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Section 90K and the Enforcement of Financial Agreements

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Section 90K of the Family Law Act sets out a number of grounds upon which a financial agreement may be set aside. Chief amongst these is section 90(k)(1)(d), which permits an agreement to be set aside on the basis of a "material change in circumstances" arising from some aspect of the care, welfare and development of a child of the marriage, resulting in hardship. Sounds simple in theory, but section 90K(1)(d) can be difficult to apply in practice.

This paper examines the application of the elements of section 90K(1)(d), and discusses what can be done to protect an agreement from a challenge pursuant to this section. There is also an analysis of the court's recent approach to s 90K(1)(d).

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1. Elements of s90K(1)(d)

Section 90K(1)(d) reads as follows:

> *since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside*

The corresponding section for de facto agreements, 90UM(1)(g), reads similarly:

> *since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the de facto relationship) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (4)), a party to the agreement will suffer hardship if the court does not set the agreement aside*

These sections can be dissected into the following:

a. Since the making of the Agreement a "*material change in circumstances*" had occurred;

b. That material change in circumstances relates to the "*care, welfare and development*" of a child of the marriage;

c. and, as a result of the change;

d. the child or, if the applicant has caring responsibility for the child, a party to the agreement;

e. will suffer "*hardship*" if the agreement is not set aside.

This paper focusses on the first and last of these requirements, namely what will constitute a material change in circumstances and what is the nature of the hardship that must flow from this, as these two factors are by far where the weight of disputes and judicial commentary fall. It is however worth noting that although sections 90K(1)(d) and 90UM(1)(g) appear similar, the definitions of "child of a marriage" and "child of a de facto relationship" are slightly different. Section 90RB defines a child of a de facto relationship as a child of both of the parties to the de facto relationship. Section 60F sets out when a child will be a "child of a marriage" and is more comprehensive than s 90RB.

2. Material Change in Circumstances

There are two components to this test which require consideration. The first is the comparison that is taking place. That is, what change of circumstances are being considered, and from when to when? The second component is what meaning is to be given to the word "material".

As to the first component, the Courts have been clear that a comparative analysis must be undertaken between the circumstances relating to the care, welfare and development of a child of the marriage as they existed when the agreement was entered into and a subsequent date. Importantly, this enquiry is entirely separate to the provisions of the agreement itself; the date of making the agreement is relevant only insofar as it fastens at a temporal level a point in time against which the word "since" may be reckoned.[1] It is however possible that the agreement could be used as evidence as to the circumstances in existence at the time the agreement was entered into.

As to the second component, the Act does not contain a definition of "material". In *Pascot & Pascot* [2011] FamCA 945 Le Poer Trench J purported to clarify "material" as meaning "substantial, significant and relevant". The Full Court however has since held that whilst this is not an inapt way of describing the word, there is no benefit in substituting other words for those used in the Act itself.[2] In other words, "material" is to be given its ordinary meaning, and what will constitute a material chance in circumstances will vary on a case by case basis.

Significantly, the Full Court in *Fewster v Drake* made it clear that the birth of a child can constitute a material change of circumstances for the purposes of s 90K(1)(d). Their Honours stated as follows [62]:

> *The birth of a child leads inexorably to his or her care, development and welfare. We do not see why a birth cannot be a material change in circumstances for the purpose of s 90K(1)(d). Whether it in fact is such a change will depend on all of the circumstances.*

Another example of "material" is found in *Frederick & Frederick* [2019] FamCAFC 87, where the emergence and diagnosis of a number of challenging and unsafe behaviours in the child of the

[1] Paragraph 449, *Guild & Stasiuk* [2020] FamCA 348
[2] Paragraph 52, *Fewster & Drake* [2016] FamCAFC 214

relationship, which required a high level of care, was found to constitute a material change of circumstances, since the signing of the agreement, relating to the care, welfare and development of the child.

A final note on "material change of circumstances"; a comparison has occasionally been drawn between s 90K(1)(d) and s 79A(1)(d) of the Act. Specifically, s 79A(1)(d) of the Act provides for Orders to be set aside if the court is satisfied that:

> *In the circumstances that have arisen since the making of the order, being circumstances **of an exceptional nature** relating to the care, welfare and development of a child of the marriage, the child or, where the applicant has caring responsibility for the child (as defined in subsection (1AA)), the applicant, will suffer hardship if the court does not vary the order or set the order aside and make another order in substitution for the order...*

Section 79A(1)(d) uses the words "of an exceptional nature" in describing the change in circumstances, whereas section 90K(1)(d) uses the word "material". The threshold under s 90K(1)(d) therefore appears lower than that which applies to s 79A(1)(d),[3] and decisions with respect to s79A ought not guide s 90K(1)(d) matters.

