Focusing on **family law**

JULY 2017

LPLC LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Contents

Introduction

As family law clients are often preoccupied and in emotional distress, they require particular care.

It is an area where simple risk management steps can make a difference. The scope of the retainer needs to be carefully defined and documented. Documenting advice and instructions, and keeping the client informed about the progress of the matter as well as the costs also deserve special attention.

The new edition of *Focusing on family law* examines the most common family law claims we have seen over recent policy years and provides a practical checklist to help you minimise the risk of receiving a claim.

The causes of claims

The major underlying causes of claims in the family law area are:

- failure to manage the legal issues
- poor engagement management (clarifying and managing the retainer)
- communication failures.

If you are aware of common mistakes and why they occur, you will be in a better position to protect against claims.

Beware the unrepresented party

Most family law practitioners know they cannot act for both the husband and wife even where they seem to agree and need you only to 'do the paper work'.

Where practitioners get caught out is when an unrepresented party later alleges they thought the practitioner was acting for them as well as the practitioner's client and the practitioner failed to protect their interests.

Our recommendations

- ☑ Never act for more than one party.
- ☑ Tell the unrepresented party you are not acting for them and that the party should get independent advice. Confirm this in writing.
- ☑ Warn your client that an unrepresented party may attempt to undo the settlement later.

Financial agreements

Financial agreements under Part VIIIA and Part VIIIAB of the *Family Law Act 1975* (Cwlth) (the Act) pose a liability risk for the practitioners who draft or certify them. Any practitioner acting in this area needs to have a comprehensive understanding of the relevant provisions and to follow the current cases in this area. Appendix Two contains a list of current cases as at July 2017, however, the law in this area changes frequently so the list should not be considered final.

In most cases the agreements purport to exclude the jurisdiction of the Family Court and necessarily are complex documents that need to cover many contingencies. These agreements should only be drawn by practitioners with extensive experience and expertise in family law. Likewise, to advise a client on a financial agreement as required by section 90G or section 90UJ of the Act, practitioners need to have experience and expertise in family law.

Drafting agreements

Drafting errors occur in financial agreements entered into both before and after the commencement of a de facto relationship or marriage. The types of drafting errors we see for financial agreements are discussed in more detail on page 10 of this guide but below are some general comments.

Drafting agreements pursuant to section 90B of the Act, otherwise colloquially known as 'prenuptial agreements', are fraught with difficulty and carry higher risk because they necessarily involve considering and/or dealing with the future entitlements to property and maintenance, and need to take account of many variables.

The risks involved in drawing these agreements are highlighted by sections 90K and 90UM of the Act which provides that the agreement can be set aside for a variety of reasons including a material change in circumstances.

The most common issue we have seen in prenuptial agreement claims is the failure of agreements to take into account future children. Practitioners drawing these agreements need to obtain as much information as possible from their clients and discuss with them many possibilities for the future when considering the agreements' content.

Duress

The parties who give instructions for the agreement to be drawn are usually the ones who have the most to gain from the agreement and are most keen for the agreement to be signed. Practitioners should advise these clients of the impact duress may have on the enforceability of the agreement. Insisting that an agreement be signed shortly before a wedding in circumstances where the other party feels they have no choice may result in the agreement being set aside later. This is particularly problematic where one party's visa status in Australia is uncertain if the marriage does not proceed. Clients need to have clear written advice about this issue.

Advising on agreements

Practitioners asked to advise on financial agreements and sign the certificate/statement under section 90G or section 90UJ need to understand what is required of them. In recent years, we have had several claims where the practitioner advising the financially weaker party has not been a family lawyer and has mistakenly thought all they were required to do is advise on the contents of the agreement.

The test in section 90G or section 90UJ is much more than that. It is to give independent legal advice on:

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

The courts have said that this means giving the client advice about what rights they would have under the Act that they are giving up. Only experienced family law practitioners should be giving this advice as it requires a comprehensive understanding of the Act and case law of the Family Law Courts.

It is particularly difficult to give this advice for prenuptial agreements, even for experienced family law practitioners, as there are many unknowns, including:

- when the marriage will break down
- what assets will be accumulated during the marriage and who will have contributed to them
- whether there will be children of the marriage and how many.

In most cases LPLC recommends that practitioners don't advise on pre-nuptial agreements. Where practitioners do act, clients need to be given clear written advice that the agreement may never be binding as well as advice about the advantages and disadvantages of entering the agreement.

Record keeping

What is clear from the cases is that practitioners, if challenged as to the adequacy of their advice, are required to provide detail of the advice given. Practitioners often find it difficult to recall the detail of the advice they gave many years earlier. In the absence of written contemporaneous file notes and letters of advice, the courts are often unwilling to accept that adequate advice was given.

Only experienced family lawyers should give independent legal advice on financial agreements and even they should think very carefully about whether to advise on prenuptial agreements. They must keep contemporaneous file notes of the advice they gave and confirm that advice in writing. It is not enough to rely on the fact that a certificate was signed as evidence of the sufficiency of the advice given.

Technicalities

Prior to 4 January 2010 the courts generally took a strict view of the requirements of the Act relating to upholding financial agreements (see *Black v Black*). That position has been ameliorated by amendments that came into operation on 4 January 2010. The courts are required to uphold an agreement if satisfied that it would be unjust and inequitable not to do so. While this gives some relief for things like referring to the wrong sections in the agreement, it may not go so far as to cure inadequacies in the advice given. The Statement of Independent Legal Advice is *prima facie* evidence of compliance with the requirements of section 90G or section 90UJ to give legal advice, but if there is evidence to support the court doing so, the court is able to look behind the statements.

