INTERNATIONAL FAMILY LAW – PRACTICAL TIPS FOR MANAGING TRICKY SITUATIONS

This paper is focused on the "three stages" of a legal problem involving a conflict of Australian and foreign law from *Nygh's Conflict of Laws in Australia*. Those three stages are: the issue of jurisdiction; the question of the applicable law; and recognition/enforcement of judgments.[1] In this paper I seek to investigate each of these stages in the context of Australian family law. However, the recognition/enforcement of judgments by its very nature involves a consideration of how foreign obligations are applied in Australia so I will also consider how Australian family law deals with "cases which involve a foreign element."[2]

1 STAGE 1: Jurisdiction and why it is the first question you need to ask yourself

Any international family law matter must start with a consideration of whether the Australian court or authorities have the jurisdiction to decide the issue at hand. Jurisdiction is a term with multiple meanings[3] but for the purpose of this paper it is assumed to mean the authority to decide or deal with a question arising under family law in an Australian context.

1.1 The Family Law Act

The table below aims to summarise the relevant jurisdictional tests under the *Family Law Act* 1975 (Cth) ("Family Law Act"). The far left hand column states the family law issue and the columns that are ticked show the factual elements required by the Australian court to found jurisdiction, thus giving them the authority to decide the relevant issue. The factual requirement need only apply to one party to the relationship, or one parent of a child, or the child itself. Importantly the jurisdictional tests under the relevant sections of the Family Law Act are framed in the alternative requirement (not in the cumulative requirement). If at least one fact can be proven by evidence then the Australian court will have jurisdiction in relation to that issue. This is a broad jurisdictional base. Binding financial agreements and the assessment of child support are included in the table, as the ability to legally deal with these issues commonly raises questions about the intersection of Australian and international law.

[1] Martin Davies and Andrew Bell*, Nygh's Conflict of Laws* (Butterworth Law, 9th ed, 2014) 1.9-1.12.
[2] Wording borrowed from the Full Court in *Pascarl & Oxley* [2013] FamCAFC 47 (26 March 2013).
[3] Mark Leeming, *Authority to Decide,* The Federation Press, Sydney, 2012, Ch. 1.

Thank you to: Jessica Provost, Karen Beashel and Michelle Whitehead for their comments on drafts of this paper.

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Required Factual Element … / Proceedings For …	Citizen of Australia	"Domiciled" in Australia	"Ordinarily resident" and has been present in Australia for 1 year immediately prior to filing	"Ordinarily Resident"	Present in Australia at the "relevant date"	Child is an Australian citizen, "ordinarily resident" or present in Australia	Australian courts' jurisdiction is not in not in conflict with any Treaty or Foreign Obligation	Legislative reference
Divorce/ "Dissolution of Marriage"	√	√	√	X	X	X	X	Section 39(3) of Family Law Act
Property settlement, spouse maintenance, declarations and other issues after marriage	√	X	X	√	√	X	X	Section 39(4)(a) of Family Law Act
Property settlement, maintenance, declarations and other issues after de facto relationship	X	X	X	√	X	X	X	Sections 90RG, 90SK and 90SD of the Family Law Act
Binding Financial Agreements re marriage	X	X	X	X	X	X	X	Sections 90B, 90C, 90D and 90G of the Family Law Act
Binding Financial Agreements re de facto relationships	X	X	X	√	X	X	X	Section 90UA of the Family Law Act
Parenting (excluding applications under the Hague Convention)	√	X	X	√	√	√	√	Section 69E of the Family Law Act
Child Maintenance	X	X	X	X	X	X	X	Section 66E of the Family Law Act

Unless an application satisfies one of the jurisdictional grounds outlined above, the Court will not have jurisdiction to hear or decide the matter: *Woodhead v Woodhead* [1997] FamCA 42 (22 September 1997).

As can be seen from the table above, concepts of "domicile" and "residence" are fundamental to the issue of jurisdiction, and for that reason these issues are discussed in more detail below. The "relevant date" is the date on which an application is filed with the court: sections 39(4A) and 39A(2)(c) & (d) of the Family Law Act.

1.1.1 Domicile

At its most basic, your domicile is the country to which you belong. In Australia, the law relating to domicile is largely governed by legislation.[4]

There are three types of domicile:

1. domicile of origin: the country in which you are born is deemed to be your country of domicile;
2. domicile of dependence: this domicile is determined by reference to another person, such as a child having the same domicile as a parent; and
3. domicile of choice: a voluntary choice of a new country of residence.[5]

In order to acquire a country as a person's domicile of choice, the person must hold the intention to make his or her home indefinitely in that country: section 10 of the *Domicile Act* 1982 (Cth).

1.1.2 Residence

Unlike domicile, there is no single concept of residence.[6] This is illustrated aptly by the different residency requirements on which jurisdiction is based under various branches of Australian family law.

For the purpose of the Family Law Act "ordinarily resident" is defined as including "habitually resident": section 4(1) of the Family Law Act. Ordinarily resident was defined by Lockhart J in *Retailer; ex parte Nat West Australia Bank Limited* (1992) 37 FCR 194 at 198 as follows:

[4] Davies and Bell, above n 1, 13.4.
[5] Ibid 13.10.
[6] Ibid 13.34.

