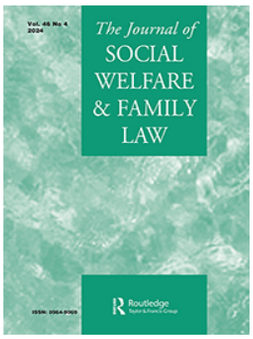

Journal of Social Welfare and Family Law

ISSN: 0964-9069 (Print) 1469-9621 (Online) Journal homepage: www.tandfonline.com/journals/rjsf20

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To cite this article: Miranda Kaye, Lisa Sarmas & Belinda Fehlberg (2024) Prenuptial agreements: Lawyers' Reflections on the Influence of Family, Journal of Social Welfare and Family Law, 46:4, 491-512, DOI: 10.1080/09649069.2025.2454108

To link to this article: https://doi.org/10.1080/09649069.2025.2454108

Published online: 22 Jan 2025.

JOURNAL OF SOCIAL WELFARE AND FAMILY LAW
2024, VOL. 46, NO. 4, 491–512
https://doi.org/10.1080/09649069.2025.2454108

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Prenuptial agreements: Lawyers' Reflections on the Influence of Family

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ABSTRACT

Since December 2000, the Family Law Act 1975 (Cth) has allowed Australian married couples to enter into a legally binding financial agreement before or during marriage covering how their property and financial resources will be divided if their marriage ends. The legislation was extended to de facto couples in 2009. Concern has mainly surrounded agreements entered before or early on in relationships ('prenups'), yet there is very little research on how these are being utilised by lawyers and their clients. Our research, involving interviews with 40 family lawyers in 2020–2021, aimed to address this gap. One of the clearest themes that emerged in interviews was the role of the families of the couple as the driving force behind entry into prenups. This paper explores how lawyers described the involvement of family members, and couples' and lawyers' responses to that involvement. Our findings demonstrate that to understand the dynamics of a prenup, we often must also consider the broader family relational context in which it emerges. This places in question the notion that the prenup is simply a contractual arrangement between two people (the couple); rather, it may be a product of 'extended' family influence

KEYWORDS

Prenuptial agreements; negotiation; financial provision on divorce; gender; family law

Introduction

The circumstances in which parties enter into prenuptial agreements are of continuing interest to the international family law community (Scherpe 2012, 2017, Thompson 2024a). Whilst the involvement of third parties in those negotiations has been noted by researchers (Fehlberg 2002, p. 134, Hitchings 2011, p. 66, Thompson 2015, p. 81), the involvement of third parties has been under-researched. This paper is the first to explore lawyers' descriptions of the involvement of family members in the negotiation of financial agreements entered before or soon after marriage or entry into a de facto relationship ('prenups').[1] It conveys how impactful and common such family involvement can be, and adds to our understanding of power, and disparate economic positions and power imbalances, in the prenups context.

After first providing an overview of the legal status of prenups generally in Australia, the legal position of third parties to prenups, and the lack of international research on

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prenups (including on how families can influence such agreements), we outline our research study, which involved interviews with family lawyers regarding prenups. We then present our findings regarding the frequency and main scenarios in which third parties were involved in prenups, and the responses of parties and lawyers to that involvement. Our discussion includes consideration of whether third party pressure could lead to a challenge to the validity of a prenup and the possible implications for lawyers of our findings.

The legal status of prenups in Australia

Australian couples have been able to make agreements determining their financial arrangements upon separation for some years now, following the amendment of the *Family Law Act 1975* (Cth) (FLA) in 2000 allowing spouses to enter legally binding financial agreements (BFAs) before, during and after marriages end,[2] and amendment in 2009 extending jurisdiction to financial disputes on de facto partner relationship breakdown.[3] If binding, the agreement ousts the jurisdiction of the court to make a property settlement order in respect of matters covered by the agreement.[4] The court would otherwise have a discretion to make 'such order as it considers appropriate' provided that it is 'satisfied that, in the circumstances, it is just and equitable to make the order'.[5]

The policy rationale underpinning the amendments was couched in terms of improving contractual autonomy, individual agency and control, and best interests. As noted in the Explanatory Memorandum to the 2000 amendments, the objectives were 'to encourage people to agree about the distribution of their matrimonial property and thus give them *greater control over their own [financial] affairs*'.[6] It was considered that this 'would enable parties to … make whatever arrangements they wished about their property [without the] … need to incur considerable expense for costly legal proceedings and [without] the current delay in finalising financial matters…'.[7] The inclusion of the requirement that each party obtain independent legal advice about the effect of the agreement would ensure that 'people will be fully aware of the legal effect of any agreement they are thinking of entering into, and *not unknowingly enter an agreement that is not in their best interests*'.[8] [emphasis added]

Prenups and third parties

Since late 2008, third parties such as creditors, family members, family companies and trusts can be parties to BFAs.[9] This might occur, for example, if the financial affairs of one intending spouse or de facto partner involve a third party such as a parent, trust or company who wants to protect their or its rights as against the other party. Notably, whilst each (intending) spouse/de facto partner party to an agreement must be provided with independent legal advice for a financial agreement to be binding and oust the jurisdiction of the courts,[10] the requirement of independent legal advice does not extend to any parties to the agreement who are not spouses (Dickey 2021, p. 46). The requirement of independent legal advice in the legislation is the 'central means of protecting the less advantaged party to a financial agreement' (Fehlberg 2002, p. 137); it is seen as one way of 'levelling

the playing field' (Thompson 2011, p. 329). The lack of the requirement for independent legal advice for the non-spouse parties appears to indicate the legislature's view that for these parties there is no potential vulnerability that needs to be addressed.

Creditor third parties can also seek to set prenups aside even if they are not parties to the agreement. The FLA provides that an agreement may be set aside if it was entered into for the purpose of defeating a creditor or with reckless disregard to the interests of a creditor (s90K(1)(aa)/90UM(1)(b) FLA. See further (Sifris *et al*. 2021, 1065–66). This was an amendment introduced in 2003, following the high-profile case of *Australian Securities and Investment Commission (ASIC) & Rich & Anor* [2003] in which the husband and wife, who were not separated, entered into a BFA providing for certain transfers of the husband's interests in property to the wife by way of provision for maintenance and accommodation of the wife and their children during their cohabitation and in the event of their marriage ending. On application by ASIC to the Family Court to set aside the agreement, O'Ryan J found that although there was prima facie evidence that the parties had entered into the agreement to reduce the husband's assets ([116]), ASIC did not have standing to make the application in the absence of concurrent, pending or completed proceedings between the husband and wife ([111]-[112], [114]).

