

INTERNATIONAL RELATIONSHIP BREAKDOWN: PARENTING AND PROPERTY ISSUES

By Nigel Nicholls – Blanchfield Nicholls Partners – Presented at the Third Annual Family Law Conference, Queensland, 29 October 2009.

INTRODUCTION

With the globalisation of family law, practitioners will often come across the difficult task of dealing with multi jurisdictional cases such as overseas orders, overseas property, overseas service, jurisdictional matters, enforcement, international marriage, divorce, custody and child support. This paper seeks to serve as a guide to practitioners when faced with the ever-increasing problem of international relationship breakdown and to briefly address the key issues that may arise.

JURISDICTION

Jurisdictional competency is determined by the rules of the Court in which the matter is proceeding.

In *Family Law Act* matters, s39 of the *Family Law Act 1975* (Cth) (FLA) will determine the circumstances in which the Court can exercise jurisdiction in a *matrimonial cause* matter. In all applications in family law, if either party is an Australian citizen, this will be sufficient ground for jurisdiction. Other criteria for jurisdiction in respect of individual applications will be further discussed.

In some cases there will be a dispute as to whether Australia or another jurisdiction should decide to invoke the jurisdiction; this is decided based on the principle of *forum non conveniens*.

Forum non conveniens is the principle that prescribes whether the Court in which proceedings are entered is the most appropriate forum.¹ *Forum non conveniens* was first applied in Australia in the case of *Voth v Manildra Flour Mills*² where the test of 'clearly inappropriate forum' was created to determine in what circumstances Australian Courts should decline jurisdiction based on the principle of *forum non conveniens*. The criteria for determining whether Australia is a 'clearly inappropriate forum' is as follows:

- 1) The plaintiff has, *prima facie*, the right to have the forum exercise the jurisdiction regularly invoked by the plaintiff either through service of the defendant within the forum or outside, unless the forum is satisfied that it is clearly inappropriate. But not too much weight should be placed on this right. It may well be significant where there is a 'finely balanced contest'. In other cases it may have little bearing on the matter.
- 2) The onus of establishing that satisfaction lies upon the party (normally the defendant) who seeks a stay or the setting aside of service on that ground, except where the plaintiff was required to obtain prior leave to serve the defendant outside the jurisdiction.

¹ Nygh, P.E, *Conflict of Laws in Australia* (7th Ed, 2002) 122

² (1990) 171 CLR 538

- 3) The following factors are relevant in considering whether the forum is clearly inappropriate. They are to be balanced against each other and none is conclusive by itself:
- a) Any significant connection between the forum selected and the subject matter of the action and/or the parties such as: the domiciles of the parties, their places of business and the place where the relevant transaction occurred or the subject matter of the suit is situated.
 - b) Any legitimate and substantial jurisdictional advantage to the plaintiff such as: greater recovery, more favourable limitation period, better ancillary procedures, or assets within the jurisdiction against which any judgment can be enforced.
 - c) The availability of an alternative forum and whether it will give the plaintiff adequate relief.
 - d) Whether the law of the forum will supply the substantive law to be applied in the resolution of the subject case.

Furthermore, multiple litigation that is 'vexatious' (meaning 'productive of serious and unjustifiable trouble and harassment') and 'oppressive' (meaning 'seriously and unfairly burdensome, prejudicial or damaging') will not be entertained in Australian jurisdictions.³

*Henry v Henry*⁴ is a family law case that applies the test set out in *Voth*. In this case the wife was a German national and the husband was an Australian citizen. The parties married in Germany in 1977 and moved to Monaco in 1987, the wife was a resident of Monaco as was the husband until 1993, when the husband returned to Australia to commence divorce proceedings and property proceedings against the wife. The wife applied for the Australian proceedings to be stayed or dismissed in favour of proceedings which were already on foot in Monaco. The wife submitted that the Family Court was a 'clearly inappropriate forum'.

The Judicial Registrar, single Judge of the Family Court and the Full Court all held that the Family Court was not a 'clearly inappropriate forum'. However on appeal to the High Court, the Full Court determined that Australia was a 'clearly inappropriate forum' based on the test set out in *Voth* and also that it was 'vexatious' and 'oppressive' to bring proceedings in Australia '*lis alibi pendens*,' or in other words, when there are already proceedings of the same subject matter in another jurisdiction.

Thus it is apparent that by whom the proceedings are brought and in which order they are brought are significant factors to take into account when instituting proceedings in Australia subsequent to international proceedings of the same kind.⁵

Brennan J further decided in *Henry* that the parties marriage had no connection to Australia, regardless of the fact that the husband was at all times an Australian citizen.⁶ Similarly in the

³ Nygh, P.E, *Conflict of Laws in Australia* (7th Ed, 2002) 131

⁴ (1996) 185 CLR 571.

⁵ Nygh, P.E, *Conflict of Laws in Australia* (7th Ed, 2002) 131

⁶ *Ibid* 580.

family law case of *Ferrier-Watson v McElrae*⁷ the Family Court declined jurisdiction in a *matrimonial cause* application because the couple married in Fiji and spent the entirety of their marriage there. Secondly the wife was intimately connected to the Fijian jurisdiction as was the husband, therefore the Court exercised the right to decline jurisdiction based on their connection (or lack thereof) to Australia, even though the Applicant was domiciled in Australia.