Our recommendations

Certifying financial agreements

- ☑ Don't act unless you are an experienced family lawyer.
- ☑ Open a file even if you did not draft the agreement.
- ☑ Have a face to face meeting with your client without the other party to discuss the agreement.
- ☑ Provide comprehensive advice to your client including:
  - » a clear statement about forgoing rights in the future by signing the agreement
  - » the advantages and disadvantages of entering into the agreement
  - » not entering into the agreement where the agreement is manifestly unfair for your client
  - » the importance of valuations.
- ☑ Advise your client about any amendments to the agreement made after your initial advice and how those amendments impact on your earlier advice.
- ☑ Make file notes of your meetings or discussions with the client and ensure you include:
  - » who was present
  - » the duration of the meeting
  - » a summary of your client's instructions and your advice to the client.
- ☑ Confirm your advice to your client in writing.

- ☑ Obtain a written acknowledgment from your client that they understood your explanation.
- ☑ Ensure the wording of the agreement and certificate reflects the requirements in section 90G or section 90UJ at the time the agreement is executed.
- ☑ Keep a copy of the financial agreement and your file indefinitely.
- ☑ Charge an appropriate fee for the work required.

Preparing agreements

- ☑ Don't act unless you are an experienced family lawyer.
- ☑ Don't act for both parties.
- ☑ Confirm in writing who you are and are not acting for.
- ☑ Explain carefully to your client:
  - » the importance of disclosure
  - » the importance of valuations
  - » the circumstances in which agreements will not be binding especially:
    - material change to circumstances
    - unconscionability
  - » the risks of insisting on signing close to the wedding date (possible duress).
- ☑ Make file notes of your meetings or discussions with the client and ensure you include:
  - » who was present
  - » the duration of the meeting
  - » a summary of your client's instructions and your advice to the client.
- ☑ Confirm your advice to your client in writing.
- ☑ Ensure the wording of the agreement and certificate reflects the requirements in section 90G or section 90UJ.
- ☑ Carefully check the agreement to ensure it complies with all of the client's instructions. In particular review the schedules and road test any formula. Where possible have someone else in your office review the agreement.
- ☑ Keep a copy of the financial agreement and your file indefinitely.

Child support

Child support is a difficult area governed by the overlapping provisions of the *Family Law Act 1975* (Cwlth) and the *Child Support (Assessment) Act 1989* (Cwlth). Claims arise when practitioners fail to grapple with the complexities and/or fail to manage the client's expectations relating to the degree of finality that can be achieved.

Common problems with child support agreements include:

- unclear drafting with the result that one party later contends the child support agreement did not operate as intended
- not applying for acceptance of a child support agreement by the Department of Health and Human Services – Child Support
- not spelling out in the child support agreement that a share of property transferred as part of the property settlement is to be credited against periodic child support obligations
- not advising the client that a child support agreement, even a binding child support agreement, is never final and is always subject to change if there is a change in circumstances of one of the parties.

Our recommendations

- ☑ Proof read the child support agreement to avoid ambiguity and ensure all issues have been addressed. Where possible have someone else review the wording with 'fresh eyes'.
- ☑ Ask the Department of Health and Human Services – Child Support to review the agreement before it is executed. This is a free service.
- ☑ Make an application for the child support agreement to be accepted by the child support agency. Remember, if it is not accepted, it is not enforceable.
- ☑ If there are non-periodic payments in the agreement, register the agreement with the Family Court.
- ☑ If the parties have agreed as part of the property settlement that a share of property is to be transferred to the other party as child support, ensure the child support agreement states this and that the annual assessed rate of child support is to be reduced by the annualised dollar value of that share of the property.

- ☑ Give a clear written warning to your client that it is not possible to achieve finality with a child support agreement and, if circumstances change, a new agreement or court orders may be required.
- ☑ If the parties have entered into a binding child support agreement, keep a copy of the agreement and your file until at least 12 months after the youngest child turns 18 years of age.
- ☑ Be clear in your advice to the client about the differences between the two types of child support agreements – a limited child support agreement and a binding child support agreement.

Problem areas

1 Drafting errors

Drafting errors occur in consent orders, financial agreements and child support agreements. The mistakes arise from:

- typographical errors, oversights or ambiguous wording coupled with failing to proofread or road test the document to ensure it says what was intended
- a lack of legal knowledge about what was required, especially for financial agreements, to ensure the agreements were binding
- failing to achieve what the client intended, either because the practitioner misunderstood the client or because there was inadequate communication with the client about what could be achieved.

Types of mistakes include:

- failing to allocate assets to the right person
- incorrect wording or formulae for apportionment of assets between parties
- using the wrong wording for financial agreements, especially reference to the wrong sections of the Act or the wrong legal advice requirement (these have changed several times)
- failing to state who pays tax or capital gains tax (CGT)
- failing to include maintenance in financial agreements
- failing to comply with the requirements of the Act to contract out of maintenance (sections 90E and 90F or 90UI and 90UJ)
- failing to spell out in the child support agreement that a share of property transferred as part of the property settlement was to be credited against periodic child support obligations.