> "To say that a person is ordinarily resident in Australia must mean something more than that he is resident in Australia. The word "ordinarily" connotes a comparison, a measure of degree. A person may have more than one residence but he is not necessarily ordinarily resident in each of them. The question must be determined … at a particular time. One must ask the question whether at that time the person was ordinarily resident in Australia. The concept of "ordinary residence" for the purpose of the Act, in my opinion, connotes a place where in the ordinary course of a person's life he regularly or customarily lives. There must be some element of permanence, to be contrasted with a place where he stays only casually or intermittently. The expression "ordinarily resident in" connotes some habit of life and is to be contrasted with temporary or occasional residence."

"Ordinarily resident" is relevant to:

- divorce, albeit with the specific requirement that the residence is of at least one year's duration;
- property settlement and spousal maintenance following the breakdown of marriage with no consideration of the duration of residence other than at the date of filing of the application; and
- property settlement and maintenance for de facto relationships:
    - where the parties were ordinarily resident in a complying Australian state or territory[7] as a couple when their relationship broke down;
    - where the parties were ordinarily resident as a couple in one or more of these locations for at least a third of their de facto relationship;
    - where one of the parties made substantial contributions, whether of property or as a homemaker or parent, in one or more of these locations; or
    - where one of the parties is ordinarily resident in one of these locations on the date of making the application.

Further, for the purposes of Australian family law, a person can be without an ordinary residence or have more than one ordinary residence at a time.[8] This must be distinguished from matters arising under the Hague Child Abduction Convention where the Full Court of the Family Court has determined that a child must be regarded as having a "habitual

[7] The Commonwealth de facto property settlement laws have been adopted in New South Wales, Victoria, Queensland, South Australia, Tasmania, the Australian Capital Territory, the Northern Territory, Norfolk Island, Christmas Island or the Cocos (Keeling) Islands ("these locations").
[8] Davies and Bell, above n 1, 13.36.

residence" at all times and is limited to only one "habitual residence": *Cooper v. Casey* (1995) 18 FamLR 433 at 436. In these matters, the finding of a child's habitually residence will require consideration of the whole context including the child's primary location for care and housing, the intention of both parents and any other relevant circumstances: *Director-General, Department of Communities (Child Safety Services) v. Hardwick* [2011] FamCA 553.

Finally, a person is a 'resident of Australia' for the purposes of the *Child Support Assessment Act* 1989 (Cth) ("Child Support Assessment Act") and the *Child Support Registration and Collection Act* 1988 (Cth) ("Child Support Registration and Collection Act") if they are a resident of Australia for the purposes of the *Income Tax Assessment Act 1936* (Cth) ("Income Tax Assessment Act"): see section 10 Child Support Assessment Act and section 4 of the Child Support Registration and Collection Act.

The terms "resident" and "resident of Australia" are defined in subsection 6(1) of the Income Tax Assessment Act. So far as an individual is concerned, these terms are defined to mean:

(a) "a person, other than a company, who resides in Australia and includes a person
   (i) whose domicile is in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia;
   (ii) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that the person's usual place of abode is outside Australia and that the person does not intend to take up residence in Australia; or
   (iii) who is:" (in summary) an eligible employee for the purposes of either the *Superannuation Act* 1990 (Cth) or the *Superannuation Act* 1976 (Cth) or is the spouse of such a person (emphasis added).

1.2 The Child Support Scheme

In contrast to the jurisdictional tests under the Family Law Act the factual requirements under the equivalent sections of the Child Support Assessment Act are framed as a cumulative requirement (rather than an alternative requirement). This means that all criteria must be satisfied, as opposed to merely fitting into one criteria amongst a range of options. Built into the definitions of a "liable parent" and an "eligible child" are factual tests that overlap with the meaning of jurisdiction as defined for the purpose of this paper.

For an assessment of child support to be accepted by the Registrar there must be: an "eligible child", an "applicant", a "liable parent," and the formal requirements of the application process must have been complied with: section 23 of the Child Support Assessment Act.

Included in the criteria necessary to qualify as an "eligible child" is the requirement that the child be:

- present in Australia; and
- an Australian citizen or "ordinarily resident" in Australia on the day that the application for child support assessment is made: section 24(1)(b) of the Child Support Assessment Act.

However, these requirements in respect of the child do not apply if the parent applying to receive child support is a resident of a "reciprocating jurisdiction": section 24(2) of the Child Support Assessment Act. This implies that an applicant for an assessment of child support does not have to be "a resident" of Australia, so long as they are resident in a reciprocating jurisdiction.

If either parent of a child is not "a resident" of Australia on the day that the application for child support assessment is made, then the Registrar must determine whether child support is reasonably likely to be payable by the paying parent: section 29A of the Child Support Assessment Act. Where there is already an overseas liability for child support registered for the same child and one party is resident in a reciprocating jurisdiction, the Registrar may decline the assessment: section 30B of the Child Support Assessment Act. Otherwise, where one parent is an overseas resident, the application for assessment is properly made if:

- the parent who is likely to be required to pay child support is not a resident of Australia on the day the application is made but is resident in a reciprocating jurisdiction which is not an excluded jurisdiction (section 30A of the Child Support Assessment Act); and the child is present in Australia or an Australian citizen or ordinarily resident in Australia (section 29A(3) of the Child Support Assessment Act); or
- the application is made by a person who is resident in a reciprocating jurisdiction and who is likely to receive child support, and the person's application is forwarded to the Registrar by the overseas authority of that reciprocating jurisdiction or made

by the overseas authority on behalf of the person: section 29B of the Child Support Assessment Act.[9]

