



PROPERTY (RELATIONSHIP) ACT CONTRACTING OUT AGREEMENTS

If a couple have been in a relationship (whether de facto, marital or civil union) for 3 years or longer, then treatment of their relationship property in the event of separation is governed by the Property (Relationships) Act 1976 ('Act'). In limited circumstances this period can be even shorter.

The Act gives little protection to pre-relationship assets and with few exceptions, provides for the equal split of all assets held by a couple (whether jointly or individually) on their separation.

The only reliable way to effectively protect pre-relationship assets and any individual gifts and inheritances is to contract out of the equal sharing provisions of the Act by way of a Property (Relationships) Act Contracting Out Agreement ('Contracting Out Agreement').

WOULD YOUR BUSINESS SURVIVE A RELATIONSHIP BREAKDOWN?

Generally, any ownership interest in a business will be regarded as relationship property, even where it is held in the sole name of one party to the relationship. Therefore it must be dealt with on the breakdown of the relationship. The effect a relationship breakdown can have on a business is often misunderstood. It invariably causes a significant disruption to the business, which not only affects the person experiencing the break up, but also their business partner(s).

It may also mean the sudden withdrawal of capital from the business on the division of the relationship property, which might threaten the viability of the business or threaten relationships with other business owners.

A Contracting Out Agreement can protect and preserve an individual's business interest as their 'separate property' in the event of a relationship breakdown. However, caution needs to be taken where an attempt is made to classify future income and gains and business assets acquired during the course of the relationships as 'separate property', particularly where it is anticipated that these will be unusually high. Such a goal maybe difficult to achieve without exposing the Contracting Out Agreement to potential avoidance as being 'seriously unjust'.

WHO SHOULD ENTER INTO A CONTRACTING OUT AGREEMENT?

It is becoming more common for couples to enter into Contracting Out Agreements where:

- ◆ One or both parties have been in a previous failed relationship;
- ◆ One of the parties brings substantially more wealth to the relationship;
- ◆ There is an expectation of a substantial third party gift or inheritance to one of the parties;
- ◆ One or both of the parties have children from a previous relationship; or
- ◆ One or both of the parties has an interest in a third party trust, partnership or company.

WHAT SHOULD I INCLUDE IN A CONTRACTING OUT AGREEMENT?

The types of things that you should consider including in a Contracting Out Agreement are:

- ◆ Property to be owned together and in what shares;
- ◆ Property that is to remain as 'separate property';

WHAT SHOULD I INCLUDE IN A CONTRACTING OUT AGREEMENT? (CONTINUED)

- ◆ Any future property or inheritance that should remain as 'separate property';
- ◆ What should happen on the death of either party; and
- ◆ How the relationship property should be dealt with on separation.

REQUIREMENTS OF ENTERING INTO A CONTRACTING OUT AGREEMENT

The Act places strict requirements as to the manner in which any Contracting Out Agreement is entered into and what can and cannot be included. For example:

- ◆ It must be in writing and signed by both parties;
- ◆ Each party must obtain independent legal advice;
- ◆ Each party's lawyer must witness their client's signing of the Contracting Out Agreement and must certify that the effect and implications of the Contracting Out Agreement have been explained to their client before they sign it;
- ◆ It is subject to the overriding interests of children; and
- ◆ It is subject to the Court's ability to set it aside as being 'seriously unjust' to one party.

WHERE AN AGREEMENT IS 'SERIOUSLY UNJUST'

The Courts have an overriding ability to declare any Contracting Out Agreement void, if it deems that giving effect to the agreement would cause 'serious injustice', even where the signing requirements have been met.

When considering whether or not a 'serious injustice' is likely to occur, the Courts will consider:

- ◆ The provisions of the Contracting Out Agreement;
- ◆ How much time has passed since the Contracting Out Agreement was entered into;
- ◆ Whether the Contracting Out Agreement was unfair and unreasonable at the time it was entered into; and
- ◆ Whether the Contracting Out Agreement has become unfair and unreasonable in light of changed circumstances of the couple since it was entered into.

MORE INFORMATION

If you're thinking about entering into a Contracting Out Agreement, need some advice or have any questions — give us a call or send us an email for more information.

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