*In the Marriage of Gilmore*⁸ another family law case dealing with forum non conveniens, the wife lived in Sydney and began property proceedings in Australia. At the same time the husband began proceedings in New Zealand where he resided. Each party invoked the jurisdiction of the forum that was most advantageous to them, for example in New Zealand the shares held in the husband's name would have likely been the property of the husband and not split between the parties.⁹ Applications to stay proceedings in both Courts on the grounds of forum non conveniens were commenced.

Both jurisdictions applied their tests for declining jurisdiction, and ordering a stay. In Australia, the test in *Voth* was applied, however in New Zealand the test in *Spiliada Maritime Corporation v Cansulex*¹⁰ (a test that was rejected in Australia) is a test that compares the New Zealand Court with that of the competing jurisdiction to make a decision of whether the foreign jurisdiction is 'more appropriate'.

Nonetheless both jurisdictions in this case did not order stays and concurrent proceedings commenced in both jurisdictions. The parties settled before final judgments were handed down. Peter Boshier a Family Court Judge in New Zealand comments in his paper¹¹ that this outcome is fortunate given that the alternative in a case such as this would be a 'race to judgment' between the parties, with the first party to secure judgment and enforce order's in the other country, gaining the best outcome.

Plaintiffs who bring claims in an Australian Court *before* the commencement of proceedings in a foreign jurisdiction will still bear the burden of proving that the Australian Court is not a 'clearly inappropriate forum', the Court will take into account such factors as; whether there is little to be gained in the foreign jurisdiction as opposed to the local Courts,¹² what remedies are on offer in the foreign jurisdiction,¹³ or what advantages will be gained by

⁷ (2000) 26 Fam LR 169

⁸ (1993) 16 Fam LR 285

⁹ Boshier, P, 'Forum Shopping in the Global Village: New Zealand and Australian cross-border disputes' (paper presented at 12th National Family Law Conference, Perth, October 2006).

¹⁰ [1987] AC 460

¹¹ Boshier, P, 'Forum Shopping in the Global Village: New Zealand and Australian cross-border disputes' (paper presented at 12th National Family Law Conference, Perth, October 2006).

¹² *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 see also Nygh, P.E, *Conflict of Laws in Australia* (7th Ed, 2002) 131

¹³ *Morgan v Higginson* (1897) 13 WN (NSW) 146 see also Nygh, P.E, *Conflict of Laws in Australia* (7th Ed, 2002) 131

obtaining a judgment in a foreign jurisdiction against the defendants assets.¹⁴ Considerations of cost and convenience will also be considered.¹⁵

In the circumstance that there are proceedings abroad as well as in Australia but both proceedings raise different issues to one another; the Australian Court must still consider whether the Australian proceedings are vexatious or oppressive within the meanings discussed in *Voth*.

In the case of *CSR Ltd v Cigna Insurance Australia Ltd*¹⁶ Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ decided that the question in these kind of proceedings is not whether Australia is 'clearly an inappropriate forum' but rather having regard to the "controversy as a whole, the Australian proceedings are vexatious or oppressive in the *Voth* sense of those terms."¹⁷

Given the large discretion granted to the Courts in determining whether to exercise jurisdiction or not it is difficult to predict what outcome will be obtained. To help alleviate this burden the following steps should be followed when faced with a matter that may give rise to an issue of jurisdiction;

1. Consider whether Australia is 'clearly an inappropriate forum' based on;
 - 1.1 Whether there is a connection between the marriage and Australia; is this connection only to one party or both parties? How strong is this connection?
 - 1.1 Whether the parties were married in Australia.
 - 1.2 Whether the parties spent the majority of their marriage or relationship in Australia or abroad.
 - 1.3 Whether the majority of the parties property is located in Australia or abroad.
2. Are there other proceedings on foot in an overseas jurisdiction?
 - 2.1 Would the commencement of Australian proceedings be vexatious or oppressive?
 - 2.2 If there are no proceedings on foot, will there be? In this case who began proceedings first may be important further down the track and as such, commencement of proceedings in Australia should not be delayed.
3. What advantages or disadvantages do Australian proceedings have for your client?
4. Will the foreign jurisdiction recognise Australian Orders? If not then Australia will most likely decline jurisdiction
5. Will the Australian jurisdiction recognise foreign Orders? If not then the Australian proceedings may be allowed.
6. Convenience and time of each jurisdiction's proceedings will be considered, therefore which jurisdiction is more convenient, time efficient and less expensive?

If it is clear that an Australian Court is unlikely to exercise jurisdiction it is advised not to continue with proceedings

¹⁴ *Hollander v McQuade* (1896) 12 WN (NSW) 154 see also Nygh, P.E, *Conflict of Laws in Australia* (7th Ed, 2002) 131

¹⁵ Nygh, P.E, *Conflict of Laws in Australia* (7th Ed, 2002) 131

¹⁶ (1997) 189 CLR 345

¹⁷ *Ibid* at 401.