That the legislation anticipates third-party involvement in BFAs and is concerned that third party creditors should not be adversely affected by BFAs, is not surprising. The laws surrounding prenups are 'inextricably linked to the framework of financial remedies that applies in their absence' (Thompson 2024a, p. 419). The Australian Commonwealth Parliament's power to legislate for an adjustive property jurisdiction centres on the parties to a marriage or a de facto relationship.[11] However, respect for the interests of third parties is a central feature of the jurisdiction, evidenced by the approach that secured and unsecured liabilities will usually be deducted from the parties' property at the first step of the property settlement order process.[12]

Even so, the position of third parties is not always clear. FLA financial cases involving third parties extend to appeals to the High Court of Australia,[13] including the leading High Court case guiding how courts should exercise discretion to alter parties' property interests, *Stanford v Stanford* [2012], and the leading Australian case on prenups, *Thorne v Kennedy* [2017]. *Stanford* involved the wife's daughter from the wife's first marriage acting as the wife's case guardian in an application for property settlement orders that would have given her, 'a better outcome under the FLA for [herself and her siblings] than would occur under the husband's will, which left his home, subject to a life interest to his wife, to the children of his first marriage'.[14] In *Thorne v Kennedy*, Mr Kennedy died during litigation in which his wife contested the validity of two prenups entered before and just after their marriage, and two of his adult children from his earlier marriage were substituted as parties in his place. Similarly, the Supreme Court decision on the status of prenups in England and Wales, *Radmacher v Granatino* (2010), involved third party influence. In that case, a German heiress with a much larger fortune than her then fiancé, suggested to him that the parties should enter into a prenup because her father demanded that she do so [86]: 'She expected to receive

a further portion of the family wealth if, but only if, she entered into the ante-nuptial agreement to protect this. Her father insisted upon this' [13]. Her father was involved in the drafting of the agreement [89]-[90].

Previous research

While the presence of third parties in FLA property disputes is clear, their role in the negotiation of and entry into prenups has not so far been the focus of analysis in Australia. An indication of third party involvement was, however, found in(Fehlberg's 2002)empirical study[15] (comprising analysis of responses to an email survey sent to family lawyers conducted in the first year of the operation of Part VIIIA and well before the FLA was amended to include de facto partner financial disputes), which suggested that use of prenups was more likely in relationships characterised by one or more of: wealth disparity, second marriages, and family wealth (Fehlberg 2002, p. 135).

In the UK, the involvement of third-party family members in the negotiation of and entry into prenups is supported by Emma Hitchings' qualitative research on property agreements (2011), conducted in England in 2008–09, involving focus groups and semi-structured interviews with 39 legal practitioners from London and regional cities in England. Hitchings found that 'one of the primary types of clientele for practitioners [are those] whose parents are pushing them to get an agreement to protect assets such as family trusts, businesses and inheritances' (Hitchings 2011, p. 66).

While the legal status of prenups in England is different to Australia (in particular, unlike in Australia, prenups are not binding under legislation and a court will not give effect to an agreement if it would lead to unfairness),[16] Hitchings' findings were of relevance to us given similarities between the two legal systems (including the broad discretion that exists to reallocate interests of the parties in their property) and lack of Australian research on the issue.

Indeed, while there has been substantial academic analysis of prenuptial agreements (e.g. Scherpe 2012, Dickey 2021), there is little empirical research into the use of prenups both in Australia and internationally (Kaye *et al.* 2023, pp. 42–43). In Australia, this is at least partly because obtaining information about prenups is difficult: prenups are not registered in court or any other central registry, and there are practical and ethical challenges to interviewing intact couples about agreements. It is often observed that money is a main source of conflict in couple relationships,[17] and that couples find it difficult to talk about money,[18] so discussion of prenups with researchers is likely to be difficult. Moreover, a motivation for entering a prenup is likely to be the desire of one or both parties to maintain financial privacy, and some prenups will contain a confidentiality provision that the parties are unable to disclose the terms of the agreement (Dickey 2021, pp. 121–22). A further concern is that reported cases involving prenups, usually applications to set a prenup aside, are unlikely to reflect how prenups are generally being used.

Australian law, however, requires that independent legal advice be given to both parties for an agreement to be binding,[19] so (subject to their duty of client confidentiality) family law professionals provide a key source of information about prenups in Australia. As a result, their accounts of how prenups are being used provide the basis for our research, and for this paper.

Our focus

This paper presents findings on third party involvement in financial agreements drawn from a study we conducted in 2021 involving semi-structured interviews with 40 family law professionals, including professionals who advise on prenups and those who do not. Our aim was to explore professionals' views and practices in relation to prenups. In doing so, we sought to provide systematic evidence of current professional perceptions and practices and to extend understanding of prenups beyond the anecdotal, and the glimpses provided in the reported cases.

The discussion in this paper builds on a previous paper from the project (Kaye *et al.* 2023), which presented findings on lawyers' views on the sorts of clients who propose prenups, the extent and nature of power imbalances between the parties, whether parties ought to be able to enter prenups, and concerns regarding professional liability when acting for parties entering prenups. The involvement of third parties, specifically the families of the couple entering the prenup, emerged as a key theme in that paper which we felt warranted further exploration.

Whilst Sharon Thompson has noted that 'third parties uninvolved in a marriage (or a prenup) can nevertheless assert significant influence', to our knowledge there has been no previous research focussing on the role of the wider family as the driving force behind entry into prenups (Thompson 2015, p. 81, 2024b, p. 380). We have also been influenced by Thompson's observation (based on qualitative research involving a comparison of the English position on prenups with that in New York State) that 'individuals do not enter into prenups in a vacuum' (Thompson 2015, p. 165). By examining third-party involvement in prenups we are exploring 'the social, material and relationship contexts' (Hall 2019, p. xxii) of the prenup, including the couple's family relationship contexts and their possible impacts upon individual autonomy. Such context may call into question the supposedly neutral, private, self-determining bargaining context in which the agreement is made, and upon which the policy basis for the legislation enabling such agreements is premised.