The list of reciprocating jurisdictions is extensive, but importantly for many parents, it is not comprehensive, in that it excludes countries such as China and Vietnam. The list is set out in Schedule 2 of the *Child Support (Registration and Collection) Regulations* 1988 (Cth) ("CHILD SUPPORT (REGISTRATION AND COLLECTION) Regulations") and can be found here:

https://www.legislation.gov.au/Details/F2015C00677

The excluded jurisdictions are relatively limited and are set out in regulation 5 of the CHILD SUPPORT (REGISTRATION AND COLLECTION) Regulations, which can be found here:

https://www.legislation.gov.au/Details/F2016C00707

It is important to note that the jurisdictional requirements under the child support scheme are ongoing whilst an assessment is in place. In the event that a child is no longer present in Australia, an Australian citizen or ordinarily resident in Australia then the assessment will terminate: section 12(1)(f) of the Child Support Assessment Act. Further, the assessment will terminate if the carer entitled to child support ceases to be "a resident" of Australia or any of the reciprocating jurisdictions: section 12(2A) of the Child Support Assessment Act. The carer ceasing to be "a resident" of Australia is not automatically a terminating event. They are able to move between reciprocating jurisdictions without terminating the child support assessment. Similarly, where an international maintenance arrangement applies, the assessment will terminate only if the "liable parent" ceases to be "a resident" of a Australia or a reciprocating jurisdiction: section 12(3A) of the Child Support Assessment Act. However, note that where there is no international maintenance agreement and the "liable parent" ceases to be "a resident" of Australia then this is a terminating event, regardless of whether the "liable parent" becomes a resident of a reciprocating jurisdiction: section 12(3)(b) of the Child Support Assessment Act.

1.3 Family Law Contracts

It is self-evident that if jurisdiction over a matter is not conferred on the Family Court by the Family Law Act, the parties cannot generally create that jurisdiction of their own volition.[10]

[9] Australian Government, *Child Support Guide* (1 July 2016) Guides to Social Policy Law Child Support Guide <http://guides.dss.gov.au/child-support-guide/2/1/5 >.
[10] Mary Keyes, 'Jurisdiction in International Family Litigation: A critical analysis' (2004) 27(1) *UNSW Law Journal* 42, 45.

However, as can be seen from the table above, if parties to an opposite sex marriage with no geographical connection to Australia wish to enter into a Binding Financial Agreement (BFA), thereby effectively submitting to the jurisdiction of the family law of Australia, then they can do so. Whether such a BFA would be, for example, void, voidable or unenforceable under s90K(b) of the Family Law Act is a question undecided by Australian family law. BFA's are interpreted under the common law of contract, which allows the validity and enforcement of the contract to be determined by the parties' choice of law, although a contract will be unenforceable if it is illegal under the law of the chosen forum.[11]

In this regard, the position of parties in an opposite sex marriage is to be contrasted with that of parties in a de facto relationship. The parties to a de facto relationship need to be "ordinarily resident" in Australia when they make a Part VIIIAB financial agreement: section 90UA of the Family Law Act.

The Registrar of Child Support will not accept a child support agreement for registration where the parents and child do not meet the relevant test for making an assessment. They will look first at issues of residency including in a reciprocating jurisdiction: section 30A of the Child Support Assessment Act. The relevant day for determining residency issues in relation to child support applications is the day on which the application for assessment is made: section 24 of the Child Support Assessment Act.

1.4 Foreign marriages and divorces

A marriage solemnised outside of Australia between a man and a woman that is valid under the law of the place where it was solemnised is a valid marriage for the purposes of Australian law: sections 88C, 88D and 88EA of the *Marriage Act* 1961 (Cth) ("Marriage Act").

An original or a certified copy of a certificate, entry or record of a marriage alleged to have been solemnised in a foreign place is prima facie evidence of the facts stated in the document and of the validity of the marriage to which the document relates: section 88G of the Marriage Act.

However, at the risk of stating the absolute obvious, if you are relying on a marriage certificate that is in a language other than English then a translation and an affidavit of the translator verifying their translation and setting out the person's qualifications to make the translation is required: rule 2.02(4) of the Family Law Rules.

[11] John Levingston, 'Choice of law, jurisdiction and ADR clauses' (Paper presented 6th Annual Contract Law Conference, Sydney, 26-28 February 2008) 5.

Any divorce or annulment of a marriage, or any legal separation of the parties to a marriage that would be recognized as valid under the common law rules of private international law shall be recognized as valid in Australia: section 104(5) of the Family Law Act. A foreign divorce decree will not be recognised under Australian family law if a party was denied natural justice or the recognition would be contrary to public policy: section 104(4) of the Family Law Act.

2. STAGE 2: What law will apply if there is a contest between the jurisdiction of Australia and the jurisdiction of a foreign country?

2.1. First, identify what remedy you are seeking

Two remedial devices are available to the Family Court in cases which involve a foreign element. The first is a "stay" which is the remedial device available to restrain a person bringing or prosecuting the Australian proceedings. The second is an "anti-suit injunction" which is the remedial device available to restrain a person bringing or prosecuting the foreign proceedings. Further, where there are parenting proceedings/issues or the foreign jurisdiction in question is New Zealand there are two important caveats that need to be considered.