INTERNATIONAL SERVICE

Regulation 12 of the *Family Law Regulations 1984* sets out the requirements for overseas service of Family Court documents, these regulations include;

- For service of documents in a country listed in the *Regulations* must be filed with the Registrar of the Court along with:
 - The document to be served.
 - A translation of the document in the language of the country in which it is to be served in (if necessary).
 - A copy of the document to be served and of the translation (if there a translation).
- These documents will be forwarded by the Registrar to the Secretary of the Attorney General's Department who will then forward it to the nominated country once it is sealed with the seal of the Court.
- Once the document is served upon the subject in the nominated country and the Registrar has received a certificate of this through diplomatic channels than the certificate can be registered.
- Certificates can be registered if they are accompanied with evidence by way of Affidavit or other, confirming how the identity of the person served was ascertained by the server of the document or evidence showing how the document came to the notice of the person on whom it was served.

In the Supreme Courts of NSW, Northern Territory, Queensland, Victoria and South Australia, leave of the Court is not required prior to service of a writ. A defendant may apply to set aside or stay the proceedings but only on the basis of forum non conveniens¹⁸ or that service was not authorised by the rules.¹⁹ The various requirements for service are contained in each Courts rules.

Leave from the Court is required when an application to serve documents overseas is made *ex parte*. The Applicant must convince the Court that leave should be granted due to the likelihood that proceedings would not be stayed based on forum non conveniens or for any other reason. Secondly there must be full and frank disclosure on the part of the Applicant.²⁰ Furthermore the Federal Court Rules require the Applicant to show a prima facie case for the relief sought before leave to serve is granted.²¹

A foreign defendant may come within the jurisdiction through voluntary submission by way of the following methods;

- If there is a pre existing agreement in express terms stating that Australia is to be the jurisdiction for any proceedings or;

¹⁸ In QLD the only basis for setting aside service is that service was not authorised by the rules. See Nygh, P.E, *Conflict of Laws in Australia* (7th Ed, 2002) 52

¹⁹ Nygh, P.E, *Conflict of Laws in Australia* (7th Ed, 2002) 51

²⁰ *The Hagen* [1908] P 189

²¹ Nygh, P.E, *Conflict of Laws in Australia* (7th Ed, 2002) 54

- If the defendant appears in the proceedings or seeks interlocutory relief other than to protest against the jurisdiction or;
- Bringing action as a cross claimant or counter-claim.

Given that each of the Courts within Australia have their own regulations and rules for service outside Australia, it is recommended that these individual rules are consulted when faced with an international service issue.

ANTI-SUIT INJUNCTIONS

Australian Courts may issue an injunction to restrain a party from proceeding as a plaintiff in another jurisdiction or continuing with foreign proceedings if the Court is satisfied that such proceedings would interfere with the current Australian proceedings,²² such action is known as an anti-suit injunction.

Anti-suit injunctions may be granted if the proceedings of another Court are considered 'vexatious' or 'oppressive'. It is to be noted however that the mere co-existence of proceedings does not on its own constitute foreign proceedings to be 'vexatious' or 'oppressive'.²³ Only when there is nothing to be gained 'over and above'²⁴ the local proceedings will the foreign proceedings be considered 'vexatious' or 'oppressive'.

The decision of *Dobson and Van Londen*²⁵ is a recent example of how anti-suit injunctions work within a family law context. In this case the parties were married in Australia in 1998 and had 4 children together by 1999. In 2003 they all relocated to The Netherlands with the intention to permanently reside there. In 2004 the husband filed in the Family Court of Australia for final orders on a property settlement and contact with the children. The wife filed an appearance and sought to have the proceedings stayed or in the alternative sought different orders. The wife then also filed in the Amsterdam District Court for a divorce, spousal maintenance, child maintenance and property settlement orders. The husband then filed in the Family Court of Australia to restrain the wife from proceeding in The Netherlands on the issues of property settlement, child and spousal maintenance.

The Full Court of the Family Court of Australia found in favour of the husband allowing him to proceed in the Australian jurisdiction with all financial matters in relation to the marriage and an anti-suit injunction against the wife was granted.

The Court took the following factors into account;

- 1) Firstly the *Family Law Act 1975* s34 (1) allows for such an injunction to be granted.
- 2) The wife had already submitted to the jurisdiction of the Family Court by seeking orders as cross-claimant.

²² *CSR Ltd v Signa Insurance Australia Ltd* (1997) 189 CLR 845

²³ Nygh, P.E, *Conflict of Laws in Australia* (7th Ed, 2002) 137

²⁴ *CSR Ltd v Signa Insurance Australia Ltd* (1997) 189 CLR

²⁵ (2005) FLC 93-225, 2005 FamCA 479.