EXAMPLES

Financial agreement – missed asset

The client gave his practitioner a spreadsheet of how the assets were to be divided between the parties. The spreadsheet showed a specific managed investment fund was to be transferred to him. The initial draft of the financial agreement did not refer to the fund and no one picked up the error despite there being four further drafts.

Orders not specific enough about payment of mortgage

The orders provided that the client was to take title to the family home and the former spouse was to continue to pay one of several mortgages. The orders were not specific about the amount to be paid and when; nor did they take into account how the liability was to be treated in the event that the client decided to sell the house. The house was sold and the former spouse stopped making payments.

Orders did not specify mortgage to be discharged

The client was to receive an unencumbered interest in the matrimonial home. The orders provided that if the former spouse could not discharge the mortgage over the matrimonial home, all nominated properties would be sold and the proceeds divided 60/40 in the client's favour. A dispute arose as to whether the matrimonial home was one of the nominated properties to be sold and there was no order requiring the former spouse to discharge the mortgage from the proceeds of sale of the nominated properties. The former spouse sold property but did not seek to discharge the mortgage of the matrimonial property, forcing the client to discharge the mortgage from her share of the sale proceeds.

Orders did not specify how property was to be transferred

The client was to receive a property owned by the former spouse's company. The client was concerned about stamp duty, and was advised that no stamp duty would be payable as the company would transfer the property to the former spouse who would then transfer it to the client as part of the property settlement. The orders stated that the former spouse 'do all things necessary to transfer' the property. The former spouse refused to have the property transferred into his name and arranged for the company to transfer the property to the client, making her liable to pay stamp duty.

Failure to determine CGT was payable

Consent orders provided that the former spouse was to transfer her interest in the family business to the client and the client was to indemnify the former spouse for all liabilities of the family business. The orders also provided that the main asset of the family business was to be sold and the proceeds divided between the parties. The practitioner did not turn her mind to the fact that the sale attracted CGT for which the client, under the terms of the consent orders, was solely responsible to pay.

Orders ambiguous on tax liability

At an interim hearing the court ordered the husband to pay the wife's $20,000 CGT liability. A court note on the orders stated that 'this payment be taken into account as part of the property pool in any final settlement'. At a later hearing, the same practitioner acted for the husband. After protracted negotiations, the parties signed consent orders for a final property settlement. However, the orders were silent as to whether final payment from husband to wife included the $20,000 already paid by him in CGT liability. The practitioner forgot to ensure that the consent orders reflected the interim tax payment already made.

Inadequate default provisions in orders

Consent orders provided that the husband would pay the wife half of her share of the property settlement immediately and the balance by yearly instalments. The husband defaulted on the instalments, sold the family farm and declared himself bankrupt. The consent orders had made inadequate provision for securing the husband's ongoing liability. An additional problem in this claim was the practitioner's failure to advise the wife to lodge a caveat over the property.

Our recommendations

- ☑ Take time to step back and consider any proposed orders or agreement terms. Where possible have someone else review the wording with 'fresh eyes'.
- ☑ Check that the wording achieves what the client wants. Ensure the wording will protect the client from the bad behaviour of the other party.
- ☑ Double check any schedules or spreadsheets to ensure all assets are properly dealt with.
- ☑ If you can't agree on wording with the other side that will completely protect your client, you need to explain the risks and consequences to the client and confirm it in writing.
- ☑ Ensure that each order states who is to act, what is to be done and when it is to be done.
- ☑ Include any necessary third parties, such as family companies, to ensure that the orders are enforceable.
- ☑ Consider the benefits and risks of dividing the proceeds of sale in percentage terms or giving your client a dollar amount. Usually percentage divisions work best so that both parties share in any windfall from a better than expected sale price. Of course, they will also share the risk of the sale price being less than expected. Dollar amounts can disadvantage a client where the sale is delayed or the time between trial and judgment is prolonged.

2 No or inadequate advice

This category of mistakes usually relates to the advice given about financial agreements. As discussed under the financial agreement section there are two issues.

- The practitioner failed to give the advice required by section 90G or section 90UJ of the Act, that is *'... the effect of the agreement on the rights of the party and the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement'*.
- The practitioner failed to keep adequate file notes of the advice they gave and failed to confirm that advice in writing. When later challenged in court, there was no written evidence to assist or support the practitioner's recall in the face of the client alleging no or inadequate advice was given.

EXAMPLE

No file notes and no recollection

The husband was referred to his practitioner by the wife's practitioner. The husband's practitioner met the husband at the wife's practitioner's office and gave advice about the financial agreement to the husband before the parties signed the agreement. The husband's practitioner had no file notes of the advice given, just ticks next to each clause on a draft copy of the agreement. The husband later alleged he received inadequate advice about the advantages and disadvantages of entering the agreement. His practitioner was unable to recall what advice he gave other than he went through each clause and discussed its meaning.

Our recommendations

See the recommendations on pages 6–7.

3 Failure to warn about ongoing financial obligations

These types of claims usually arise when the practitioner relies on the client's instructions and fails to investigate the client's circumstances or conduct adequate searches. They can also arise where the practitioner assumes the client understands an issue or thinks the issue, such as ongoing tax liabilities, is not part of the retainer. If there is potential for a CGT liability or an income tax liability arising, encourage the client to seek tax advice. A client may not be aware, for example, that CGT rollover relief for part or all of the principal residence may be lost if the parties are living separately.