3. What constitutes "Hardship"

Similarly to the word "material", "hardship" is not defined in the Act, and the Courts have held that the ordinary meaning must be given to the word. The Full Court in *Frederick* (at 52]) did however helpfully give obvious examples of hardship as the loss of opportunity to earn income due to the care of the child, difficulties with the provision of housing and loss of educational opportunities.

There are also a number of guiding principles to apply when considering whether hardship is made out:

1. The concept of "unfairness" does not equate to "hardship".[4] There is no statutory provision which enables a financial agreement to be set aside merely because it is unfair.[5]

2. The test for hardship is of a higher threshold than simply less than would otherwise be obtained pursuant to a claim under section 79 of the Act.[6] For it to be otherwise would undermine the point of financial agreements.

3. The standard of living enjoyed during the marriage may be a relevant consideration, but again the hardship must amount to more than simply a lower standard of living than that of the relationship.

[3] *Fewster & Drake* [2016] FamCAFC 214 at [48]
[4] *Guild & Stasiuk* at [442]
[5] *Fewster & Drake* [2016] FamCAFC 214 at [65]
[6] *Fewster & Drake* [2016] FamCAFC 214 at [70-71]

4. There must be a causal link between the changing circumstances and the hardship. In other words, the hardship must flow from the material change in circumstances and not from some other cause, or from the agreement itself.[7]

5. There must also be a comparison between the position of the child, or the person with caring responsibility, if the agreement remains in place and the position of that child or person if the agreement is set aside. It is only by doing so that the court can place itself in a position to determine whether there will be hardship if the agreement is not set aside.

   Inherent in this comparison will often be a consideration of the potential outcome of section 79 proceedings if the agreement was set aside. This then raises considerations of what evidence is required in the proceedings to set aside the agreement, in order to enable the court to undertake this comparison. At first instance in *Frederick*, the Trial Judge said that as the wife had not led proper evidence as to the value of the husband's assets, he was unable to undertake the comparative enquiry required by s 90K(1)(d), and on this basis the wife's application to have the Financial Agreement set aside pursuant to this section. On appeal the Full Court disagreed with this approach. They emphasised that the primary judge was not hearing a final property case, but an application to set aside a financial agreement. They reiterated the Full Court's decision in *Fewster & Drake,* where Justices Aldridge and Kent said at paragraph 67:

   > *"We turn now to the second aspect of this challenge. The concluding words of s 90K(1)(d) are 'if the court does not set the agreement aside'. Logically and inevitably those words require the court to undertake some comparison between the position of the child, or the person with caring responsibility, if the agreement remains in place and the position of that child or person if the agreement is set aside. It is only by doing so that the court can place itself in a position to determine whether there will be hardship if the agreement is not set aside. The primary judge did not undertake such a comparison."*

   In *Frederick,* their Honours Strickland, Aldridge and Austin JJ expanded on this to say (at [42]) that whilst *some* comparison is require between the position of the child, or the person with caring responsibility, if the agreement remains in place and the position of that child or person if the agreement is set aside, it is not necessary for the applicant to call all the evidence that would be called on a final property hearing such as formal valuations. The Full Court drew a similarity to an application for leave to commence property proceedings out of time. Specifically, section 44(3) of the Act requires consideration of a prima facie case or a case with a 'real' probability of success.

   This approach was also applied in the decision of *Higgins & Moruba* [2018] FamCA 467. Here, the wife sought extensive disclosure from the husband, in the context of her application to set aside a financial agreement. In rejecting the necessity for the level of disclosure requested, Her Honour confirmed the interpretation of *Fewster & Drake* as

[7] *Fewster & Drake* [2016] FamCAFC 214 at [50]

providing authority for the proposition that s 90K(1)(d) does not require a detailed assessment of the likely outcome of any potential s 79 application under the Act.

6. When determining hardship, it is not appropriate to consider whether the applicant may be able to ameliorate that hardship by way of a child support application or a spousal maintenance claim.[8] In *Frederick*, the Trial Judge took into account the absence of a child support assessment and the possibility of the wife seeking an order for spousal maintenance to attenuate the hardship. The Full Court said this was in error. In relation to child support, this is because child support is directed at the support of a child and not at ameliorating the hardship of a person caring for the child, which may go well beyond support of the child. In relation to spousal maintenance, this is also misplaced because of the distinction between applications for division of property and for maintenance which attract different considerations. They are not a substitute for each other. Where both are heard at the same time, the property application must be dealt with first as the outcome may affect the ability of the applicant to support himself or herself or the respondent's capacity to meet an order.