- 3) In the case of *CSR Ltd v Signa Insurance Australia Ltd*²⁶ the majority of the High Court held that an anti-suit injunction will be favoured if one Court permits resolution and the other Court does not, in other words, if one Court offers finality in proceedings, this Court will be favoured. In *Dobson* any Australian outcome for property will affect the calculation of child and spousal maintenance in The Netherlands, therefore if concurrent proceedings occurred each outcome would significantly affect the other, but if all financial matters proceeded in Australia, the orders would be final.
- 4) Practical considerations of cost to the husband were also considered. The Court took into account: the complicated transferral of evidence from Australia to the Netherlands including translations and expert evidence as to Australia's tax and trust system. Also the differences in philosophy and approach of both systems were considered, as was the fact that the wife had legal qualifications in both countries which disadvantaged the husband.
- 5) The fact that the wife was essentially running the same case in both countries was considered 'vexatious' to the husband.

Thus the general principle is, that if the foreign jurisdictions proceedings interfere with the proceedings of the local forum and the foreign proceedings gain nothing more than the local proceedings, an anti-suit injunction may be granted. A close analysis of *Dobson* will assist in guiding practitioners in further understanding which circumstances are sufficient in the application of an anti-suit injunction in family law matters.

DIVORCE

Section 39 (3) of the FLA dictates the criteria for obtaining a divorce in Australia, and are as follows;

A divorce will be granted if on the date the Application is filed in Court, either party satisfies the below criteria;

- 1) An Australian citizen or;
- 2) Is domiciled in Australia or;
- 3) Is ordinarily resident in Australia and has been so for 1 year immediately preceding that date.

However there are other factors that may come into play in an international marriage/divorce case and will be further discussed.

Firstly where a marriage is not legally valid in Australia the opportunity for a divorce is limited. Such invalid marriages include polygamous marriages, marriages between parties who are too closely related by blood (i.e. half brother and sister), homosexual marriages, marriages between parties who are underage, and marriages where one of the parties was not consenting to the marriage.

²⁶ *CSR Ltd v Signa Insurance Australia Ltd* (1997) 189 CLR

If a person is a party to an invalid marriage under the *Commonwealth Marriages Act 1961* (Cth) they will not be granted a divorce in Australia, even if the marriage is legally recognised in the country that the marriage was obtained.

Similarly in foreign jurisdictions a divorce may not be granted due to their own local law. For example Malta and the Philippines are the only two nations that do not have provisions for divorce in their legal systems, however they do have the option of marriage annulment, although this can be difficult to obtain. However these countries do recognise foreign divorces if they are valid in the country in which the divorce was approved.

More commonly overseas jurisdictions require the Applicant in a divorce to prove fault in the breakdown of the marriage. Varying requirements for divorce in overseas jurisdictions include;

- France - if an Application for divorce is contested by one of the parties then the Applicant must prove the Respondent was at fault for the relationship breakdown. The Applicant must always pay costs however if the “innocent party” has suffered oral or material damage then they may sue the other party for damages.
- India - Indian law dictates that there are different fault elements to be proven for the husband and wife. If the husband can prove adultery, venereal disease, mental disorder, desertion or cruelty, then a divorce will be granted. However the wife can only seek a divorce if she can prove that the husband has been guilty of rape, sodomy, bestiality or if she was underage at the time of the marriage or if he has been ordered to pay her maintenance because they have been living apart. However both parties can make a joint application for divorce after one year of marriage and fault does not have to be proven.
- USA - Both fault and non-fault based divorces are granted in most States. Non-fault divorces are only granted after a certain period of separation between the parties. However there is no time requirement in fault based divorces if adultery, cruelty, desertion, confinement, or physical inability to engage in sexual intercourse (if this was not disclosed before the marriage) can be proven.²⁷
- England - Adultery, cruelty and unreasonable behavior are the three fault based divorce requirements that must be proven.²⁸ Non fault based divorce will be granted after a separation period of more than two years.
- Canada - Cruelty and/or adultery must be proven to be granted a divorce, otherwise a non fault based divorce will be granted following one year of separation.²⁹

Given that there are varying requirements for divorce in foreign jurisdictions it is essential to enquire with the other relevant jurisdiction as to what the requirements are and how this will

²⁷ Find Law, *No Fault Divorce vs Fault Divorce FAQ* (2007) <<http://family.findlaw.com/divorce/divorce-process/divorce-fault.html>> at 14 August 2009.

²⁸ SharingPensions.co.uk, *Divorce UK Proceedings* (2001) <<http://www.sharingpensions.co.uk/marbreak.htm>> at 14 August 2009.

²⁹ CanadianDivorceLaws.com *Canadian Divorce Laws* (2003) <<http://www.canadiandivorcelaws.com/divorce-articles/>> at 14 August 2009.

be best suit your client. Another important issue when considering divorce in a foreign jurisdiction is to ensure that the choice of forum for obtaining a divorce does not restrict future property settlements, for example in Egypt if a client chooses a no-fault divorce the parties must return any property received under their respective marriage contracts or dowries. The parties will also forgo alimony. Any subsequent property settlements that are ordered in Australia are likely to be unenforceable in Egypt. Furthermore in England and numerous other countries property settlement cannot proceed without first obtaining a divorce, therefore clients should be advised appropriately.

