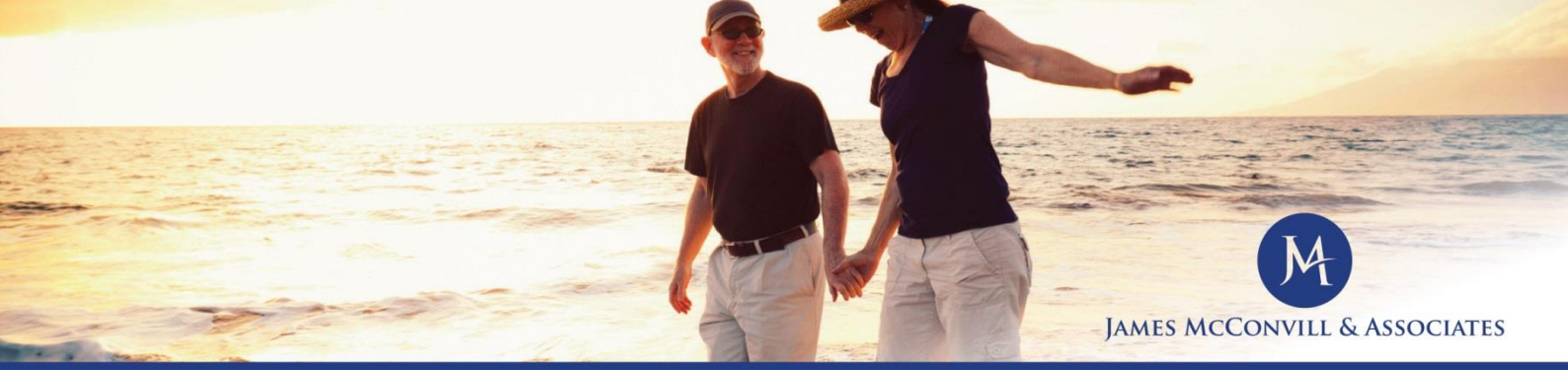


JAMES MCCONVILL & ASSOCIATES

Full Court of Family Court Finds Duress Does Not Exist with Two Binding Financial Agreements

Duress did not provide an escape route for wife who had been provided with independent legal advice before signing agreements.

INTRODUCTION

The case of *Kennedy & Thorne* [2016] FamCAFC 189 (26 September 2016) heard in front of the Full Court of the Family Court of Australia (their Honours Strickland, Aldridge and Cronin JJ), involved the executors of Mr Kennedy's estate appealing orders made by Judge Denmark granting Ms Thorne's application that the Binding Financial Agreements between Mr Kennedy and Ms Thorne, under s 90B and under s 90C of the *Family Law Act 1975*, be set aside.

BACKGROUND

In mid to late 2006, Mr Kennedy and Ms Thorne met on an online dating site. Mr Kennedy ("the husband") was an 67-year-old property developer, with a total net asset worth of $18 million dollars. Ms Thorne ("the wife"), was a 36 year old and lived overseas when the parties met.