EXAMPLES

No advice about CGT

The client took a transfer of an investment property under the property settlement and paid his wife an amount of money. The transfer received rollover relief in relation to CGT under the marriage breakdown provisions. The client later complained that he was not advised he would be liable for CGT when he eventually disposed of the property and if he had known he would have paid his wife less in the settlement.

Failure to ascertain client was a co-borrower

The consent orders provided that the former spouse indemnify the client for any partnership debts and remove her as a guarantor of the loans of the partnership. The practitioner failed to ascertain that the client was a co-borrower rather than a guarantor on business loans. Although the client had an indemnity from the former spouse, she nonetheless remained primarily liable for the loans.

Failure to ascertain second mortgage

A settlement was reached whereby the client received the matrimonial home and assumed responsibility for mortgage payments, and the former spouse took over the family business. The practitioner relied on instructions from the client that there was only one mortgage on the matrimonial home and did not conduct a title search which would have revealed that there was a second mortgage. When the existence of the second mortgage was discovered, the former spouse was asked to discharge it and refused, leaving the client with the additional liability.

Our recommendations

- ☑ Obtain your client's instructions to conduct comprehensive searches or make appropriate enquiries so consent orders or financial agreements may be framed with full knowledge of the liability position.
- ☑ Wherever possible, seek to have existing joint mortgages or loans refinanced.
- ☑ Where this is not possible, warn your client of their ongoing liability and confirm the warning in writing.
- ☑ Advise your client about CGT issues or refer the client to an accountant or tax lawyer if you are excluding that advice from your retainer.

4 Failure to protect the asset pool

Once a major source of claims, we have seen considerably fewer of these claims in recent years. The claims now mostly commonly arise from a failure to lodge a caveat over the former spouse's property or to respond to a notice to remove the caveat.

There are a number of other circumstances where this arises including the situations listed below.

- > There is confusion about the extent of the retainer. The practitioner is initially approached to deal with matters relating to children. Once resolved, everyone's attention then shifts to the property issues, by which time the former spouse has dissipated assets. The client alleges the practitioner failed to take steps to protect the assets such as lodging caveats over property and the practitioner denies being retained to handle the property settlement.
- > File notes are not made or written confirmation is not sent in respect of advice regarding the need to make a property application.
- > The client delays in making a decision to take action. In the meantime, the former spouse has dissipated the assets. The client blames the practitioner for the delay or alleges that no advice was given.
- > The mortgagee of property in the name of the former spouse is not notified of the client's interest and further funds are advanced to the former spouse, which are dissipated, reducing the equity in the property.

Our recommendations

- ☑ If the initial retainer only relates to child issues and not property matters, advise your client of the 12-month limitation period for making an application for property orders. This limitation period runs from the date on which the divorce order took effect or, in a de facto relationship, two years after separation.
- ☑ If you are instructed not to deal with property matters, advise your client that any delay in resolving property matters could result in property being dissipated. Keep a file note and confirm this advice in writing.
- ☑ Seek instructions to lodge a caveat as soon as possible if real property is involved and your client is not on title. Caution: caveats should only be lodged where your client has a legitimate caveatable interest. Evidence should be obtained to substantiate this, especially if a constructive trust is alleged. The definition of a caveatable interest is not the same in all states and territories.
- ☑ Act promptly when a notice to remove a caveat is received and obtain instructions to either withdraw the caveat or institute court proceedings to justify the caveat.
- ☑ Where the property is in the name of the former spouse and represents a significant asset of the marriage:
  - » seek formal written acknowledgement from the former spouse that they will not draw down further funds against the property or otherwise encumber it
  - » write to the mortgagee, including a copy of the acknowledgement if you receive one, and ask that the mortgagee agree it will not allow further funds to be drawn down against the property
  - » if the former spouse or mortgagee will not provide the above acknowledgement or agreement, consider applying to the court for an injunction preventing further funds being drawn down or other encumbrances being imposed on the property.
- ☑ Confirm all advice in writing and your client's response to it, particularly where your client has chosen not to take your advice and elected to accept the resultant risk.

5 Superannuation slip-ups

We have seen a surge in superannuation-related claims in the last few years. Some recent claims relate to orders that were made before amendments to Part VIIIB of the Act and involve drafting mistakes in orders. The other claims relate to a failure or delay in serving sealed orders on the trustee of the superannuation fund, resulting in the other spouse removing funds they were not entitled to.

Pensions in the payment phase are particularly difficult to advise on. This may be an area where claims become more common. Be aware of the recent cases of *Surridge & Surridge* [2017] FamCAFC 10 and *Campbell v Superannuation Complaints Tribunal* [2017] FCA 808.

For more information on superannuation splitting under Part VIIIB, see Appendix One.

EXAMPLE

Not serving sealed orders

Final orders were agreed by the parties and involved the wife receiving an entitlement to half of the husband's superannuation. The orders required the wife's practitioner serve a sealed copy of the orders on the superannuation trustee. Inexplicably this was overlooked. Three and a half years later when the wife sought to recover the superannuation after hearing that the husband retired, she discovered that the husband had withdrawn all the funds.