It is important to note that a "stay" and an "anti-suit injunction" involve different considerations. In *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 ("*CSR v Cigna"*) at 390 the majority of the High Court held:

> "... Because stay orders and anti-suit injunctions are the remedies by which actual or potential conflict is resolved, there has been a tendency, at least in the United Kingdom, to view both measures as governed by the same legal principles. That tendency has now been corrected, it having been pointed out by the Privy Council in *Société Aerospatiale* that the principles are not the same.
>
> Although stay orders and anti-suit injunctions are not governed by the same principles, it will later become apparent that, in some cases, the power to grant anti-suit injunctions is an aspect of the power which authorises a court to stay its own proceedings and it will also become apparent that, in other cases, the power to grant anti-suit injunctions should not be exercised without the court concerned first considering whether its own proceedings should be stayed..." (emphasis added)

This means that the issue of a "stay" of the Australian proceedings must be considered first.

2.1.1. The "stay" test

In determining whether the Australian court should decline to exercise its jurisdiction on the grounds of forum, the court will apply the principle laid down by the High Court in *Voth v. Vanildra Flower Mills Pty Ltd* (1990) 171 CLR 538 ("*Voth*"). The Australian court should only decline to exercise jurisdiction if Australia is a "clearly inappropriate forum", which is to be determined by considering whether continuation of the proceedings would be "oppressive" in the sense of "seriously and unfairly burdensome, prejudicial or damaging", or vexatious in the sense of "productive of serious and unjustified trouble and harassment."

In *Deslandes & Deslandes* [2015] FamCA 913 (27 October 2015) at paragraph 22 Kent J neatly summarised the stay test in a family law context. Whether or not Australia is a clearly inappropriate forum depends on an assessment of the following (non-exhaustive) factors (derived from Lord Goff's factors in *Spiliada Maritime Corp v Cansulex Ltd* [1986] UKHL 10) as approved of in *Voth* and as added to by *Henry v Henry* (1996) 185 CLR 571 at 592-593:

(a) Factors of convenience and expense, such as the location of witnesses;

(b) Whether, having regard to their resources and understanding of language, the parties are able to participate in the respective proceedings on an equal footing;

(c) The connection of the parties and their marriage with each of the potential jurisdictions and the issues on which relief may depend in those jurisdictions;

(d) Whether the other potential forum will recognise Australian Orders and vice-a-versa and the ease of enforcement in each country;

(e) Which forum may provide more effectively for a complete resolution of the matters involved in the parties' controversy;

(f) The order in which each of the proceedings were instituted, the stage which they have reached and the costs incurred in each jurisdiction;

(g) The governing law of the dispute;

(h) The place of residence of the parties;

(i) The availability of an alternative forum; and

(j) Any legitimate juridical advantage to litigating in either jurisdiction.

2.1.2. The "anti-suit injunction" test

Under the general law, an anti-suit injunction (an application to restrain proceedings being brought by a party in a foreign court) may be granted by the court on one of two grounds: as an exercise of the court's inherent jurisdiction to protect its own process, or in the exercise of equitable jurisdiction: *CSR v Cigna*. These are principals derived from courts of equity. Although the Family Court is arguably not a court of equity, the Full Court has proceeded on the basis that it is open to the Family Court to grant an injunction in the same circumstances as an injunction could be granted by a court of equity: *Cole & Abati* [2016] FamCAFC 78. An anti-suit injunction may therefore be granted by the Family Court in the exercise of its implied powers or pursuant to s114(3) of the Family Law Act: *Teo & Guan* [2015] FamCAFC 94 at 100.

Whether the foreign proceedings are vexatious and oppressive in the eyes of the Australian court is the key to determining whether an anti-suit injunction ought to be granted.[12] The Family Court must consider whether foreign proceedings might interfere, or have a tendency to interfere with the pending Australian proceedings in order to determine whether it would be prima facie vexatious and oppressive to allow the continuation of the foreign proceedings: Cohen J in *Kumar & Gupta* [2008] FamCA 885 (26 September 2008) at 22.

2.2. Parenting applications

Where an application regarding parenting under Part 7 of the Family Law Act is pending and there is a "foreign element" regarding the care of a child then the legal test to be applied is what is best for the child instead of granting relief pursuant to the "stay" or "anti-suit injunction" mechanisms discussed above.

In *Pascarl & Oxley* [2013] FamCAFC 47 (26 March 2013) (Bryant CJ, Faulks DCJ and Finn J), child-related proceedings were on foot in both the Family Court and the Family Division of the High Court of Justice of England and Wales, both of which were valid jurisdictions. The Full Court concluded that the character of the application before the Family Court itself establishes the principles to be applied in resolving whether or not to accept jurisdiction:

[12] Davies and Bell, above n 1, 9.26.

> "[T]he principles to be applied in parenting cases which involve a foreign element will be determined by the nature of the application before the court. Where an application is made under provisions of the Act which prescribe the best interests test, whether or not a child is within the jurisdiction, then it is that test, and not the test of forum conveniens, which will apply." (emphasis added).

It is not necessary for both parents to seek a parenting order for the best interests test to be applicable. Often, one parent will seek an interim and final "stay" of the parenting proceedings and seek to rely on the *Voth* criteria. For an example of this see *Dickson & Dickson* [2014] FCCA 2184 (noting that the Court there also expressed a view on the *Voth* test at paragraph 139). That said, the clear trend in the cases is for the court to take the view that a child's best interests will best be advanced by the court of the country of the child's residence determining questions about their welfare: see *Zenga & Zenga* [2015] FamCA 340 (11 May 2015) (children in Spain), *Dunstan & Ziegler* [2015] FamCA 419 (4 June 2015) (child in Cook Islands) and *Killam & Loeng* [2015] FamCAFC 41 (summary removal of the children from Australia and return to China, after they had been detained during a holiday from their home in China).

