Thorne v Kennedy: the death knell for prenups in Australia?

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Perhaps not shock waves but certainly ripples have passed over the Family law legal community in Australia with the judgment handed down by the High Court in *Thorne v Kennedy* on November 8. In that case, the court held that a prenuptial agreement, and a subsequently settled post nuptial agreement in substantially the same terms, would not be enforceable on the basis of undue influence and unconscionable conduct by the husband. This comes at a time when prenuptial agreements as well as post nuptial agreements are on the rise and generally more acceptable not only in Australia, but in many countries globally, not least Hong Kong.

Here, the husband was a successful property developer, owning assets worth between A$18 million and A$24 million, a divorcee with three adult children who was aged 67 at the time of the marriage. The wife was an Eastern European woman living in the Middle East, also divorced but with no children and aged 36. The couple met over the Internet on a dating website in 2006. They met in person soon after and he took her on an extended trip around Europe, meeting her family. They moved to Australia in March 2007 and set their wedding day for September 30, 2007. In August Mr. Kennedy instructed his solicitor to prepare a prenuptial agreement but it was not until 11 days before the wedding that he informed Ms. Thorne that they needed to make an appointment to see the solicitors to sign it. He had made it clear from the outset that there would be no wedding without an agreement in place as he wanted to leave his assets to his children.

The following day, Ms. Thorne sought independent legal advice. She was given strong advice by the family law solicitor not to sign the agreement as the A$4,000 provision for maintenance was very poor from someone in Mr. Kennedy's circumstance. He had further provided housing for her but there was no certainty that the housing would be built. Lump provision of A$50,000 was described by her lawyer as *'piteously small'.* There was also provision in the event that Mr. Kennedy were to die while they were still living together, which was Ms. Thorne's main concern at the time. Her lawyer went on to advise that she believed Ms. Thorne was under significant stress in the lead up to the wedding and that she was only prepared to sign so that the wedding would not be called off.

Despite her legal advice to the contrary, Ms. Thorne signed the agreement on September 26, four days prior to the wedding. Her relatives had flown out from Eastern Europe and were staying, courtesy of Mr. Kennedy, in his home. After the wedding, again contrary to the strong advice from her lawyer, Ms. Thorne also signed a postnuptial agreement in substantially the same terms as the prenuptial agreement.

In less than 4 years after the marriage, the parties separated and signed a separation declaration and Ms. Thorne applied to set aside the agreements, seeking property worth A$1.1 million and a lump sum of A$104,000. Unfortunately Mr. Kennedy died in 2014 during the trial and the case was continued by the executors of his estate, who were two of his adult children. The primary court found that the agreements should be set aside, the Full Court disagreed on appeal and the matter came before the High Court for determination.

The court looked at the legal concepts of duress, undue influence and unconscionable conduct. The primary court had focused on the wife's lack of free choice rather than whether the husband had exerted pressure on her. Lack of free choice, particularly between fiancées, was a presumption within the legal doctrine of undue influence. In finding that the wife had no choice or was powerless, the primary judge noted her lack of financial equality with Mr. Kennedy, her lack of permanent status in Australia at the time, her reliance on Mr. Kennedy for all things, her emotional connectedness to their relationship and hopes for motherhood, her emotional preparation for marriage and the *'public-ness'* of her upcoming marriage. She had *'no job, no visa, no home, no place, no community'.* In respect of the postnuptial agreement, the effect was the same – if she did not sign, the marriage would be at an end before it had begun.

The Full Court on appeal essentially held that financial inequality in itself could not provide a reasoned basis for duress. The court further held that Ms. Thorne could not have been subject to undue influence because she has acquiesced in Mr. Kennedy's desire to protect his assets for his children and because she had no concern about what she would receive on separation. Rather, her concerns were whether he would predecease

her. They also found that there was no unconscionable behaviour because there had never been any misrepresentation on his part: he had always been clear that, should they separate, this would happen.

The High Court agreed with the primary judge that the agreements should be set aside because of undue influence and Mr. Kennedy's unconscionable conduct: he had clearly taken advantage of Ms. Thorne's weak position, and that she was at a special disadvantage which he, or any reasonable person, would see was a real possibility. The circumstances in which she found herself were such that her state of mind was affected to the extent that rendered her incapable of making a judgment in her own best interests.

Is this new? In fact, not really. There are many cases all over the world in which guidelines have been given to safeguard the rights of the financially weaker party and, in particular, there are guidelines in respect of how many days before the wedding should the agreement be signed.

In England the recommended number of days is 28, in which time the parties should have been able to consider the implications of their agreement and allegations as to duress and undue influence fall away, or are at least diminished. The agreement must also be fair. One clear point which came out in trial on the evidence of Ms. Thorne's lawyer was that the agreement was *'entirely inappropriate'* and inadequate.

So will this mark the death knell for prenuptial and postnuptial agreements? No, but it is a useful reminder that agreements may well not be enforceable if certain factors are absent: the parties must have time to reflect on their agreement, there must be intention to make the agreement which is unaffected by pressure from either side and the agreement must be a fair one, providing adequate provision for both parties in the event of relationship breakdown.

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