Lessons from down under

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A comparison between financial remedy law in Australia and England & Wales

Transnational marriage is now a part of modern life, and with an increasingly globalised society this appears set to continue. For many family practitioners it is now commonplace to receive enquiries from foreign nationals who are habitually resident in the UK and who wish to seek a divorce or dissolution of a civil partnership. The need for an awareness of family law practice in other jurisdictions is therefore of increasing importance.

This article explores the Australian position. It offers a comparison between financial remedy principles on separation, explores Australia's divergence from its common law roots, discusses the advantages and disadvantages of differing financial remedy principles, and finally considers whether any lessons can be learnt from the Australian experience.

First, a short history of the development of Australia's family law. As a former colony, Australian family law originally reflected its English origins and in many ways it continues to do so. Initially the six states and two territories were self-governing but eventually referred their power to the federal government to legislate with respect to matrimonial matters.

In 1975 the federal government overhauled the family law system, and the Family Law Act 1975 (the Act) was brought into effect. This was a controversial piece of legislation. With it came the creation of the Family Court of Australia. There was only one state, Western Australia, which retained the use of its state courts for family law matters rather than deferring to the federal government and the new Family Court.

At that time there was one important matter on which the Federal Government was unable to legislate, namely the legal implications of breakdown of a "de facto" relationship (non-married couples). This power remained with the individual State legislatures.

It was not until the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth) that every State (with the exception of Western Australia) referred their legislative powers to the Federal Government. Now de facto couples are treated identically as married couples with respect to matrimonial proceedings.

Preliminary considerations

It is always interesting to see what principles other jurisdictions rely upon when dividing assets on separation or divorce, and Australia is no exception. Despite there being obvious similarities, there are stark differences too, particularly in terms of spousal maintenance principles and also the treatment of contributions made during the marriage when dividing property. In Australia there are two separate applications for financial remedy available following the breakdown of a relationship: property settlement and spousal maintenance. Before delving into these applications, the usual consideration of jurisdiction must be undertaken. The Australian court will only have jurisdiction where at least one of the parties:

- regards Australia as their home and intends to live in Australia indefinitely
- is an Australian citizen; or
- ordinarily lives in Australia and has done for the 12 months immediately preceding filing for divorce.

Importantly, the Australian courts do not have much regard for a party filing first in another country in attempt to seize a more favourable jurisdiction. If the Australian court is satisfied that Australia is the more appropriate forum it will have no problem in allowing the proceedings to continue.

With respect to an application for divorce, the court must also be persuaded that the parties have lived separately and apart for 12 months and there is no reasonable likelihood of resuming married life. Notably, parties may seek a division of matrimonial assets following the breakdown of the relationship without seeking a divorce.

Assuming the jurisdiction criteria are satisfied, the first priority is timescale. A party must ensure that any application for property settlement or spousal maintenance is made within the relevant limitation period. For married couples, an application must be made within 12 months of the divorce becoming final. For de facto couples the period is longer, expiring two years after the breakdown of the relationship. Applications may be made out of time; however, this requires leave from the court, which can be a high threshold to meet. The notion of claims automatically being

extinguished if applications are not made within a certain, short period may sit uncomfortably with family lawyers in England & Wales, but perhaps provides greater certainty and would avoid the vagaries arising in cases such as *Vince v Wyatt* [2013] EWCA Civ 495.

Property settlement claims

Family lawyers in England & Wales will find the notion of property settlement fairly familiar territory. "Property" carries the same meaning as in England & Wales, and a property settlement is essentially the division of the matrimonial pot. However, in England & Wales the majority of cases are needs-based cases, which mean that the question of who needs what is of greater significance than the question of who brought what into the marriage. In Australia the starting point for all cases is the assessment of the parties' existing property interests and whether it is fair for there to be any alteration of this. Whilst the end result may be the same, the focus is different. There appears to be less of a willingness in Australia to intervene in the private financial interests of individuals, and adjustments to existing property interests will only be made if, from the outset, it is clear that it is just and equitable to do so.

When deciding financial remedy cases in Australia, the key legislative power is found in s79 of the Act. The two primary subsections are:

- Subsection 2: The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.
- Subsection 4 (Australia's version of s25 of the Matrimonial Causes Act 1973 – paraphrased): In considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account:
  - (a) financial contributions made directly or indirectly to the marriage;
  - (b) contributions (other than a financial contribution) made directly or indirectly to the marriage;
  - (c) the contribution made by a party to the marriage to the welfare of the family, including any contribution made in the capacity of homemaker or parent;
  - (d) the effect of any proposed order upon the earning capacity of either party to the marriage;
  - (e) the matters referred to in subsection 75(2) so far as they are relevant (these include factors to be considered when assessing spousal maintenance);
  - (f) any other order made under this Act affecting a party to the marriage or a child of the marriage;
  - (g) any child support.

