

lawyer (who gave evidence via video link as he was in prison during the trial). The conference lasted for 20 minutes and the wife recalled the lawyer saying words to the effect that is she were his client he would tell her not to sign the agreement.

Judge Phipps held that in order have the agreement set aside on the basis of either duress or undue influence, the wife needed to establish that she was in a position of special disadvantage known to the husband. His Honour concluded that the husband had known of the special disadvantage due to the late production of a completed and signed agreement. Judge Phipps found that the wife's consent to the agreement was not independent and voluntary because in the wife's mind she had "no choice". His Honour held, therefore, that the Agreement had been made under duress and undue influence.

His Honour further went on to the equitable action of unconscionable conduct. His Honour found that the husband was the stronger party and had taken advantage of the wife, who had suffered a 'special disability' at the time of entering into the Agreement, being the financial and emotional pressure of cancelling a wedding so close to the date.

The Agreement was set aside.

This recent decision highlights the pitfalls that can arise from the

circumstances in which Binding Financial Agreements are entered into. If you are considering entering into a Binding Financial Agreement or seeking to have one set aside, we encourage you to obtain legal advice as early as possible.



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ATO Access to Court Documents

The recent judgement in *Commissioner of Taxation & Darling* has highlighted that documents provided in family law matters may be made available and used by the Australian Taxation Office (ATO) for its function of assessing and collecting tax.

Documents filed in family law matters are normally only available to the parties. However, rule 24.13(c) *Family Law Rules 2004* allows the court to give access to a person with a proper interest in either the case, or in information obtainable from the court record.

The ATO initially accessed and copied documents in the court file using their statutory coercive powers, without notification to the parties. The Full Court considered these actions were a contempt of court. It was prepared to overlook the contempt on this occasion, as a result of the subsequent approach taken by the ATO in not using the documents without leave of the Court.

Where a party accesses litigation documents,

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they are under an obligation to not use them for any purpose other than the litigation, unless the Court relieves them of that obligation. However the Court needed to determine whether a stranger to the litigation was bound by the obligation. It held that there was *'no reason to treat a stranger to the litigation any differently to someone with a direct connection (provided the stranger is aware the documents were generated in, or for the purposes of, litigation)'* The policy reason for this was to protect privacy and encourage frank disclosure in litigation.

The Court also held that the obligation did not yield to inconsistent statutory provisions unless there were clear words in the statute and there were no such words in this instance.

The Court then enquired as to whether the ATO should be relieved of the obligation. It held that such relief is only given in special circumstances, although this does not require extraordinary factors, and it was found sufficient for good reason to be shown.

As the ATO did not originally have access to the documents, and were seeking access as part of an audit of the parties, such special circumstances existed. In finding this the Court also confirmed that the ATO is able to conduct a "fishing" exercise in order to find information it may not know exists, which is

contrary to normal approach to disclosure.

Reasons for providing such access included:

- Performance of an important public duty.
- The audit was targeted and not random, although this may not be a necessary factor.
- The ATO is restricted in its use of the information, thus preventing them entering the public domain.
- The documents could be expected to be read in open court.

With regard to the disincentive to parties to providing full and frank disclosure, the Court pointed to the heavy obligation already placed on parties, underlined by the written undertaking they must provide to the court. It also highlighted that the disincentive already existed as *the Court can and does refer such matters to the authorities for investigation.*

As such parties should be aware that court documents may be accessed by the ATO. It is now clear though, that such access will only occur pursuant to rule 24.13(c) and that the parties will be notified. It is presumed that other bodies performing a public duty, which are able to demonstrate a proper interest, may also be given access.

1. The husband was not able to sell, transfer or deal with the shares in any way until they vested (other than receiving dividends);
2. The value of the shares could increase or decrease prior to the shares vesting (depending on market fluctuations);
3. In the event the husband resigned or had his employment terminated he would lose any shares that had not yet vested; and
4. There was no guarantee that the husband would remain employed by the company until all of the shares vested.

In light of those factors, the Court considered the unvested shares to be a financial resource at the husband's disposal and not an asset of the marriage available for distribution between the parties.

Parkes & Parkes: Binding Financial Agreements and Duress, Undue Influence and Unconscionable Conduct

In the recent case of *Parkes & Parkes* [2014] FCCA 102, Judge Phipps determined whether or not a Binding Financial Agreement could be set aside for reasons of duress, undue influence or unconscionable conduct. In this case, the parties entered into a Binding Financial Agreement in 2008. The Applicant wife accepted that all relevant requirements in order to make the agreement binding under the *Family Law Act* had been complied with. However, the wife argued that, in the context of entering into the Agreement, the husband had exercised duress or undue influence or had engaged in unconscionable conduct and therefore the Court should set the agreement aside.

The husband first raised the issue of entering into a prenuptial agreement on the evening of 12 November 2008, three days before the parties' wedding. The wife's parents had already spent \$40,000 on the wedding reception. The wife's evidence was that she had asked the husband what would happen if she did not sign the document he had already signed and the husband had responded that the wedding would be called off.

The following day the husband had arranged for the wife to see a

about your case.

Arbitration can be used in certain property and maintenance matters but cannot be used in parenting matters.

There are many advantages of Arbitration including:-

1. The parties will have control over the process, the method of Arbitration used, and the timing of the Arbitration;
2. The parties have the ability able to select the individual Arbitrator who will determine their case;
3. The delays in reaching a final resolution by way of Arbitration are likely to be more limited than if the matter proceeds through the traditional Court process;
4. Arbitration can be used to resolve a difficult aspect of a dispute in the Court process such as a valuation issue, to enable the parties to negotiate an overall settlement.

