International Comparative Legal Guides

Family Law 2021

A practical cross-border insight into family law

Fourth Edition

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

A divorce can be applied for in Australia if either of the parties:

- regard Australia as their home and intends to live in Australia indefinitely;
- is an Australian citizen by birth, descent or by grant of Australian citizenship; or
- ordinarily lives in Australia and has done so for 12 months immediately before filing for divorce.

1.2 What are the grounds for a divorce? For example, is there a required period of separation, can the parties have an uncontested divorce?

The *Family Law Act 1975* (**FLA**) established the principle of no-fault divorce in Australian law. This means that a court does not consider why the marriage ended.

The only ground for divorce is that the marriage has broken down irretrievably and there is no reasonable likelihood that the parties will get back together. The parties must have been separated and thereafter lived separately and apart for a continuous period of at least 12 months in order to satisfy the court that the marriage has broken down irretrievably.

If there are children aged under 18, a court can only grant a divorce if it is satisfied that proper arrangements have been made for the children (s 55A FLA).

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

An uncontested divorce in Australia can occur by way of an Application for Divorce filed jointly by the parties, or when the respondent to a sole Application for Divorce does not oppose the granting of the divorce.

If a joint application was made, the parties are not required to attend the court hearing (even if there is a child of the marriage aged under 18).

If a sole application was made and there is a child of the marriage aged under 18 years, the applicant is generally required to attend the court hearing. If a respondent has completed and filed a Response to Divorce, but does not oppose the application, they do not need to attend the hearing.

1.4 What is the procedure and timescale for a divorce?

A divorce application ordinarily takes several months to be granted and made by the court, but this may be delayed by matters such as if a party opposes a divorce being granted, or if the court requires further information. The timeframe begins with the filing of an Application for Divorce with the court and finishes when a Divorce Order is issued by the court. The Divorce Order becomes final one month after the order is granted (s 55 FLA) at which time the court will issue a Divorce Certificate (s 56 FLA).

An Application for Divorce is usually listed before the court for a divorce hearing approximately six to eight weeks after the application is filed, subject to the court's availability. If a sole application is made, the other party must be properly served with the Application for Divorce 28 days before the divorce hearing, or 42 days if the spouse is overseas.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Yes. The granting of a divorce is separate to other ancillary matters and is only connected to property matters by imposing a time limit for parties to initiate court proceedings if they cannot reach an agreement.

If a party wants to apply for maintenance or a division of property, a separate application must be filed within 12 months of the date the divorce becomes final. Otherwise, the parties will need to seek leave from court to apply for such orders.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Australia will recognise an overseas divorce if it was effected in accordance with the laws of that country (s 104(7) FLA).

1.7 Does your jurisdiction allow separation or nullity proceedings?

There are no legal processes to formally separate in Australia. The parties may be held to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one of the parties, or in circumstances where the parties continued to reside in the same residence following separation (s 49 FLA).

The court may grant a declaration of nullity declaring a marriage void on the following grounds:

1. one or both of the parties were already married at the time;
2. one or both of the parties were underage and did not have the necessary approvals; or
3. one or both of the parties were forced into the marriage under duress.

(See s 51 FLA; ss 23 and 23B *Marriages Act 1961*.)

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Divorce proceedings may be stayed, and an Australian court should only decline to exercise jurisdiction, if Australia is a "clearly inappropriate forum" (*Voth v Manildra Flour Mills Pty Limited* (1990) 171 CLR 538). A finding of a clearly inappropriate forum depends on whether continuing the proceedings would be oppressive or vexatious and will take into account other factors such as:

1. convenience and expense, location of witnesses;
2. whether the parties can participate in the respective proceedings on an equal footing;
3. the connection of the parties to the other jurisdictions, and the relief available;
4. the recognition of Australian orders in the country;
5. which forum would provide more effective resolution of the matters;
6. the timeframe and stage of each proceedings;
7. the place of residence of the parties; and
8. the advantages of each forum.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

In Australia, financial (or property) matters are separate to the granting of divorce and must be applied for by way of a separate application filed with the court. Applications for financial matters can seek orders in relation to property settlement, spousal maintenance, child maintenance and child support.

