

SETTING ASIDE A PROPERTY ORDER FOR DURESS

For separated couples, when emotions are high and speedy outcomes are wanted, parties can often feel pressured by their former partners to compromise or give in and sign off on proposed arrangements. The question that then arises is - how far does this pressure go? Does it go far enough to constitute duress and therefore effect the validity of an agreement made between the parties?

THE LAW:

Generally, the law provides that, merely being pressured by a party is not enough, but it can be made out if the following requirements are satisfied:

- the pressure is used by, or on behalf of, one person in relation to a transaction
- the pressure is illegitimate - whether it consists of unlawful threats or amounts to unconscionable conduct
- the pressure causes, or contributes to, the innocent party's consent to the transaction, and
- the consent is reasonable in the circumstances (i.e. there is no reasonable alternative but to submit)

RECENT CASE:

The Court recently determined a case where the Wife applied for property settlement Orders to be set aside on the following grounds:

1. A 'miscarriage of justice' by reason of duress when signing the Consent Orders;
2. Poor or incompetent legal representation; and
3. The general group of 'any other circumstances' the Court may consider relevant when determining whether an Order should be set aside.

THE FACTS:

- The parties were married for 17 years and there were 3 children of the relationship aged 20, 19 and 17 (two children lived with the Husband and the other with the Wife).
- The Wife alleged:
 - she was subjected to various and significant acts of violence during the marriage involving, among other things, "guns and other menaces"; and
 - she had been stalked by the Husband (post-separation) and the Husband had regularly telephoned and text-messaged her abusively; and
 - her van had been egged.
- The Wife was seeking medical treatment for anxiety and related conditions. Medical records tendered in Court made frequent reference to the Husband's 'rage' and the Wife's fear.
- When signing the Consent Orders, the Wife's solicitor told her that she should consult someone with family law litigation experience, as it was not his area of expertise.

- There was dispute regarding various figures, however it was established that the Consent Orders provided for the Wife to receive between 10.2% and 14.6% of the total asset pool.

CONCLUSIONS

- "Fairness of the Order itself is not the sole criteria by which the Court exercises its discretion to set aside Orders.
- The duress must have been effective at the time the agreement was signed. Pressure exerted in the past, which has been removed, is insufficient.
- The Wife did not make out the ground for duress. However, the telephone calls and text messages constituted "unconscionable conduct" where both parties were legally represented and there was no need for the Husband to speak to the Wife.
- The advice from the solicitor was "less than fulsome and appropriate in the circumstances".
- The percentage division of assets was disproportionate in light of the length of the relationship.
- The Court found that the combination of relevant factors brought about a miscarriage of justice sufficient to set aside the Order.

ORDERS:

- The Wife's Application to set aside the Orders was successful and the parties were Ordered to provide updated sworn financial statements and attend a Conciliation Conference to try and renegotiate matters.