Family Law Financial Issues on Both Sides of the Tasman[1]

1. This paper will examine the following issues:

   (a) Forum differences with respect to property division under the Family Law Act 1975 and Property (Relationships) Act 1976.

   (b) Enforceability of Court orders made in Family Court in NZ and vice versa.

   (c) Recognition and enforceability of s21 agreements in Australia and Binding Financial agreements in New Zealand ("NZ").

   (d) Changes under the Trans-Tasman Proceedings Act as they relate to family law.

Movement to and from Australia

2. As at 30 June 2012 there are 647,863 NZ citizens who live in Australia (or nearly 15% of NZ's total population)[2]. For the year ending 30 June 2012 60,293 NZ citizens moved to Australia. NZ citizens coming back to NZ in 2011–12 were numbered 9,104 (up 4.5% from 2010-11) but long-term departures decreased slightly to 6,891 (down 2%). Therefore net outgoing movements for 2011-12 was 44,298, an increase of 32.5% on the previous year.

3. Given these statistics, the significance of becoming familiar with the issues associated with cross-border family law property cases is important. This paper canvasses the main issues below.

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[2] See http://www.immi.gov.au/media/fact-sheets/17nz.htm[2] Of interest 20.2% live in New South Wales, 34.1% in Queensland, 21.7% in Victoria and 19.8 per cent in Western Australia. Of those who indicated they had an occupation, 60.2% were skilled. 19.4% were semi-skilled and around 20% were unskilled or were believed to be employed but did not provide an adequate description to properly classify their occupation.

pursuant to a BFA or Court orders. CGT which is a tax on the capital gains between purchase and sale does not apply to the family home but may apply to other assets, most commonly investment property. If property is transferred under a BFA or Court orders a party will receive 'rollover relief' and no CGT will apply until eventual sale.

7. "Binding Child Support Agreements" ("BCSA") contract out of the Australian child support regime and allow parties to reach their own arrangements in relation to both periodic and non-periodic child support. BCSAs cannot be altered by either party unless there is consent or there are exceptional circumstances and hardship to a parent and/or child.[6]

8. De-facto and same sex couples are covered by the FLA and have been so since March 2009. Prior to this de-facto relationships were governed on a state and territory basis. Agreements entered into by de-facto couples were in NSW called "Domestic Relationship agreements".[7]

9. The property settlement process under FLA differs markedly to NZ. It is a 4-step process being:

   (a) Step 1: Identification and valuation of all property, liabilities, and financial resources at time of hearing. Property has a very wide definition to include trusts and superannuation interests.

   (b) Step 2: Assessment of financial and non-financial contributions of the parties from commencement to date of hearing (figure out of 100%).

   (c) Step 3: Adjustment of the contribution based entitlements at step 2 upwards or downwards having regard to the future needs factors (15 criteria considered) including:

      (i) Age and state of health;

      (ii) Income, property and financial resources and the physical and mental capacity for gainful employment;

[6] Section 136 of Child Support (Assessment) Act 1989.
[7] Section 44 Property (Relationships) Act 1984 (NSW).

of NZ, jurisdiction is based on one of the parties being domiciled in NZ at the date of the Application.[11] Even if this criterion is satisfied there remains a residual discretion under s7(3) to decline jurisdiction on forum non conveniens.[12] Importantly the date for the assessment of whether an asset is moveable or immoveable is determined at the date of hearing – hence it is possible for an asset to be a foreign immovable at separation but if sold prior to hearing would be covered by the PRA.[13]

Classification

13. There is no classification system under the FLA designating relationship or separate property. There is also no definition of "relationship" or "personal debts". Generally speaking all property and liabilities are included as property available for division such as:

(a) Inheritance property;

(b) Interests held in any trust provided an element of control can be established (actual or ostensible) by one of the parties;[14]

(c) Property owned prior to relationship;

(d) Gifts;

(e) Property acquired after separation.

Division

14. Division under the FLA is not assessed on the basis of 'presumptions' rather on the basis of contributions to the relationship and future needs. Under the FLA there is a much greater level of discretion in relation to property settlement (usually discussed

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[11] See section 7 PRA.
[12] See RGK v AJE (2005) 25 FRNZ 84, also reported as *Kane v Ethell [Forum non conveniens]* [2006] NZFLR 421.
[13] See *Shepherd v Shepherd* (CIV 2008-404-2212) High Court 23 October 2008 Asher J. In that case the husband owned a half share in a macadamia nut farm in New South Wales at the time of separation. When the wife filed proceedings it was still land, but by the hearing date the husband had sold the land and transferred the proceeds of sale to NZ. Asher J. held that the hearing date was the relevant date because that was when the division occurred in respect of the property then in existence.
[14] *Kennon v. Spry* [2008] HCA 56 and *Stephen v Stephen* [2007] Fam CA 680.