In property settlement proceedings, the court can make such order as it considers appropriate altering the interests of the parties in the property (s 79 FLA). The court must not make such an order unless it is satisfied that in all the circumstances it is "just and equitable" to do so (s 79(2) FLA). Therefore, in property settlement proceedings, the court has a great degree of discretion in deciding what orders to make, including to:

- alter the legal ownership of parties' assets;
- make orders involving third parties and alter the legal ownership of third-party assets;
- assign value to assets and force their compulsory sale;
- set aside transactions entered into with third parties; and
- disregard asserted legal liabilities.

The court also has the discretion to make orders for periodic or lump sum spousal maintenance, on an interim or final basis (ss 72 and 74 FLA).

Financial orders in relation to children can also be made, which will be considered in section 5.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

Matrimonial regimes do not exist in Australia. There is no default matrimonial property regime.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

The Family Court adopts the following broad approach (known as the five-step process) when determining an overall property division in relation to property settlement (s 79(4) FLA):

1. First, it would consider whether it is just and equitable to make an order for division of property at all.
2. Second, it would then identify and value the content of the current asset pool, being all assets, liabilities, superannuation entitlements and financial resources.
3. Third, the court considers the parties' respective contributions towards the asset pool in a financial, non-financial, and parenting/homemaker capacity.
4. Fourth, the court would assess the parties' respective future needs and the various factors such as the future earning capacity of the parties, the duration of the marriage and the parenting roles of the parties (s 75(2) FLA).
5. Finally, having balanced all of the above considerations and made adjustments to the parties' respective property entitlements accordingly, the court would then assess whether the outcome of those adjustments is ultimately just and equitable and, if not, may further adjust those property entitlements.

(See *Stanford v Stanford* [2012] HCA 52.)

2.4 Is the position different between capital and maintenance orders? If so, how?

Yes. The court considers the following when determining applications for spousal maintenance applications (s 72 FLA):

1. First, it considers whether the party seeking maintenance is unable to support themselves adequately, whether:
   (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
   (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or
   (c) for any other adequate reason,
   having regard to any relevant matter referred to in sub-section 75(2) of the FLA.
2. Second, it considers whether the other party is reasonably able to support the person seeking maintenance.

In the event that both of the above considerations are satisfied – that is, the first party successfully shows that they have a financial need and that the other party has a capacity to meet that need – the court may then make an order for spousal maintenance to be paid.

A lump sum payment or the transfer or settlement of property can be ordered pursuant to section 77A of the FLA in circumstances where the party that is to provide the maintenance does not have the income to make payments to the other party periodically and on an ongoing basis.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

If parties have reached an agreement in relation to financial matters, they can apply to the court for Consent Orders without the need to attend court. Consent Orders have the same legal effect as if they had been made by a judicial officer after a court hearing.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

In Australia, it is relatively common for interim spousal maintenance orders to be made by the court pending a final financial settlement between the parties. Such interim orders remain in place until such time when final orders are made by the court (either when parties have reached a final property settlement agreement or following a final hearing if no agreement can be reached).

It is comparatively uncommon for spousal maintenance orders to be made by the Family Court on a final basis, although there are cases where final spousal maintenance orders are made by the court if the circumstances so warrant. Even if the court is to make a final order for spousal maintenance, such an order is usually for a limited period of time (rather than ongoing).

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

The FLA defines "property" broadly such that every potential property interest that either party may have can be considered in property adjustment proceedings before the court (*Jones v Skinner* (1835) 5 LJ Ch). The relevant interests can be either real or personal property, and may include choses in action (*In the Marriage of Duff* (1977) 15 ALR 476).

Generally speaking, any assets, liabilities and superannuation entitlements acquired by one or both of the parties after marriage will be treated as property of the marriage.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

As discussed earlier, a divorce application is distinctly separate from substantive property settlement proceedings.

