

## Relationship Property Agreements Getting Them and Getting Them Right

### Why have one?

Relationship property agreements are also known as "section 21 agreements", "contracting out agreements", "pre-nups" and "post-nups". They enable parties to take control of their own property, and avoid the default position under our relationship property legislation that all relationship property is owned by the relationship partners equally and should be divided evenly if they separate.

Subject to limited exceptions, relationship property includes the family home and all income and assets acquired by either party after the marriage or defacto relationship began.

### Formalities required for a binding relationship property agreement

The legal requirements of such agreements are in section 21 of the Property (Relationships) Act 1976. Because one partner may be foregoing valuable property entitlements, section 21 requires strict compliance. For an agreement to be valid:

1. it must be in writing and signed by both parties;
2. each party must have had independent legal advice before signing the agreement;
3. the signature of each party must be witnessed by a lawyer;
4. the lawyer who witnesses the signature of a party must certify that, before their client signed the agreement, the lawyer explained to them the effect and implications of the agreement.

It is the fourth requirement that causes the greatest difficulty.

### The Lawyer's Job

In order to advise a client on the effects and implications of a proposed agreement, a lawyer must:

- make a proper assessment of what is relationship property (or could become relationship property in the case of a "pre nup");
- get information about the value of that property;
- assess the client's entitlements under the default, equal sharing provisions of the Act;
- explain to the client how their entitlements under the proposed agreement compare with their entitlements under the Act.

**Coxhead v Coxhead** was a Court of Appeal decision under the pre 2002 regime (in 2002 major changes to the Act occurred). Assessment of the relationship property pool and values by the wife's lawyer had been limited because the husband was unable or unwilling to disclose the necessary information. The Court held that the wife's lawyer had fulfilled

the requirement of explaining the effects and implications of the agreement by making the wife aware of the gaps in the lawyer's knowledge and therefore his advice.

However, under the present regime, the High Court has consistently held that such an approach is not good enough. According to the Court in **Graham v Graham**, the lawyer must "be in possession of a sufficient body of evidence, including valuation evidence, as will at least ensure the client knows of his or her entitlement under the Act".

In some cases, agreements have been declared invalid and set aside (in one case 10 years later), even where the lawyer had advised the client against entering into the agreement, and the client had insisted on doing so despite that advice.

In such cases the parties faced expensive litigation about the validity of their agreement, and then the cost, emotional upheaval and uncertainty of renegotiating their property division.

## Making a Valid Agreement

Care needs to be taken to ensure an agreement is valid to reduce the risk of it being set aside. There must be full disclosure of all relationship assets and liabilities. These must be valued. Where real estate is involved, ideally registered valuations should be obtained. Where business assets, shares or interests in a partnership form part of the relationship property pool, valuation evidence should be obtained from an expert valuer (usually an accountant).

For many, this may seem like unnecessary expense – paying not just lawyers, but also accountants. But, the consequences of failure to obtain the required level of disclosure of assets and their value are serious.

Doing the agreement properly in the first place with full disclosure and valuation evidence will be a fraction of the cost of battling any subsequent proceedings, and renegotiating property division.

## Conclusion

It is imperative that both parties, both the one without the knowledge and the one with the knowledge (or the ability to obtain that knowledge), understand the importance of disclosure of all assets and the proper values of those assets. Accountants should be aware that valuations of businesses for separation purposes must be as accurate as possible and that they should not be afraid to ask for more information from the owner of the business to ensure the valuation is accurate.

There is no point in either party trying to "hoodwink" the other regarding the existence and value of assets owned by them (either jointly or separately) because, if they do, the agreement will be void. The partner who took less than their entitlement may be able to come back and have another bite at the total relationship property pie.

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Brookfields has specialists in all aspects of relationship property, estate and trust litigation, and preparing section 21 agreements and other asset protection documents. For further assistance contact us:

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