Our recommendations

- ☑ Take comprehensive instructions on the employment background of the parties and possible superannuation entitlements.
- ☑ Act promptly when requesting information concerning the member spouse's interest from the trustee of the superannuation fund.
- ☑ Obtain a professional valuation of the superannuation interest based on the information received from the trustee.
- ☑ If appropriate, flag the interest in the former spouse's superannuation by way of a superannuation agreement or court order.
- ☑ Develop a file management system to ensure original sealed orders are served promptly on superannuation trustees. Do not serve unsealed orders.
- ☑ Read the completed Superannuation Information Form carefully to check the type of fund, whether the interest is splittable and any other important information about the superannuation interest. If necessary, obtain advice from an expert in superannuation as to the value of the interest or other matters.

6 Delay in lodging applications, orders or agreements

Delay in lodging applications, orders or agreements is a common error in family law. Like in any litigation, the delay in lodging applications can have significant impact on the rights of the parties. It usually occurs when a practitioner fails to tell their client of the time limits to bring proceedings, most commonly for de facto property disputes where there is only two years from separation. The client then takes too long to decide what to do and instruct their lawyer.

The delay in lodging orders or child support agreements often occur due to oversight or improper systems in the office, especially where orders are returned requiring amendment.

EXAMPLES

De facto time limit lapsed

The client sought advice about property settlement after separating from his de facto partner. Initially the practitioner lodged caveats on the client's behalf but then didn't hear from him for over two years. By this time, it was too late to issue proceedings as de facto property proceedings must be issued within two years of separation. The client alleged the practitioner never advised him of this limitation timeframe.

Vague and uncertain orders

The husband and wife signed a child support agreement drafted by the wife's practitioner, after the parties themselves had agreed the terms. The agreement was lodged with the child support agency (CSA) by the wife's practitioner. The CSA returned the agreement to the wife's practitioner and advised that the agreement could not be registered as the parties' obligations were unclear. The practitioner handling the matter attempted to contact the CSA and left various messages before going on leave. While another practitioner in the office did speak to a CSA representative, the matter ultimately went nowhere.

When the wife sought to enforce the orders, the husband refused, and the failure to register the agreement came to light. The husband refused to negotiate on clearer orders.

Our recommendations

- ☑ In your initial meeting with a de facto client, raise with them the two-year limitation period to commence property proceedings.
- ☑ Ensure your precedent retainer letter for de facto matters clearly sets out the two-year limitation period.
- ☑ Record the two-year limitation period in your diary system and follow up any clients that have not instructed you to issue proceedings as the time limit approaches.
- ☑ Ensure your matter checklist deals with who will lodge the child support agreement.
- ☑ Ensure your file closing checklist includes checking the child support agreement has been lodged with the CSA.

7 Failure to obtain a valuation

In recent years, these claims have involved the failure to obtain valuations of businesses. They often arise in the following circumstances.

- The practitioner recommends a valuation be obtained but the client says they cannot afford to obtain a valuation or do not want to 'rock the boat' and simply accepts the value suggested by the former spouse.
- The practitioner simply does not discuss the issue of a valuation or considers it to be unnecessary, particularly where financial statements are available for businesses.
- The practitioner is consulted at the last minute by a formerly unrepresented party for independent advice on a proposed property settlement and the client insists a valuation is unnecessary.

Our recommendations

- ☑ Raise the issue of a valuation with your client when real estate or businesses are involved.
- ☑ If your client refuses to obtain a valuation, you should advise that the consequence of not obtaining a valuation is that property may be worth more or less than your client thinks.
- ☑ Confirm your advice and your client's instructions in writing.

8 Sue for costs and receive a counterclaim for negligence

When family law practitioners sue for costs, they often find the client's response is to issue a counterclaim alleging negligence on the practitioner's part.

Counterclaims may be cynically considered as a client's attempt to avoid paying the bill, but can sometimes reflect the client's dissatisfaction with the way they have been treated by the practitioner. Typically, the counterclaims reflect a breakdown in communication between practitioner and client. Some clients feel they have not been kept informed, or not treated with respect or courtesy.

Clear and regular communication throughout the conduct of the matter with clients goes a long way toward managing the client's expectations about the outcome and the cost. This can minimise the risk of a disgruntled client making a claim against you.

It is always worth reviewing the file before suing for your costs to assess the likelihood of a claim. Whether or not the client's allegations have merit, the process of a client making a counterclaim slows down the debt recovery process and takes up your time in dealing with LPLC and defending the claim.

EXAMPLES

The disaffected client

The client was a difficult elderly man, aggrieved at the prospect of dividing his considerable assets with his wife of 20 years. Throughout the retainer his instructions were changeable and sometimes incomplete. The client's ultimate dissatisfaction stemmed from consent orders he claimed to have felt pressured to sign. The day after he signed he left a message for his practitioner to call him back about the possibility of appealing the orders. The next day the practitioner sent him a copy of the sealed orders and noted the steps the client needed to take to comply with them. The practitioner did not address appeal prospects as he was fed up with the client. The practitioner's response 'to ignore the client's enquiries about an appeal' fuelled the client's discontent and the sense that his case was not being taken seriously. The client consulted other practitioners, seeking to have the orders set aside. The practitioners sued for costs and received a counterclaim in reply.