2.3. New Zealand.

Section 17 of the *Trans-Tasman Proceedings Act* 2010 (Cth) provides the test where there is dispute between Australia and New Zealand over which one is the "more appropriate forum." The court must only have regard to the following factors, which are set out in Section 19(2). In deciding whether a New Zealand court is the more appropriate court to determine a particular matter, the Australian court must take into account the following factors:

(a) the places of residence of the parties or, if a party is not an individual, its principal place of business;

(b) the places of residence of the witnesses likely to be called in the proceeding;

(c) the place where the subject matter of the proceeding is situated;

(d) any agreement between the parties about the court or place in which those matters should be determined or the proceeding should be commenced (other than an exclusive choice of court agreement to which subsection 20(1) applies);

(e) the law that it would be most appropriate to apply in the proceeding;

(f) whether a related or similar proceeding has been commenced against the defendant or another person in a court in New Zealand;

(g) the financial circumstances of the parties, so far as the Australian court is aware of them;

(h) any matter that is prescribed by the regulations;

(i) any other matter that the Australian court considers relevant; and

(j) the court must not take into account the fact that the proceeding was commenced in Australia.

2.4. Bifurcation

Finally, it is essential not to forget the possibility that the case could be split and only some aspects of it dealt with in Australia, with other relevant issues being dealt with by an overseas court. In *Skinner & Alfonso-Skinner* [2010] FamCA 329 (28 April 2010) Murphy J held at 66-67:

> "… there is nothing as a matter of principle that prevents the bifurcation of proceedings emanating from a single controversy with part of the proceedings being heard in one country and another part in another country, assuming that doing so causes no offence to international comity.
>
> Frequently, though, there can, as a matter of discretion, be seen to be strong reasons for preventing the bifurcation of proceedings in such a manner. In the exercise of the discretion, an important consideration is the nature of each of those differing aspects of the same controversy and the remedies sought and available in respect of each. The evidence needed in support of those differing aspects of the controversy, and the availability of mutual recognition of each Court's orders in each respect are, as the High Court has made clear, relevant matters."

2.5. Summary

The Full Court in *EJK & TSL* [2006] FamCA 730 (9 August 2006) (also referred to as *Kwon v Lee* (2006) FLC 93-287) made the following comments which despite the many cases since remains a useful and helpful "check list" in dealing with cases with a "foreign element" (excluding New Zealand).

"We consider the following principles can be distilled from authority:

i. where an Australian court's jurisdiction under the Act is properly invoked in respect of a family law matter, including an application for divorce, and an issue of competing fora arises, generally the principles to be applied in respect of an application for a stay or anti suit injunction are those applicable at common law;

ii. in cases involving competing applications for differing types of relief arising from the breakdown of a marriage, or a de facto relationship (where the parties have children of that relationship), including some applications for parenting orders, it may be appropriate pursuant to the Court's inherent power to grant a stay or an anti suit injunction based on common law principles;

iii. the granting of relief by way of a stay of proceedings is more likely to be appropriate in a case where the child or children, the subject matter of the litigation, are resident in the foreign forum, and there is no necessity to make any order other than a stay to determine the application before the Court;

iv. in proceedings involving competing fora when the child is in Australia and the Court's jurisdiction is regularly invoked, and it is necessary to make a parenting order for interim residence or an aspect of parental responsibility to provide effective relief, the principles relevant to the granting of a stay or an anti suit injunction are not the appropriate principles to be applied, and the Court must make such orders as are necessary with the child's best interests as its paramount consideration (s 60CA);

v. if an order sought in addition to, or ancillary to, a stay is a parenting order it must be instituted under Part VII of the Act and determined in accordance with s 60CA;

vi. in some circumstances, such as an abduction from a non Hague Convention country it may be appropriate for the matter to be dealt with by way of a speedy summary hearing and an order for the return of the child to the foreign jurisdiction. In making such summary order the Court will have regard to the child's best interests as its paramount consideration;

vii. in cases, such as in (ii) above, where the Act does not proscribe a 'best interests' requirement, the child's best interests will often be a significant and weighty matter to be taken into account; and

viii. that litigation involving children is not strictly inter partes litigation, and the child's best interests will almost inevitably be a significant matter."

3. David's STAGE 3: Strategic considerations relevant to our family law

The following is a practical list of key issues and actions that, based on my experience, you need to consider when faced with a family law case that has a foreign element:

- Immediately have your client appoint a foreign lawyer in the relevant foreign jurisdiction (or jurisdictions!). Even where the Family Court clearly has jurisdiction, regard needs to be had as to whether an Order of the Court will be capable of enforcement in the foreign country and whether, practically speaking, the assets can be recovered for the party in Australia. Further, there can be legal and practical matters relating to the foreign jurisdiction that you need to know. For example, in England you can lodge the effective equivalent of a caveat on a family home, despite not having paid money or documented consideration towards the purchase or upkeep of the property. In France, one spouse is automatically entitled to the tax returns of the other spouse. Your foreign counterpart can be an invaluable source of local knowledge. You may also consider having the foreign lawyer do the equivalent of basic ASIC and LPI searches in that jurisdiction.