Methodology

Potential participants were recruited through the Family Law Section of the Law Council of Australia, augmented by snowball sampling (that is, research participants being invited to identify other potential participants) and the research team's professional networks. To be eligible for inclusion, potential participants needed to be practising family law, either as their sole practice area or one of their practice areas.[20]

We interviewed 40 participants. The final sample comprised 23 female and 17 male family law professionals in mostly metropolitan ($n = 35/40$) and some rural and regional locations across Australia. Participants from all Australian States and Territories except South Australia and the Northern Territory were represented. The majority ($n = 33/40$) of participants were solicitors (20 female; 13 male); seven barristers also participated (3 female; 4 male). Most participants were highly experienced family law specialists ($n = 32/40$ had more than 10 years practice as a family lawyer). The majority of participants ($n = 31/40$) did advise on or draft prenups, and often upon many prenups each year. Our

interviews therefore provide access to the prenup drafting and advice process of a very large number of prenups.

Interviews occurred between March and October 2021. With fieldwork affected by COVID-19 restrictions (especially in Victoria), face-to-face, in-person, semi-structured interviews were replaced with COVID-safe data collection methods: primarily Zoom interviews, along with a small number of telephone interviews based on participant preference. Interviews generally lasted about an hour; were audio-recorded with participants' permission; and typically occurred in participants' workplaces (with a minority occurring in participants' homes due to lockdowns, close contact rules, or convenience). Participants were asked to avoid mentioning any specific client details or cases during the interviews that might allow third-party identification.

The interview guide explored a wide range of areas of interest in relation to drafting and advising upon prenups.[21] All interviews were transcribed verbatim through a professional transcription service and checked by members of the team. Participants were also offered the opportunity to check their transcript prior to analysis. Each transcript was de-identified, and each participant was assigned a code which identified the State or Territory in which the participant practised and whether they practised as a barrister or solicitor. Ethics approval for the project was obtained from all researchers' institutions.

Thematic analysis formed the basis of our analytic approach for this paper. The 40 interview transcripts were disaggregated into four sets (Interview #1–10; #11–20 etc.), with each set comprising 10 interviews. Each team member was allocated a set of transcripts to code in relation to third-party involvement in prenups. This was based upon specific questions that we asked participants about family involvement and upon comments that some participants made about third-party involvement in the interviews more generally. We coded interviews into the following themes:

(1) Whether third parties were often parties to prenups;
(2) The proportion of prenups that involved or were influenced by third parties?
(3) The main scenarios involving third parties;
(4) When a third party was involved, whether the 'client/proposer' appeared to really want the prenup?
(5) What was the other party's response to the family involvement?
(6) Lawyers' approaches in cases involving third parties.

Each team member then cross-checked the coding of one other team member.

This was a small-scale, qualitative study. No claim is made that our findings are representative of all family law practitioners across Australia. Rather, and similar to previous research on prenuptial agreements (Fehlberg 2002, Thompson 2015), our findings contribute to the understanding of an underexplored area.

Findings

In this section we present our findings related to the six themes just set out.

Third parties as parties to financial agreements?

Anthony Dickey has commented that although people other than spouses can be parties to an agreement, usually spouses are the only parties to the agreement (2021, p. 3). This comment is supported by our research.

Only two participants discussed a third party being a formal party to the prenup. One solicitor said that third parties were 'certainly in the background' ... and 'sometimes we join them ... we have had BFAs, where we've joined the parent's company that is going to be providing the wealth' (#5, ACT Solicitor). The second commented that, 'As parties to the actual agreement, I've only been involved in one or two of those, over the 20 years that we've been able to do these agreements' (#33, Victorian Solicitor). This participant observed that where third parties are party to the agreement, 'they don't need the advantages and disadvantages and effects on rights type advice'. They commented that family members are simply 'trying to ensure that money is advanced and secured and repaid'.

Third parties wanting to directly protect their own interests are usually able to do so much more simply than by being a party to a prenup. For example, parents providing money for a house purchase might be mortgagees, parties to formal loan agreements, or be co-owners in property. Other families might set up a family discretionary trust. These options may be cheaper and simpler than being a party to a prenup whilst avoiding the 'discomfort' of a prenup (Millman 1991, p. 25, Grossi 2019, p. 281). As so few participants referred to third parties as parties to agreements, the reasons why third parties might take this course of action were not explored in this study.

Proportion of matters involving third parties

Third parties were more likely to be described as involved in the negotiation of BFAs than to be parties. However, among the 31 participants who drafted or advised on prenups and were asked directly what proportion of prenups that they acted in involved third parties, perceptions of family involvement varied considerably.

A small number reported that family was involved in a minority of cases. For example, a Victorian solicitor (#34), said of those they had personally dealt with, it would 'really only [would have] been a couple'. Others reported seeing a sizeable minority of prenups involving family (around one third to one quarter of these cases).

The largest proportion were lawyers who thought that the influence of family was present in 'at least half' (#10, NSW Solicitor) of the financial agreements they negotiated, with estimates ranging from half to 80%. For example, one solicitor commented that financial agreements involving third parties were 'a major part of the work that we do' (#40, WA Solicitor). Another participant commented:

> [T]he influence of parents ...is, I'm sure enormous. And if I was to look at all of those couples who are in their 20s, 30s, inevitably, there would be a family influence behind it – usually, because the family wealth is disproportionate as between the spouse parties. (#33, Victorian Solicitor)

Another participant described the decision to enter into the prenup as 'routinely' made by family members, as opposed to the spouse parties:

> It's usually not the lovebirds who decide to have one. It's the others. It's the parents. (#36, WA Barrister)

Family in the shadows

Involvement of family members meant that although third parties were usually not parties to agreements, parties were bargaining in the shadow of family influence, as well as the shadow of the law (Mnookin and Kornhauser 1979).