Australian courts will only apply Australian law, rather than foreign law, in granting a Divorce Order. Pursuant to section 39 of the FLA, for Australian courts to grant a Divorce Order, at least one party to the marriage must be either:

1. an Australian citizen;
2. ordinarily resident in Australia; or
3. present in Australia. The party must have been present in Australia for one year prior to the date of filing the divorce application.

Similarly, Australian courts will only apply Australian law in proceedings for substantive property settlement, and will not make orders applying foreign law rather than Australian law. However, if parties can reach an agreement as to the division of assets and spousal maintenance, Australian courts will consider whether the agreement is "just and equitable" in all the circumstances and may make those orders by consent.

2.9 How is the matrimonial home treated on divorce?

The matrimonial home is included in the property pool available for division between the parties and is treated in the same way as all other property owned by the parties. Generally, if one of the parties seeks to retain the matrimonial home as part of the overall property settlement, and it is likely that the party will have the financial means to do so, that party will be permitted/given the opportunity to retain the home. In cases where neither party seeks to retain the matrimonial home or does not have the financial means to do so, the court may order the sale of the property and for the proceeds to be split in accordance with the overall property settlement determined by the court.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

In Australia, the court identifies all property interests of the parties in the relationship and this extends to interests held by either party in a trust. In many cases, a trust will be treated as property of the marriage, where the parties hold the roles of appointor, trustee and/or beneficiary.

Even where a party is only a mere discretionary beneficiary (i.e. with no present entitlement to trust assets), the court will still take that into account as a financial resource of that party when determining the overall property settlement.

Spry v Kennon [2008] HCA 56 is the leading authority in terms of the court's powers when considering trust structures.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

The powers available to Australian courts to make orders following a foreign divorce are the same as those available for an Australian divorce.

If the foreign proceedings or any aspect of same are current and undetermined, there is likely to be an argument as to whether Australia is a clearly inappropriate forum for the determination of the Australian proceedings (*Voth v Manildra Flour Mills Pty Limited* (1990) 171 CLR 538).

If there are no current foreign proceedings, and it is determined by the court that Australia is not a clearly inappropriate forum, Australian courts are most likely able to deal with some financial claim(s).

In limited circumstances, parties who can establish jurisdiction in Australia can maintain proceedings for financial relief, even if orders for a divorce and orders for financial relief have been made in a foreign court (see *Pagliotti & Hartner* (2009) FLC 93-393, which was followed by *Chen & Tan* [2012] FamCA 225).

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce? E.g. court, mediation, arbitration?

Methods of alternative dispute resolution in Australia include negotiation through lawyers, conciliation conferences, private mediation or arbitration. However, agreements reached by these means (other than arbitration) are not legally binding unless subsequently made into orders filed with the court or by way of a Binding Financial Agreement.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

In Australia, marital agreements are known as Binding Financial Agreements. The Agreements can be entered into before, during or after marriage or a *de facto* relationship, and are legally binding and enforceable in Australia if they follow the strict legislative requirements set out in the FLA.

Foreign agreements are not recognised under Australian law unless they also comply with the strict technical requirements that must be satisfied under Australian law.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

A financial agreement is binding on the parties if:

1. it is signed by both parties;
2. each party has received independent legal advice from a qualified lawyer, prior to signing the financial agreement, as to the effect of the agreement upon their rights and the advantages and disadvantages, at the time the advice was provided, of signing the agreement;
3. each party's lawyer signs a Statement of Independent Legal Advice which is annexed to the agreement;
4. it has not been terminated;
5. it has not been set aside by a court; and
6. after it is signed, the original financial agreement is retained by one of the parties, and a copy is given to the other (s 90B FLA).

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance)?

Binding Financial Agreements can cover both substantial property settlement between parties, as well as spousal maintenance. While sections 90B(3)(b), 90C(3)(b) and 90D(3)(b) of the FLA provide for Binding Financial Agreements to cover "matters incidental or ancillary" to the property settlement and spousal maintenance along with "other matters", there is very little case law on those terms in relation to Binding Financial Agreements.