Costs blowout

The client consulted a practitioner in a desperate state about an 'unfair' property outcome delivered by judgment interstate. The practitioner assured the client he had good appeal prospects, which he did. The retainer followed a stormy route, with erratic instructions from the client. He was particularly anxious about the progress of his appeal and frustrated about delays in the appeal process. The practitioner came close to terminating the retainer because the client was so difficult. Although the appeal was ultimately a success and halved the client's liability to his former wife, the accrued appeal costs eclipsed any real gain. The client was incensed by the outcome and declined to pay his practitioner's account. When the practitioner sued for costs he was met with a counterclaim for negligence.

Our recommendations

- ☑ Have clear criteria for taking on a new client including their capacity to pay your fees. Consider if there are any signs at the beginning of the matter that suggest this client will be difficult to manage.
- ☑ Be clear at the start of the retainer about the likely cost of the matter.
- ☑ Keep your client informed about how the matter is progressing and, in particular, review and update cost estimates throughout the matter in accordance with the requirements of the Legal Profession Uniform Law.
- ☑ Send periodic or monthly bills as they are a good way of informing the client about the amount of work being done on the file, progress in the matter and the accruing costs. It is also a useful way of managing the client's expectations about costs so there are no nasty cost 'surprises' for the client at the end.
- ☑ If the client's behaviour is causing the costs to increase, make that clear to the client in person and in writing.
- ☑ Be clear in your verbal and written advice to the client that costs incurred need to be proportionate to the total property pool and actions taken should be proportionate to the potential gain from the action
- ☑ Consider the possibility of any allegations of negligence before issuing cost recovery proceedings and weigh up the costs involved.

9 Dissatisfied litigant

This category of mistakes is new in the family law area but it is similar to the types of claims we see in commercial litigation.

The complaints include:

- the client being unhappy with settlement and subsequently alleging, for example, the valuation was inaccurate because the valuer had not been briefed properly
- allegations that the practitioner failing to prepare the matter adequately for trial
- the client having to pay the costs of an adjournment and a general complaint that the costs incurred by the client's own practitioner were too high.

These claims are often made where the client refuses to give adequate instructions right up to the door of the court or fails to provide funds to allow a barrister to be briefed to prepare for trial in a timely manner. It is often exacerbated by the firm not keeping the client informed about what is happening in the matter, why delays are occurring and how the costs are mounting.

EXAMPLE

Unrealistic client

The client had unrealistic expectations relating to his custody dispute and refused to take his practitioner's or barrister's advice. The practitioner and barrister say their retainers were terminated the day before the trial. The client represented himself at trial and lost. He subsequently brought an application in VCAT to recover money paid into the firm's trust account alleging the practitioner and barrister had not prepared the matter for trail.

Our recommendations

- ☑ Warn your client about the specific risks of litigation.
- ☑ Advise your client in writing of the cost consequences of winning or losing.
- ☑ Advise your client about the progress of the trial and, if necessary, make settlement recommendations.
- ☑ Confirm your advice and your client's instructions in writing, particularly where an offer is made and rejected against your advice.
- ☑ If you require costs before preparing for trial, ensure you receive them well in advance.
- ☑ Have a clear policy that you will stop acting if the client does not pay when required to in the lead up to trial. Ensure the client understands the consequences of not paying.

10 Office administration mistakes

This is a new category of mistakes that often arises from office management and attention to detail issues. Examples include:

- > sending important information to the client at the wrong email address
- > disbursing the incorrect amount of money to the parties because no one checked the orders or financial agreement
- > leaving money in the firm's trust account where it did not earn interest without seeking the client's instructions to do so.

EXAMPLE

Disbursing wrong amount

The parties had agreed a property settlement of 70/30 split in favour of the husband. The asset pool comprised the matrimonial home and a car.

The practitioner for the wife disbursed the proceeds of the sale of the home with 70 per cent to the husband and 30 per cent to the wife forgetting that the wife retained the car. The husband realised the mistake and sued the practitioner for the shortfall.

Our recommendations

- ☑ Include in your checklist whether the issue of investing any money in an interest-bearing account has been raised with the client and undertaken.
- ☑ Check email addresses are correct and confidential. When important information is to be passed on to clients, consider contacting them by telephone as well.
- ☑ Always refer to orders before disbursing any money to ensure the correct amount is distributed.
- ☑ When receiving email instructions from clients about where to send funds always confirm those instructions orally as we have seen examples of email hacking where money has been directed to fraudsters' accounts. See the *Cyber security* section of our website.

LPLC Family Law Checklist

While the following checklist is **not** exhaustive, it does draw attention to the key areas many practitioners overlook in family law matters. The checklist may be photocopied for ongoing use.

Client:

Matter:

General:

- ☐ Have clear criteria for taking on a new client, including their capacity to pay your fees. Consider if there are any signs at the beginning that suggest this client will be difficult to manage.
- ☐ Be clear at the start of the retainer about the likely cost of the matter.
- ☐ If the initial retainer only relates to child issues and not property matters, advise your client of the 12-month limitation period for making an application for property orders, which runs from the date of the divorce order or in relation to de facto relationships, two years after the date of separation.
- ☐ If you are instructed not to deal with property matters, advise your client that any delay in resolving property matters could result in property being dissipated. Keep a file note and confirm this advice in writing.
- ☐ In your initial meeting with a client, raise with them the two-year limitation period to commence property proceedings for de facto clients or one year after the divorce order for married clients.
- ☐ Make a comprehensive file note of the initial conference with your client.
- ☐ Obtain clear instructions as to the basis on which you are to proceed, particularly where your client seeks to limit your retainer or fails to take your advice.
- ☐ Confirm your retainer and your advice in writing, particularly where the retainer is limited, setting out:
  - any areas where your client has chosen not to take your advice and elected to accept the resultant risk (eg. not issuing a property application or obtaining independent verification of property values)
  - the limitation period in relation to property matters, whether the parties were married or in a de facto relationship.
- ☐ Do not act for both parties. Write to the unrepresented party, explaining that you are not acting for them and recommending they obtain independent advice.
- ☐ Document all attendances and meetings with your client and other relevant parties.