19. The options to enforce an Australian order in NZ are limited to:

(a) Register the FCA orders in a state Court and, if so, then there will be grounds to register the orders under the Reciprocal Enforcement of Judgments Act 1934 (NZ) (sub part 3A – Inferior Courts); or

(b) Upon securing final money orders in Australia apply under the Judicature Act 1908 (NZ) for summary judgment. The only defences available against the enforcement of a foreign money judgment are limited to fraud, contrary to public policy or breach of natural justice.[19]

Recognition and Enforceability of s21 agreements and Binding Financial agreements.

Section 21 agreements

20. Section 21 or 21A agreements are neither recognised nor enforceable in Australia.

21. The case of *Steen v Black*[20] is a good example of this. In that case O'Ryan J refused to dismiss the wife's application for property settlement under the FLA notwithstanding the parties had signed a s21 agreement at separation that finalised financial matters between them.

22. The facts of that case were that the parties who were together for six years had signed a s21 agreement in December 1995, about 12 months after separation. The agreement contained all the usual provisions about full and final settlement etc. In particular the agreement recorded:

> *This agreement applies whether any such claims or rights are under the provisions of the Matrimonial Property Act 1976 ... ... or under any other statute or rule of Common Law or Equity or otherwise.*

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[19] See Goddard and McLachlan Private International Law – litigating in the trans-Tasman context and beyond August 2012 pages 61 to 65.

[20] (2000) FLC 93-005. See also *Woodcock v Woodcock* [1997] Fam CA 5 (7 February 1997) in the context of agreement generally. In that case the Full Court held that unless the agreement complies with the necessary formalities an agreement cannot oust the jurisdiction of the Court to make orders under FLA. Further the doctrine of equitable estoppel does not operate to prevent a Court making orders under the FLA. Where however the doctrine is established it may be relevant to the nature of orders made.

28. For parties entering into a contracting out agreement the issues are more vexed as to how a s21 agreement would be considered under a different property regime in Australia. The best option is to enter into a mirror BFA recording a desire to contract out of the FLA.

Binding Financial agreements

29. BFAs and earlier state and territory based cohabitation agreements are recognised in NZ under s7A of the PRA to the extent that they oust the application of the PRA provided the formalities have been complied with and the agreement is not contrary to public policy.[21] Thus a BFA properly executed in Australia would prima facie act as a bar to an application under the PRA.

30. The issue of enforcement is a separate issue and BFAs cannot be enforced without separate proceedings being initiated in the High Court for summary judgment. Therefore unless successful enforcement proceedings in personam are taken against the defaulting party in Australia then parties would be wise to enter into a mirror s21 agreement in NZ reflecting the terms of settlement at the time.

Spouse Maintenance

Agreements from Australia

31. Unlike NZ there is provision under the FLA to contract out of spouse maintenance (that is say nil/nil maintenance) be it at the commencement of the relationship, during the relationship or at the end.

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[21] Guidance on what it means for the application of foreign law to be contrary to NZ public policy is provided by the recent Court of Appeal decision in relation to enforcement of foreign judgments in *Reeves v OneWorld Challenge* [2006] 2 NZLR 184 at [67] where Justice O'Regan said that for the public policy defence to apply, the enforcement of the foreign judgment would need to shock the conscience of a reasonable New Zealander, be contrary to NZ's view of basic morality or a violation of essential principles of justice or moral interests in NZ. His Honour emphasised at [56] that the public policy exception is a narrow one that must be confined in line with the principle of comity of nations. Accordingly, the mere fact that a case could have been approached differently under NZ law will not be a weighty enough factor to invoke the exception. There have been some suggestions in decisions of the Family Court that the threshold under s 7A(3) is lower than this: but see *Bergner v Nelis* HC Auckland CIV 2004-404-149, 19 December 2005, Heath J.

36. *C* v *G* was followed in the case of *PTB v AFB* (Family Court, Dunedin FAM-2002-012-1020, 6 April 2011), a decision of Judge Twaddle, who ruled for similar reasoning to *C v G* that the orders agreed to in the United Kingdom for spousal maintenance were an 'overall package' and were given substantial weight. He declined the application by the husband to vary the overseas maintenance orders.

37. Where there is a risk that a party may commence a claim for spousal maintenance in NZ, then in addition to a jurisdiction/forum clause in the BFA, a party (who is married) should enter into a s21 agreement providing for 'nil' maintenance. In such circumstances claims for maintenance will only be able to be made up to divorce. Following divorce a claimant will be statute barred under s182(6) of the Family Proceedings Act from bringing an application unless the agreement is set aside.[23]

Agreements from New Zealand.

