Prenuptial Agreement upheld on Appeal – De Facto Relationship with one woman while married to another

Date : October 6, 2017

In the recent decision of *Sha & Cham [2017],* the Full Court of the Family Court of Australia considered an appeal by the Appellant Husband (who we will call Mr B) and the Respondent De Facto Wife (who we will call Ms C).

Background

The appeal arose from the first instance decision of His Honour Judge Johnston in proceedings before the Family Court of Australia. In those proceedings Ms C bought an application seeking injunctive orders and enforcement of a s90UC Binding Financial Agreement, more commonly referred to as a prenuptial agreement which She and Mr B had entered during the course of their relationship.

Judge Johnston found that the parties were in a de facto relationship. As such, Ms C was successful in the Family Court.

The Facts

Mr B married Mrs B.

Mr B meets Ms C in a massage parlour and they commence a sexual relationship that evening.

Mr B continues to live and be married to Mrs B.

Mr B meets with Ms C and they discuss having a baby together and Mr B begins making monthly payments to Ms C for her mortgage and other expenses.

The prenuptial agreement (s90UC Binding Financial Agreement)

The parties entered into a prenuptial agreement, formally known as a Binding Financial Agreement which provided that the Mr B would:

1. Pay Ms C 50% of the value of his matrimonial home within 2 years of the birth of their child; and

2. Pay $400 per week (with a 10% increase each year) for the child's living costs and any reasonable expenses for the child until the child turned 18.

Ms C became pregnant via IVF and gave birth to the parties' daughter.

Mr B and Mrs B separated and Mr B transferred his half of his matrimonial home to Ms B by way

of property settlement. Mr B and Mrs B divorced.

Mr B and Mrs C's relationship began deteriorating. Ms C signed the Separation Certificate, a pre-requisite of the terms of the prenuptial agreement coming into effect. Ms C commenced proceedings seeking injunctive orders and enforcement of the prenuptial agreement between her and Mr B.

The Family Court found that the Court had jurisdiction to hear the application on the basis that a de facto relationship existed between the parties.

On Appeal

There were two grounds pressed at the hearing of the Appeal:

1. That His Honour erred in finding that the parties shared a 'common residence' at Ms Cham's home for 'relatively confined periods of time'; and
2. That His Honour erred in finding that the parties were in a de facto relationship at the time of entering into the BFA.

Appeal decision

The Court held that a de facto relationship had been established in circumstances where:

1. Mrs C had, upon Mr B's request, given upon her employment as sex worker in a massage parlour so as to:

    1. Further their relationship; and
    2. Receive IVF treatment with a view to becoming pregnant with Mr B's baby.

1. Mr B spent time with Mrs C overnight but did not live with her on a full-time basis, as he was still married and living with Mrs B.

The Full Court allowed the appeal but only to the extent of substitute the words regarding the period of the de facto relationship. Instead of a de facto relationship being *"during the period from approximately mid-March* 2012 *until approximately September 2013",* the Full Court upheld the prenuptial agreement on the basis that a de facto relationship had existed as at the date of entering into the prenuptial agreement, that is "*as at 3 August 2012*".

Our specialist separation lawyers are able to give you legal guidance in regards to your current situation and prenuptial agreements.

Speak to one of them today!

Contact us on 1800 300 170 or email us at familylaw@matthewsfolbigg.com.au

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