Voth* (1990) 171 CLR 538 in *Henry v Henry* [1996] HCA 51, stating that "a stay should be granted if the local court is a clearly inappropriate forum, which will be the case if [a] continuation of the proceedings in that court would be oppressive, in the sense of "seriously and unfairly burdensome, prejudicial or damaging", or, vexatious, in the sense of "productive of serious and unjustified trouble and harassment.""
5. The proceedings in the case of *Kent v Kent* (No 3) [2017] FamCA 809 referred to above related to the husband's entitlement in a trust known as the E trust which was a trust

established in Papua New Guinea. The wife sought to restrain the husband from making any further withdrawals from that trust and to provide a copy of that order of restraint to the trustee. The wife maintained that the husband had already withdrawn $515,968.00 from the E Trust. She wanted to restrain him from accessing the remaining funds. She also stated that he had failed to provide her with a "full and proper" accounting of his use of the said funds. The husband maintained that as the vast majority of the property of the parties was situated in Papua New Guinea and it was difficult to transfer money from there to Australia, he sought to preserve his ability to access funds in the E Trust. The Court ordered that the husband be restrained and an injunction issue so restraining him from making any further withdrawal from that trust.

6. The complicating factual matrix of foreign trusts is likely to impact on the Court's determination as to whether it has jurisdiction.
7. If the Court does determine it has jurisdiction, one has to consider whether the existence of family trusts can be considered in the exercise of that jurisdiction.

The question of whether assets in a trust can be protected from a claim by an ex-partner is a complicated one.

8. It could be said, however, that such assets are not necessarily "protected" by being in a trust.
9. In the *Marriage of Davidson* [No 2] [1991] 101 FLR 373, the Full Court of the Family Court considered that "Australian courts today have to look at the reality of the situation and the purpose for which family trusts serve today."
10. Pursuant to s.78 of the Act, the Court is able to declare that either of the parties to a marriage owns property.
11. Pursuant to s.79(1) of the Act, the Court is provided with a discretion to alter the proprietorial interests of the parties to a marriage, as declared or otherwise, as it considers appropriate. This discretion is subject to the overall considerations of what is "just and equitable" (s.79(2)).
12. The Act incorporates a wide definition of 'property' and emphasises the significance of an *entitlement* to an asset within that definition.
13. Pursuant to s.79(4) of the Act, the Court must consider, inter alia, the financial contributions directly and indirectly made, the non-financial contributions directly and indirectly made, the contributions the parties made to the welfare of the family, the effect of any proposed order upon the earning capacity of either party and the matters referred to in s.75(2) so far as they are relevant.

14. The matters to be taken into account under s.75 of the Act refer, in essence, to "future" needs of maintenance including, inter alia, age, state of health, income (income earning capacity), duration of the marriage, property and financial resources, the financial circumstances of any cohabiting person with that party, whether either party has the care of or control of a child, commitments of each to enable the party to support himself or herself and any child that that party has a duty to maintain, the responsibilities of either party to support any other person, the eligibility of either party for a pension allowance or benefit and a standard of living that in all the circumstances is reasonable.
15. Pursuant to s.90SL of the Act, the Court is given similar powers to make declarations with respect to the parties of a de facto relationship.
16. Pursuant to s.90SM of the Act, the Court is given similar powers to divide the property of parties to a de facto relationship. The Court must again consider similar factors to that set out in paragraph 10 (see s.90SM(4)) and the matters set out in paragraph 11 (see s.90SF(3)).
17. As part of the analysis referred to above, the Court must identify all of the property interests of the parties in the relationship, including those held by either party in a trust. The parties' property (held jointly or separately) is used to determine the net asset pool to be distributed. A party may point to property that is held by their ex-partner in a trust for the Court to consider whether it is included in determining that pool.
18. Whether a trust forms part of the property pool depends on the nature of the ex-partner's interest and the degree of control that that party has over a particular trust.
19. If the trust is found to be a sham or the 'alter ego' of one of the parties, then the Court is able to 'bust the trust' and, in those circumstances, the property of the trust would be considered the property of the party who controls it.
20. *In the Marriage of Gould* [1993] 115 FLR 371, Fogarty J discussed the distinction between the term "sham" and the term "alter ego", noting that the distinction between the two is not unimportant. His Honour said, as follows: "On the other hand, the description of an entity as the "alter ego" or "puppet" of a person really denotes something different. Correctly described, it is not an assertion that it is a "counterfeit, a facade or a false front". Rather, it describes an actual situation although as a matter of law or practicality the actions of the other entity may be capable of and may in fact be controlled by the party in question. For example, a party may establish a trust over which he or she exercises control. That trust may in turn own or control property. It may be correct to describe that trust as the alter ego or even perhaps the puppet of that party, but it would not be correct to describe its existence or its ownership or control of property as a sham. Transactions entered into by it under