Prior to 2012, the court interpreted s79 to mean that a four-step process should be followed for all property settlement applications (pursuant to Pt VIII for married couples or Pt VIIIAB for de facto couples of the Act). The four steps are as follows:

1. Identify and value the net property of the parties. Property includes any property interest in the name of either party or in the control of either party. In Australia, parties are required to complete a financial statement (very similar to the form E) and are under a duty to provide full and frank disclosure of their financial position.
2. Consider the contributions of the parties made at the beginning of the relationship as well as during the relationship. Importantly, and as in this jurisdiction, the court treats non-financial contributions, such as home-making duties, as equal to the financial contributions made by the breadwinner. However, the court's approach to non-financial contributions is not as broad brush as in England & Wales. The home-maker must physically be undertaking home-making duties or managing the household to be able to claim a non-financial contribution. Once the parties' respective contributions have been established, the court attributes a value to each of them, which is naturally a difficult exercise when dealing with non-financial contributions. With this form of contribution, the court can consider matters more in the round, concentrating on the type of contribution and how substantial it has been rather than attributing a particular percentage to it. The principle of contributions is familiar to UK lawyers, but its treatment is different. In England & Wales it is well-established that both financial and non-financial contributions are important, however the legislation does not discriminate between different factors in s25 (save for the needs of children being the first consideration), and contributions are not attributed with more significance than other factors, nor are they attributed with any precise value as in Australia. It appears that the matter of contributions is to a greater extent part of the court's fact-finding process rather than part and parcel of the circumstances of the case relevant to the court's discretion as in England & Wales. There also appears to be no appetite in this jurisdiction to consider the importance of contributions before the needs principle.
3. Consider the future needs of the parties and whether any adjustment is required to meet the needs of a party. "Future needs" is taken as meaning all needs, both current and in the longer term. Relevant factors include consideration of who is to care for any children, any health needs or a need to re-skill in order to re-enter the workforce, or needs upon retirement if one party is retired or approaching retirement age.
4. Consider whether the order proposed is just and equitable. As in England & Wales, this principle allows the court an opportunity to check the financial settlement is fair in all the circumstances.

Importantly, this interpretation of the Act was approved by the Full Court of the Family Court of Australia in *Russell v Russell* (1999) FLC 92-877. This process was followed carefully, and some say blindly, for decades by practitioners and the judiciary alike until 2012, when a fundamental change was brought about by *Stanford v Stanford* [2012] HCA 52.

Stanford v Stanford

Prior to *Stanford*, Australia was on comfortable territory with the above-mentioned four-step process. *Stanford* presented a dramatic change and one that was not welcomed by all, causing uncertainty. The High Court in *Stanford* emphasised that it is important first to ascertain the existing property rights of both parties as determined by common law and equity. Once the legal rights of each respective party have been determined then the judge must decide whether it is just and equitable to alter those interests at all. This decision caused great confusion for many family law practitioners. There was no common agreement as to the extent to which it affected the four-step process.

It was not until 2014, when the Full Court interpreted *Stanford* in its judgment in *Bevan v Bevan* (2014) FLC 93-572, that this issue was clarified. In a majority judgment, Chief Justice Bryant and Justice Thackray held:

> "[40] To conclude that the making of an order is 'just and equitable' only by reference to various matters in s79(4), without a separate consideration of s79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act."

> "[65] Although the High Court did not disapprove the four-step process, we accept it was not approved either. Given the way the matter was resolved, there was no requirement for a pronouncement either way. However, the High Court's decision serves to refocus attention on the obligation not to make an order adjusting property interests unless it is just and equitable to do so."

Although this was not the clarification that many family law practitioners were hoping for, the message from *Bevan* was that when dealing with property settlement applications, the first question should be whether it is just and equitable to make an order which alters the property interests of the parties whatsoever, rather than this being the fourth and final step of the process. *Stanford* serves as a reminder that the four-step process was merely a guide for trial judges and should not be followed blindly and by way of habit.

Many factors set out in s79 and the four-step process remind practitioners in England & Wales of the section 25 factors. However, the emphasis placed on certain factors, and the treatment of those factors, differs. For example, the treatment of the parties' contributions, as mentioned above. Further, it is notable that, unlike in s25, the standard of living enjoyed by the parties is not one of the factors to be considered when dealing with property settlement applications, although s79 does refer in passing to other factors relevant to spousal maintenance applications (dealt with by s75 of the Act), which include standard of living. Standard of living arguments can be key when assessing and presenting arguments on the division of capital in a financial remedy case in England & Wales. Whilst a couple's standard of living must be relevant when assessing capital needs in Australia, it does not appear – at least overtly – to be given the same weight as it is in England & Wales.