4. Drafting Financial Agreements with Section 90K(1)(d) in mind

Most agreements contain a recital to the effect that the parties have considered the possibility of a wide range of events when entering into the agreement. Does this, in of itself, protect the agreement from attack pursuant to s 90K(1)(d)? The answer, which is clear from both the wording of s 90(k)(1)(d) as well as judicial commentary, is that merely contemplating the change in the agreement is insufficient.

In *Raleigh & Raleigh* [2015] FamCA 625, it was argued on behalf of the husband that as at the time of entering into the agreement the parties contemplated having children, and indeed the wife was pregnant with the parties' first child at the time the agreement was signed, it could not be said that a change of a material nature had arisen following the signing of the agreement. This was rejected by Justice Watts. He stated (at [190]):

> *The parties may have contemplated children but the covenants of the agreement do not do so in any meaningful way. The fact that the parties contemplate children and then do not in any meaningful way attempt to address that possible contingency in their agreement, gives rise to the potential application of s 90K (1)(d) of the Act.*

Similarly, in *Guild & Stasiuk* the husband attempted to defend against a finding of a material change of circumstances by submitting as follows [456]:

> *This Agreement specifically contemplated children and increased the Applicant's entitlement in that precise circumstance. It is clearly implicit in the Agreement that the Wife would be responsible for the children and there is no change of circumstance constituted by the extent to which she is responsible for the children.*

[8] *Frederick & Frederick* [2012] FamCAFC 87 at [49-55]

Justice Wilson disagreed with this assertion. He found that [457]:

> *Far from it being "*clearly implicit*" in the agreement that the applicant would be responsible for the children, the terms of the agreement do not determine the relevant circumstances pertinent to s 90K(1)(d) nor do they determine whether a material change in those circumstances has occurred.*

His Honour also stated (at [456]) that the mere fact that an agreement records the parties' contemplation of children is not determinative of whether a material change has occurred.

For practitioners drafting financial agreements, the key therefore to protecting against a later s 90K(1)(d) claim is to build into the agreement contingencies to ameliorate any argument of hardship that may arise. It is obviously extremely difficult to predict and make provision for all possible changes of circumstance that may arise in the future. For agreements between parties of child bearing age however, it ought to be standard practice to anticipate and make provision for what is to occur in the event the parties have children.

5. Recent case examples

Daily & Daily [2020] FamCA 486

The wife relied on s 90K(1)(d) in seeking to set aside the Agreement, on the basis of the following matters:

1. That at the time that the agreement was made she was employed as a fulltime serving public servant.

2. That following marriage two children were born.

3. That the parties agreed the wife would cease her fulltime employment and take on the primary role of caregiver for the children.

4. That the husband continued in his fulltime employment which resulted in a substantial increase in superannuation entitlements from $67,669 to $970,578 and savings of $74,230 to $693,508 at or about the time of separation.

5. That as a result of the wife's role as primary carer to the children she suffered a significant reduction in her earnings and has returned to part-time employment only now comprising 0.8 of fulltime equivalent.

6. That her capacity to contribute to superannuation and accumulated savings was diminished and in any event is significantly less than the current financial circumstances of the husband.

7. As a result of the marriage, the wife's capacity to earn an income and support herself and the children had been substantially diminished.

The agreement itself was silent as to the possibility of children being born. His Honour noted at paragraph 268 that, "whether contemplated or not, the advent of children should be considered as a material change in circumstances since the making of the financial agreement". Thus, this aspect of s 90K(1)(d) was borne out by the birth of the children.

Even if wrong in this regard however, His Honour found that the arrangements for the care of the children post separation and the significant disruption to the children's lives by now spending time with their parents in two different houses would represent a material change.

In determining hardship, His Honour determined firstly what the agreement provided for the wife. He did not however embark on an exercise of seeking to determine what would be the outcome in respect of a property settlement, beyond noting that the wife would likely be entitled to a more generous outcome than her entitlements pursuant to the agreement.

His Honour ultimately found that the position of the wife, in that:

1. her reasonable expenses significantly exceeded her income; and

2. she had no prospect of securing accommodation other than rental accommodation,

represented significant hardship that resulted not just from the care, welfare and development provided by the wife for the children but also her current circumstances of being able to provide appropriately for herself and the children.

His Honour then found that the wife's entitlement pursuant to the agreement would not adequately satisfy the wife's ability to care for the children, and on that basis the agreement was set aside pursuant to 90K(1)(d).