which it deals with its property by, for example, a transfer of property to a third party would not be a sham transaction. It is likely to be a genuine transaction although the evidence may demonstrate that the transaction was carried out "by direction of or in the interest of" the party."

21. A party alleging that a trust is a "puppet" or "alter ego" of the other party clearly has the burden of proof, in that regard.
22. *In the Marriage of Ashton* (1986) FLC 91-777, at 75,652, the Full Court of the Family Court of Australia held that as: "it was conceded throughout that the husband was in full control of the assets of the trust and the evidence made it clear that he was applying them and income from them as he wished and for his own benefit" and, as such, there were grounds "for saying that the trust [was] no more than the husband's alter ego."
    a. The Court also has powers to set aside transactions pursuant to s.106B of the Act (in relation to both married parties and de facto parties) and to make orders against a third party to change ownership (see ss.90AE and 90AF in relation to married parties under Part VIIIAA of the Act and s.90TA in relation to de facto parties under Part VIIIAB of the Act).
23. In *Kennon v Spry* [2008] HCA 56***,*** the following were the background facts:
    a. The husband (Spry) and the wife separated in 2001 and the marriage was dissolved in 2003. In June 1968, the husband created a trust ("**the trust**"), and its terms were executed in October 1981 through an instrument. The husband was the trustee and settlor.
    b. The beneficiaries of the trust included the husband and his siblings and the spouses of all of them. At the date of distribution of the fund, the fund would be divided between such beneficiaries as the trustee thought fit or, in default, equally between all male beneficiaries save for the husband.
    c. In March 1983, the husband made a deed ("**the 1983 Deed**") by which he released and abandoned all and any beneficial interest or rights which he as settlor might have held under the trust and confirmed that he ceased to be a beneficiary of the trust.
    d. In December 1998, the husband made an instrument ("**the 1998 Instrument**") by which he excluded himself and his wife from all interests and rights in the capital of the trust fund and varied the trust so that no power or discretion to pay or apply the capital of the fund could be exercised in favour of himself or his wife.

e. In January 2002, the husband established 4 separate discretionary trusts in identical terms, relating to each of his four children. He executed an instrument whereby he applied all of the income and capital of the trust by assigning one-quarter to the trustees of each of the children's trusts ("**the 2002 Instrument**").

f. In April 2002, the wife applied to the Family Court of Australia for property settlement and maintenance orders.

g. The Court found that the 1998 Instrument and the 2002 Instrument were made to defeat an anticipated order for property settlement in future proceedings.

h. When considering the nature of the trust and the source and purpose of the assets, the Court concluded that the property in the trust came from the "fruits of the marriage" and that it could be vested in the other party at any time during the relationship, rather than just at the time of trial.

i. Orders were made setting aside each of those instruments pursuant to s.106B of the Act and the assets of the trust were treated as the property of the husband and included in the pool of property for division between the husband and the wife. The husband was, ultimately ordered to pay a specified sum to the wife.

24. When one examines trust deeds, it is not unusual for one party to be both the appointor and the trustee (and the beneficiary), thus having the power to control the trust's assets. The greater the degree of control, the more likely the party's interest as a beneficiary in a trust will be treated as property. For example, a beneficiary who has a fixed entitlement interest in a trust where no discretion vests in the trustee to alter that interest is likely to find that the interest will be considered property under the Act.

25. In the case of a discretionary trust, where a party is a beneficiary to an entitlement at the absolute discretion of the trustee, this would not, without more, be considered the property of that party. A discretionary trust can be considered under 2 types: "exhaustive", where the trustee must distribute all income accruing to the trust fund and "non-exhaustive", where the trustee has an express power to accumulate income. In those circumstances, the beneficiary of a non-exhaustive discretionary trust who does not control the trustee directly or indirectly has a right to due consideration and to due administration of the trust but has no present entitlement and may never have any entitlement to any part of the income or capital of the trust. Accordingly, such an interest is difficult to value and, in any event, unlikely to be considered property under the Act.