Participants' responses consistently conveyed that although they were not certain about the extent of family involvement, there was the sense or knowledge that the third party might be the mastermind behind the agreement. For example:

> Quite often though they won't come in but you know they're in the background. You'll get sent emails where mum and dad or the daughter is being copied in and things like that – so you get an idea of who the real puppet master is fairly early on. (#24, Queensland Solicitor)

Participants were not always told of third-party family involvement, and worked out for themselves that this was operating. For example, one commented that although they would not usually directly see third party involvement, 'I can sense other people in the room without them being in the room' (#29, Victorian Barrister). Another participant commented:

> It's probably a smallish percentage I think, maybe 5% . . . . But sometimes you don't really know where that pressure's coming from, but when the client describes their financial situations, if they are a beneficiary of a family trust, I'll work out pretty readily what might be going on. (#32, Victorian Solicitor)

Main third-party scenarios

Participants described two main scenarios where third parties were directly involved in the prenup:

(1) Where parents or wider family members sought to protect the wealth that they were passing on to their child. This could be in the context of a 'Mum and Dad' advance or gift to their child, or wider dynastic wealth protection.
(2) Where the parties were entering a second or subsequent relationship and sought to protect their wealth for adult children from a previous relationship.

A participant neatly summarised both scenarios:

> A lot of them are driven by one side's parents and so that child may not actually have those assets yet but he's going to receive them and the other category are people who are forming a new relationship later in life, already have children, . . . and just want to make sure that they keep their own wealth for their children. (#31, Victorian Solicitor)

Protecting family wealth where wealth is being passed on to children

Participants often described financial agreements as being prompted by older family members (usually parents, but sometimes extended family members, especially grandparents) who wished to protect their inter-generational transfers from falling into the hands of an in-law or, more importantly, a potential future ex in-law if there was a later 'separation dispute' (#14 NSW Solicitor). For example, one participant described, 'mum and dad … looking to ensure the safe transfer of generational wealth, without the risk of a divorce upsetting long-term asset planning arrangements' (#35, Victorian Solicitor).

These transfers of wealth could be conditional upon the child entering into a prenup with their partner:

> [I]t's clear it's the parents who are the driving force behind it. It may be the case the parents have said that, look, we have some trust distributions that we want to make, or we want to give you an early inheritance, but we're not going to give it to you until you enter into a financial agreement with your other partner'. (#37, WA Solicitor)

Additionally, the family might 'be more prepared to make their money available to the parties' during the relationship if 'they have that protection [of the prenup]' (#34, Victorian Solicitor).

Whilst the protection of the intergenerational transfer may be in the context of a 'mum and dad' or grandparent one-off transfer, there was also a larger context of long- term dynastic wealth protection. For example, when asked what the reasons are for people to enter a prenup, one participant answered:

> Dynastic wealth often. So, they either feel an obligation to protect that which their family has given them, or their family places pressure on them to protect their wealth. (#7, NSW Barrister)

Another commented that prenups were used where 'one family's particularly wealthy [and] wants to protect their family's wealth from the daughter-in-law, routinely'. (#36, WA Barrister)

A further participant said that in these cases it was:

> [T]ypically their parents in the background trying to push their own agenda … they want to create almost like a bloodline trust where they know that everything is going to just stay within their family if something goes pear-shaped. (#24, Queensland Solicitor)

In dynastic wealth scenarios, entry into a prenup appeared to be part and parcel of being a member of the family 'firm' and fold: 'If you're going to get married and remain part of the group and comply, you must enter into one' (#6, NSW Barrister). The signing of the prenup in this context was just one part of wider family business transactions:

> In my experience it's not uncommon that the first call I get is from the parent, not the child. … Or in [certain case], the CEO of the family office called me. (#31, Victorian Solicitor)

> If you're a first time around, it's normally because it's family planning. So often the ones I see are, the larger family groups who are interested in trying to protect and quarantine, not often the farm, but the family farm is a good analogy. The family business structure from the claims. (#6, NSW Barrister)

Second 'marriages' where there are children from previous relationships – protecting wealth for adult children

The second context in which third parties were involved was second marriages where there was a desire of one or both parties to protect their wealth for their adult children of a previous relationship:

> So, there's a strong wish later in life, where people have their asset position, they're forming a new relationship, they've got adult children, that really they're just saying, what's mine is mine, what's yours is yours. But now we're going to live together or marry, but it's all for my children. And sometimes children actually have a bit of a view about the need for their parents to enter into those kinds of relationship agreements. . . (#12, NSW Solicitor)

Adult children could be the driving force behind a prenup in this situation:

> [i]t's funny because it's often when it's the older people who are entering into a new relationship, it's often their adult kids who are pushing for the financial agreement because they don't want to see their inheritance go to this new bird or this new bloke that's on the scene. (#24, Queensland Solicitor)

This second group featured less in the descriptions of our participants than the former group involving wealth transfers to children. This may be due to the generally high net wealth group that comprised the client base of many of our participants.

Does the 'client' really want the prenup?

Participants were asked whether, in cases where third parties were involved in the prenup, the client (that is, the party proposing the prenup), really wanted a prenup. Among the 32 participants who discussed this issue, responses conveyed that: family dynamics were complicated so it could be hard to tell whether the 'client' really wanted the prenup; clients ranged from those who were 'on the same page' with their family to those who objected; and that whatever the client's real feelings were regarding entry into the prenup, objection and refusal were rare in the usual case involving third party parental influence. There was little reference by our participants to responses of clients whose children encouraged them to enter prenups.

