

# THE BUSINESS OF PRENUPTIALS?

June, 2004

## **PRENUPTIAL AGREEMENTS ARE PERSONAL RELATIONSHIP AGREEMENTS BUILT ON COMMERCIAL CONTRACTS. THEY ARE COMING INTO VOGUE IN QUEENSLAND, BUT HOW DO THEY WORK AND ARE THEY REALLY NECESSARY?**

What's love got to do with it?" crooned Tina Turner in her popular hit song. More and more, it seems, love has less to do with it.

In the last four years, the law with respect to property determination in marriages and defacto relationships has made a collective lurch into uncharted waters.

Outside of the United States, the "Prenuptial Agreement" and its assorted cousins do exist, but it has only been in recent time that the law in Australia has been amended to recognise these agreements as binding. These documents at present seem to be for people with a heightened interest in protecting their pre-relationship assets, perhaps in the event of untimely death or early separation.

The most obvious person seeking this arrangement is the mature person with a partner. Usually he - , but sometimes she - seeks to protect the assets accumulated during the first marriage or defacto relationship, for the sake of the children of the first relationship. The pain of the first marriage property split is often the trigger to seek legal advice before re-partnering, to avoid a repeat performance.

Almost as prevalent, however, is the client who has accumulated significant assets before settling down - the 30-something single. Parents who have amassed substantial assets, often a family business including trust entitlements for their children, also encourage their young adults to consider protecting their assets before committing to a long-term relationship or marriage.

### **NEW LEGISLATION**

With the new legislation that has commenced in recent years, the legal gap between the law governing the property split of a relationship, between a man and a woman who live either defacto or married, is narrowing.

Property division in marriage is regulated by the *Family Law Act*. Property division in defacto relationships in Queensland is regulated by the *Property Law Amendment Act*, (but only for couples who separated before 1 March, 2009, defacto couples who separate after that date come within the scope of the Family Law Act).

On December 27, 2000, the *Family Law Act* was amended to introduce Binding Financial Agreements (BFAs). These agreements can be made before or during marriage or after separation.

The BFA is a powerful document for the protection of assets. Once certified by lawyers acting for both parties, the jurisdiction of the Family Court is ousted except for the ability of the Court to enforce the agreements or set them aside in very limited circumstances, including fraud or unconscionable conduct.

The Court does not scrutinise BFAs when they are made, to ensure they are just and equitable. There is also no registration process for them.

The purpose for BFAs are endless, including to specifically address spouse maintenance, superannuation or even requiring compulsory mediation and arbitration of disputes.

On December 21, 1999, the *Queensland Property Law Act* was amended. This legislation provided a definition for a defacto relationship and also guidance as to how defacto property division should be effected. It also introduced Recognised Agreements (RAs) for defacto couples. (This legislation only applies to defacto couples who separate before 1 March, 2009.)

The RAs are similar to BFAs in that they can be completed before and during a relationship or after separation. They also attract stamp duty transfer relief, but not capital gains tax (CGT) rollover relief. However, RAs are unable to provide for splitting superannuation or spouse maintenance.

(Warning: Anyone who has entered a Recognised Cohabitation Agreement prior to 1 March, 2009 should get Specialist Family Law advice regarding the adequacy of that document to continue to be enforceable under the Family Law Act, post the 1 March 2009 amendments.)

So, Prenuptial Agreements and its various hybrid forms do exist and, if done correctly, they are enforceable. While there is a significant section of the community who would greatly benefit from the use of such agreements, they are usually complex and are not for everyone.