

## Duress Trumps 'Belt and Braces' Pre-Nup

**Thorne & Kennedy [2015] FCCA 484** involved the all too common scenario of a looming wedding becoming conditional upon the signing of a pre-nuptial agreement. The pre-nuptial agreement was intended to protect the husband's \$25M of assets from the prospect of a future claim by his wife to be.

However this case's point of difference was the signing of a second agreement being a post-nuptial agreement soon after the wedding which both terminated and replicated the substantive terms of the previously signed pre-nuptial agreement.

This raised the question: Did the post-nuptial agreement overcome the obvious duress tainting its predecessor?

The pre-nuptial agreement the parties signed shortly before their wedding in 2007 included the following provision:

*that within 30 days of the signing of this Agreement, they will each enter into and sign another Agreement being a Financial Agreement pursuant to [section 90C](#) of The Act in terms similar to the terms provided herein.*

Shortly after their marriage, a post-nuptial agreement was duly signed by both parties and their respective lawyers.

In 2011 the husband signed a 'Separation Declaration', signalling his view that the marriage was over and the wife subsequently commenced proceedings seeking orders that the agreement be set aside for duress, a property settlement of \$1.1M and lump sum spousal maintenance of \$104K.

The husband sought an order that the post-nuptial agreement be declared binding arguing that in order to establish duress, there must be pressure the practical effect of which is compulsion or absence of choice.

The evidence indicated that the husband did not negotiate on the terms of the agreement. He did not offer to negotiate. He did not create any opportunities to negotiate. **Judge Demack** was satisfied that when the husband said there would be no wedding unless the agreement was signed, he also meant that the relationship would be over.

The Judge was also satisfied that the wife wanted a wedding. She loved the husband and wanted a child with him. She had changed her life to be with him. She was in Australia only in furtherance of their relationship. She brought no assets of substance to the relationship. If the relationship ended, she would have nothing. No job, no visa, no home, no place, no community. The consequences of the relationship ending would be very significant and serious. She would not be entitled to remain in Australia and she had nothing to return to elsewhere.

Every bargaining chip and all the power was in the husband's hands. He knew that the wife wanted to marry him. For her to do that, she needed to sign the document. He knew that she would do so. He didn't need to open up negotiations. He didn't need to consider offering something different, or more favourable.

That situation was something much more than inequality of financial position. The wife's powerlessness arose not only from her lack of financial equality, but also from her lack of permanent status in Australia, her reliance on the husband for all things, her emotional connectedness to their relationship and the prospect of motherhood, her emotional preparation for marriage, and the publicness of her upcoming marriage.

In those circumstances, the Judge concluded that the wife signed the first agreement under duress borne of inequality of bargaining power where there was no outcome available to her that was fair or reasonable.

The Judge assumed that the husband's lawyer's rationale for proposing the post-nuptial agreement was to allow the time pressure of the impending wedding to be released and for it to be signed without that element of duress.

However the Judge had no difficulty concluding that the time pressure was the only difference. All of the other inequalities remained. Accordingly the second agreement was simply a continuation of the first – the marriage would be at an end before it was begun if it wasn't signed. In those circumstances the second agreement was also signed by the wife under duress and was set aside with an order for costs against the husband.