



By Lloyd Collins
lloyd@collinsmay.co.nz
 DD: 576 1403

Eugene Collins
eugene@collinsmay.co.nz
 DD: 576 1407

Amy Haste
amy@collinsmay.co.nz
 DD: 576 1412

Hannah Nimot
hannah@collinsmay.co.nz
 DD: 576 1409

Elly-Marie Connolly
elly-marie@collinsmay.co.nz
 DD: 576 1411

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PRENUPTIAL AGREEMENTS

Are they rock solid?

The short answer is NO!!

In New Zealand we all know that one in three marriages end in divorce. A further worry of course is that one in two second marriages end in divorce. We do not keep statistics on de facto relationship break downs.

As you are now all aware the Property Relationships Act 1976 ("the Act") imposes upon married and de facto couples rules which are applicable in the eventuality their relationship comes to an end.

For those people entering into a second marriage or de facto relationship the risk is extremely high. Hence a willingness on the part of those people to enter into a Prenuptial Agreement especially where there is a disproportionate value of assets being contributed to the new relationship or marriage.

It is common for people to enter into a Prenuptial Agreement (defined as a Contracting Out Agreement in the Act) setting out what is to happen to each party's assets in the eventuality of separation or death.

The Act allows the family court to set aside a Prenuptial Agreement where there is "serious injustice". Nothing is 100% in the law unfortunately. So one has to be prudent and act in a fair manner in order to avoid the court setting the agreement aside. If the agreement is set aside then all the property is divided in accordance with the Act and the consequences could be harsh for some people.

The New Zealand Court of Appeal in *Harrison* has held that where a Prenuptial Agreement protects pre-relationship property they could never see it being a set aside for "serious injustice".

However a recent decision in the New

Zealand High Court in *Clayton* shows why a Prenuptial Agreement must be fair in all the circumstances. In *Clayton* the parties had entered into a Prenuptial Agreement six weeks prior to the date of the marriage. The reason for the agreement is that Mr Clayton already owned a family home and a family business which had been started up by his father. Mrs Clayton had no assets and agreed to enter into the Prenuptial on the basis she would receive \$10,000.00 after the first year of marriage, \$20,000.00 after the second year of marriage and \$30,000.00 after the third year of marriage.

It was accepted at hearing that the non-business assets totalled in excess of \$3,000,000.00. His Honour at para 14 of the judgment:

"It is arguable that the agreement was not unfair or unreasonable in the circumstances pertaining at the time it was made but, having regard to the time that has elapsed (20 years) since and the substantial assets which have been accumulated, it has undoubtedly become unfair or unreasonable. The Judge was clearly right to set it aside".

Clayton is authority that where after a lengthy marriage or relationship a party does not enjoy the fruits of the marriage or relationship then the agreement will be set aside by the courts. The *Clayton* decision emphasises the need that a party with a disproportionate amount of property should place them into a trust before the commencement of a marriage or de facto relationship. A Prenuptial Agreement may not stand the test of time.

20 MINUTE FREE

**WANT to review your Family Trust structure?
 THEN call us and take advantage of our 20 Minute Free interview**