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Case note: *Thorne v Kennedy* [2017] HCA 49

The High Court has unanimously allowed an appeal against the decision of the Full Court of the Family Court of Australia. The much-awaited decision restores the first instance decision of a Judge of the Federal Circuit Court of Australia, setting aside two financial agreements made pursuant to Part VIIIA of the *Family Law Act* 1975 (Cth).

Background

The parties met on the internet in 2006, when Ms Thorne was living in the Middle East and Mr Kennedy was living in Australia. Ms Thorne was 36 years old, with no substantial assets. Mr Kennedy was 67 years old, and was a property developer with assets of at least $18 million.

Ms Thorne moved to live in Australia in February 2007, and the wedding was set for 30 September 2007. On 19 September 2007, Mr Kennedy told Ms Thorne that they were going to see a solicitor to sign an agreement. Mr Kennedy told Ms Thorne that if she did not sign, the wedding would not go ahead. Ms Thorne ultimately signed the pre-nuptial agreement pursuant to section 90B of the *Family Law Act* on 26 September 2017, four days before the wedding. She did so against legal advice.

The second agreement, a post-nuptial agreement pursuant to section 90C of the *Family Law Act*, was in almost identical terms to the first agreement. It was signed shortly after the parties' marriage. Again, it was signed by Ms Thorne against legal advice.

As stated by Ms Thorne's lawyer who advised her against signing the agreements, the provision in the agreements for Ms Thorne was "*piteously small*" in the context of Mr Kennedy's wealth.

After separation, Ms Thorne applied to the Federal Circuit Court for the agreements to be set aside. Mr Kennedy died during the proceedings. His executors and trustees of his estate were substituted as parties, and continued the litigation. Ms Thorne was successful at first instance, with the primary judge setting aside both agreements for duress, although as noted by the plurality of the High Court, the primary judge used the term 'duress' interchangeably with 'undue influence'.

The primary judge's decision was based on the combination of six matters, upon which her Honour concluded that Ms Thorne had "*no choice*" or was "*powerless*", being:

1. Ms Thorne's lack of financial equality with Mr Kennedy;
2. Ms Thorne's lack of permanent status in Australia at the time;
3. Ms Thorne's reliance on Mr Kennedy for all things;
4. Ms Thorne's emotional connectedness to the relationship and the prospect of motherhood;
5. Ms Thorne's emotional preparation for marriage; and
6. The "publicness" of the upcoming marriage.

The Full Court of the Family Court of Australia allowed the husband's appeal, in effect upholding the agreements and precluding Ms Thorne from seeking a division of property pursuant to Part VIII of the *Family Law Act*.

High Court of Australia

Ms Thorne appealed successfully to the High Court of Australia, with the High Court unanimously allowing the appeal and restoring the first instance decision.

The High Court unanimously held that the agreements were voidable (pursuant to section 90K(1) of the *Family Law Act*) due to unconscionable conduct. The majority (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ and Nettle J in a separate judgment) also found that the agreements were voidable due to undue influence. Justice Gordon, in a separate judgment, held that the agreements ought be set aside due to unconscionable conduct but not undue influence.

The Reasons for Judgment provide a concise overview of the doctrines of undue influence and unconscionable conduct, both generally and in the statutory context of financial agreements. The High Court also considered the doctrine of duress, although it was ultimately not necessary to decide upon this issue as the High Court found that the primary judge's findings were better characterised as undue influence. Overall, the decision provides a useful roadmap on the different vitiating factors of duress, undue influence and unconscionable conduct and the relationship between the doctrines.

One issue before the High Court was the relevance of the "*unfair and unreasonable*" terms of the agreements. The plurality held at paragraph 55 that the primary judge's description of the agreements as not being fair or reasonable "*was not merely open to her. It was an understatement*". The plurality noted that the primary judge had been correct to consider the unfair and unreasonable terms of the agreements, stating at paragraph 56 that:

> "*Of course, the nature of agreements of this type means that their terms will usually be more favourable, and sometimes much more favourable, for one party. However, despite the usual financial imbalance in agreements of that nature, it can be an indicium of undue influence if a pre-nuptial or post-nuptial agreement is signed despite being known to be grossly unreasonable even for agreements of this nature*".

Ultimately, the plurality found that the primary judge's conclusions (particularly the "six factors" as set out above) were open on the evidence and that it was "*open to the primary judge to conclude that Ms Thorne considered that she had no choice or was powerless other than to enter the agreements*".[1] The plurality set out a list of factors which may have "*prominence*" in the context of financial agreements,[2] being:

1. Whether the agreement was offered on a basis that it was not subject to negotiation;
2. The emotional circumstances in which the agreement was entered, including any explicit or implicit threat to end a marriage or engagement;
3. Whether there was any time for careful reflection;
4. The nature of the parties' relationship;
5. The relative financial positions of the parties; and
6. The independent advice that was received and whether there was time to reflect on that advice.

As succinctly stated by Justice Nettle in concluding that the agreements should be set aside, "*it would be against equity and good conscience for Mr Kennedy or his successors to be permitted to enforce either agreement*".[3]

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[1] At paragraph 59.
[2] At paragraph 60.
[3] At paragraph 78.