JURISDICTION AND FORUM
IN FAMILY LAW PROCEEDINGS IN AUSTRALIA

David Hodson

Introduction

Australia, like many other countries, allows proceedings in most family law matters to be instituted within the jurisdiction only if they have a reasonable connection with the jurisdiction. This upholds the policy that relief in family law should be granted not to any comers but only to those who have a sufficient nexus with the jurisdiction to justify the grant of relief in this socially important area of law. What should be the nexus?

But there are an increasing number of cases where in two or more countries there are family law proceedings, often between the same parties and concerning the same issues. What criteria should courts adopt to decide which to allow to proceed and which to stay to allow the proceedings to continue in the other jurisdiction? And do so without appearing too jealous of its own proceedings.

Jurisdiction

The jurisdictional requirements for the institution of proceedings which constitute a ''matrimonial cause" are set out in sec 39(3) and (4), Family Law Act 1975. They distinguish between four kinds of proceedings, namely:

- proceedings for a decree of dissolution of marriage: s 39(3);
- proceedings for a declaration as to the validity of a marriage or of the dissolution or annulment of a marriage: s39(4)(a)
- proceedings for any other matrimonial cause except ''matrimonial cause" (f): s39(4) (a), (b).
- proceedings for ''matrimonial cause" (f). There are no jurisdictional requirements for the institution of proceedings for this ''matrimonial cause"..

By the sec 39(3) proceedings may be instituted under the Act for a decree of dissolution of marriage if, at the date on which the application for the decree is filed in a court, either party to the marriage is:

(a) an Australian citizen; or
(b) domiciled in Australia; or
(c) ordinarily resident in Australia and has been so resident for one year immediately preceding that date.

Only one party need fulfil the jurisdictional requirements.

By sec 39(4) (a) proceedings for a declaration as to the validity of a marriage or of the dissolution or annulment of a marriage may be instituted under the Act if, ''at the relevant date", either party to the marriage is:

(a) an Australian citizen; or
(b) ordinarily resident in Australia; or
(c) present in Australia. (NB: Note this difference to divorce)

Copyright The International Family Law Group, unless as shown. This document must not be copied and reproduced for any commercial and/or profitable purposes without prior written permission. They can be copied for personal use and the personal use of others but then only on condition the copyright is observed and every document copied shows and acknowledges the practice and the web site details of www.iflg.uk.com

"Relevant date" here and elsewhere is same as operative date or the date of first application to court if made orally

S39(4) (a) and (b) sets out the jurisdictional requirements for the institution of any ''matrimonial cause" as defined in s4(1), save for those defined in s4(1)(f) which in turn cross refers to "any other proceedings". This definition can only be described as Kafkaesque, or even Pythonesque. In practice this will often be property division and spousal maintenance, which are the chief areas of forum issues. Jurisdiction arises if, at the relevant date either party to the marriage or any party to the proceedings is:

(i) an Australian citizen; or
(ii) ordinarily resident in Australia; or
(iii) present in Australia.

The expression ''party to a marriage" is defined in sec 4(2) to include a person who was a party to a marriage that has since been dissolved or annulled, whether in Australia or elsewhere, or that has been terminated by the death of one party to the marriage.

By s69E(1), proceedings may be instituted in Australia concerning a child if either parent or child or party to the proceedings is:

(i) an Australian citizen; or
(ii) ordinarily resident in Australia; or
(iii) present in Australia.

However proceedings may also be instituted in relation to a child if in accordance with either a treaty or arrangement in force between Australia and another country or by the common law rules of international law.

Forum in non children cases

Where proceedings in two jurisdictions, should the Australian courts continue the action or stay them to allow the foreign proceedings to continue? What criteria will the courts adopt?

In Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538, the High Court held that the ordinary rule is that a party who has properly/regularly instituted proceedings in Australia has a prima facie right to have the proceedings determined by an Australian court unless Australia is the clearly inappropriate jurisdiction. Surely a high water mark of isolationism and protectionism. It gives little time for international comity and the realities of forum shopping.

But what of family law? Did it have the same law?

Leading case is Henry (1996) 185 CLR 571 and (1996) FLC 92-685

The wife was a German national resident in Monaco. The husband was an Australian citizen who had been a resident of Monaco until 1993. The parties married in Germany in 1977 and moved to Monaco about ten years later. The husband returned to Australia in 1993 and commenced divorce and property proceedings against the wife in the Family Court. The wife applied for the Australian proceedings to be stayed or dismissed in favour of proceedings which were already on foot in Monaco. She submitted that the Family Court was a clearly inappropriate forum. There were hearings before a Judicial Registrar, a single Judge of the Family Court, and the Full Court. At each stage it was held that the divorce proceedings should go ahead in Australia. So far 3–0. But it's not over until the five fat ladies have sung. The wife appealed to the High Court.