One example provided by a participant of a client being 'on the same page' with their parent involved a female client who would inherit a large amount of money. Her father had attended all the appointments in relation to her prenup. Her lawyer commented that:

> I can see there's a collaborative relationship [between the father and daughter]. They are both on the same page. They're not all like that. These are astute businesspeople and see a relationship as a business transaction. (#26, Tasmanian Solicitor)

However, more complicated dynamics associated with third party involvement in financial agreements were consistently communicated by participants. For example:

> There are all sorts of family dynamics. The clients for whom I act do want the agreement. Now, whether that's motivated by a feeling that that's required as part of the family dynamic or whether they have a personal wish to preserve their assets, I don't always know . . . I haven't had a situation where the child of a wealthy family has seemed to be reluctant to do it. (# 10, NSW Solicitor)

> Often there's a real ambivalence to it, but at the same time, many of these kids, for want of a better expression, are financially sophisticated and see this as being just simply part of financial planning. And it's not seen to be anything untoward, or the like. There's a recognition of the significance and importance of these kinds of documents. It's rare that I encounter these days the kind of notional opposition to the prospect of entering into a financial agreement. (#33, Victorian Solicitor)

While complicated dynamics could be behind the proposal for a prenup, participants consistently conveyed that client resistance to entering agreements was rare. For example:

> I haven't had a situation where the child of a wealthy family has seemed to be reluctant to do it. Reluctance is more often when I'm advising the weaker financial party on a financial agreement that's being proposed by their partner or spouse. (#31, Victorian Solicitor)

From both children and parents entering prenups, lack of resistance may be due to the presence of an unspoken threat or understanding:

> I think it never gets said in so many words but you get the impression that there might be discussions that have gone on beforehand that 'well, you're not going to receive your inheritance unless there's a financial agreement in place' or 'I'm not going to care for you as you get older if you give everything to this new person that's come into your life'. (#24, Queensland Solicitor)

Alternatively, the client may sign out of a general sense of familial obligation: '[The client might] feel it's unnecessary, but they want it because the family want them to have it' (#8, NSW Solicitor).

When a parent sought that their child enter a prenup, agreement to sign could be due to client awareness of the benefits of ongoing family financial support for the couple if the agreement was signed:

> Parental interference isn't always nasty. It's sometimes benign and helpful. Sometimes they should be there. They're not just there to influence. They should be there because they're actually involved in one way or another. Their money's involved, or they're going to be the ones funding the private school fees. (#36, WA Barrister)

Response of the recipient party who is asked to sign the prenup

Participants commented that by the time the recipient party (that is, the party asked by their partner to sign the prenup) receives it, they are often not surprised. As this participant commented, 'They know about it . . . . they mightn't understand it but they're expecting it'. (#26, Tasmanian Solicitor)

The pressure on the recipient party to sign the proposed prenup may be heightened where extended family – parents or adult children – are driving the prenup:

> [W]here the generation above is thinking of divesting its wealth down to this generation . . . they want their child's partner to say very clearly what they will and won't be entitled to, before they start divesting their family wealth downwards. (#5, ACT Solicitor)

Barlow and Smithson (2012) have commented that for some [recipient parties], the signing of a prenuptial agreement denying oneself the right to apply for ancillary relief on divorce is not a legal rational act, but the ultimate sign of commitment to your partner

at a time of high emotional optimism (p. 317). We found some evidence that involvement of the family might heighten the need to demonstrate such commitment and to counter the perception of just being in the relationship for the money. The non-moneyed spouse may sign to avoid their characterisation by the family as 'money-hungry' or as a 'gold-digger':

> [A woman] tends to be more about, 'No. I'm not marrying him for money. I don't want the pressure of the family thinking that that's what it's about. . . .'. That's a common one. It's quite gendered. (#31, Victorian Solicitor)

Another participant commented that where adult children are driving the prenup, it was usually 'to preserve family wealth' where there was 'a concern that a newfound love is really just a gold digger' (#33, Victorian Solicitor), who was assumed to be female:

> And so, the family are wanting to ensure that, yes, if it all goes badly, yes, she gets what she's entitled to, but no more than that. And then there's no consequences for their expected inheritances. (#33, Victorian Solicitor)

The recipient party may feel they have some, but usually very limited, ability to renegotiate the terms of a prenup that their partner is also being forced into:

> And sometimes there might be a sense that the other [proposing] party is not really . . . maybe they're being forced into it by their family too, so there's a bit more of a window open to enable that renegotiation. But a lot of the time it's really difficult because they [the recipients] have been presented with an agreement or a proposition and it's kind of a fait accompli and there's really no room for movement. . .. (#31, Victorian Solicitor)

Alternatively, the involvement of family might be used by the lawyer and their proposer client to help to 'sell' the prenup and overcome the recipient party's reluctance by suggesting the prenup is outside the proposer partner's control:

> [I]t's often in the sell of a financial agreement to the other spouse that you kind of encourage your own client to, explain that, look, this is something Mum and Dad want. Or it's something Granddad wants. . . Not to the level where that might then be undue influence, or some sort of unconscionability, but so that there's a kind of explanation around these things. (#33, Victorian Solicitor)

> And if somebody . . . says, oh, look, my parents are really, really pissed off, and they really want us to sign this, and they're going to be really ugly with me, and they're not going to fund the wedding and . . . even if that's not true, it still slips through. (#36, WA Barrister)

In some cases, the prenup may truly be outside the proposer partner's control:

> Sometimes, and I've got one at the moment, it's quite clear that the parties, that the actual husband and wife had essentially nothing to do with it. The family group instructed, prepared the BFA, presented it to the parties, who trotted off to their lawyers and were signed up on it. (#6, NSW Barrister)

Lawyers' responses to third party involvement

Participants expressed a wide range of responses to third party involvement. Views ranged from welcoming such involvement to being very wary of it.

One participant who found such involvement useful reasoned as follows:

> Sometimes I will say to clients 'look . . . it would be of assistance if, perhaps, we organise a time to meet with your parents . . . just so that they have a chance to ask all the questions' . . . because sometimes the considerations that are important for parents are different for children . . . . It won't surprise you that quite often there are a number of people involved in a person's decision. And it helps them if you get them on board. (#35, Victorian Solicitor)

In contrast, another participant expressed concern about such involvement:

> I have a practice that I won't meet with the parent. I'm more than happy to take the call and speak to them but say you're not going to be my client and I need to speak to your son or daughter. But there's that ongoing conversation about dad wants me to do this. Typically, it's dad. It's very rarely mum. (#31, Victorian Solicitor)

Another participant expressed a mixed response to such involvement:

> Q: Do the parents attend the client interviews?
>
> No, most people are reasonably grown up. Sometimes you get the parents interfering, and that can be quite useful in getting the information that you need to be able to tie up the agreement properly to a reasonably desired objective. (#32, Victorian Solicitor)