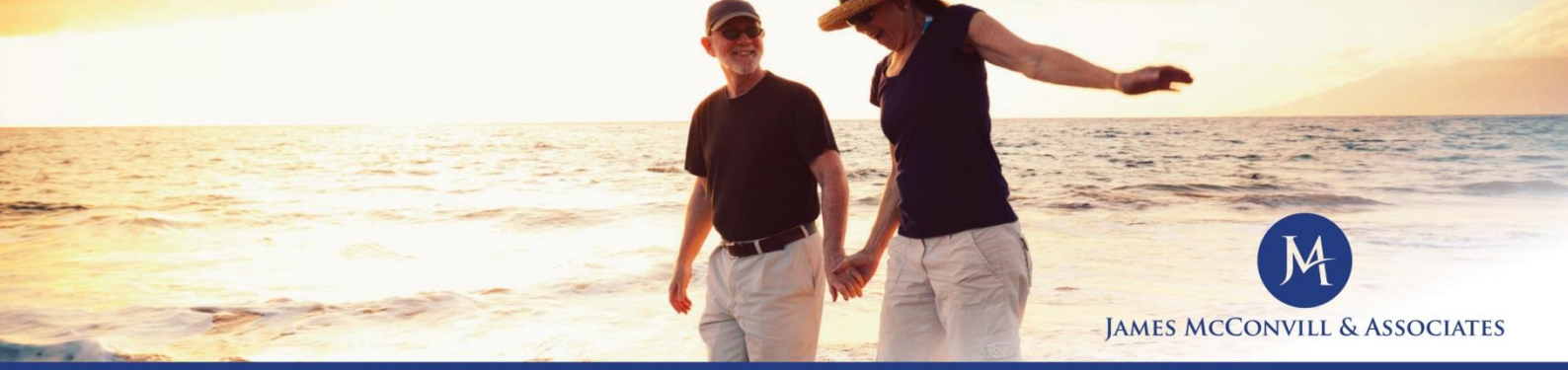
The wife received independent legal advice regarding the two binding financial agreements made by the husband's solicitors. The wife received legal advice stating that the first binding financial agreement (made in contemplation of marriage) must not to be signed by the wife as it was "no good and should not be signed". The legal advice on the second binding financial agreement (made after the marriage) was that it was "terrible and … should not [be signed]".

After three years of marriage the parties separated and the wife filed proceeding in the Family Court to have the agreements set aside on the grounds of duress, undue influence, and/or unconscionability found under s 90K of the *Family Law Act 1975* (Cth). Judge Denmark only excepted the first ground of duress. The husband passed away while the trial was partly heard and the case was carried on by the husband's estate.

Regarding the issue of duress, the Full Court of the Family Court stated there are two limbs to establish duress:

1. 'It is submitted on behalf of the [husband] … that to establish duress there must be pressure the practical effect of which is compulsion or absence of choice. …'
2. 'In those circumstances, the wife signed the first agreement under duress. It is duress born of inequality of bargaining power where there was no outcome available to her that was fair or reasonable.'

In applying this test, Judge Denmark at first instance came to the decision that both agreements were made under duress.



APPEAL

The executors brought the appeal to challenge Judge Denmark's decision as her Honour applied the wrong legal test to the facts. On appeal before the Full Court, their Honours Strickland, Aldridge and Cronin JJ did not agree with the executor's submissions as to the law.

As to the issue of duress, Strickland, Aldridge and Cronin JJ cited the decision of *Australia & New Zealand Banking Group v Karam* [2005] NSWCA 344:

> "The vagueness inherent in the terms 'economic duress' and 'illegitimate pressure' can be avoided by treating the concept of 'duress' as limited to threatened or actual unlawful conduct. The threat or conduct in question need not be directed to the person or property of the victim, narrowly identified, but can be to the legitimate commercial and financial interests of the party. Secondly, if the conduct or threat is not unlawful, the resulting agreement may nevertheless be set aside where the weaker party establishes undue influence (actual or presumptive) or unconscionable conduct based on an unconscientious taking advantage of his or her special disability or special disadvantage, in the sense identified in *Commercial Bank of Australia Ltd v Amadio.*"