- The original jurisdiction of the Family Court includes jurisdiction in relation to "persons or things outside Australia": section 31(2) of the Family Law Act. This is because jurisdiction is personal (in personam) to the parties of the marriage or de facto relationship rather than being over the specific asset, wherever it may be located. As such there is no objection in principle to the exercise of that jurisdiction in respect of assets whether movable or immovable located outside of Australia: *In the marriage of Gilmore* (1993) 16 FamLR 285 at 292 per Fogarty J.

- An asset overseas is property and not a financial resource. There is no impediment to taking foreign property into account or making Orders that the parties transfer or sell that property: *Hickey* [2003] FAMCA 395; *Wilkinson* [2005] FamCA 430; *Noble* (1983) FLC ¶91-338 & *Wallmann* (1982) FLC ¶91-204. For examples of cases where a foreign property has been held to be an asset of a spouse see *Van Der Kreek and Van Der Kreek* (1980) FLC 90-810 (property in Papua New Guinea) and *Pastrikos and Pastrikos* [1980] FLC 90-897 (property in Greece). An order in respect of real property situated overseas requiring that one party transfer their interest to the other party is not an exercise of jurisdiction in respect of the title of the land, but an order in personam against the owner of the land.[13]

[13] Davies and Bell, above n 1, 27.27.

- The position in respect of foreign corporations is more complex. Section 7 of the *Foreign Corporations (Application of Laws) Act* 1989 (Cth) provides that any question relating to the rights and liabilities of members of foreign corporations and its shareholders or the existence, nature and extent of any interest in a foreign corporation may only be determined by an Australian court in accordance with the law of the place of incorporation of that foreign corporation: *Gould and Gould; Swire Investments Ltd* (1993) FLC ¶92-434.

- The Protocol for the division of work between the Family Court of Australia and the Federal Circuit Court dated 12 April 2013 provides that disputes as to whether a case should be heard in Australia ought to be commenced in the Family Court. Divorce applications are required to be filed in the Federal Circuit Court but these can be transferred to the Family Court and consolidated with any other proceedings that are pending or determined by the Family Court.

- You may want to ensure that your client gets into a court "first in time". The Full Court has said that the order in which proceedings are commenced is not a factor that would ordinarily attract much, if any weight, when the second proceedings are commenced relatively soon after the first. However, when allied with the finding that a court is able to resolve the entire issue, the court will not be averse to considering who filed first and where: *Teo & Guan* [2015] FamCAFC 94 at 139.

- The Respondent to Australian proceedings may attempt to resist filing a Financial Statement on the basis that the forum issue is not a "financial case." The Family Court has held:

    1. that there is power in section 123 of the Family Law Act for the Judges of the Family Court to make a ruling requiring the filing of a Financial Statement;

    2. by seeking a permanent stay a Respondent has objected to the court exercising jurisdiction in respect of a "financial case";

    3. rule 13.05 does not apply to a Respondent seeking to object to jurisdiction and so the rule does not require the Respondent to file a Financial Statement;

    4. however, financial information may be required to determine a jurisdictional fact or whether an objection to jurisdiction should succeed and thus can still be ordered in that context: *Bolton & Kingsford (No 2)* [2015] FamCA 905 (21 October 2015).

- The content of foreign laws is treated by Australian courts as a question of fact, not of law: *Neilson v. Overseas Project Corporations of Victoria Ltd* (2005) 223 CLR 331. This means

that joint experts need to be appointed to determine the relative rights of the parties under the foreign law. Importantly, if you do not have evidence of the foreign law applicable in the relevant location, then "… absent any expert evidence, as a general rule there is a presumption that the law of a foreign country is the same as that of the forum": *Khademollah and Khademollah* [2000] FamCA 1045.

- You cannot necessarily simply serve Australian court documents on a person located in a foreign country. Australia is a member of the *Hague Convention on the service abroad of judicial and extra judicial documents in civil or commercial matters* 1965 ("Hague Service Convention"). If the other party to the dispute is resident in one of the countries that is a party to the Hague Service Convention then you must follow the rules in that Convention.

- If you are presented with the reverse situation, where a foreign lawyer from one of the jurisdictions that is party to the Hague Service Convention asks you to file documents on a person present in Australia, then note Australia does not object to the use of private process servers but it has made reservations under Article 10 of the Hague Service Convention to the effect that only Registered Post is to be used for service by post.

- By the same token, you cannot necessarily assume that an Affidavit sworn/affirmed by a witness physically located in a foreign country for the purpose of Australian court proceedings will be valid. For example, in Switzerland it is a criminal offence to swear an oath for a foreign court (as it is thought to be an infringement of Switzerland's sovereignty) and the Affidavit will need to be finalised at the Australian Embassy or Consulate. This type of concern is also flagged in Rule 16.06 which relates to a witness giving foreign evidence by electronic means to the Family Court.

- Australia is a party to the Convention of 18 March 1970 on the *Taking of Evidence Abroad in Civil or Commercial Matters*. Depending on the scope of the evidence in question certain steps may need to be followed and further information can be found here: http://www.hcch.net/en/states/authorities/details3/?aid=485

- Chapter 26A of the Family Law Rules deals with cases to which the Trans-Tasman Proceedings Act apply. It is possible to issue and serve a Subpoena in New Zealand pursuant to these rules (26B.14 and 26B.17).