It was also noted by His Honour that his decision was influenced by the fact that the parties were in dispute as to the wife's entitlement under the agreement, and that the terms of the agreement itself were not necessarily capable of clear understanding.

Leung & Fan [2020] FCCA 764

In arguing to set aside the agreement pursuant to s 90K(1)(d), the Applicant argued the birth of the child coupled with the parties having separated earlier than they intended as the material change in circumstances causing hardship.

In finding that there had not been a significant change in circumstances, His Honour distinguished from *Fewster & Drake*, where the Full Court found that the birth of a child could constitute a material change in circumstances.

Here, His Honour pointed out that the agreement specifically acknowledged that the applicant was 6 months pregnant, and did not accept that the existing pregnancy of itself would constitute a material change. As for the submission that a material change was established by the parties having separated earlier than was intended, His Honour again did not accept this.

Milavic & Banks (No 2) [2016] FamCA 884

Here, the wife was pregnant at the time of signing the agreement. In arguing to set aside the agreement pursuant to section 90UM, the material change in circumstances upon which the husband relied is that, although when the Agreement was signed the wife was pregnant with the younger child, the parties could not have foreseen that their as yet unborn child would be born with autism.

Her Honour was satisfied that this amounted to a material change in circumstances, noting that the diagnosis added significantly to what was required of the parties for the child's care physically and emotionally and to some extent financially.

As to hardship, it was the husband's case that as he had shared parental responsibility and the child spends time with him it would be difficult for him to look after the child and maintain employment as a result of which he and/or the child would suffer hardship. In other words, if the Agreement were not to be set aside he would remain in a position where he is financially responsible for two children under an Agreement that does not adequately provide for such a responsibility.

Her Honour rejected this argument. On the facts, the only hardship she could identify was the husband's inability to buy his own home unless the agreement was set aside and the court were to make orders for property settlement. This was not hardship of such a serious nature or would result in such inequity that it can only be rectified by the "extreme" step of setting aside or varying an existing order of the Court or in this case the Agreement.

Her Honour also went on to find that to the extent that there was any hardship caused to the husband and/or the child because he is in a financially disadvantageous position compared to the wife, that was not a consequence of the fact that the child is autistic. To the contrary, the husband's position would be exactly the same even if the child had not been autistic.

Teasdale & Teasdale (No.2) [2018] FCCA 3297

At the time of entering into the financial agreement, it was anticipated that the wife would have the primary care of the children. It was on this basis that the husband agreed with the terms of the agreement. The agreement itself however contained no provision relating to the care of the children.

Ultimately this did not transpire, and two years after the agreement being entered into, the children came into the husband's primary care from the wife.

The husband sought to set the agreement aside, submitting:

1. He took on the role of primary carer with diligence and enthusiasm, but at a crippling financial cost to himself;

2. He purchased a new business, but is only able to run it with the significant support of his sister, who works significant hours in the business, and also assisted the husband with the care of the children;

3. His financial circumstances, as a result of the change in circumstances, have led to hardship.

The court agreed that there had been a material change of circumstances, by virtue of the following:

1. At the time of and following the financial agreement, and up until December 2014, the children were in the primary care of the wife, with the husband usually spending time with the children only one day each week, and the husband was able to devote most of his energies to the running of his business.

2. The financial agreement contained no provision relating to the care of the children;

3. In December 2014 the children came into the husband's primary care from the wife;

4. By reason of the contemporaneous parenting proceedings, the children will remain in the husband's primary care

As to the question of hardship, the court had some misgivings about the extent of the husband's income, but nonetheless found that it was clear that he was not able to work the long hours that he was working before the children came into his primary care and thus increase his own earnings.

In deciding to set the agreement aside, the court conducted a comparison between the husband's position if the financial agreement remains in place and the position of the husband if it is set aside. This was fairly easy to do, as at the hearing the parties adduced evidence relating to property adjustment in the event the financial agreement was set aside. The difference in the two positions was $103,000.

Guild & Stasiuk [2020] FamCA 348

This is a very recent decision of Justice Wilson, and is comprehensive in its analysis of the operation of s 90K(1)(d). Here, His Honour set aside the agreement pursuant to s 90K(1)(d), finding the existence of both a material change of circumstances, and hardship flowing from those change of circumstances if the agreement was not set aside. Specifically:

1. The wife had the primary care of the children, and by virtue of her role will have the overwhelmingly physical, emotional and financial responsibility for them. His Honour applied

the rationale of *Fewster v Drake* that a birth can be a material change for the purposes of the section, and mere the fact that the agreement recorded the parties' contemplation of children was by no means determinative.

