

## PUT IT IN WRITING

Confirm family law financial agreement advice in writing.



Allegations of failing to adequately advise about family law financial agreements continue to be prevalent in family law claims and notifications received by LPLC. Providing a comprehensive letter of advice is good practice and makes it easy to refute the allegations and avoid being drawn into time consuming and costly litigation later on.

Pre-nuptial financial agreements are notoriously difficult to advise on for many reasons. Not the least of which is clients are often focusing on their current situation and emotions and not considering what might happen in the future. It's not surprising clients may struggle to remember the advice that was given when separation occurs many years later. Providing a comprehensive letter of advice confirming the oral advice given to the client is best practice as it will crystallise your oral advice and act as a reference for a client, and also serve as good evidence in the future if the advice is disputed.

### What to include — an example

In a recent notification the firm's letter of advice was a good example of what needed to be covered. It was a comprehensive seven-page letter which covered the following things.

- Details of the agreement including:
  - what property belonged to each party and how it will be dealt with in the event of separation
  - how debts will be dealt with
  - how separation is defined
  - what will happen with spousal maintenance
  - what happens if one of the parties dies.
- Details about the effect of the agreement on the client's rights including:
  - bold type statement that the parties were contracting out of their rights under the *Family Law Act* (Act) to have the property settlement and spousal maintenance determined in accordance with the Act
  - the process a court would take to determine property orders and that the agreement didn't allow for this
  - the obligation set out in s72 to provide for spousal maintenance and the factors to be considered in s75 of the Act and that the agreement didn't allow for this
  - the safety net maintenance provisions of s90F which still applied if one party was unable to support themselves after separation.
- Details of the advantages and disadvantages of entering into the agreement including:
  - the advantage of entering the agreement avoids unpleasant, expensive and protracted litigation in the event the parties separate
  - the disadvantage was that their client would be far worse off if they separated in the future compared to what they would

### TIPS

- Confirming letters of advice is essential risk management.
- Keep your advice files indefinitely.
- Keep electronic copies of advice letters.
- Ensure you can recover them in many years' time.

likely be awarded under the Act, based on the current financial position, and the reasons why.

- Potential for undue influence, unconscionable conduct or duress and that the client considered it to be fair and reasonable in the circumstances.
- Details about the grounds on which the agreement could be set aside
- Recommendation that the client should not sign the agreement.

### The circumstances of this matter

In this example the client was only going to receive approximately 1 per cent of current total assets owned by the parties. The practitioner assessed that this did not properly recognise their client's contributions to the relationship at the time and raised the concerns in conference with the client and recorded them in the

letter. When the client complained about the practitioner's costs and the practitioner's questions about potential duress the practitioner again pointed out the inequity of the agreement. The client responded that they understood the agreement was one-sided but felt it wouldn't be fair to fight for anything more and the decision was based on their own morals.

The practitioner was able to negotiate some minor changes to the agreement, but felt the version ultimately signed by the parties was very one sided. Several years later the parties separated and there was some indication that the practitioner may be blamed for an unfair settlement by not adequately advising the client. After producing the comprehensive letter of advice to the client's new lawyers, nothing further was heard about the matter.

### Risk management lessons

If you provide advice about financial agreements, having a good precedent letter of advice that can be easily customised for each matter is good practice. Make sure the precedent covers all the relevant advice and in particular covers the areas required by s90G, namely:

- the effect of the agreement on the rights of the client
- the advantages and disadvantages to the client, at the time that the advice was provided.

Ensure you send the letter of advice in each matter so you and the client have a record of the advice given.

Keep your advice file indefinitely and, if it is a hard copy, keep an electronic copy of at least the signed agreement and the letter(s) of advice.

Ensure any electronic records can be recovered and read in many years when your technology may have changed. ■

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