There are some disadvantages of Arbitration which may include that:

1. Delays may be increased if one or other party elects to seek a review of the Arbitrator's decision;
2. The Arbitrators may not have as much decision-making experience as a Judge;

3. The parties will have to pay the Arbitrator;

If you would like to discuss the possibility of Arbitration in your case, please do not hesitate to contact Nicholes Family Lawyers to discuss.

Employee Share Schemes

In recent times, we have seen an increase in the number of cases involving employee share scheme entitlements, being situations where people are either given or required to invest part of their income into shares of the company they work for. Often these shares will not 'vest' for some time and should the employee cease working for the company the unvested shares will be lost.

The recent decision of *Beklar & Beklar* [2013] saw the Court assess how unvested shares should be viewed within a family law context.

In that case, the husband had unvested shares in the company he was employed by. The husband argued that the shares were a financial resource that he may be able to access at a later date, whereas the wife argued that the unvested shares should be deemed property and form part of the asset pool.

When characterising the unvested shares, the Court had regard to various factors including:-

Taking lessons from Ledarn

Justice Cronin of the Family Court of Australia recently delivered a judgment in the matter of *Ledarn & Ledarn* [2013] FamCA 858 which covered various issues which can arise in family law matters.

Valuation of the parties' business

During the course of the parties' 29 year marriage, they established and developed a very profitable business. At the time of trial, the single expert valued the business at \$8,000,000.

The wife's position throughout the trial was that she believed the business to be worth \$10,000,000 and would retain the business based on that increased value.

The husband took the view that this was tantamount to bargaining and would distract the Court from its proper function of determining the parties matrimonial dispute.

Cronin J confirmed that it is the Court's responsibility to determine the value of assets having regard for the information available. The Court is not bound by the opinion of the single expert witness.

Cronin J observed that although it is common in family law matters to consider what a hypothetical prudent purchaser would pay for the business, it is also common practice to consider the value of an entity

to a party should they retain the business, particularly if the business will continue to operate after the relationship.

The Court accepted the evidence of the wife as a witness and took the view that the wife was in a better position to understand the business and how it operates. Further, the Court found that there was no prejudice to the husband, once it was determined that the wife would retain the business, to use determine the value of the business as being \$10,000,000.

Post separation spending and distributions

The husband raised concerns regarding the wife's post separation spending of matrimonial funds.

During the course of the litigation, the parties reached an agreement that neither party would withdraw more than a set amount per month. The wife exceeded that limit.

The husband sought to have those funds notionally 'added back' to the matrimonial asset pool.

The Court determined that it was not appropriate to 'add back' into the pool the sum of \$2,100,000, being the figure the Court determined the wife had inappropriately retained unilaterally above her monthly entitlement. The Court decided to make an adjustment in the husband's favour

when looking at the relevant s79 (the parties' respective contributions) and s75(2) factors in this case (colloquially known as the 'future needs' factors).

Accordingly, Cronin J awarded the Husband \$1,000,000 from the wife's share of the assets to have regard for the funds retained by the wife.

The correct approach to dividing matrimonial assets

Cronin J considered the impact of *Stanford v Stanford [2012] FamCAFC1* and confirmed that the first thing the Court must do is decide whether there needs to be an alteration of the parties' property interests on the basis of justice and equity.

In this case, the husband was declared bankrupt in or around 2003. As a result, the vast majority of the family wealth was either in the wife's name or in entities controlled by the wife. Cronin J found that it was just and equitable to make an adjustment of the parties' interests.

In order to determine the adjustment, Cronin J then went on to identify the parties' existing property interest and then consider the issues raised in s79 of the *Family Law Act*, which includes the contributions of the parties, and s75 being the parties respective future needs.

The Court's power to injunct the parties from competing

The wife sought, along with the retention of the business, an injunction stopping the husband from competing with the business.

The Court first considered whether it had the power to make such an injunction.

Cronin J agreed that the 'power of the Court to alter parties' interest is wide and discretionary' and, in accordance with s 114 of the *Family Law Act* the Court can make such Orders as it deems appropriate to adjust the parties property interests.

Although the Court decided not to grant the injunction in this case, it appears that the Court has the power to make such injunctions.

Sally Nicholes and Anna Parker appointed to Independent Children's Lawyer Panel

Nicholes Family Lawyers are excited to announce that both of our Partners, Sally Nicholes and Anna Parker, have been appointed as Independent Children's Lawyers (ICL).

The role of the ICL is a specialised role where lawyers are engaged by the Court to represent the interests of a child or children in a family law case to assist the Court in determining what Orders would best promote the child's best interests.

This role differs from the usual role of lawyer in that the ICL is not actually the child's representative and is not required to act on the child's instructions.

The Independent Children's Lawyer role includes :-

1. Forming an independent view, based on the evidence, of what is in the child's best interests;
2. Acting in the children's best interests throughout the proceedings;
3. If the ICL has formed a view of what course of action would be in the child's best interests, making submissions to the Court suggesting that such a course be adopted;
4. Acting impartially when dealing with the parties in the proceedings;
5. Ensuring that the child's views are before the court;
6. Making arrangements to have relevant reports regarding the child before the Court;
7. Minimising the trauma to

the child associated with the proceedings; and

8. Facilitating agreed resolutions where it is in the child's best interests to do so.

Both Sally and Anna are looking forward to being able to advocate for children in this new role and provide valuable assistance to the Court in complex children's matters.

Arbitration in Family Law Matters

We have recently reported on the One of the lesser-known alternative dispute resolution processes available in family law matters is Arbitration.

Arbitration is a process where parties to a dispute can present arguments and evidence to a single person, the Arbitrator, who makes a binding determination to finalise the dispute. The Arbitrator is not a Judge, but rather a solicitor or barrister with specialised training.

The trained Arbitrator will listen to the evidence or read the submissions and make a decision