26. The authorities indicate that each case may differ and the outcome is, substantially, dependent on its individual circumstances. See *Mansfield & Mansfield & Ors (No. 3)* [2018]

FCCA 970. In this case, the wife claimed that the husband had access to wealth and properties which were in trusts established by his father (Mr Mansfield Senior). The wife sought to join Mr Mansfield Senior and his related entities as a third party to the proceedings. The Court found that Mr Mansfield Senior (and not the husband) had total control over the trust's assets and that as the husband lacked control over the trust assets and had not received any distributions, the wife's application was dismissed.

27. The Court in *Mansfield* had regard to *Kennon v Spry*, which considered that the Court, in determining the treatment of the assets of a trust property, needed to have regard to a number of factors including legal title, control, powers of distribution and the source of the trust fund. The Court stated that the lack of control on the husband's part and indeed his lack of input into anything to do with his father's business affairs was "crucial". The husband could not be described as being anything analogous to an owner of any of the property concerned and he was not his father's guardian. Mr Mansfield Senior did not owe his son any form of fiduciary duty as a consequence of some joint business interest.
28. Similarly, in *Rigby & Kingston* (No. 4) [2021] FamCA 501, the Court dismissed the husband's attempt to include the assets of a testamentary trust created by the wife's father where the property in that trust passed to his adult children, which included the wife, but in circumstances where he made it clear that no entitlement was to accrue for his children's future spouse, being the husband. The Court concluded that the wife did not control the assets held in that testamentary trust, which were not vested, as "legal title [was] held either jointly with her two brothers or by a corporate trustee in which the wife [was] one of three directors. The wife alone [could not] make decisions to distribute trust funds to herself. Further, the source of the fund in the [trust] was from a stranger to the marriage" and not as a result of the efforts of either the husband or the wife.
29. The Court looks at various factors when determining whether a party has such a degree of 'control' over the trust that the assets within that trust should be distributed between the parties. These factors include the following:
    a. The terms of the trust deed;
    b. Who the trustee and appointor are;
    c. Whether a party to the proceedings 'controls' the trust directly or indirectly (being the degree of influence a party has over the trustee or appointor). If it is found that the party does not have control within or over the trust, then the influence they may exert over the people who do may be considered.

d. Who the beneficiaries are – for example, if a party is a beneficiary, attention may be paid to whether the benefit is guaranteed (fixed entitlement) or whether the trustee is able to have the choice to allocate the benefit to someone else (mere expectancy).
e. Whether a party has had a history of receiving distributions.
f. How the assets of the trust were acquired.
g. The contributions by the parties to the property owned by the trust.
h. Any other benefits the parties derive from the trust e.g. loans, motor vehicles, payment of expenses.
i. Whether or not a party is entitled to receive a share of the assets, for example on termination/wind up of the trust.

30. The above cases demonstrate how the structure and the administration of a trust can provide some protection.
31. Common problems arising in relation to trusts and enforceability:
    a. The size of the beneficial pool.
    b. Whether the beneficiaries are themselves trusts.
    c. The question of enforceability of the terms of the trust itself.
    d. Whether the trust document has been drafted appropriately. Often trusts have been prepared by accountants using a precedent provided by a lawyer. Often those precedents have schedules which link two definitions in the trust document. Often schedules for fixed trusts have been swapped for schedules for discretionary trusts. These issues can give rise to rectification suits.
    e. Whether the trustee has in reality acted as a trustee that is with independence and prudence in the exercise of the trustee's obligations.
    f. Whether stamp duty has been paid on the trust.
32. The Court is also able to consider whether trust property would be considered a financial resource of one of the parties to the relationship.
    a. In *Harris v Harris* [2011] FamCAFC 245, the Full Court of the Family Court of Australia found that the assets of a discretionary trust were a financial resource of the husband. In that case, the trust was established by the husband's father prior to the parties' relationship. During the relationship, the husband's father died and the husband's mother became the appointor. The husband's parents were the shareholders and directors of the original corporate trustee. The husband and his wife became directors during the marriage. The husband's mother restructured the

original trustee so that she held 98 shares and the husband and his sister each held one share. The beneficiaries were the husband, the husband's deceased father and the husband's sister, including other beneficiaries but not including the wife. The husband, wife and a company controlled by the husband received income distributions from the trust. The husband's mother, as appointor, appointed a new trustee of the trust. The Directors were the husband's mother, the husband's son from his previous marriage and a friend of the husband. The wife argued that the trust was the "alter ego" of the husband. The Court found that the husband did not have direct or indirect control of the trust and it could not be proven that his mother was his "puppet". The Court held that the trust's assets were not an asset of the parties' marriage and at most, the trust would be a financial resource of the husband.