Recognition of Foreign Divorces in Australia

Section 104 of the *Family Law Act 1975* (Cth) stipulates the requirements for the recognition of a foreign divorce:

- That the Respondent was ordinarily resident in the overseas jurisdiction at the relevant date.
- The Applicant was resident in the overseas jurisdiction at the relevant date and either;
 - Was ordinarily resident for at least one year before the relevant date or
 - The last place of cohabitation of the parties was that jurisdiction
- The Applicant or the Respondent was domiciled in that jurisdiction on the relevant date.
- The Respondent is a national of the overseas jurisdiction at the relevant date
- The Applicant is a national of the overseas jurisdiction and was ordinarily resident at the relevant date or had been ordinarily resident in that jurisdiction for a continuous period of one year falling within the period of 2 years before the relevant date.

If a foreign divorce was not granted in the overseas jurisdiction but all of the abovementioned requirements are satisfied, the Family Court of Australia will grant the parties a divorce if they apply for one in Australia. Furthermore if the abovementioned requirements are not met but the divorce is still valid under common law rules of private international law then Australia will recognise the foreign divorce.

A foreign divorce will not be recognised if;

- The divorce contravenes the common law rules of private international law or has denied one of the parties natural justice.
- Recognition of the divorce would be contrary to public policy.

If a client married overseas they can apply for a divorce in Australia if either they or their spouse:

- regard Australia as their home and intend to live indefinitely in Australia, is an Australian citizen or resident, or
- is an Australia citizen by birth or descent, or
- is an Australia citizen by grant of Australia citizenship, or
- ordinarily live in Australia and has done so for 12 months immediately before filing for divorce.

These requirements are pursuant to Part VI of the *Family Law Act 1975* (Cth).

The following must be provided to the Court with a copy of the marriage certificate. If the marriage certificate is written in a language other than English, you must file:

- an English translation of the certificate, and
- an affidavit from the translator which:
 - states his or her qualifications to translate
 - attaches a copy of the marriage certificate
 - attaches the translated marriage certificate
 - states that the translation is an accurate translation of the marriage certificate, and;
 - states that the attached copy of the marriage certificate is a true copy of the marriage certificate translated.

PROPERTY

Section 79 of the FLA provides that the Courts can decide on any property that is owned by the parties of the marriage. This effectively includes any property held overseas. Section 31 (2) is more specific in stating that the Family Court may exercise jurisdiction to persons and things outside Australia and its territories.

Section 39 (4)(a) of the FLA states that parties may bring property proceedings in the relevant Australian Court if either party to the marriage is, at the time of institution of proceedings;

1. An Australian citizen or,
2. Ordinarily resident in Australia or,
3. Present in Australia at the relevant date

Secondly section 104 of the FLA provides that a marriage dissolved by a recognised foreign decree will not be barred from commencing property proceedings in Australia, provided that the proceedings arise in relation to the decree and not subsequent events.³⁰ However when an overseas decree is not recognised, the Australian Court may exercise jurisdiction based on the fact that the property dispute arose out of the matrimonial relationship.³¹

If the marriage has been dissolved by foreign decree the 12 month limitation period pursuant to s44 (3) of the *Family Law Act 1975* will not apply.³²

Once jurisdiction is established, the principle of forum non conveniens and the test set out in *Voth* are to be applied.

Recognition of Foreign Property Orders

*In the Marriage of Miller and Caddy*³³ is a leading Australian case on the recognition of foreign property orders. In this case both parties were resident in California when the wife brought proceedings for property division there. The California Court ruled an equal division of assets; this included a Sydney unit that was jointly owned. The Court specifically ruled

³⁰ *In the Marriage of Skoflek and Batriovski* (1988) 12 Fam LR 55 see also Nygh, P.E, *Conflict of Laws in Australia* (7th Ed, 2002) 504

³¹ *Ibid* Nygh 504

³² *In the Marriage of Cain* (1987) 11 Fam LR 540 and *Kemeny v Kemeny* (1998) 23 Fam LR 105

³³ (1986) 10 Fam LR 858

that both parties could hold onto their half interest in the unit. After a number of years the wife, who was residing in Australia, brought proceedings under s79 of the FLA in relation to the unit.

Because the Californian judgment in relation to the unit was made *in personam* meaning that it was a judgment against a person rather than a judgment *in rem* which is a judgment against property, the judgment was recognised in Australia. However the Court applied the principle of *res judicata*, thus estopping her from bringing any further property proceedings in Australia that had already been decided on in California.

Statutory provisions for the recognition of foreign judgments should also be referred to when determining the likelihood of recognition of foreign property judgments.

