

International Law Series Part 2:
Where to Divorce? Forum for Property Disputes in Anglo-Antipodean Separations

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This second article in the series will discuss the complicated and unique arrangements for establishing the courts of England and Wales (‘England’), Australia and New Zealand as the forums for deciding property disputes between married couples. It is assumed the reader will have read Part 1 and, for that reason, this article will not re-visit the principles of habitual/ordinary residence and domicile. It will leave for a later article in the series the issue of applications for property orders when a divorce/dissolution takes place overseas.

The article will alert to the pitfalls that arise from the broad jurisdiction of the Australian and New Zealand courts and the much narrower jurisdiction of the English court.

Jurisdiction in England and Wales

The English court’s jurisdiction to make orders for financial provision and property adjustment after divorce flows from its jurisdiction to entertain a divorce petition.¹ As Part 1 in this series identified, depending on the when the petition is filed, that requires at least one party to be domiciled in England and otherwise requires a form of habitual residence in England.

Considerations in Practice

It follows that whilst an English national might have relocated to Australia or New Zealand with a settled intention of residing in that new country and it being the centre of their interests, they may have retained English domicile by virtue of not intending to live in their new country indefinitely. Family lawyers in Australia and New Zealand advising English clients living in those countries will need to have fully explored the possible advantages of their client’s property claims being issued in England, what is often described as ‘the divorce capital of the world’.

Whether an expatriate client has retained their English domicile after relocating will require a thorough fact-finding exercise of the connections the client and their spouse retained with England. The starting point should be confirming the existence of an English domicile of origin and a robust analysis of the potential for them to have since acquired a domicile of choice in their new country to oust their English domicile.

Similarly, for the Australian or Kiwi expatriate, who wishes to invoke the jurisdiction of the English courts, they will need to demonstrate that they at least hold an English habitual residence (with associated conditions, which have been described in Part 1).

¹ Matrimonial Causes Act 1973, s 23.

Jurisdiction in Australia

Applications for property and financial orders may be made after separation and no later than 12 months of the date of divorce (unless the court gives leave or the other party consents to the making of a later application).² The parties do not need to be divorced or need a certificate of divorce to resolve their financial positions.

The Australian courts will have jurisdiction to entertain an application for an order determining the division of property between parties to a marriage if, at the date the application is issued, either party is:³

- An Australian citizen; or
- Ordinarily resident in Australia; or
- Present in Australia.

Considerations in Practice

The basis for jurisdiction for property orders in Australia is self-evidently *very* broad. On one hand, the ability to establish jurisdiction by the mere presence of one party in the country on the date of application casts a broad ‘domestic net’ capturing jurisdiction even if presence is temporary and neither party are habitually resident or domiciled in the country.

On the other hand, the inclusion of citizenship is a notable distinction to jurisdiction in English law, which has the effect of ‘exporting’ Australian jurisdiction. It ensures that an Australian national will retain the ability to issue property proceedings in Australia even if they are habitually resident and/or domiciled in England

Jurisdiction in New Zealand

As in Australia, in New Zealand the legal regimes for the dissolution of marriages and the division of family property are separate. Property can be divided at any time before dissolution and up to 1 year after the marriage is dissolved.⁴

The New Zealand court has jurisdiction in all cases of ‘immovable property that is situated in New Zealand’,⁵ notwithstanding the residence, nationality, or domicile of the parties.

In cases of ‘moveable property’ situated in New Zealand or anywhere else in the world, the New Zealand courts have jurisdiction if one of the parties is domiciled in New Zealand:⁶

- At the date of the application; or
- At the date of agreement between the spouses about the division of their property; or
- At the date of their death.

If an order is sought against a person who is neither domiciled nor resident in New Zealand, the court can decline to make an order in respect of any movable property that is situated outside New Zealand.⁷

²*Family Law Act 1975* (Cth), s 44.

³ *Ibid*, s 39(4)(a).

⁴ *Property (Relationships) Act 1976* (NZ), s 24(1)(a).

⁵ *Ibid*, s 7(1).

⁶ *Ibid*, s 7(2).

⁷ *Ibid*, s 7(3).

Considerations in Practice

The Kiwi expatriate living in England, who remains domiciled in New Zealand, retains the option of jurisdiction of their former home for settling property arrangements. Even if the client is not domiciled in New Zealand, the New Zealand court may exercise jurisdiction for immovable property in New Zealand.

Conclusions

The national law of these jurisdictions creates a complicated picture. The more encompassing property division jurisdictions of Australia and New Zealand mean expatriates of those countries are likely to have options to bring their claims in their jurisdiction of origin, possibly even after substantial periods living overseas.

The writer suggests the following are part of best practice in advising clients whether they have property claims in a different jurisdiction:

- Identify at the outset whether there is a possible alternative jurisdiction to hear the parties' property claims.
- Ask the right questions and fact-find thoroughly to ascertain ordinary residence, habitual residence and domicile as detailed in Part 1.
- Get early legal advice in the alternative jurisdiction to understand the client's potential claims – ideally from someone who is dual-qualified so advice can be given of the relative merits of claims in each jurisdiction.

Coming up in the International Law Series Part 3: Determining forum disputes between jurisdictions.