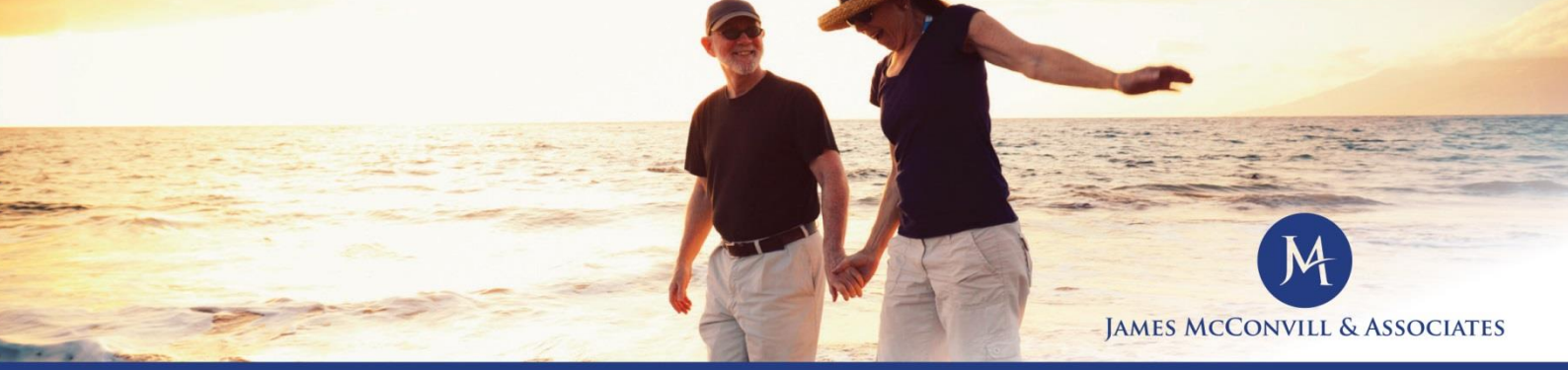
The Full Court stated that the correct test is whether there is a "threatened or actual unlawful conduct" and that there needed to be a finding that the "pressure" was "illegitimate" or "unlawful". The test identified by Judge Denmark was held to be incorrect. The Full Court agreed, however, with Judge Denmark that the "that the pressure may be overwhelming and that there is 'compulsion' or 'absence of choice'".

The law in relation to duress was identified by Lords Wilberforce and Simon of Glaisdale in *Barton v Armstrong* [[1976] AC 104 at [118]:

> " ... in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this pressure must be one of a kind that the law does not regard as legitimate."

Their Honours made the distinction that "inequality of bargaining power" cannot establish duress. On this point again, Judge Denmark made an error. The Full Court, at paragraph 74 of the judgment, stated:

> "In any event, the trustees say that there was no 'inequality of bargaining power', and the trial judge erroneously found that 'there was no outcome available to [the wife] that was fair or reasonable'. The facts are that the husband was at pains to point out to the wife from the outset, that his wealth was his, and he intended it to go to his children. The wife was aware of that at all times and she acquiesced in that position. Relevantly, the trial judge found that the wife's interest lay in what provision would be made for her in the event the husband pre-deceased her, and not what she would receive upon separation. And we note that the agreements provided for the wife to receive what she sought in that regard."



It was additionally noted by their Honours that Judge Denmark erred in her decision as both agreements were incorrect, and there were grounds for appeal.

DECISION

The Full Court concluded that the test to be relied upon for duress is whether 'threatened or actual unlawful conduct' occurred. Further, if it is said that pressure has been applied on the other party, that pressure needs to be 'illegitimate' or 'unlawful', and it is not necessarily sufficient if it is 'overwhelming' or there is 'compulsion' or an 'absence of choice'.

The evidence relied on by the wife to establish duress was in summary as follows:

a) From the moment the parties met the husband expressed to the wife that he would provide for her and look after her for life if she came to Australia and married him.

b) The husband made it clear that the wife would need to sign a document prior to marrying that acknowledged his wealth was his and it would go to his children.

c) The wife was at all times financially and emotionally dependent on the husband having permanently left and cut her ties with Country B, and being in Australia on a limited visa.

d) Just prior to the wedding, the husband arranged an appointment for the wife with a solicitor for the purpose of the wife obtaining legal advice about the financial agreement prepared by the husband's solicitor.

e) Before seeing the solicitor, the husband told the wife that if she did not sign the agreement the wedding would be off, and he told the wife and the solicitor that the agreement was non-negotiable.

f) The wife's parents and her sister had arrived in Australia for the wedding.