Recognition and Enforcement of Foreign Judgments by Statute

The *Foreign Judgments Act 1991* (Cth) enforces overseas judgments through registration. There are specific criteria that must be met before a foreign judgment is registrable. Such requirements include;

1. Judgments must be 'money judgments'³⁴ unless specified by the *Act*.
2. The judgment must be rendered in the first instance in the superior Courts and specified inferior Courts of the reciprocating jurisdictions³⁵ listed in the *Foreign Judgment Regulations 1992* (Cth).
3. The judgment can be registered 6 years after it is handed down in the reciprocating jurisdiction.³⁶
4. The judgment must be final and conclusive³⁷. This can include judgments that are made in interlocutory proceedings,³⁸ default judgments even if it may set aside on the defendant showing cause,³⁹ and judgments that are final and conclusive even if an appeal is pending in the overseas country or the time allowed for appeal in the overseas country has not yet expired⁴⁰ (in this event the Court of registration can order a temporary stay of the enforcement proceedings on the condition that the appeal is pursued in an expeditious manner).⁴¹
5. The judgment must come from civil proceedings or a civil claim in criminal proceedings.⁴²

³⁴ *Foreign Judgments Act 1991* (Cth) s 3

³⁵ *Ibid* s 51(1)

³⁶ *Ibid* s 6(1)

³⁷ *Ibid* s 5(4) (a)

³⁸ *Ibid* 3(1) see also Nygh, P.E, *Conflict of Laws in Australia* (7th Ed, 2002) 202

³⁹ *Barclays Bank Ltd v Piacum* [1984] Qd R 476 see also Nygh, P.E, *Conflict of Laws in Australia* (7th Ed, 2002) 202

⁴⁰ *Foreign Judgements Act 1991* (Cth) s 5(5)

⁴¹ *Ibid* s 8

⁴² *Ibid* s 3(1)

6. Money judgments exclude taxes, fines and penalties, unless it is a New Zealand or Papua New Guinea tax (including penalties or interest).⁴³
7. Orders for costs can be registered.⁴⁴

A foreign judgment will not be registrable if at the time of application;

1. If it has been wholly satisfied.
2. If it could not be enforced in the country of the original Court.⁴⁵

If the judgment is partially satisfied the Court can only register the unsatisfied part.⁴⁶

Furthermore registration will be set aside;⁴⁷

1. If the judgment does not meet the above criteria.
2. If the judgment is registered for a higher amount payable than the original Court determined.
3. If the original Court had no jurisdiction in the circumstance of the case. The grounds for jurisdiction are listed in s7 (3) and allow for *in personam* judgments, *in rem* judgments and judgments in relation to immovable and moveable property outside the jurisdiction.
4. If the judgment debtor did not receive notice of the proceedings in sufficient time to be able to defend the proceedings and did not appear.
5. The judgment was obtained by fraud.
6. The judgment was reversed on appeal or set aside in the original jurisdiction or discharged.
7. The judgment has been wholly satisfied.
8. The judgment would be contrary to public policy (this does not include a judgment enforcing payment of New Zealand tax). Other judgments based on penalties or revenue debts will be considered contrary to public policy.

CHILD SUPPORT

The Child Support Agency (CSA) has the ability to collect child support payments from parents in reciprocating countries; a list of these countries is found in Schedule 2 of the *Child Support (Registration and Collection) Regulations 1988*. The following is a practical guide to various situations a practitioner may face in relation to international child support and is based on *The Child Support (Registration and Collection) (Overseas-Related Maintenance Obligations) Regulations 2000*. These regulations govern the registration of overseas maintenance liabilities, which includes child support as well as spousal maintenance orders.

⁴³ Ibid s 3

⁴⁴ *Connop v Varena Pty Ltd* [1984] 1 NSWLR 71

⁴⁵ Ibid s 6(6)

⁴⁶ Ibid s 6(12)

⁴⁷ Ibid s 3(2)

Payer in Australia, Child/Payee Overseas

If a child resides overseas and the parent who is liable to pay child support lives in Australia the liable parent may apply to the CSA for a child support assessment if the other parent is in a reciprocating jurisdiction or if the child is an Australian citizen.

If a non-Australian payee resides overseas with a non-Australian child and wishes to claim child support from a parent who resides in Australia they must first apply to their relevant child support authority in the reciprocating jurisdiction in which they reside and have the application forwarded to the CSA.

Payer overseas, Child/Payee in Australia

A parent who is residing overseas and is liable for child support to a parent/child who lives in Australia is able to apply to the CSA or their relevant local authority for a child support assessment if they are residing in a reciprocating jurisdiction.

Non-reciprocal jurisdictions

If the paying parent is in a non-reciprocal jurisdiction, the CSA will not accept an application for child support unless it is by Court order.

Relocation Overseas

Where a child support agreement is already in place and the payer moves overseas, only the payee in Australia can apply through the CSA to have the reciprocating authority in the overseas location in which the payer now resides, collect payment and forward to it through the CSA. For example;

The father relocates to New Zealand and wants to have his payments collected by the New Zealand Child Support Agency who will then transfer the money to the CSA for distribution to the child and mother in Australia.

Only the mother in Australia can apply to have the New Zealand Child Support Agency collect on the CSA's behalf, the Father cannot apply for this.

Collecting payments overseas

When a paying parent is residing overseas in a reciprocating jurisdiction, the CSA will attempt to establish regular payments with the payer. This can be done by telegraphic transfer or by post (through bank draft or cheque). However if this is unsuccessful the CSA can transfer the case to the relevant authority in the reciprocating jurisdiction for collection, however this option can take up to a minimum of 6 months to organise, the CSA will then have little control over collection.