Two questions arose for consideration by the High Court: does Voth apply to proceedings for a decree for dissolution of marriage under the Family Law Act? And, if so, what factors does Voth require the Court to take into account?

"The parties to the marriage in the present case were not married in Australia. They have never lived in this country as man and wife. Their married life was lived in Europe, latterly in Monaco where they had their matrimonial home. In this country, there are no children of the marriage whose custody, maintenance or welfare might be affected by the making of a decree of dissolution. Nor is there here any substantial property of the spouses the disposition of which might be affected by the making of a decree of dissolution. In short, there is no connection between the marriage of the parties and this country." "The Family Court was a clearly inappropriate forum. It did not matter whether the wife's proceeding in Monaco or the husband's in Australia was commenced first."

"The institution of marriage is of fundamental legal and social significance, but the married status is of little significance to the legal system or society of a territory in which the parties have never lived as man and wife, where there are no children of the marriage and where there is no substantial amount of property belonging to the spouses or on which a spouse might reasonably be thought to have a claim by virtue of the matrimonial relationship. The courts of such a territory are prima facie inappropriate fora in which to institute proceedings for a decree of dissolution of the marriage. That is the present case."

"Before proceedings instituted under s 39(3) of the Family Law Act are stayed, two conditions must be satisfied: first, that the Family Court is a clearly inappropriate forum in which to determine proceedings for a decree of dissolution of the marriage in question; secondly, that there is some forum in another country which has and can exercise jurisdiction in proceedings for a decree of dissolution of marriage.

The test of ''clearly inappropriate forum" formulated in Voth was the test to be applied in these proceedings. The question was whether a continuation of the proceedings would be ''oppressive" in the sense of seriously and unfairly burdensome, prejudicial or damaging, or ''vexatious" in the sense of being productive of serious and unjustified trouble and harassment. In determining the question of appropriateness a number of factors must be balanced against each other

"In Voth, this Court confirmed its rejection … of the forum non conveniens principle as stated by the House of Lords in Spiliada Maritime Corp v Cansulex Ltd. The Spiliada principle allows that a court may stay proceedings which are pending before it if that court is not the natural forum and there is another available forum which is clearly or distinctly more appropriate. The result is that, in the United Kingdom, a stay will be granted in favour of a clearly more appropriate forum or, which is much the same thing in practice, the natural forum, that being the forum ''with which the action [has] the most real and substantial connection". And in determining which is the natural forum it is relevant to have regard to ''connecting factors", which include ''not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction ... and the places where the parties respectively reside or carry on business". It has since been held in de Dampierre v de Dampierre that, depending on the circumstances, the existence of other proceedings in the alternative forum may also be a relevant matter. It was also held in de Dampierre that the Spiliada principle applies in the United Kingdom to matrimonial disputes as much as to commercial litigation

In Voth, this Court adopted for Australia the test propounded by Deane J in Oceanic Sun, namely, that a stay should be granted if the local court is a clearly inappropriate forum, which will be the case if continuation of the proceedings in that court 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". It was also held in Voth that, in determining whether the local court is a clearly inappropriate forum, "the discussion by Lord Goff in Spiliada of relevant 'connecting factors' and 'a legitimate personal or juridical advantage' provides valuable assistance". In this last regard, Lord

Goff of Chieveley expressed the view that legitimate personal or juridical advantage is a relevant but not decisive consideration, the fundamental question being ''where the case may be tried 'suitably for the interests of all the parties and for the ends of justice' ''

"*Clearly inappropriate*" means that the continuation of proceedings in the Australian court would be either oppressive or vexatious to the objecting party.

''*Oppressive*" means seriously and unfairly burdensome, prejudicial or damaging.

"*Vexatious*" means productive of serious and unjustified trouble and harassment

Whether or not Australia is appropriate or clearly inappropriate depends on the general circumstances taking account of the true nature and full extent of the issues involved. It is a discretionary jurisdiction. A number of considerations apply, as stated in Henry:

- whether a foreign jurisdiction has jurisdiction
- will each court recognise the other's orders and decrees
- which forum can more effectively provide for complete resolution of the matters involved in the dispute
- the order in which proceedings were first instituted, the stage which they have each reached and the cost incurred and to be incurred in each
- the connection of the parties and the marriage with each jurisdiction and the issues on which relief may depend in each jurisdiction
- the advantages and disadvantages arising from a continuation of the proceedings in each jurisdiction including a consideration of the connecting factors and legitimate personal or juridical advantage
- having regard to the parties' resources and their understanding of language, whether the parties are able to participate in the respective proceedings on an equal footing.