- A court should be reluctant to give permission to serve a Subpoena abroad in circumstances where the court is unable to force compliance: *Schneider v. Caesarstone Australia Pty Ltd* [2012] VSC 126. A Subpoena that seeks documents from a foreign party in a foreign country risks being set aside as impinging on the sovereignty of the

foreign country, since it is an attempt to compel a foreigner to produce documents in respect of proceeding outside of their home jurisdiction, under threat of punishment for contempt from an Australian court: *Gao v. Zhu* [2002] VSC 64.

4. Nygh's STAGE 3: Enforcement

4.1. Summary determinations

4.1.1 ``overseas child order''

Part VII, Division 13, Subdivision C of the Family Law Act deals with the registration of overseas orders regarding children. An "overseas child order'' is an order of a "prescribed overseas jurisdiction", however expressed, that deals with "custody": how a child lives, how a child spends time or how a person has contact with a child: section 4(1) of the Family Law Act. On registration the foreign order is treated as if it was an order of the Australian court: section 70H of the Family Law Act. The prescribed overseas jurisdictions are surprisingly limited and are largely confined to New Zealand, Papua New Guinea, Switzerland and various states of the USA: see regulation 14 of the Family Law Regulations 1984. The full list of the prescribed overseas jurisdictions is set out in Schedule 1A which can be accessed here:

https://www.legislation.gov.au/Details/F2015C00800

All relevant remedies available under the Family Law Act are available for the enforcement of an overseas child order: *Blair and Jenkins; Attorney-General (Cth)* (1988) FLC ¶91-912.

"Where the earlier custody order is made by an overseas court of appropriate jurisdiction and that court has recently considered the issues in full and has made a custody order applying the rule that the child's welfare or interests are the paramount consideration, the Australian Court should be reluctant to act inconsistently with that order unless the exceptions set out in section 68(4) are met.'' *Khamis* (1978) (per Evatt C.J. and Ellis J.).

The procedure for registering an overseas child order is set out in regulation 23 of the Family Law Regulations. You need to send a request by letter to the International Family Law Section of the Federal Attorney General's Department with three certified copies of the child order, and a certificate signed by an officer of a court or by some other authority in the country in which the order was made relating to the order. It must contain a

statement that the order is, at the date of the certificate, enforceable in that country or jurisdiction.[14]

A court order can be registered in Australia only if there is reason to believe that the child, a parent of the child, or another person who has rights relating to that child under a court order is present in Australia.

The request for registration of an overseas court order may be posted to the International Family Law Section at:

International Family Law Section
Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600
AUSTRALIA

Once the request is received, the Federal Attorney General's Department usually delegates responsibility for the matter to the community services department of the state where the child is living. In NSW, that is the Department of Family and Community Services ("FACS"). The department issues a letter to the Registrar of the Court who considers the request and then issues a certificate of registration.

4.1.2 Overseas "maintenance orders"

Section 110 of the Family Law Act provides for the registration in Australia of overseas orders made in "reciprocating jurisdictions" concerning, effectively, spousal maintenance, child maintenance, adult child maintenance and child bearing maintenance expenses (note de facto maintenance is not covered in Section 110). See also Regulation 24A of the Family Law Regulations.

The reciprocating jurisdictions for the purpose of maintenance orders are not the same as the reciprocating jurisdictions for the purpose of child support. The list is set out in Schedule 2 of the Family Law Regulations which can be found here:

https://www.legislation.gov.au/Details/F2015C00800

[14] See https://www.ag.gov.au/FamiliesAndMarriage/Families/InternationalFamilyLaw/Pages/Registrationofoverseaschildorders.aspx

On registration of an overseas maintenance order, a party can apply to vary it, and for the purposes of this application it is treated as if it was an order of the Australian court: regulation 36 of the Family Law Regulations 1984.

If the person to receive maintenance is a resident of Australia, the application can be made directly to the Registrar of Child Support: section 25(1) Child Support Registration and Collection Act. By the same token, if the person to pay maintenance is a resident of Australia the application can be made directly to the Registrar of Child Support, provided the person to receive maintenance is a resident of a reciprocating jurisdiction: section 25(1C) & 25(1D) Child Support Registration and Collection Act). In these scenarios the receiving or paying parent can simply apply on the phone to the Department of Human Services (there is no official forms to complete).

If the person to receive maintenance is a resident of a reciprocating jurisdiction the application must be given to the Registrar of Child Support by the overseas authority in their country: section 25(1A)(c) Child Support Registration and Collection Act.

If the person to pay maintenance is a resident of a reciprocating jurisdiction the application can be made directly to the Registrar of Child Support or given to the Registrar of Child Support by the overseas authority in their jurisdiction (section 25(1C) & 25(1D) Child Support Registration and Collection Act). In these circumstances the person to receive maintenance is must be a resident of Australia: section 25C Child Support Registration and Collection Act.

4.1.3 Hague Applications

Section 111B of the Family Law Act provides that the Regulations may make provision to give effect to the Hague Convention on Child Abduction.[15] This has been done by the Family Law (Child Abduction *Convention) Regulations* 1986 (Cth) which give legislative force in Australia to the Hague Child Abduction Convention.

In these matters the Court is not subject to the paramount principles of the best interests of the child as the primary consideration. The point of The Hague Convention is to secure the prompt return of an abducted child to his or her home country (rather than to return the child to the person from whom they have been taken, though this may be the initial practical result) so that the Court of the home country can determine parenting issues.

[15] *Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, 1343 UNTS 98 (entered into force 1 December 1983). Australia ratified on 29 October 1986.

