

MEMORANDUM

DATE: 9 February 2007

RE: Minors and Binding Financial Agreements

The information contained below is correct as at 9 February 2007.

1. Introduction

This memorandum examines the ability of minors to enter into valid binding financial agreements under the *Family Court Act 1997* (WA) ('the Act'). The Act makes provision for de facto couples to enter into financial agreements to deal with property rights upon separation. However, a situation may arise whereby one party to the de facto relationship is under 18 years of age (a 'minor') with no significant assets in his or her name. The other party to the relationship, if 18 years or over, may well possess an interest in land (or other property interest) that he or she wishes to protect by way of a financial agreement. A question then arises concerning the minor's ability to enter into such an agreement, either by him or herself or through a case guardian or parent.

The following advice covers the above scenario, namely, a minor proposing to enter into a financial agreement that purports to take away rights and entitlements of the minor while conferring no apparent benefit. The advice provided would be different if the financial agreement (as a whole) could be construed as conferring a benefit on the minor.

2. Legislative framework

Section 205ZO of the Act makes provision for written financial agreements to be entered into during a de facto relationship.

Under s.205ZS, there are several requirements to be satisfied before such a financial agreement will be considered 'binding'. Importantly, both parties must sign the agreement, and both parties must have been provided with independent legal advice before signing.

Section 205ZV of the Act sets out the circumstances in which a court may set aside a financial agreement. The most significant in this scenario is s.205ZV(1)(b), which states

that the court may make an order setting aside an agreement if the agreement is void, voidable or unenforceable.

3. **Can the minor enter into this financial agreement?**

It is highly likely that should a minor purport to enter into such a financial agreement it may be set aside as 'void, voidable or unenforceable' under s.205ZV(1)(b) of the Act. Section 205ZW of the Act provides that the question of whether a financial agreement is valid, enforceable or effective is 'to be determined by a court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts'.¹

At common law, contracts of minors are generally voidable. The only exception relates to binding acts done for a minor's benefit (unlikely to be applicable here).² There is even some authority to suggest that contracts 'necessarily prejudicial' to minors are generally void.³ Whether the financial agreement is considered 'void' or 'voidable', it can be set aside by a court pursuant to s.205ZV of the Act. In any case, neither a void or voidable contract is enforceable against a minor at common law.

Additionally it is worth noting that the courts have no general power at common law to 'approve' (and thus render binding) a contract entered into by a minor. Similarly at common law parents are unable to give validity to contracts entered into by their children.⁴

4. **Could a case guardian be appointed to enter into the financial agreement on the minor's behalf?**

Under Rule 6.08(1) of the Family Law Rules 2004 (Cth)⁵ a child may start, continue, respond to, or seek to intervene in, a case only by a case guardian.

There are several reasons why a case guardian may not be appointed in this scenario:

¹ A similar interpretation was supported by the Full Family Court of Australia in *In the Marriage of Blackman* (1998) 22 Fam LR 416 at 431

² *Zouch d Abbot and Hallet v Parsons* (1765) 97 ER 1103 at 1106-7 per Lord Mansfield

³ See *De Garis v Dalgety & Co Ltd* (1915) SALR 102, where the Full Court of the Supreme Court of South Australia held that an undertaking in relation to a minor's property was obviously prejudicial where he obtained no personal benefit.

⁴ See *Field v Moore* (1855) 44 ER 269 at 275; *Capes v Hutton* (1826) 38 ER 370

⁵ The *Family Law Rules 2004* (Cth) have been adopted for the purposes of the Family Court of Western Australia in the *Family Court Rules 1998* (WA). See *Family Court Rules* rr. 12 & 13.

- (a) Firstly, the minor concerned may fall within Rule 6.08(2), which provides that Rule 6.08(1) does not apply if the court is satisfied that the child understands the nature and possible consequences of the case and is capable of conducting the case.
- (b) Second, there is some doubt as to whether the signing of a financial agreement falls within Rule 6.08(1), which provides for the conducting of a *case* by a case guardian. As this scenario effectively involves the signing of a contract, it may not be considered to fall within 'starting, continuing, responding to, or seeking to intervene in a *case*'. 'Case' is not defined in the *Family Court Act*, *Family Court Rules*, *Family Law Act* or *Family Law Rules*, but is defined in the Oxford English Dictionary as 'a legal action that is to be or has been decided in a court of law'.
- (c) Lastly, regard should be had to Rule 6.13, which seems to indicate that a case guardian must act in the best interests of the represented child.⁶ Rule 6.13(1)(c) provides that a case guardian 'may, for the benefit of the party, do anything permitted by these Rules to be done by the party' (emphasis mine). As the proposed financial agreement seeks to take away rights and entitlements of the minor it is unlikely to be considered 'for the minor's benefit'. Therefore, even if a case guardian *is* appointed, it is unlikely they would be able to enter into the financial agreement on the minor's behalf.

5. Could the minor's parent/s enter into the financial agreement on the minor's behalf?

The only provision made in the Act for a person to act on behalf of a minor is that relating to case guardians. If a parent of the minor were appointed case guardian (as is common practice) they would still be bound by all the ordinary rules applicable to case guardians, including the requirement that they act in the minor's best interests (discussed above).

⁶ This interpretation has long been supported with regards 'next friends' (another term for a case guardian). See *Rhodes v Swithenbank* (1889) 22 QBD 577; *Re Whittall* [1973] 1 WLR 1027 at 1030.

Further, it is unlikely the minor's parents could claim any common law parental 'right' to enter into the financial agreement on the minor's behalf (should they choose to do so). Again, the difficulty is that this agreement does not appear to be in the best interests of the minor concerned. Were the minor's parents to purport to enter into the financial agreement on the minor's behalf it would appear inconsistent with the general duties they owe to the minor as parents.⁷

6. **A further issue – undue influence**

As an aside it is also worthwhile raising that, even if the minor were permitted to enter into the financial agreement, very real issues of undue influence may arise. In this scenario (involving a contract being presented to a minor by his or her older de facto) it would not be difficult for the minor to establish the requisite relationship of trust and confidence, leaving his or her partner with the burden of establishing that the minor entered into the agreement of her own volition. The only thing that may assist his or her partner in this scenario is the requirement to obtain independent legal advice before entering into a financial agreement (s.205ZS of the Act), which may go some way to negating the relationship of influence.

7. **Conclusion**

In summary, it would be very difficult to establish a binding financial agreement in these circumstances. As the minor has not yet reached the age of majority and hence cannot validly enter into the contract, the agreement appears highly likely to be set aside by a court under s.205ZV. Similarly a case guardian is unlikely to be appointed to assist a minor in entering into such a contract which does not appear to be for his or her benefit. Unless the financial agreement - as a whole – could be construed as being in the minor's best interests, there appears no way in which a binding financial agreement can be formed.

⁷ McHugh J in *Secretary, Department of Health & Community Services v JWB (Marion's Case)* (1992) 175 CLR 218 commented that: "[t]he authority to act for children is conferred on parents... for the benefit of the child and not for the benefit of the parents".