For some participants, third party involvement prompted additional steps to protect the integrity of the process and the agreement:

> There'll be one or two that come along and aren't so sure and maybe don't understand. And I actually focus my attention on them, and I'll probably be really upfront and blunt to their family and say, 'I get why you're here, but you're not my client', and, ultimately, I've got to make sure that the person entering into this is on the page, they get it, they want it and it accords with their own values. Because it is, to an extent, a document that is going to reflect some value governance about the nature of the relationship and what the parties intend. (#26, Tasmanian Solicitor)

Another participant recalled acting for the responding party to a prenup in circumstances of significant third-party influence. The participant 'refused to sign' the prenup due to concern about the quality of their client's consent in the circumstances:

> The family had not only significant wealth they wanted to protect, they had also ensured that the groom-to-be had no assets in his name. . . . The house that they lived in was owned by a trust controlled by the parents. Even their cars they didn't own. . .. She wanted to have five children or something. And I said at the end of those five children, you could end up with no money. And you will have led this fantastic life . . . her children will have grown up in that environment and then they separate. And she will be there with no money. . . . But she was quite obsessed with the idea, 'but I'm not marrying him for his money' [and was] completely oblivious to all the changes that were about to happen to her. (#31, Victorian Solicitor)

In contrast, other participants saw third party involvement more positively as an opportunity for broader succession and estate planning:

> Sometimes you see a family come in, and they want advice about how to protect in general . . . Recently . . . I saw parents and their daughter . . . we talked about not just a BFA, we also talked about would we just do a loan agreement between the parent and the daughter. And what will we do about their estate plan? So it was more an overall sort of, these are the things that we can do to protect your assets, you, the parent's assets and a BFA is one of those options. (#4, ACT Solicitor)

> In those succession planning meetings, it will be often a whole of family. You'll have typically the patriarch, although I have got one matriarch at the moment, with their broader commercial advisors, and all of that sort of thing. And sometimes you will have, what I'll call the children, as part of the general planning meeting of all of it. (#6, NSW Barrister)

Participants also had mixed responses to the question of whether it was appropriate for the third party to pay the legal bill and what the impact of holding the purse strings might be. Some saw such direct financial involvement as problematic, while others were less concerned.

One participant put it this way:

> Well, if they're there, and they're paying the bill, they're definitely driving the agenda. I don't think there's too much question about that . . . . It's quite significant the number of parents who are paying for their adult children's legal fees. It is absolutely Mum-and-Dad-Bank. (#3, ACT Solicitor)

Another participant responded:

> [Who pays the bill] varies. Some are eventually paid by dad, some are paid by the child, they've already got other wealth.
>
> Q: So, if it is the parents who are paying the bill does that present a problem for you . . . ?
>
> No, ... We enter into cost agreement with the client, where they then forward the bill is up to them. (#31, Victorian Solicitor)

Despite the mixed views as to third parties paying the bill, overall, there was a strong view that it was the client that the lawyer was taking instructions from, not the third party:

> Typically speaking. . . [t]he initiating call [is] from the parents. Sometimes they come into the initiating meeting as well but, more frequently, as soon as the introductions are made, the parents are out of the picture. . . . we [are] primarily dealing with the client directly, and we have to, for all sorts of reasons. And just primarily to make sure that it is, in fact, what the client wants. (#22, Queensland Solicitor)

Discussion and conclusions

Overall, our findings were consistent with, but expand on, the very limited previous research touching on the circumstances in which third parties are likely to be involved in entry into BFAs. They also offer some support for the notion that recipient parties may be under heightened pressure to sign. Relatedly, they suggest risks for parties and lawyers arising from the possibility of third-party conduct that may undermine consent.

Explaining the circumstances of third-party involvement

As discussed in Section III, our participants identified two main reasons for third party involvement: (1) where parents or wider family members are seeking to protect the wealth being passed on to younger generations (involving two further categories: transfers/gifts and dynastic wealth), and (2) where parties are entering second marriages and there is a desire of one or both parties to protect their wealth for their adult children of a previous relationship. These findings align with Hitchings' UK research, and build on

Fehlberg and Smyth's Australian work soon after the (Fehlberg and Smyth 2000) amendments which noted these as motivating factors for entry into BFAs but did not explore them.

While there is nothing new about third party family members being involved in decision-making – it is always the case that 'our decisions' are in fact decisions reached within a relational context and so not straightforwardly ours' (Herring 2014, chap. 3) – it is possible that in the current economic climate, prenups may be increasingly influenced by family members. As a recent media report noted:

> One of the country's largest family law firms reports requests for BFAs jumped 79% in a year, while multiple others reported a doubling of requests since the pandemic . . . Lawyers said drivers included the 'bank of mum and dad' insisting upon them in return for helping their children purchase a home, increased demand from those entering second and third marriages, and an economic environment that [is] pushing more people to protect their wealth and assets (Cann 2024).

Increased family involvement is not surprising in the context of research indicating that parental transfers – both inheritances and financial gifts – have become one of the key enablers of home ownership for first homebuyers in Australia (Cook and Overton 2024). This is consistent with a reported increase in passing on of wealth to descendants while alive (Cigdem and Whelan 2017, Codas *et al.* 2023). Our participants observed that receipt of money from parents (or grandparents) involved the negotiation of familial expectations. As Heath and Calvert have noted, in some cases an 'expectation of "something for nothing" is anything but' (Heath and Calvert 2013, p. 1131).

By contrast, the involvement of third parties in prenups required in the context of dynastic wealth appears less likely to be influenced by current economic conditions. Research has suggested that 'members of dynastic families learn to own and value cross-generational wealth accumulation' (Kuusela 2018, p. 1162). Kleve et al have suggested that the dynastic business family 'continually oscillates between being a "family" and a "business family"' (Kleve *et al.* 2020, p. 517). Some of our participants' comments conveyed that prenups were just another business transaction within the wider context of the business/family. There was acceptance of 'an intertwined relationship between kinship and wealth accumulation' (Toft and Friedman 2021, Kuusela 2023).