b. The Court must be satisfied that a party is likely, however, to receive a benefit from the trust for the interest to be considered a financial resource.
c. The Court may have regard to increasing the share of a party in the non-trust property pool to take into account the effect of that financial resource.
d. The financial resource will be considered in determining the future needs of the party.

FINANCIAL AGREEMENTS

33. The Act provides for parties to relationships to enter into financial agreements. Part VIIIA of the Act provides for such agreements where the parties are married and Part VIIIAB of the Act provides for such agreements where the parties are in a de facto relationship.
34. In terms of both married and de facto relationships, those financial agreements may be entered into before marriage/de facto relationship (s.90B/s.90UB of the Act), during the marriage/de facto relationship (s.90C/s.90UC of the Act) and after divorce/breakdown of the de facto relationship (s.90D/s.90UD of the Act). The financial agreements must recite that, at the time of their making, the parties are not parties to any other binding agreement and specifically state that the agreement was made under the relevant section.
35. These financial agreements allow parties to arrange to protect their assets and to formalise how those assets, property and superannuation will be divided if their relationship breaks down. This may be significant in cases of individuals who have children from previous relationships (e.g. child support considerations), or in cases of inheritance. The financial

agreements may also cover issues such as maintenance during the marriage/relationship, after divorce/breakdown of relationship.

36. The financial agreements can be made binding provided specific requirements are met. Those requirements are set out in s.90G of the Act (in the case of marriage) and s.90UJ of the Act (in the case of a de facto relationship). Broadly speaking, those requirements are as follows:

    (a) The agreement is signed by all parties; and

    (b) Before signing the agreement, each party was provided independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and

    (c) either before or after signing the agreement, each party was provided with a signed statement by the legal practitioner stating that the advice referred to in (b) was provided to that party (whether or not the statement is annexed to the agreement); and

    (ca) a copy of the statement referred to in paragraph (c) that was provided to the party is given to the other party or to a legal practitioner for the other party; and

    (d) the agreement has not been terminated and has not been set aside by a court.

37. In Australia, a number of cases were run on the basis that the lawyers had largely failed to comply with the obligations set out in paragraph 36, above. The Courts strictly interpreted those obligations. The matters set out in paragraph 36, above, were also subject to some amendments and lawyers had adopted precedents which referred to previous statements of what was required to be advised. Many lawyers refused to provide the certificates of legal advice as their insurers increased insurance premiums in light of litigation against lawyers for negligence in the drafting of the financial agreements.
38. As a result of the issues identified in paragraph 37, above, the Act was amended to provide that an agreement could be binding if one or more paragraphs (1)(b), (c) and (ca) were not satisfied in relation to the agreement but a court was satisfied that it would be unjust and inequitable if the agreement were not binding on the parties to the agreement (disregarding any changes in circumstances from the time the agreement was made) and the court makes an order declaring that the agreement is binding on the parties to the agreement.

39. The Court receives applications by a party seeking a declaration that a financial agreement is binding. The Court also receives applications by a party seeking to set aside a financial agreement.
40. Often a financial agreement includes a provision which is beyond statutory power. For example, a provision which relates to the maintenance of a party or a child is void unless the provision specifies the party or the child for whose maintenance provision is made and the amount provided for or the value of the portion of the relevant property attributable to such maintenance (see s.90E of the Act for marriage and s.90UH of the Act for de facto relationships). No provision should exclude or limit the power of a court to make an order in relation to the maintenance of a party if the court is satisfied that when the agreement came into effect, the circumstances of the party were such that, taking into account the terms the effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit (see s.90F(1A) of the Act for marriage and s.90UI(2) of the Act for de facto relationships).
41. Under s.90K of the Act (for marriage) and s.90UM of the Act (for de facto relationships), a Court may set aside a financial agreement in certain circumstances. Those circumstances include that the agreement was obtained by fraud, the agreement is void, voidable or unenforceable, in the circumstances that have arisen since the agreement was made it is impractical for the agreement or a part of the agreement to be carried out, since the making of the agreement a material change in circumstances has occurred, being circumstances relating to the care, welfare or development of a child and as a result of the change, the child or the parent having care, responsibility for the child being a party to the agreement will suffer hardship if the agreement is not set aside, a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable, and the agreement covers at least one superannuation interest that is unsplittable for the purposes of the Act.
42. The question as to whether a financial 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 determining the validity, enforceability and effect of contracts and purported contracts.
43. A financial agreement being a new financial agreement may terminate a previous financial agreement if all of the parties to the previous agreement are parties to the new agreement.
44. A financial agreement may also contain matters incidental or ancillary to the matters set out in paragraph 35, above, and may include other matters for example the payment of any outstanding debts, insurance coverage and what will be covered in the parties' wills.