Section 84(5) of the *Child Support (Assessment) Act 1989* provides that "nothing in this Part is to be taken to prevent the same document being both a child support agreement and a financial agreement". There are cases in which a financial agreement has been enforced as a child support agreement, such as the matter of *Huckle & Harl (Child Support)* [2018] AATA 4895.

However, it is prudent for child support to be dealt with in a separate document known as a Binding Child Support Agreement. This is because there are differing grounds for setting aside Binding Financial Agreements and Binding Child Support Agreements, and child support arrangements may be more likely to change than property settlement arrangements.

The Australian courts can also make orders about child maintenance (either by consent or by judgment of the court). The FLA provides that the court can also register agreements about child maintenance. This is discussed in more detail in section 5.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

From 1 March 2009, parties to an eligible *de facto* relationship can apply to the court to have financial matters dealt with in the same way as married couples. Claims must be made within two years of the breakdown of the *de facto* relationship (s 44 FLA).

4.2 What financial orders can a cohabitant obtain?

Parties to an eligible *de facto* relationship can seek the same financial orders as married couples.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

Cohabitants are defined as parties to a *de facto* relationship under section 4AA of the FLA if one of the following factors are met:

1. The relationship is at least two years.
2. There is a child in the relationship.
3. The relationship was registered under a prescribed law.
4. There would be a serious injustice if no order was made due to significant contributions by one party.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Same-sex marriage in Australia has been legal since 9 December 2017 (s 5 *Marriage Act 1961* (Cth)). Same-sex relationships can also be classified as *de facto* relationships if they satisfy certain criteria set out in section 4AA of the FLA.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

Parents (or non-parent carers) can bring a claim for child support in relation to children born without or outside of a marriage (ss 25 and 25A *Child Support (Assessment) Act 1900*) (**CSA Act**)). These claims are brought on behalf of the parent or non-parent carer (not the child) to cover the child's expenses or part thereof.

More commonly, child support for a child is determined by an administrative assessment, whereby one party makes an application to Services Australia – Child Support (Division 1 CSA Act).

In addition, a parent or non-parent carer can:

- make a court application for an order for child support as part of the determination of other financial matters between the parties. To bring an application, the applicant parent must first obtain an administrative assessment for child support from which the applicant parent wishes to depart (ss 98B and 116 CSA Act); and
- enter into a formal agreement known as a Binding Child Support Agreement in relation to financial support for the child (s 98T CSA Act). This can include child support to be paid by a lump sum, ongoing payments, transfer of assets, or payment of non-periodic expenses such as school fees, private health insurance and medical expenses.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

The provision of financial support for children is most commonly determined and administered by a child support assessment issued by Services Australia – Child Support rather than a court order for child maintenance.

A formula is used to calculate the amount of child support required on a case-by-case basis and takes into consideration the child's age, the parents' incomes and the total percentage of time the child spends with each parent.

The courts may also make child maintenance orders in particular circumstances, including where there is an immediate need for assistance (s 66Q FLA), or where the child is over 18 and requires continued support (s 66L FLA).

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Child support will end when the child turns 18 unless they remain in secondary education (at which point the application must be extended), upon the child's marriage or death, or if they are no longer an Australian resident or citizen (Subdivision F FLA).

A child who is over 18 is able to obtain financial support from a parent if the child:

- is completing their secondary or tertiary education;
- has a serious illness; or
- has a physical or mental disability.

This is called adult child maintenance. Either the parent or the child can apply for an adult child maintenance order against the other parent:

- when a child is 17, to begin when the child turns 18, or
- after the child has turned 18.

5.4 Can capital or property orders be made to or for the benefit of a child?

Under section 79(1)(d) of the FLA, the court can make an order requiring either or both parties to the marriage, for the benefit of a child of the marriage, to carry out a settlement or transfer of property as the court determines.

Further, a court can make orders for the payment of lump sum child support (including the transfer of property) in circumstances where there may be difficulties in enforcing periodic child support payments. The lump sum must be equal to or greater than the annual child support liability as assessed by Services Australia – Child Support.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

A child cannot apply to Services Australia – Child Support for a child support assessment (ss 25 and 25A CSA Act).

