Gender duress in marital agreements: an Australian case study

Marital agreements are not yet part of English cultural life. But undoubtedly family lawyers are now being increasingly asked to draft them. For many of us, our continued anxiety and worry is the pressure put on the financially weaker party, often although not always the wife, to enter into an agreement which is less good than relying on the law. Sometimes it can be very disadvantageous.

In the months leading up to the intended wedding, very subtle and sometimes quite explicit pressure is put on the financially weaker party to enter into the agreement. At its most extreme, the wedding would not go ahead unless the agreement was entered into. How can the law put in place an appropriate balance between the freedom of adults to enter into contractual arrangements and opt out of the law on the one hand and the need to protect financially weaker parties from particular duress on the other hand?

This was highlighted in the leading English Supreme Court case of *Radmacher*, which now sets out the law on marital agreements in England and Wales. In a dissenting judgement, Baroness Hale expressed real concern about the impact of these agreements on women. She stated that very often the woman loses out by the agreement in contrast to what would occur on divorce.

The issue was faced recently by the Full Court of Australia, the equivalent of the English Court of Appeal, in a fairly classic instance of pressure to sign a marital agreement.

The decision is *Kennedy v Thorne* (2016) FamCAFC 189. The parties met abroad where the wife lived and married a year later in Australia. He had assets of $18 million with three adult children of previous relationships whom he intended to bequeath his assets. He was 67 and she was 36.

There were two marital agreements. At the time of the first, before the marriage, the wife was legally advised that it was "*no good and should not be signed*". At the time of the second, after the marriage, the lawyers had become even more stronger in their advice and they said it was "*terrible and should not be signed*". No equivocation here! Moreover it was clear that if the wife did not sign, there would be no wedding.

The distinctive features relied on to establish duress included the following

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the husband said throughout he would provide for her after they married;

- she knew she would have to sign a document before marriage acknowledging the wealth was his and would go to his children;
- the wife was financially and emotionally dependent upon him and only in Australia on a limited Visa;
- the husband arranged the appointment for the wife with the lawyer before the marriage;
- she knew the wedding would not go ahead if she did not sign;
- her family had arrived in Australia for the wedding so there was family pressure for it to go ahead;
- the husband drove the wife and her sister to the meeting with the lawyer;
- it was only at the meeting that the wife became aware for the first time of the finances of the husband and the impact of the settlement;
- the lawyer advised against signing;
- this advice was given orally and in writing;
- despite her limited English, it was found she understood both the agreement and the advice;
- she signed the agreement and the wedding went ahead;
- at the time of the post marriage agreement, she was still financially dependent upon the husband;
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on the second occasion she saw the same solicitor and had the same advice and still signed the agreement.

There was a first instance hearing, during which the husband passed away and the matter proceeded with his trustees. The wife won at first instance and lost on appeal.

The Full Court stated "*the correct test is whether there is "threatened or actual unlawful conduct*." "*There needed to be a finding that the "pressure" was "illegitimate" or "unlawful."* Further it said "*it is beyond doubt that "inequality of bargaining power" cannot establish duress.*" There was no evidence that she had been threatened or actual unlawful conduct. The wife had a concern about what would happen to her if he predeceased her and this was provided for in the agreement. But he had been made clear what would happen if there was a separation namely she would have no provision. Nevertheless she had gone ahead with the agreement.

In all the circumstances no duress was found and the agreements were enforceable.

These are difficult cases for all lawyers. In some countries a good number of lawyers refuse to undertake these cases. There are real practical steps needed by lawyers to make sure clients fully understand the advice being given, in good time before the marriage, with invariably another member of staff present at the meeting to corroborate advice given and the signature to the agreement.

These are difficult situations for many spouses intending to get married.

Australia is one of the most extreme countries in the world in strong preconditions to marital agreements. These requirements are to protect against duress and misrepresentation. Yet still these situations occur.

In stark contrast, across much of continental Europe, there is no expectation of any independent legal advice or disclosure before these agreements. There is significant difference in practice between common law and civil law legal traditions. Many lawyers in England are very anxious about those who enter into binding marital agreements in continental European countries and traditions where there is no separate legal advice and the possibility of duress is even higher.

For any intending to get married and faced with the demand of a harsh marital agreement, it is important to get specialist independent legal advice at the very earliest opportunity and then weigh up all of the issues, benefits and disadvantages, before signing.

Furthermore, whether you are the weaker or wealthier financial party be very wary of entering any pre-nuptial agreement unless you are sure you can live by its terms, not just now but in years and decades to come.

Although in England, such agreements are not binding, they carry increasing weight and as this Australian case demonstrates, they are ultimately contracts, where usual contractual principles apply and this can make them very hard to override. Relying on your partner, regardless of what the pre-nup says, "doing the right thing" or "understanding you can no longer afford what you had offered" are dangerous mantras for divorcing parties.

Therefore always take legal advice from a specialist family lawyer and where it is likely you will be living abroad, advice from that country or those countries can also be invaluable; as where you separate is most commonly where you divorce and where you marry is usually irrelevant. The laws around the world are also very different. For instance some countries do not recognise nuptial agreements at all, but that is not to say the rights offered without one are any better.

I am grateful to Nicholes Family Lawyers of Melbourne for bringing this case to my attention and more information can be found on their website http://nicholeslaw.com.au/ [2]. I'm also grateful to James McConville and Associates of Australia for the helpful information on their website http://www.mcconvill-associates.com/ [3].

David Hodson OBE is an English solicitor, mediator, arbitrator, an Australian qualified solicitor and barrister and a part time deputy family court judge in London (DDJ at the CFC). He is a co-founding partner of The International Family Law Group LLP, a specialist practice in Covent Garden, London, (www.iflg.uk.com [4]) serving the interests of international families and their children. He is editor and a primary author of The International Family Law Practice (Jordans), England's leading textbook on international family law. He is visiting Professor at the University of Law

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