45. The High Court of Australia considered in ***Thorne v Kennedy*** **[2017] HCA 49** a financial agreement which was argued to be binding. In this case, the appellant (the wife) was from overseas and married a property developer (the husband) in Australia. A document being described as a pre-nuptial Agreement had been signed. The husband had informed the wife that the wedding would not proceed if she did not sign the Agreement. The wife signed the Agreement, as well as a post-marriage binding financial agreement. Both were signed after she had received independent legal advice not to sign the agreements. The trial judge found that the agreements were signed due to duress and undue influence and set them aside. The husband appealed and the Full Court of the Family Court of Australia overturned the trial judge's decision and found the agreements to be binding. The wife appealed to the High Court of Australia. Chief Justice Kiefel and Justices Bell, Gageler, Keane and Edelman found that there had been actual undue influence. The High Court noted that "… the nature of agreements of this type means that their terms will usually be more favourable, and sometimes much more favourable, for one party. However, despite the usual financial imbalance in agreements of that nature, it can be an indicium of undue influence if a pre-nuptial or post-nuptial agreement is signed despite being known to be grossly unreasonable even for agreements of this nature. In other words, what the Full Court rightly recognised as the significant gap between [the wife's] understanding of [her legal practitioner's] strong advice not to sign the "entirely inappropriate" agreement and [the wife's] actions in signing the agreement was capable of being a circumstance relevant to whether an inference should be drawn of undue influence." The High Court noted that "the vitiating factor of duress focuses upon the effect of a particular type of pressure on the person seeking to set aside the transaction" citing *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267 at 289 per Kiefel J, wherein Lindgren J agreed that "it does not require that the person's will be overborne. Nor does it require that the pressure be such as to deprive the person of any free agency or ability to decide. The person subjected to duress is usually able to assess alternatives and to make a choice. The person submits to the demand knowing "only too well" what he or she is doing… As Holmes J said in *Union Pacific Railroad Co v Public Service Commission of Missouri* (1918) 248 US 67 at 70: "it always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."
46. The High Court went on to state [at paragraph 30]: "in *Allcard v Skinner* (1887) 36 Ch D 145 at 183, Lindley LJ said that: "no Court has ever attempted to define undue influence". One reason for the difficulty of defining undue influence is that the label "undue influence" has

been used to mean different things. It has been used to include abuse of confidence, misrepresentation, and the pressure which amounts to common law duress. Each of those concepts is better seen as distinct. Nevertheless, the boundaries, particularly between undue influence and duress, are blurred. One reason why there is no clear distinction is that undue influence can arise from widely different sources, one of which is excessive pressure. Importantly, however, since pressure is only one of the many sources for the influence that one person can have over another, it is not necessary that the pressure which contributes to a conclusion of undue influence be characterised as illegitimate or improper."