A child may apply for a child maintenance order (s 66F FLA). In considering the financial support necessary for the maintenance of a child, the court must take into account the exhaustive list of matters set out in section 66J of the FLA.

In relation to a child over 18 years old, a court must not make an adult child maintenance order unless the court is satisfied that the provision of the maintenance is necessary to enable the child to complete their education or because of a mental or physical disability of the child (s 66L FLA).

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction, whether (a) married, or (b) unmarried?

Both parents of a child, whether married or unmarried, can exercise parental responsibility (s 61C FLA). Parental responsibility extends to all long- and short-term decisions made about the child that concern their care, welfare and development. Such long-term decisions include:

- care arrangements;
- health decisions;
- education-related decisions;
- name; and
- religion.

In determining what parenting orders to make, one of the primary considerations is the benefit to the child of having a meaningful relationship with both parents. This is regardless of whether the parents were married or unmarried.

6.2 At what age are children considered adults by the court?

A child is legally a minor until they turn 18 years old (s 4 FLA).

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Until the child turns 18 years old; marries/enters into a *de facto* relationship; is adopted; or in the event of the death of a parent (ss 65H and 65J FLA).

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

An application for parenting orders is a separate application to a divorce application. A party can make an application for parenting orders following separation, either before or after a divorce is granted.

The court has a wide discretion to make orders in relation to the care, welfare and/or development of the child, provided the orders are in the child's best interest (s 60CA FLA). This includes orders dealing with living arrangements, special occasions, changeovers, care of the child, communication with the child, interstate and international travel, education and medical care.

The court does not automatically make orders in relation to child arrangements in the event of divorce, though the court does need to be satisfied that there are proper arrangements in place for the care, development and welfare of the child before granting a Divorce Order (s 55A FLA).

6.5 What factors does the court consider when making orders in relation to children?

The child's best interests are the paramount consideration when making orders in relation to a child. In determining what is in the child's best interests, the court must assess the primary and secondary considerations set out in section 60CC of the FLA.

The primary considerations are outlined in section 60B of the FLA as follows:

1. the benefit of the child having a meaningful relationship with both parents; and
2. the need to protect the child from physical or psychological harm and from being exposed or subjected to abuse, neglect or family violence (noting this takes priority over the abovementioned primary consideration).

The court also considers a range of secondary considerations (see the extensive list outlined in s 60CC FLA).

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

Each parent has parental responsibility for the child (s 61C FLA). Therefore, where no contrary court order has been made, parents may exercise this responsibility independently or jointly when making decisions about issues affecting the child's welfare. This is regardless of whether the parties were married, living together, never lived together or separated, as long as there was no contrary order in force (*Goode & Goode* [2006] FamCA 1346).

However, parents acting unilaterally may be impacted by practical obstacles or safeguards put in place by third parties, such as requirements for both parents to sign for passports or change of name. Further, it is an offence to take a child overseas if there are current parenting orders in place against this or if parenting proceedings have been commenced (ss 65Y and 65Z FLA).

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

The law does not say that children must spend equal amounts of time with each parent after their parents separate.

However, under section 65DAA of the FLA, where the parents have equal shared parental responsibility, the parents (and the court) must consider whether an arrangement where the child spends equal time with each parent is (a) in that child's best interests, and (b) reasonably practicable.

If the answer is "no" to either (a) or (b) then the court must consider whether the child should live with one parent and spend "substantial and significant" time with the other parent. Again, the parents (and the court) have to consider whether the arrangements are in the child's best interests and reasonably practicable.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Yes.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

The Judge may consider evidence prepared by an independent professional in rendering a decision. The Judge does not meet with the child alone.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

An independent children's lawyer (ICL) can be appointed to represent the child's best interests in parenting proceedings.