38. Agreements providing for 'nil maintenance' in NZ are unable to be enforced in Australia and if parties desire protection in Australia then a BFA should be signed. There are no jurisdictional requirements under part VIIIA of the FLA so all parties can be outside Australia at time of signing provided the agreement is certified by an Australian lawyer. However an agreement which provides for periodic spousal maintenance and is registered with the IRD is able to be enforced via the Child Support Agency in Australia.

Changes expected under the Trans-Tasman Proceedings Act 2010

39. The Trans-Tasman Proceedings Act ("TTPA") is legislation that hopes to make life negotiating family law judgments/settlements on either side of the Tasman much easier.

40. In particular the Act provides that its purpose is to:[24]

    (a) Streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency; and

[23] See *Townsend v Bellamy* CA 170/04; s182 Family Proceedings Act 1982.
[24] Section 3 of the TTPA.

include, although not exclusively being limited to, matters such as convenience, expense, witness availability, national law governing transactions, the parties respective residences, their place (or places) of business, the time spent in each country, where the assets are held (or bulk thereof), residency status and where the income earning activities occurred.[29]

48. The NZ approach differs to Australia where the inquiry is whether Australia is a 'clearly inappropriate' forum.[30] The inquiry in NZ is whether the foreign forum is clearly more appropriate than NZ and such a test is more consistent with other commonwealth jurisdictions.

49. In contrast the FCA will not be drawn into a consideration of the comparative appropriateness of the foreign forum. The result in Australia can be that while the foreign forum, for example NZ, may be more appropriate, the FCA may nevertheless deal with the matter itself on the basis Australia still is not 'clearly inappropriate'.[31] Consequently parallel proceedings have occurred where both countries have considered it is the appropriate forum.[32]

50. The TTPA will remove this uncertainty by applying a common statutory forum non conveniens test known as the 'more appropriate forum test'. This test will be complemented by a list of factors the courts will take into consideration when deciding whether to stay proceedings.[33] These factors are:

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

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[29] For example in *RGK v AJE* (2005) 25 FRNZ 84, also reported as *Kane v Ethell [Forum non conveniens]* [2006] NZFLR 421, it was necessary to determine the circumstances in which it was appropriate for the Court to exercise its discretion under s 7(3) to grant a dismissal or a stay of proceedings. The applicant spouse lived in NZ and the respondent in Australia. The property consisted entirely of movable assets, most in Australia. The applicant filed an application to divide the parties' relationship property in NZ. The respondent protested jurisdiction and sought a stay of proceedings on the basis that the parties had a real and substantive connection with Australia (the respondent was an Australian citizen; the parties had married there and the applicant had lived there for 17 years and only 3½ years in NZ) and that any connection to NZ was temporary. The question was whether the discretion under s7(3) should be exercised. Following *Howson v Howson* 2/5/02, Master Faire, HC Hamilton CP 52/01, Judge Smith adopted the doctrine of forum non conveniens to determine the issue and held that the Australian forum was "clearly or distinctly more appropriate" given the number of assets in Australia, time there and no real juridical advantage.

[30] See *Voth v Manildra Flour Mills* (1990) 171 CLR 538.

[31] This is precisely what happened in the case of *Gilmore* where both courts determined it was the more appropriate forum.

[32] See *Gilmore* above.

[33] Section 24 TTPA.

between the parties". It also gives the Family Court under s7A(1) prima facie jurisdiction to apply the PRA to all property wherever owned.

Summary

54. The current 'snap shot' of issues for a NZ family law practitioner advising on property with a trans-Tasman element are:

(a) If a property dispute contains elements of a relationship and property on both sides of the Tasman then it will be very wise to obtain a view on outcomes in both countries particularly where the dispute contains features such as:

(i) Relationship length issues;

(ii) Future needs issues – care of children, income differential, new partners, amount of child support paid;

(iii) Property that would otherwise be excluded here – inheritances, gifts, trusts, property owned prior to the relationship.

(b) If property (real estate, shares etc.) is being transferred between parties in Australia then considerations of stamp duty and capital gains tax may arise. Local advice should be sought.

(c) NZ Family Court orders, FCA and FMC orders are unenforceable in the other country. Orders need to be registered in a 'qualifying court' or summary judgment proceedings initiated in NZ/Australia.

(d) Section 21 agreements do not act as a bar to prevent proceedings being brought in Australia and are unenforceable. If there is a concern that proceedings may be taken then orders should be made here or a mirror BFA/Consent orders obtained in Australia as a condition of settlement.

(e) BFAs properly executed will act as bar to prevent the PRA applying (s7A) though subject to public policy considerations. BFAs are not enforceable in NZ.

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