4.2. Enforcement of foreign judgements

4.2.1 Statute

Under the *Foreign Judgments Act* 1991 (Cth) ("Foreign Judgments Act), there is a process for the enforcement of judgements made by specified foreign courts through registration in the Australian court system. However, section 3(1) of the Act provides that the judgments capable of registration do not include a "matrimonial cause" or proceedings "in connection with" "matrimonial matters" or the "guardianship of infants."[16] There is no case that I am aware of that has tested whether a judgment of a foreign court regarding the division of property in relation to de facto partners would come within the meaning of the words "in connection with" "matrimonial matters."

Money judgments made in New Zealand may be enforced by registration pursuant to the Trans Tasman Act, making orders relating to property enforceable. Note, however, that judgments regarding children cannot be registered under this Act.[17]

4.2.2 Law of NSW

In view of the exclusion of family law matters under the Foreign Judgments Act, recourse may be had to the common law of NSW or common law equitable principals in order to enforce a foreign obligation. The nature of the obligation to be enforced will be determinative of the steps taken in NSW. These sorts of applications are dealt with in the Supreme Court (not the Family Court).

At common law, a foreign judgment is prima facie capable of recognition and enforcement if the following requirements have been met:

(a) there is identity of the parties (ie the parties in both proceedings are the same);

(b) the foreign judgment is a judgment of a court (as opposed to a tribunal or other body);

(c) the foreign judgment is for a certain (fixed) sum of money;

(d) the foreign judgment is final, in that it is not interlocutory and has not been appealed; and

(e) the foreign court exercised a jurisdiction that Australian courts recognise for the purposes of the rules of recognition and enforcement of foreign judgments at common law

[16] See definition of "in personam" at Section 3(1)(a) and (f) of the *Foreign Judgments Act.*
[17] *Trans-Tasman Proceedings Act* 2010 (Cth) s66(1).

(also known as "jurisdiction in the international sense"): *Maleski v Hampson* [2013] NSWSC 1794.

At equity, a plaintiff in NSW can rely on the estoppel created by the judgment in two distinct ways. First, the plaintiff can say it is reliant on the defendant to pay the sum owing pursuant to the foreign judgment as if it were a simple debt due pursuant to a contract. Second and in the alternative, the plaintiff can rely on the foreign judgment as creating an estoppel precluding the defendant from raising any defence which was or could have been available in the foreign proceedings.[18]

4.3. Transnational freezing orders

Sections 68B(1), 114(1) and 90SS of the Family Law Act give a court power to issue "independent" injunctions, that is, injunctions which are not directly associated with any other form of relief and are a source of relief in their own right. Sections 68B(2), 114(3) and 90SS(5), on the other hand, authorise the issue of injunctions which support, or are in aid of, some other form of relief. Note there is some overlap due to the breadth of powers under the second head of power mentioned here.

In *Re Ross-Jones*, *Marinovich and Marinovich*; *Ex parte Green* (1984) FLC ¶91-555, four members of the High Court emphasised that the injunctive powers (under s 114) are not unrestricted, but are confined to circumstances in which a court is exercising jurisdiction under the Family Act, namely by virtue of the proceedings coming within the definition of "matrimonial cause", for the purpose of the injunctive power under s 114(1), and when it is otherwise exercising jurisdiction under the Act, for the purpose of the injunctive power under s 114(3).

In effect, the injunctive powers of the Family Court may be of limited utility in situations where there are foreign family law proceedings on foot, but there are also assets in Australia that a party to the relationship breaking down may want to protect. A freezing order, sometimes known as a Mareva order, is a court order that prevents a party from selling, giving away, destroying or otherwise diminishing the value of assets, where those actions would frustrate the enforcement of a judgment against them. Freezing orders can apply to property, bank accounts and any other assets.

In order to obtain a freezing order, you must demonstrate that:

- you have a good, arguable legal case;

[18] Davies and Bell, above n 1, 40.46 -40.49

- that the assets are owned by the other party to the proceedings; and
- that there is a danger that any judgment in your favour will go unsatisfied if the other party is not restrained from dealing with those assets.

Freezing orders will generally only be granted in exceptional circumstances and for a limited time. They do not prevent the other party dealing with assets in order to meet their ordinary living expenses, legal expenses or run their business.

It is not uncommon for an application for freezing orders to be made urgently and without notice to the other party. However, claimants under these circumstances must give an undertaking to the court that they will compensate the other party for any loss or damage suffered as a result of the freezing order if it is later overturned. Claimants also have a duty to give complete disclosure of all material facts to the court.

The question of whether to grant a freezing order is discretionary and will often depend on the Judge's assessment of the balance of convenience. However, interfering with a party's ability to deal with their assets is seen to be a drastic remedy requiring a high degree of caution. It is not an order that will be made lightly. It is important to note that a freezing order is not intended to benefit the claimant by providing security that there will be funds available to pay them. Its purpose is solely to prevent frustration or abuse of the court's process.

The Supreme Court of NSW has confirmed it can make a Mareva order over Australian assets in aid of a foreign Mareva order: *Davis v Turning Properties* [2005] NSWSC 742 (15 July 2005). Further and although in the context of a judgment to which the Foreign Judgments Act 1991 could ultimately apply, the High Court has now confirmed that it was within the inherent power of an Australian court to make a freezing order in anticipation of a judgment by a foreign court which would be enforceable in Australia under the Foreign Judgments Act 1991: *PT Bayan Resources TBK v. BCBC Singapore Pty Ltd* [2015] HCA 36.