Where the payee and child live overseas and the payer is in Australia, payment will be collected in the normal way and transferred to the payee overseas on the payer's behalf.

Receiving payments overseas

The CSA cannot directly transfer payments into overseas bank accounts; they will transfer payments once a month via cheque to the payees nominated address overseas. The

payments will be sent in the receiving countries currency, not in Australian dollars. The CSA will not transfer any payments that are less than \$50.00 unless it is a final payment.

Varying assessment

If a child support assessment has been calculated by an overseas authority, the overseas authority will have to be contacted to change the assessment.

Overseas Court orders that specify the amount of child support to be paid may be varied in an Australian Court. Variations to foreign Court orders by an Australian Court may not be valid in the overseas jurisdiction.

Currency conversion

Foreign orders and assessments made in foreign currency will be converted to the equivalent amount in Australian dollars on the date on which the order becomes an enforceable order in Australia. This is calculated on the basis of the telegraphic transfer rate of exchange prevailing on that date.

Issues with Overseas Collection and Payment

It should be noted that the above processes can be arduous and extremely timely due to the lack of staff and resources in child support agencies in foreign jurisdictions and the difficulty of working with foreign nations. The CSA have advised that the best solution to overcome these hurdles with international child support payment is for the parents to organise their own private payment arrangements, however this may obviously not be possible between hostile parents or parents who refuse to pay.

Secondly, given the issues of enforcement within Australia alone, enforcement in overseas jurisdictions, in reality, is highly unlikely.

PARENTING ORDERS

Section 69E of the FLA prescribes the criteria that must be met to institute parenting orders in Australia, namely;

- 1) The child must be present in Australia on the relevant date; or
- 2) The child is an Australian citizen or ordinarily resident on the relevant date; or
- 3) The parent of the child is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day; or
- 4) A party to the proceedings is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day; or
- 5) It would be in accordance with a treaty or arrangement in force between Australia and an overseas jurisdiction, or the common law rules of private international law, for the Court to exercise jurisdiction in the proceedings.

Registration of an overseas order

If an overseas parenting order is from a prescribed overseas jurisdiction in accordance with Regulation 23(1) of the *Family Law Regulations 1984* (Cth) and set out in Schedule 1A (as

listed below) then it may be registered and enforceable within Australia if there are reasonable grounds for believing that

- 1) the child/children who are subject to the order and/or
- 2) the parent of the child/children and/or
- 3) the person that has a right to contact with the child/children;

Is either ordinarily resident in Australia, present in Australia or on their way to Australia in accordance with Regulation 23(1).

The following jurisdictions are prescribed in the regulations:

All states of the United States of America (including the District of Columbia but excluding New Mexico and Missouri), Austria, New Zealand, Papua New Guinea, and Switzerland.

The Secretary of the Attorney General's Department must receive a certified copy of the order and a certificate from the Court in the overseas jurisdiction containing a statement that the order is enforceable in that jurisdiction.

The Secretary will then send the documents to the Registrar of the Family Court or the Registrar of a Supreme Court of a State or Territory.

The Registrar will then register the order. The order is not limited to being registered in only one Court and may be registered concurrently in any other Court that has jurisdiction under the Act. Multiple registration is acquired through application to the Registrar of the Court of where the order was initially registered in Australia. A certificate of registration from the initial registering Court is sufficient evidence for a concurrent registration.

Where an order is received by the Court other than from the Secretary, the Court may register the order if all other requirements are met.

Courts may exercise s70J of the FLA which provides that the Court can alter overseas orders with the consent of the person who has a contact right with the child (parent, guardian etc) and/or if it is in the best interest of the child to alter the order. In such an instance the Registrar of the Court must forward to the relevant authority in the overseas jurisdiction:

- 1) 3 certified copies of the order and the reasons for the order
- 2) A copy of the depositions; and
- 3) Such further material as the Court directs

Transmission of orders to an overseas jurisdiction

If a person who is a party to an Australian parenting order, requests in writing for the Australian parenting order to be sent to one of the prescribed jurisdictions for registration and enforcement, the Registrar of the Court must send to the prescribed jurisdiction;

- 3 copies of the order.
- A certificate signed by the Registrar stating that the order is enforceable in Australia.
- Any information regarding the whereabouts or identity of the child or any person who is subject to the order.
- A letter requesting the order is enforceable in that jurisdiction.

SPOUSAL MAINTENANCE

The jurisdiction for spousal maintenance proceedings is derived from section 39 (4)(a) of the FLA whereby; if either party to the marriage is an Australian citizen, ordinarily resident in Australia or present in Australia at the relevant date, they may apply for spousal maintenance. This criterion also applies to de facto couples.

The *Family Law Regulations 1984* (Cth) stipulate the enforcement of overseas maintenance orders.

Section 110 provides that maintenance orders made in reciprocating jurisdictions will be recognised in Australia. The full list of reciprocating jurisdictions according to the *Family Law Regulations 1984* (Cth) can be found in Regulation 25 and set out in Schedule 2.

Section 111 provides for the implementation of the *United Nations Convention on the Recovery Abroad of Maintenance of 1956* (also known as the New York Convention) to which Australia is a signatory.