2. The two properties she owned at the time of entering into the agreement no longer existed in her name, and her business had failed. She no longer had the financial security conferred by her having the benefit of the net value of the two parcels of real estate.

3. Although the evidence as to the wife's financial circumstances at the time of entering into the agreement was scant, His Honour noted that pursuant to *Frederick* full valuation evidence such as would be called on a final hearing of a property case was not required here.

4. Since separation, the wife had been reliant on members of her family to purchase groceries for the her and certain of the children's extracurricular activities have stopped

5. Applying the rationale of *Fewster v Drake*, a child's birth is a material change for the purposes of s90K(1)(d) The mere fact that the agreement recorded the parties' contemplation of children was by no means determinative. Here, the applicant had the overwhelming care of the children – physically, emotionally and financially. That was not the situation when the agreement was executed.

Chaffin & Chaffin [2019] FamCA 260

At the time of signing the agreement, the wife was expecting the parties' first child. The parties went on to have three children, one of whom had special needs. In finding the existence of a material change of circumstances, His Honour differentiated between the normal expectation where both parents share parenting obligations for their children and what was the case here, namely the wife's sole care of the children without any assistance whatsoever from the husband. Specifically, His Honour stated (at [185]):

> *It is life experience that upon separating the primary obligation as to parenting will often fall upon one parent, in most cases the mother. It is also life experience that the other parent save for exigencies such as to risk etc. will play a significant if not substantial role in their child or children's lives. Such a result imposes on the primary carer an obligation that can be regarded as "an appreciable detriment" in having to undertake a primary caring role when during cohabitation the household comprised both parents. Such a circumstance alone cannot amount to hardship in the context of s 90K(1)(d). It represents simply one of the expected exigencies of relationship breakdown*

The particular agreement in this case did contemplate children of the relationship. It provided for:

1. The husband to purchase a property with sufficient bedrooms for each of the wife and children;

2. That the purchase price to be approximately $1 million;

3. For the property to be in an area similar to where the parties resided at separation and within a 50 kilometre radius of where the husband resides;

4. The property to be purchased by the parties as joint tenants;

5. The property to remain the wife's home until the youngest child attains 18 years;

6. That after the youngest child attains 18 years the property is to be transferred to the wife's name alone;

7. That pending transfer to the wife the husband is to pay council rates, water rates, insurances and the like and the maintenance and upkeep of the property.

His Honour found the existence of hardship, noting that:

1. The agreement saw the wife tied geographically to the husband who has no engagement with the children.

2. The wife and the children are required to live in the property notwithstanding exigencies as to the children and their care, with no property of her own until the youngest child attains 18 years in 2032, and no ability to borrow against the property to meet her or the children's needs.

Carran & Carran [2022] FedCFamC2F 818

This is a more recent decision of Judge Turnbull.

In this case the Wife sought that the Agreement in question be set aside pursuant to a number of grounds, and was ultimately successful in setting it aside pursuant to s90K(1)(d), namely that it was uncertain and thus void. However His Honour also, helpfully, went through the process in s90K(1)(d) with respect to the Agreement.

Here, the birth of children satisfied the requirement that there be a material change of circumstances. There were however also a number of other factors which His Honour also said amounted to material changes, including:

1. The Husband commencing a new business in which the Wife worked;

2. The Wife's serious surgery in 2008 following an illness which continued to cause her issues;

3. The Wife commencing administrative work for the Husband's business;

4. The Wife undertaking a significant role in the prosecution of an employee in another company in which she worked which burdened her with extra work;

5. The Wife's 2018 diagnosis of a medical condition, since which time her health has not improved; and

6. The living arrangements of the children post-separation, including one child spending little time with her father and the other commencing living with the Wife.

His Honour confirmed that Section 90K(1)(d) did not allow him to consider any hardship arising from a binding financial agreement itself. The test required him instead to compare the position of the child, or the person with caring responsibility, in two situations:

1. if the 2006 agreement remains in place; and
2. if the 2006 agreement is set aside.

There was some dispute between the parties about what the effect of the Agreement was. But referable to the total net pool of $3 million, the wife's entitlement under the Agreement represented between 12% and 23% of that net pool. His Honour concluded that if the Agreement was set aside, her entitlement pursuant to a section 79 property adjustment order would likely be higher than her best case scenario under the Agreement, and the impact on her in dollar terms would plainly be significant in the circumstances. His Honour concluded that the Wife would suffer hardship if the Agreement was not set aside.

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