47. The High Court stated that one method to prove the existence of undue influence is by "direct evidence of the circumstances of the particular transaction." The other is by presumption. The High Court stated that a presumption "arises where common experience is that the existence of one fact means that another fact also exists" (*Calverley v Green* (1984) 155 CLR 242 at 264 per Murphy J) and that "common experience gives rise to a presumption that a transaction was not the exercise of a person's free will if (i) the person is proved to be in a particular relationship, and (ii) the transaction is one, commonly involving a "substantial benefit" to another, which cannot be explained by "ordinary motives", or "is not readily explicable by the relationship of the parties.""
48. Although the classes of presumption are not closed, in *Johnson v Buttress* (1936) 56 CLR 113 Latham CJ described the relationships that could give rise to the presumption as including parent and child, guardian and ward, trustee and beneficiary, solicitor and client, physician and patient, and cases of religious influence … the presumption can also be raised by proof that the history of the particular relationship involved one party occupying a similar position of ascendency or influence, and the other a corresponding position of dependency or trust (*Johnson v Buttress* at 134-135 per Dixon J). In either case, the presumption is rebuttable by the other party proving that the particular transaction or transfer, in its particular circumstances, was nevertheless the result of the weaker party's free will (*Spong v Spong* (1914) *18 CLR 544* at 549 per Griffith CJ).
49. The High Court noted that: "common experience today of the wide variety of circumstances in which two people can become engaged to marry negates any conclusion that a relationship of fiancé and fiancée should give rise to a presumption that either person substantially subordinates his or her free will to the other."
50. The High Court found that there was no presumption of undue influence based on the relationship itself, however was satisfied in the circumstances of the transaction itself, there was actual undue influence.

51. In terms of unconscionable conduct, the High Court stated: "There was no controversy on this appeal concerning the principles of unconscionable conduct in equity. Those principles were recently restated by this Court in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392. A conclusion of unconscionable conduct requires the innocent party to be subject to a special disadvantage "which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests" (*Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462 per Mason J). The other party must also unconscientiously take advantage of that special disadvantage (*Kakavas* at 398 [6]). This has been variously described as requiring "victimisation" (*Kakavas* at 401 [18], 402 [22], 403 [26], 439-440 [161]), "unconscientious conduct" (*Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 64 [15]), or "exploitation" (*Kakavas* at 439-440 [161]). Before there can be a finding of unconscientious taking of advantage, it is also generally necessary that the other party knew or ought to have known of the existence and effect of the special disadvantage (*Amadio* at 462 per Mason J)."
52. The High Court went on to state that although undue influence and unconscionable conduct will overlap, they have distinct spheres of operation.
53. In that regard, the finding of undue influence may give rise to a special disadvantage but there are also other circumstances of special disadvantage which would exist without establishing undue influence. Further, undue influence does not always require pressure from one party which might amount to victimisation or exploitation.
54. The High Court concluded that "the findings by the primary judge that [the wife] was subject to undue influence – powerless, with what she saw as no choice but to enter the agreements – point inevitably to the conclusion that she was subject to a special disadvantage in her entry into the agreements. [The wife's] special disadvantage was known to [the husband]. Her special disadvantage had been, in part, created by him. He created the urgency with which the pre-nuptial agreement was required to be signed and the haste surrounding the post-nuptial agreement and the advice upon it. While [the wife] knew [the husband] required her acknowledgment that his death would not result in her receiving a windfall inheritance at the expense of his children, she had no reason to anticipate an intention on his part to insist upon terms of marriage that were as unreasonable as those contained in the agreements. Further, [the wife] and her family members had been brought to Australia for the wedding by [the husband] and his ultimatum was not accompanied by any offer to assist them to return home. These matters increased the pressure which contributed to the substantial subordination of [the wife's] free will in relation to the

agreements. [The husband] took advantage of [the wife's] vulnerability to obtain agreements which, on [the wife's lawyers] uncontested assessment, were entirely inappropriate and wholly inadequate. Even within that class of agreement, the agreements which [the wife] signed involved "gross inequality" (119).

55. Accordingly, the High Court held, that the agreements were voidable. Kiefel CJ and Bell, Gageler, Keane and Edelman JJ held that there was undue influence and unconscionable conduct. Justice Nettle held that there was unconscionable conduct. Justice Gordon held that there had been unconscionable conduct but also expressly concluded that there had been no undue influence. There was, therefore, no error in the primary judge's conclusion that the agreements should be set aside.
56. Accordingly, for agreements to have the best chance of being enforced they should be reasonable if not generous and provide more than reasonable time for consideration and other (including accounting) advice to be obtained.
57. Finally, the Act requires a person who is the subject of property proceedings to provide full and frank disclosure of all financial interests, including assets, liabilities and financial resources regardless of where they are located. The Court has powers to make property settlement orders that deal with assets that are located overseas (pursuant to s.31(2) of the Act, which states "the jurisdiction of the Family Court may be exercised in relation to persons or things outside Australia and the territories"). Clearly, any person seeking a property settlement in an Australian Court with overseas property/assets/trusts should seek to obtain a property agreement in the country where that property/asset/trust is situated.

Judge Dale Kemp
Federal Circuit and Family Court of Australia