"*The list is not exhaustive. Rather, the question whether Australia is a clearly inappropriate forum is one that depends on the general circumstances of the case, taking into account the true nature and full extent of the issues involved*."

There is much debate about the prima facie right to have the proceedings here if regularly issued. This raises issues of international comity. In Henry it was said undue emphasis may have been placed on "t*he prima facie right [of a party who has invoked the jurisdiction] to insist upon its exercise, a consideration which appears to have been material in the decisions in this case. It was pointed out in the majority judgment in Voth that that prima facie right was common ground in the judgments of the majority in Oceanic sun. And as such, it was doubtless taken into account in the decision to adopt the ''clearly inappropriate forum" test rather than the Spiliada test. But there was also a statement to the effect that, in some cases, too much weight may have been given to ''the notion that a proceeding regularly invoked provides a prima facie right to have the proceeding continue in that forum.*

There may be cases in which the notion of prima facie right has some role in determining whether or not a stay should be granted. For example, it may well be significant in what is otherwise a finely balanced contest. But there are also cases in which that notion can do little more than indicate that the onus lies on the party seeking a stay to establish that the chosen forum is clearly inappropriate.

Indeed, there may be cases where the forum is so clearly inappropriate that the notion of prima facie right can have no real bearing on the matter, as, for example, if the cause of action arose in a country in which the parties reside or carry on business and their controversy can conveniently be litigated in that country."

This may just be good judicial law giving/interpretation but there must be some element that it recognises the smaller global community in which we live and that the clearly inappropraite rule taken with the prima facie right was putting Australia seriously out of step with many other jurisdictions.

In Ferrier-Watson v McElrath (2000) FLC 93-022, the Court held that Australia was a "*clearly inappropriate forum*" for the husband's application for dissolution of marriage. The reasons included the marital relationship was already being litigated in Fiji, the parties owned property in Fiji, the question of the husband's domicile was being litigated in Fiji (giving rise to the possibility of two courts making inconsistent findings), the parties' connection to Fiji (the court found the wife had an "intimate connection" to Fiji), their being married there and spending their marital years there, and they both could participate in that jurisdiction on an equal footing.

In Steen v Black (2000) FLC 93-005, in applying the ''*clearly inappropriate forum*" test, the Family Court balanced the following factors:

- whether there was a significant connection between the forum selected and the subject matter of the action and/or the parties;

- whether there was any legitimate and substantial juridical advantage to the party bringing the action here; and

- whether the law of the forum will be the substantive law to be applied in the resolution of the parties' rights and obligations.

The husband argued the wife's application should be dismissed because they had an agreement stated to be in full and final settlement of all claims under New Zealand matrimonial law. The Court concluded Australia was the natural forum for the proceedings. The parties lived in Australia, were only in New Zealand for a limited period, the property the subject of the proceedings was in Australia and there may have been a juridical advantage to one of the parties in bringing the claim in Australia.

In Khamedollah (2000) FLC 93-050, the Full Court held it was open to the trial Judge to find that Australia was the appropriate forum where the parties were Australian citizens, the wife and children had lived in Australia for 10 years, the husband had brought proceedings in Australia for the dissolution of the marriage, he was present in Australia for the proceedings and there was jointly owned real estate in Australia. Here, both parties originated from Iran. The husband had argued that the court did not have jurisdiction to make property orders because there existed an order of the Iranian court concerning property settlement.

Forum in children cases

But the position is or at least was subtly different in relation to children, as stated in Henry. In ZP v PS (1994) 181 CLR 639 (a pre 1995 case) the High Court held that the "*clearly inappropriate*" test in Voth does not apply to proceedings in respect of children where the best interests and welfare of the child are the paramount consideration. In such a case, a party who has properly instituted proceedings in Australia has a prima facie right to have the proceedings determined by an Australian court unless the best interests of the child require otherwise

But now see the Family Law Reform Act 1995, in force from June 1996. In B v B (Re Jurisdiction) [2003] Fam CA 105, the Full Court held that as a result of the 1995 Act, the paramount consideration principle does not now apply to the choice of forum issue. The Full Court said that the paramount consideration principle now applies only to decisions to which the Act expressly says it applies: "*the clear legislative intention of the 1995 amendments was to limit the reach of the paramountcy principle*". Instead the test to be applied on international forum issues is the "clearly inappropriate forum" test. In determining, however, whether or not a forum is "*clearly inappropriate*" one of the matters to be taken into account is what is the best interests of the child.

David Hodson
dh@davidhodson.com
© February 2005