The involvement of adult children in parents' prenups was also unsurprising given the reported cases discussed in our Introduction, and that one third of Australian de facto partnerships and marriages are now second relationships.[22] Whilst there are no reliable figures for the breakdown of de facto relationships by age group, the rate of divorce for those aged 55 and over has increased markedly despite the overall rate of divorce in Australia declining. According to Australian Bureau of Statistics data, the rate of divorce per 1,000 people aged 55–59 has increased between 2001 to 2023 from 2.8 to 6.8 for men and 1.4 to 5.4 for women (2023). It seems more likely that parties, or a party, will bring property into a second relationship than into a first relationship entered at a younger age. While we are not aware of previous Australian research on this point, a recent media report warned 'previously married couples to have a frank discussion about their property and financial agreements for current – and future- children before they walk down the aisle again' (Hughes 2020). Adult children (and parents) may well be concerned about how the new relationship might have an adverse impact on their future wealth –

a point supported by recent UK research finding that most divorcees continue to financially support their children long after they are of 'non-dependent' age (Hitchings *et al*. 2023, p. 235).

Increased pressure on recipients to sign?

Participants observed that there was sometimes heightened pressure on recipient parties (and even on proposers) to sign where wider family was involved. As indicated above, such pressure could take the form of unspoken threats (to disinherit a child or not look after an older parent); a desire by the recipient party to show their emotional commitment to the relationship; or a desire by the recipient to dispel or avoid their characterisation as a 'gold-digger'.

The latter resonates with Sharon Thompson's findings regarding the 'gendered power of the gold-digger stereotype' (Thompson 2024b, p. 374) and the gold-digger trope in family law (Thompson 2016, 2019) in which 'the stereotypical gold digger is female' (See also: Miles and Hitchings 2018, Thompson 2024b, p. 375). Signing the prenup may be a test or demonstration 'to convince third parties, such as affluent parents' or adult children that he is not marrying a gold-digger and for her, to avoid her characterisation as a gold digger' (Thompson 2016, p. 1240).

Thompson has further suggested that 'moral panics about gold-diggers and alimony drones add an extra layer of coercion to financial settlements and nuptial agreements' (Thompson 2019, p. 196). Consistent with this, Emma Hitchings, in research for the Law Commission of England and Wales, observed that participants in her focus groups discussed 'whether third parties driving an agreement could be a … form of duress' (Hitchings 2011, pp. 66–67).

The possibility that pressure placed by third parties on a family member to enter a BFA may amount to economic abuse, or elder abuse in the case of parent parties, is not a matter that has been discussed in the case law and which, probably as a result, was not identified or discussed by participants. However, given the current proposal to amend the FLA to include a definition of 'economic and financial abuse' (Family Law Amendment Bill 2024 (Cth), proposed s 4AB(2A)(a)), inclusion of economic abuse in the (Domestic Abuse Act 2021) (England and Wales) (s 1(3)(d) and (4)), and increasing attention to the significance and extent of elder abuse (Kaspiew *et al*. 2016 (Australia) (Safe 2016), (UK)), this is an important matter for future research.

Relatedly, the issue of whether third party pressure could lead to a challenge to the validity of a prenup is not a matter that is commonly raised in legal argument (or by way of judgment) in the Australian case law.[23] We also did not ask participants directly about third party conduct that may lead to the challenging of a prenup, and this was not a matter raised by them when asked questions that would have encouraged this discussion. The lack of attention given to this issue is, however, perhaps surprising given that our findings suggest that many prenups are the result of some influence of third parties.

One explanation for this could be that there is a lack of awareness of, or perhaps doubt about whether third party pressure is a circumstance in which a court may set aside a financial agreement under the FLA. Indeed, such lack of awareness or doubt is implicit in the recent judgment of *Suess & Suess* (2024), where the wife claimed that she was under

pressure to sign a post-nuptial FA by the husband *and the couple's sons* (our emphasis).[24] In relation to the pressure exerted by the sons, Berman J held:

> Whilst I accept that the parties' three adult sons were keen to see an end to the settlement discussions between the parties and whilst there may have been overt animosity displayed by possibly two of the three adult sons, that did not amount to an advantage being taken **by the husband** of the disadvantaged position of the wife. [199] [our emphasis]

Justice Berman later added:

> I am left in little doubt that the wife had strong regard to the possibility that her relationship with her children and grandchildren may be adversely affected if a timely settlement was not reached. . . .
>
> I do not consider that the evidence would support a finding **that the husband engaged in unconscionable conduct or that in some way the adult children were being used by him** to achieve that outcome. [201]-[202] [our emphasis]

In our view there is a clear legislative basis in the FLA for setting aside financial agreements procured by the duress, undue influence, or unconscionable conduct of third parties. Specifically, sections 90K/90UM and 90 KA/UN FLA set out the circumstances in which the court may set aside a financial agreement and relevantly include where 'the agreement is void, voidable or unenforceable'. Section 90 KA provides that '[t]he question whether a financial agreement . . . is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts'.[25]

On the matter of relevant equitable principles, there is clear authority for setting aside a transaction procured by the duress, undue influence, or unconscionable conduct of a third party.[26] As Lord Eldon said in *Huguenin v Baseley* (1807)

> I should regret, that any doubt could be entertained, whether it is not competent to a Court of Equity to take away from third persons the benefits, which they have derived from the fraud, imposition, or undue influence, of others. . . . [There] is an express authority, that it is within the reach of the principle of this Court to declare, that interests, so gained, by third persons, cannot possibly be held by them . . . [at 532].

Given that third party conduct may vitiate a transaction in equity, such conduct provides a basis upon which the financial agreement may be set aside as not being 'valid, enforceable or effective' pursuant to section 90 KA/UN.

As prenups are routinely given effect in the courts of England, Wales and Northern Ireland (Thompson 2024a, p. 420) despite them not necessarily having binding status (Thompson 2018, p.415), it is pertinent to also consider whether pressure might have an impact on the application of prenups in those jurisdictions. In *Radmacher v Granatino* (2010), the UK Supreme Court made it clear that vitiating factors such as pressure would make it unlikely that a financial agreement would be given effect:

> In relation to the circumstances attending the making of the nuptial agreement . . . . The first question will be whether any of the standard vitiating factors: duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to

> be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it [71].