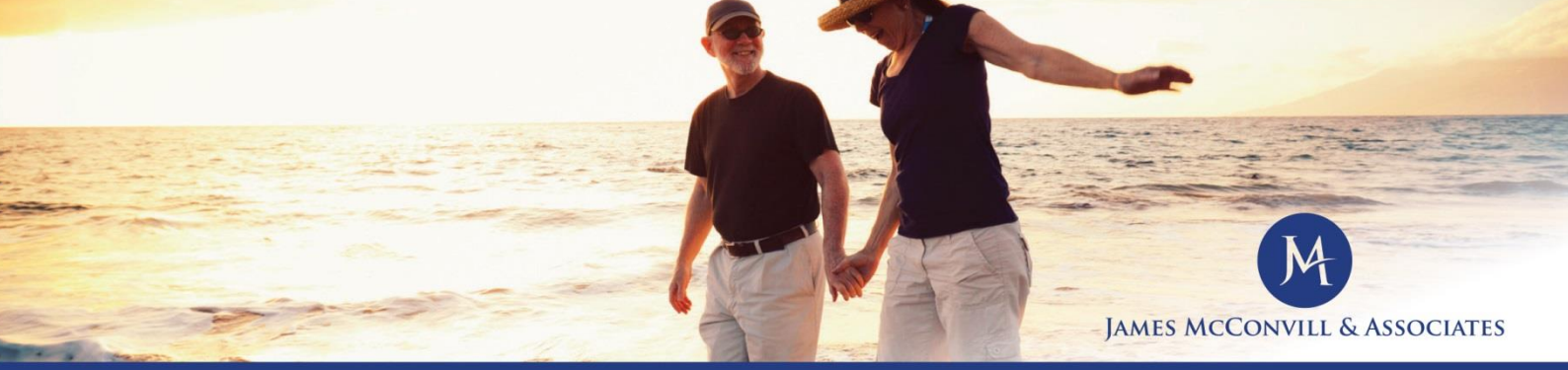
g) The husband drove the wife and her sister to the appointment with the solicitor and waited outside.

h) At the meeting with the solicitor, the wife became aware for the first time of the contents of the agreement and had information about the husband's financial position.

i) The solicitor provided her advice to the wife, and it was to the effect that the agreement was no good and she should not sign it. That verbal advice was followed up with detailed written advice by the solicitor, and at a subsequent appointment the solicitor went through that written advice with the wife.

j) Despite the legal advice, the wife signed the agreement and the wedding went ahead.

k) As to the second agreement, the wife's position had not changed, in that she was still entirely dependent upon the husband, and similar conditions were in place. The wife saw the same solicitor and was given the same advice, but despite that, proceeded to sign this agreement.



It was not apparent from the evidence provided by the wife showed that she was 'threatened or actual unlawful conduct' by the husband. Put another way, what pressure he applied that was 'illegitimate' or 'unlawful'. It was obvious that the wife was reliant on the husband both financially and emotionally, the husband met that expectation and the wife accepted it. Therefore, it cannot be seen as an element of legitimate or unlawful pressure.

Conditions were imposed on the wife, but Judge Denmark found that the wife was "keen to acquiesce". This meant the wife was aware from the beginning that her husband's wealth was to go to the children and the document needed to be signed to protect the husband's and children's positions.

The Full Court noted that the real difficulty for the wife establishing duress was that she was provided with independent legal advice about the agreements. The wife was advised not to sign them, but she signed regardless. Their Honours were not persuaded that the wife entered into either agreement under duress. Their Honours found that both agreements were valid and enforceable. It was noted that once the second agreement was valid and enforceable, there is no need to bother with the first agreement because the second agreement (entered into after the marriage) terminated the first.

The appeal was allowed and the s 90C Agreement declared to be binding.