Spousal maintenance claims

The starkest difference between the two jurisdictions is perhaps the treatment of spousal maintenance applications. To claim spousal maintenance in Australia, a party must submit a separate application to the financial property settlement application within the relevant limitation period. If an application is made outside of this time period then permission of the court is required before the application can be made, and this is not always granted. One spouse has a responsibility to financially assist the other spouse or de facto partner if that person cannot meet their own reasonable expenses from their personal income or assets. As in England & Wales, the extent of the financial support also depends on what the other party can afford to pay. In Australia a court will only order a party to pay spousal maintenance from the surplus that exists between their income and reasonable expenditure. Likewise, the recipient spouse will only receive enough to meet the deficit that arises from the difference between their income and reasonable expenditure.

This obligation can continue even after separation and divorce, but the key difference between maintenance orders in England & Wales and those in Australia is the Australian court's clear reluctance to order that maintenance is payable beyond a couple of years after separation/divorce (there are of course exceptions). On an anecdotal basis, the judicial feeling is apparent: where a party is able to work then they should be expected to do so and should be willing to do so, rather than to rely on a former spouse for income. The legislation is also clear on this point. Section 81 of the Act places a duty on the court to end financial relations between the parties both in terms of property settlement and spousal maintenance applications:

> "The court shall, as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them."

Whilst this section aims to prevent further proceedings between the parties, it has been referred to by the judiciary when refusing to make orders with prolonged operation periods, such as long-term maintenance orders.

The jurisdiction of England & Wales has been criticised for making overly generous maintenance awards. Its sought-after joint lives maintenance orders are often called a "meal ticket for life". Whilst it may be that there is currently a turning of the tide in the judiciary's willingness to make such orders, no such criticism could ever be made of Australia's approach to maintenance. It is well-established and accepted that financial independence is to be pursued, and the burden on parties to take all necessary steps to achieve self-sufficiency is heavy. Maintenance is intended to be paid only over a temporary period in which "rehabilitation" steps can be taken, for example re-training to allow entry/re-entry to the workforce.

Child maintenance

In Australia, child support is predominantly dealt with by the Child Support Agency (CSA), and there are many

similarities with the jurisdiction here. Parents do not need the assistance of the Family Court of Australia or Federal Circuit Court of Australia to seek a child maintenance payment from the "non-primary carer". They can simply look to the CSA. However, as in this jurisdiction, it is agreed by many that CSA assessments provide child support liability figures which are insufficient to meet the real expenses incurred in raising children. If a party seeks a higher figure, for example to pay private school fees, then the CSA assessment must be appealed and only once the primary carer has exhausted all appeal routes through the CSA can they apply to the Family Court for a "child support departure order" providing for a higher level of periodic child support or specific non-periodic payments (such as the payment of private school fees).

In circumstances where parties maintain an amicable and working relationship following separation, they will commonly enter into a binding child support agreement (BCSA) to provide for further private payments above the CSA assessment figure. A BCSA is binding on the parties and, importantly, ousts the jurisdiction of the Family Court to vary the agreement unless there has been a significant change in circumstances or fraud (s90K of the Act). Both parties must receive independent legal advice and the agreement must be registered with the CSA. Setting aside BCSAs is considered to be very difficult due to the high threshold imposed by the Act. This is the primary difference when considering child support in the two jurisdictions. As family practitioners in England & Wales will be aware, the Child Maintenance Service encourages couples to make their own arrangements for payment of child support, but these are not binding and non-payment merely leads to an application for a formal assessment, with the intention of then being able to pursue CMS enforcement mechanisms.

Conclusion

When comparing and contrasting two jurisdictions it must be questioned whether they are simply too different for any meaningful lessons to be learnt. This is not the case with Australia and England & Wales. The two family law landscapes are in many ways not dissimilar and their common law roots are strong. However, Australia has diverged paths in a number of important ways: two prime examples are its recognition of the rights of unmarried couples, and its willingness to disentangle the financial affairs of separating couples, pushing for an end to any financial bonds immediately upon this becoming feasible. The appetite in Australia for increased rights for all and financial independence following separation appears strong, although with it comes a weighty burden on the financially weaker party, who is generally expected to achieve self-sufficiency within a short period of time. Whilst there is a move towards change in the UK regarding cohabitee rights, this has been met with resistance. The road to reform is long and slow, and despite a number of attempts at change (for example the Law Commission proposals of 2007 or *R (Steinfeld and Keidan) v Secretary of State for Education* [2016] EWHC 128 (Admin)), the law remains the same. It is hoped by many that with the progression of the Cohabitation Rights Bill 2016–17 through Parliament the law in England & Wales will align to a greater extent with the principles of equality on which the Australian law is based. However, any proposals for dramatic change to spousal maintenance provisions are likely to sit very uncomfortably with practitioners in England & Wales. It is easy to understand why a move towards achieving self-sufficiency is desirable, but whether it is sensible to go as far as Australia is a different matter. In many ways the wide judicial discretion, which makes England & Wales so different from many other jurisdictions, could be seen as part and parcel of an advanced and flexible system which is able to move with societal change. To those practising abroad it perhaps seems obscure, but to those used to the peculiarities of this system and the uncertainties caused by such wide discretion, it is clear that its ability to offer tailor-made solutions is worth defending.

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