We acknowledge that there is a 'blurred line' (Fried *et al.* 2021, p. 95) which we are examining and that at least some of the examples of third-party influence provided by participants may not be technically termed '*undue*' influence or unconscionable conduct. Emotional pressure does not 'necessarily vitiate an individual's decision-making capacity' (Buckley 2014, p. 265). However, the issue of third-party pressure as a vitiating factor in prenups warrants greater research, and perhaps greater attention by family law system professionals. This is particularly so given our broader research finding that most family lawyers consider that there is often a power imbalance between the parties entering a prenup (Kaye *et al.* 2023, p. 60). Involvement of third-party family members may add to and complicate that imbalance.

What next? Implications for lawyers

This paper provides clear evidence of third-party influences that tend to be overlooked both in research and in practice, and is important in enriching understanding of prenups and their relational context. Our participants' wide-ranging responses to third-party involvement in the entry into prenups, ranging from supportive to discouraging, and varied strategies for dealing with that involvement when it was seen as raising a risk that a party's consent may be compromised, may suggest a need for greater practitioner focus on the possibility of financial agreements being set aside due to vitiating conduct of the third party. While the area would certainly benefit from further research closely on the nature of the pressure brought to bear by third parties, there are significant challenges in conducting that research, as discussed earlier in our paper. Unfortunately, as has been the general pattern with the law on financial agreements, and particularly prenups so far, we may need a high-profile case to promote change.

Notes

1. The term 'prenup' is often used colloquially to describe such agreements (although we acknowledge that this terminology is neither strictly legally correct nor recognised in the legislation. For example: Hughes (2018, 2020); Shoebridge and Turnbull (2017).
2. *Family Law Amendment Act 2000* (Cth); FLA (n 1) pt VIIIA; *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth); FLA (n 1) pt VIIIAB. A financial agreement may cover a range of financial matters including property (including superannuation) and financial resources, spousal or de facto partner maintenance, and child support (if the requirements for binding child support agreements are satisfied) and may cover child maintenance: *Family Law Act 1975* (Cth) ss 90E, 90UH ('FLA'). For what may be covered by financial agreements entered before marriage see: at ss 90B, 90UB.
3. *Family Law Amendment (De Facto Financial Matters & Other Measures) Act 2008* (Cth); Part VIIIAB FLA *1975* (Cth).
4. Ss 71A, 90SA FLA.
5. Ss 79(1), 90SM(1) FLA.
6. Explanatory Memorandum, *Family Law Amendment Bill 2000* p6.
7. Ibid at 8.
8. Ibid at 8–9.

9. Schedule 3 Part 1, *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth). See concluding sentence of ss 90B(1), 90C(1), 90D(1), 90UB(1), 90UC(1), 90UD(1), which states that 'the parties 'may make a . . . financial agreement with *one or more other people*' (emphasis added).
10. s90G(1)(b), s 90UJ (1)(b) FLA.
11. See further (Fehlberg *et al.* 2015, p. 13–22).
12. *Biltoft & Biltoft* [1995], [57], *Stanford and Stanford* [2012] (French CJ, Hayne, Kiefel & Bell JJ).
13. See further (Fehlberg and Chisholm 2022).:
14. See further: Fehlberg *et al.* (2015, p. 498).
15. Fehlberg and Smyth's earlier work also included analyses of the use of such agreements before 2000 (drawing on Australian Institute of Family Studies' Australian Divorce Transitions Project data), and of the 2000 reforms (Fehlberg and Smyth 1999, 2000):
16. *Radmacher v Granatino* [2010] at [75].
17. e.g., Emma Duffy, 'Money is the biggest source of conflict for nearly 60% of Australian couples', 19 May 2021, savings.com.au, available at: https://www.savings.com.au/savings-accounts/money-is-the-biggest-source-of-conflict-for-over-half-of-australian-couples, accessed 25 October 2023.
18. e.g., NAB, 'NAB Launches "Money Mondays" with leading therapist', NAB News, nab.com.au, available at: https://news.nab.com.au/news/money-mondays/, accessed 25 October 2023.
19. Ss 90 G/90UJ FLA.
20. For more details on recruitment see (Kaye *et al.* 2023, p. 44–46).
21. Ibid.
22. https://www.betterhealth.vic.gov.au/health/healthyliving/Relationships-remarriage#bhc-content.
23. Cf *Quincey & Quincey* [2024], where the wife argued that a BFA was obtained by undue influence from the husband's family members. Due to non-disclosure by the husband, the judge did not need to explore that argument. In that case, in 'the weeks leading up to the signing the BFA the husband's mother, sister and sister's husband all phoned the [wife] and verbally abused her, insisting that she sign the [BFA]. During the phone call from [the husband's mother], she said, '"you are nothing", "it is all [the husband's] money", "you must sign all documents", "you are nothing without him"'. [9–10].
24. Whilst most of this paper considers the pressures to enter into prenups, the statutory vitiating factors to set aside post-separation agreements are identical to those to set aside prenups (s90K/90UM). Our commentary would apply equally to setting aside prenups due to the undue influence or unconscionable conduct of a third party.
25. See further (Sarmas and Fehlberg 2019)., See also, *Thorne v Kennedy* [2017] per Kiefel CJ, Bell, Gageler, Keane and Edelman JJ, stating with apparent approval at [23]: 'At all stages in this litigation it was assumed that each of the vitiating factors applied according to the principles of common law and equity as described in s 90 KA'.
26. See *Thorne v Kennedy* [2017] at [25] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), citing, *inter alia Bridgeman v Green* (1757) at 64–65 [97 ER 22 at 25]; Bank of New South Wales v Rogers (1941; See also (Ridge 2014, p. 113–15).

Acknowledgments

The authors would like to thank Professor Bruce Smyth of Australia National University for his substantial contribution to this project as a team member. With us, Bruce conducted many of the participant interviews, was involved in the analysis of the interviews and has provided helpful comments on this paper. We also want to thank the Family Law Section of the Law Council of Australia, the legal practitioners who participated in this study, and Jackie Jones, UTS Faculty of Law, for her assistance with the interview schedule. Thank you to the anonymous reviewer for their helpful comments on an earlier draft of this paper.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Funding

Funding for this research was provided by the UTS Law Health Justice Centre.

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