The court can appoint an ICL under section 68L of the FLA, or on the application of a child, an organisation concerned with the welfare of children or any other person, to represent and promote the best interests of a child in family law proceedings.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Pursuant to section 65C of the FLA, adults such as the grandparents or "any person concerned with the care, welfare or development of the child" may apply for parenting orders in relation to the child. Where an independent professional is involved, grandparents and step-parents who usually reside with the child are also interviewed.

Section 60I of the FLA requires that parties attempt to resolve their dispute relating to children with the assistance of a Family Dispute Resolution Practitioner (**FDRP**) prior to commencing court proceedings. FDRP is a form of alternative dispute resolution, like mediation. If parties are unable to resolve their dispute through alternative dispute resolution, the FDRP is to issue a section 60I certificate, which is required by a court before an application can be made to the court for parenting orders, unless an exemption is granted.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

Moving a child to another state or country is known as relocation. If parties cannot agree about relocation, then either parent can apply to the court for orders allowing them to relocate interstate or overseas. The court will consider the best interests and welfare of the child in making their determination as to whether the relocation order should be granted.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

This will depend on the location where the parent intends to relocate and the impact the relocation will have on the current parenting arrangements. Generally speaking, consent is required if the relocation involves a change to the child's living arrangements that would make it more difficult for the child to spend meaningful time with both parents.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

The court will balance the rights of the relocating parent with the following considerations, bearing in mind that the final decision must be in the best interests of the child:

- the child's interests in having a meaningful relationship with both parents;
- protecting the child from physiological or psychological harm or from being subjected to or exposed to abuse, neglect or family violence;
- the child's views;
- the nature of the child's relationship with the parents, and others such as grandparents;
- whether the parents are willing and able to facilitate and encourage a relationship between the child and the other parent;
- how the changes are likely to affect the child's circumstances;
- maturity, sex, lifestyle and background of the parents and the child;
- any incidences of family violence; and
- anything else the court considers relevant.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

The same factors identified at question 7.3 would apply.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

Interstate and international relocation are considered on a case-by-case basis. Generally speaking, the further away the parent intends to move, the less likely the court will agree it is in the child's best interests, as contact with the other parent is likely to be much less frequent. Therefore, interstate relocation is more commonly granted in comparison to overseas relocation.

Importantly, however, courts have repeatedly said that freedom of movement is subordinate to the best interests of children (*U v U* (2002) 211 CLR 238).

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Domestic abduction

If one party breaches the parenting order by failing to return the child as required, a court may make a recovery order requiring the party to return the child (s 67Q FLA). A recovery order can authorise or direct a person or persons, such as police officers, to take appropriate action to find, recover and deliver a child to the relevant party. A recovery order can also provide directions about the day-to-day care of a child until the child is returned or delivered.

A recovery order may also prohibit the party from again removing or taking possession of the child. In these cases, a recovery order can authorise the arrest (without warrant) of the party who again removes or takes possession of the child.

International abduction

Australia is a party to the Hague Convention, which provides a process through which a parent can seek to have their child returned to their home country.

The process of having the child returned to Australia depends on the country the child is being held in, and whether that country is a party to the Hague Convention.

If a child is abducted to a Hague Convention country, the Australian Central Authority within the Attorney-General's Department is responsible for administering and actioning applications for the return of an abducted child to Australia.

If a child is located in a non-Hague Convention country, the Australian court needs to decide first if Australia is the appropriate place to determine the issues. Sometimes a foreign court order will be made before the Family Court of Australia can decide where the child should live. In such cases, the Family Court may recognise the foreign order and take no further action.

At other times, the Australian parent left behind can get an order in Australia that prevents a foreign court making an order about the child (by getting an order that the abducting parent does not commence or continue proceedings overseas).

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years?

The Family Court of Australia announced a dedicated National Arbitration List (**NAL**) which commenced in June 2020. The innovation has proven to be a successful way of resolving family law property disputes. Importantly, it has provided families with a cost-effective and timely alternative to the traditional path of litigation. It is noted that parenting cases continue to be heard by Judges and not arbitrators.