- ☐ Record the appropriate limitation period for instituting property and maintenance proceedings in your diary system and follow up any clients that have not instructed you to issue proceedings as the time limit approaches.
- ☐ Ensure your matter checklist deals with:
  - who will lodge the child support agreement with the Department of Health and Human Services – Child Support and, if appropriate, register it with the Family Court
  - whether the issue of investing any money in an interest-bearing account has been raised with the client and undertaken.
- ☐ Keep your client informed about how the matter is progressing and, in particular, about the level of costs throughout the matter in accordance with the requirements of the Legal Profession Uniform Law.
- ☐ Check email addresses are correct and confidential. When important information is to be passed on to clients, consider contacting them by telephone as well.
- ☐ Send periodic or monthly bills, as they are a good way of informing the client about the amount of work being done on the file, progress in the matter and the accruing costs. It is also a useful way of managing the client's expectations about costs so there are no nasty cost surprises for the client at the end.
- ☐ Where your client is causing delay or an increase in the costs, set out in writing the consequences of their behaviour including any relevant time limit(s).
- ☐ Ensure your file notes:
  - are dated
  - identify the author
  - record the duration of the attendance
  - record who was present or on the telephone
  - are legible to you and someone else
  - record the substance of the advice given and the client's response/instructions
  - are a note to the file rather than a note to yourself.
- ☐ Consider the possibility of any allegations of negligence before issuing cost recovery proceedings and weigh up the costs involved.
- ☐ Ensure your file closing checklist includes checking the child support agreement has be lodged with the Child Support Agency.

Specific:

- ☐ Obtain your client's instructions to conduct comprehensive searches and appropriate enquiries so any application or consent order may be framed with full knowledge of the liability position.
- ☐ Wherever possible, have joint mortgages or loans refinanced and warn your client in writing of the risks of not doing so.
- ☐ Think through the consequences of consent orders.
- ☐ Make application promptly to the Department of Health and Human Services – Child Support for acceptance of the child support agreement.
- ☐ Where the parties intend that a share of the property transferred as part of the property settlement is to be credited against periodic child support obligations, spell that out in the child support agreement.
- ☐ Advise your client that a child support agreement is not final and may be varied by a new agreement or court order, if circumstances change.
- ☐ When advising on spousal maintenance, address the circumstances in which periodic payments may stop and the grounds upon which capitalised maintenance may be revisited.

Running litigation

- ☐ Warn your client about the specific risks of litigation.
- ☐ Advise your client in writing of the cost consequences of winning or losing.
- ☐ Advise your client about the progress of the trial and if necessary, make settlement recommendations.
- ☐ Confirm your advice and your client's instructions in writing, particularly where an offer is made and rejected against your advice.
- ☐ If you require costs before preparing for trial, ensure you receive them well in advance.
- ☐ Have a clear policy that you will stop acting if the client does not pay when required to in the lead up to trial. Ensure the client understands the consequences of not paying.

Property disputes

- ☐ Seek instructions to lodge a caveat as soon as possible if real property is involved and your client is not on title.
- ☐ Where the real property is in the name of the former spouse and represents a significant asset of the marriage:
  - seek formal written acknowledgement from the former spouse that they will not draw down further funds against the property or otherwise encumber it
  - write to the mortgagee including a copy of the acknowledgement if you receive one, and ask that the mortgagee agree it will not allow further funds to be drawn down against the property
  - if the former spouse or mortgagee will not provide the above acknowledgement or agreement, consider applying to the court for an injunction preventing further funds being drawn down or other encumbrances being imposed on the property.
- ☐ Advise your client to retain an independent accountant when considering the property division.
- ☐ Recommend that valuations be obtained for real property and business assets of the marriage and warn your client of the risks of not doing so in writing.
- ☐ Take time to step back and consider any proposed orders or agreement terms. Where possible have someone else review the wording with 'fresh eyes'.
- ☐ Check that the wording achieves what the client wants. Ensure it protects the client from the bad behaviour of the other party.
- ☐ Double check any schedules or spreadsheets to ensure all assets are properly dealt with.
- ☐ If you can't agree on the wording with the other side that will completely protect your client, you need to explain the risks and consequences to the client and confirm it in writing.

Superannuation

- ☐ Take comprehensive instructions on the employment background of the parties and possible superannuation entitlements.
- ☐ Act promptly when requesting information concerning the member spouse's interest from the trustee of the superannuation fund.
- ☐ Obtain a professional valuation of the superannuation interest based on the information received from the trustee.
- ☐ If appropriate, flag the interest in the former spouse's superannuation by way of a superannuation agreement or court order.

Pre-nuptial financial agreements certification

- ☐ Consider seriously the risk implications of providing certification advice on pre-nuptial financial agreements. Read the section on financial agreements starting at page 4 of this guide.