Section 111A provides for the implementation of the *Hague Convention on Recognition and Enforcement Decisions Relating to Maintenance Obligations 1973* which Australia has also become a party to.

Registration of overseas maintenance orders

If the Respondent of a spousal maintenance order is present in Australia, ordinarily resident in Australia, or on their way to Australia, Regulations 28, 28A and 28B set out the process for registering provisional maintenance orders from overseas jurisdictions. The process is as follows:

1. A certified copy of the provisional order is sent to the Attorney General's Department, accompanied by a statement setting out the grounds on which the order could have been opposed in the original Court by the Respondent. Secondly a copy of the witness depositions from the proceedings in which the original order was made should be attached to this document.
2. The Attorney General's Department must serve the Respondent with the Application, calling upon the Respondent to show why the order should not be confirmed in Australia.
3. During the hearing the Respondent must raise any ground of opposition that could have been raised if the proceedings were held in Australia, or any grounds that could have been raised in the original proceedings.

If the Respondent fails to appear at Court or fails to satisfy the Court that the order should not be confirmed, the Court can;

- a) Confirm the provisional order (with or without modification).
- b) Discharge the provisional order.
- c) Adjourn the proceedings and remit the provisional order to the Court that made it, with the request that the Court take further evidence and further consider its provisional order.

It is the duty of the Court to then notify in writing the relevant officer in the reciprocating jurisdiction of the outcome.

Pursuant to Regulation 34, if the reciprocating jurisdiction notifies the Court in writing that the agreement is no longer enforceable overseas, the Australian Court which registered the Order shall direct its Registrar to cancel the registration of the agreement by noting the fact and date of the cancellation on the certified copy of the agreement filed in Court. The Court will then notify the Respondent (payer) of this cancellation in writing.

If the Australian party did not have notice of the proceedings, did not appear in the proceedings or did not consent to the creation of the orders, they may make an application for modification of the order under Reg 36. This can be done within 6 months of service of the registration of the order in Australia (Regulation 37). However this only applies to orders made in one of the following jurisdictions;

Brunei, Canadian Provinces and Territories as outlined in Schedule 2, Territory of Christmas Islands, Territory of the Cocos (Keeling Islands), Cook Islands, Cyprus, Fiji, Gibraltar, Hong Kong, India, Republic of Ireland, Kenya, Malawi, Malaysia, Nauru, New Zealand, Papua New Guinea, Sierra Leone, Singapore, Sri Lanka, South Africa, Tanzania, Trinidad and Tobago, United Kingdom including the Channel Islands, as outlined in Schedule 2.

The orders are final in all other reciprocating jurisdictions and cannot be revived once they have been registered.

Making provisional maintenance orders against a person in a reciprocating jurisdiction

If the Applicant has grounds to bring a spousal maintenance claim in an Australia Court but the Respondent is ordinarily resident, present in or on their way to a reciprocating jurisdiction, Regulation 29 provides that Australia has the power to make provisional spousal maintenance orders even if the Respondent has not been served or has not consented to the orders. However these orders will not have effect until confirmed in the relevant reciprocating jurisdiction.

Once the provisional order has been made on an *ex-parte* basis, the Registrar of the Court must send to the Secretary of the Attorney General's Department.

- A copy of the depositions of the witness's, and;
- Three copies of the order, and;
- A statement of the grounds on which the making of the provisional order could have been opposed by the Respondent, and;
- Any information the Registrar has in relation to the identity and whereabouts of the Respondent.

If the reciprocating jurisdiction remits the order back to the Australian Court for further evidence, the Court must take this evidence and provide it to the reciprocating jurisdiction. The Court must give notice to the witness/(s) before taking the evidence. If after the Court received fresh evidence and the Court believes they should not have made the order the Court may discharge the order or modify the provisional order.

If the order is confirmed in the reciprocating jurisdiction then it will take effect in Australia. If the Australian Court wishes to cancel the enforcement order they will do so and then notify the reciprocating jurisdiction in writing that they are to cancel the orders. The reciprocating jurisdiction is to then notify Australia in writing that they have cancelled the order and the

date in which they did so. In turn the party that bears the maintenance liability will be notified of this cancellation in writing.

The Australian party may attempt to alter or discharge an overseas maintenance order in the normal way in which an Australian Court would handle domestic spousal maintenance agreements and go through the same process as above.

Any non provisional spousal maintenance orders can be registered with the Child Support Agency in accordance with the *Child Support (Registration and Collection) (Overseas-Related Maintenance Obligations) Regulations 2000* in the same way in which an overseas child support order is registered.

CONCLUSION

Relationship breakdown with international aspects raise a minefield of jurisdictional, recognition and enforcement questions. Finding the right forum can have a huge impact on the outcome of a matter for your client. It will be a very rare practitioner who can advise on all these issues, without careful research and advice.

This paper provides merely a guide to the complexities and practical steps you might take. The first step always in advising a client where there are international aspects to their matter is to advise the client to take advice from a competent family lawyer in the other jurisdiction.

However, be aware that decisions often need to be made promptly especially in circumstances where there may be a possibility of competing forums.

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