The NAL was introduced to reduce the backlog of pending cases in the courts. As an alternative to a court trial, parties can appoint their own accredited arbitrator and they can set their own timetable. This can enable families to extricate themselves from the anxiety of waiting for a Judge to become available to hear their case.

Cases conducted as part of the NAL are heard and determined by accredited arbitrators within approximately three months of entering the Judge-controlled NAL. Under court rules, the arbitrator must produce an award within 28 days of concluding the arbitration. Once registered, the award becomes a decree of the court, enforceable like any other court order.

8.2 What impact, if any, has the COVID-19 pandemic had on family law in your jurisdiction to date, and is likely to have over the next 12 months?

The COVID-19 pandemic has had a considerable impact on family law in Australia, and this is expected to continue over the next 12 months.

The impacts of COVID-19 have placed increased pressure on an already overwhelmed court system. The court is currently operating at a reduced pace, reserving resources for the most urgent cases and conducting matters electronically where possible.

The courts have also established a national court list which commenced on 29 April 2020 and is dedicated to dealing with urgent family law disputes that have arisen as a direct result of the COVID-19 pandemic.

8.3 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic (e.g. virtual hearings, remote access, paperless processes)? Are any of these changes likely to remain after the COVID-19 crisis has passed?

As a result of COVID-19, the court has modified its practices and protocols in order to minimise the need for legal practitioners and/or the parties to physically attend court. The key changes include the following:

- Since March 2020, courts have been conducting most appearances and hearings by telephone or video link. In-person attendances are only conducted in exceptional circumstances.
- Special measures have been introduced to allow for the electronic signing of documents and dispensing the need for various documents to be witnessed.
- There has been a shift towards paperless files, online filing and the production of electronic documents.

It is likely that many of these changes will remain in the foreseeable future.

8.4 What are some of the areas of family law which you think should be looked into in your jurisdiction?

The legislation in relation to property settlements could be clarified. The process in relation to property settlements is not presently codified, and the legislative pathway would be clarified if this were to occur.

As it stands, the FLA cross-references sections that can lead to confusion for litigants. For example, when considering whether to make an order in property settlement proceedings pursuant to section 79 of the FLA, reference is made to section 75(2) of the FLA which is entitled "[m]atters to be taken into

consideration in relation to spousal maintenance". Section 75(2) includes some factors that are clearly not relevant to property proceedings. Simplifying the FLA would likely make it more comprehensible, thereby leading to more consistent outcomes for litigants.

In addition, practically, there are two courts in Australia dealing with family law matters at a federal level. The Family Court deals with more complex and lengthy proceedings while the Federal Circuit Court deals with less complex matters. Both courts have jurisdiction under the FLA but often have different rules, forms and procedures. Matters can also be transferred between the two courts, which can create confusion and lead to inefficiency. Harmonising the rules and procedures applicable in both courts exercising jurisdiction under the FLA would reduce confusion and streamline the litigious process.

Eleanor Lau is an Accredited Family Law Specialist who practises exclusively in family & relationship law. Eleanor assists clients in all areas of family law including property settlement, spousal maintenance, parenting matters, financial agreements, child support, and international family law matters.

Eleanor is well versed in advising clients across the spectrum of family law issues with particular expertise in financial matters involving complex structures such as trusts, companies and partnerships, including where assets are held both within Australia and overseas. Eleanor is also experienced in complex parenting matters, particularly in cases where an overseas element is involved.

She is one of only a small number of Cantonese and Mandarin speaking family lawyers in NSW who have attained specialist accreditation in family law.

Eleanor is appointed as a member of the Law Society of NSW Specialist Accreditation Family Law Advisory Committee, which is responsible for overseeing and assessing other family lawyers in gaining their specialist accreditation in family law.

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Jeanette Merjane has been practising exclusively in family law since March 2020, after completing the Graduate Program at Lander & Rogers.

Jeanette's areas of expertise include:

- property matters, including *de facto* property matters;
- parenting matters;
- spousal maintenance, child support and child maintenance matters;
- divorce applications; and
- litigation.

Jeanette's accounting background and interdisciplinary experience provide a strong foundation for family law matters involving property.

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