- ☐ If you do decide to proceed, manage the process very carefully by:
  - having a face to face meeting with the client
  - providing comprehensive advice to your client, including an explanation that your client will be forgoing rights that they would otherwise have on marriage breakdown
  - keeping a written record of the advice you have given and the client's response to your advice
  - confirming the advice in writing
  - insisting your client obtain independent financial advice from an accountant
  - obtaining a written acknowledgement from your client that they understood your advice
  - ensuring the wording of the agreement and the certificate reflect the requirements of section 90G
  - using an independent interpreter if your client does not speak English
  - retaining your file indefinitely.

Drafting pre-nuptial financial agreements

- ☐ Consider the risk implications of drafting 'pre-nuptial' agreements and if you do decide to proceed:
  - act for one party only
  - write to the other party confirming you are not acting for them and recommend they obtain separate representation and advice
  - provide comprehensive written advice to your client, including an explanation that your client will be forgoing rights that they would otherwise have on marriage breakdown
  - request that each party provide a formal declaration of their assets and impress on your client the need for disclosure
  - canvass with your client what should be done to protect specific assets of the marriage that may be dissipated or diminished over time
  - warn your client of the risks of signing the agreement in close to the wedding and retain your file indefinitely.

Disbursing funds

- ☐ Always refer to orders before disbursing any money to ensure the correct amount is distributed.
- ☐ When receiving email instructions from clients about where to send funds, always confirm those instructions orally as we have seen Examples of email hacking where money has been directed to fraudsters' accounts. See the *Cyber security* section of our website.

Appendix One – Superannuation

Part VIIIB of the *Family Law Act 1975* (Cwlth) allows separating spouses to divide superannuation entitlements. Superannuation is treated as 'property' for the purposes of section 79.

Part VIIIB has effect over all other law and any trust deed. If a superannuation payment is to be split, it must be in accordance with Part VIIIB.

De facto couples are now able to split superannuation under the Family Law Act (but not in Western Australia).

What is permitted?

Part VIIIB allows a non-member spouse to:

- request information on the member spouse's superannuation interest from the trustee of the member spouse's superannuation fund
- flag the member spouse's superannuation interest (a payment flag operates in a similar way to a caveat)
- enter an agreement to split the superannuation entitlement or seek court orders to split the superannuation entitlement; and waive their rights to the superannuation entitlements of the spouse.

See the Family Law (Superannuation) Regulations 2001 for further detail on the rules governing the splitting and flagging of superannuation and methods for calculating parties' entitlements.

Steps to flag an entitlement or obtain a split order

- Identify the type of superannuation interest (such as accumulation scheme or defined benefit) and what phase it is in (either growth phase or payment phase) so the right information is requested.
- Request information from the trustee of the fund (and not the fund administrator) concerning the member's superannuation interest. The request must be in the appropriate form (superannuation information form and form 6 declaration which both need to be signed by the non-member client) together with the appropriate fee for the provision of the information. It would also be prudent to have an authority for the trustee to provide the information to the practitioner.

- Value the interests. The methodology is set out in the regulations. It is a three-step process for a growth phase interest.
  - Determine gross value.
  - Deduct amounts for any earlier splits.
  - Deduct any surcharge debt (surcharge is or was a tax on certain contributions and rollovers made to superannuation funds).

To waive an entitlement

The waiver of an entitlement by a non-member spouse:

- requires agreement of the trustee and the non-member spouse
- must be in the prescribed form
- must be accompanied by a statement that the non-member spouse has received financial advice from a financial adviser as to the financial effect of the waiver
- must be certified by the financial adviser.

Binding death benefit nomination (BDBN)

BDBN, being a reversionary interest, is a splittable payment unless the beneficiary is:

- a child under 18 years or
- a dependant child over 18 years and the payment is made to enable education to be completed or
- the child has special needs.

See regulation 13 of the Family Law (Superannuation) Regulations 2001. Payments may be made to these children at the discretion of the trustee, notwithstanding a flag or split order.

This is not a comprehensive summary of superannuation splitting. Practitioners are encouraged to consider the legislation together with the rules and regulations carefully.

Appendix Two – List of cases

Adame & Adame [2014] FCCA 42

Renard & Geach [2013] FCCA 617

Wallace & Stelzer & Anor [2013] FamCAFC 199

Wallace & Stelzer [2001] FamCA 54

Hoult & Hoult [2013] FamCAFC 109

Hoult & Hoult [2012] FamCA 367

Hoult & Hoult [2011] FamCA 1023

Parker & Parker [2012] FamCAFC 22

Sullivan & Sullivan [2011] FamCA 752

Ruane & Bachmann-Ruane and Anor [2009] FamCA 1101

Carmel-Fevia & Fevia [2009] FamCA 9

Blackmore & Webber [2009] FMCAfam154

Moreno & Moreno [2009] FMCAfam 1109

Black & Black [2008] FamCAFC 7

Ryan & Joyce [2001] FMCAfam 225

Saintclaire & Saintclaire [2015] FamCAFC 245

Raleigh & Raleigh [2015] FamCA 625

Piper & Mueller [2015] FamCAFC 241

Reed & Reed [2016] FCCA 1338

Kennedy & Thorne [2016] FamCAFC 189 (on appeal to the High Court – with appeal to be heard in August 2017)

Parke & Parke [2015] FCCA 1612

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