Enforcement of Australian

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Enforcement of Australian property orders

If orders are obtained in Australia, either through the Federal Magistrates Court (FMC) or the Family Court of Australia (FCA), the orders are currently unable to be registered under the *Reciprocal Enforcement of Judgments Act 1934* (NZ) (REJ) and so are unenforceable in NZ. Currently, only the High Court of Australia, the Federal Court of Australia and the Supreme Courts of the states and territories are deemed to be superior courts and as such the orders of those courts are able to be registered and enforced. [2]

The County or District Courts, Local Courts and Magistrates' Courts of the states and territories are specified as "inferior courts" and are also recognised meaning orders issued by those courts are enforceable [3]

The notable omission is the FCA, which is not referred to in either category and is not regarded as a "superior" court. This issue has been subject to judicial comment on both sides of the Tasman. [4]

Currently the options available for enforcement of a property order from the FCA are:

- register the FCA orders in a state court, then there will be grounds to register the orders under the REJ; or
- upon securing orders in Australia apply under the *Judicature Act 1908* for summary judgment on the basis of orders in Australia. This is obviously not ideal as it gives a party a "second bite at the cherry".

Fortunately the process is under substantial review and once the *Trans-Tasman Proceedings Act 2010* (TTPA) is brought into force, FCA orders will be considered a "registrable" judgment, provided it is final and conclusive.[5] At this stage the TTPA has not been brought into force by either country and is awaiting approval from the states and territories. The TTPA will allow FCA property orders to be registered in the High Court of NZ and then enforced through measures available for orders made in NZ.

Urgent interim relief – property proceedings

When urgent interim relief is required in NZ for substantive proceedings taking place in Australia, the current options for this are:

- An application to the High Court for a "freezing order" or an "injunction", such orders to include:
  - An order restraining a party from removing any assets located in or outside NZ or from disposing of, dealing with, or diminishing the value of those assets
  - An order for the detention, custody, or preservation of any property or
  - An order that a fund be paid into court or otherwise secured if the proceeding concerns the right of a party to the fund.
- A notice of claim or caveat registered over real property, provided that it is protecting an interest in land
- An application under the *Property (Relationships) Act 1976* to restrain disposition of property that would defeat the right of a party under that Act.[6] Any such application must relate to immovable property (real property) or one party must be domiciled in NZ. [7]

Once the TTPA is in force, it will be possible to obtain interim relief in support of Australian proceedings, which is anticipated to include injunctive/restraining orders.[8]

Enforcement of Australian parenting orders

The TTPA does not provide for registration in NZ of Australian parenting orders.[9] If a parenting order has been made in Australia the options for enforcement are:

- Registering the order in a NZ Family Court.[10] Registration is a straight forward process where an order is certified by an officer of the Australian Court confirming that the order remains in force and then sent to the NZ Family Court for registration. Once registered, the order can be enforced in the same manner as if the order had been made in NZ.
- An application under the Hague Convention on the Civil Aspects of International Child Abduction. [11]

If there is no Australian parenting order in force and the child/children are in NZ then there is potentially a quick and cost effective option whereby a parent whose child has been retained in NZ can apply without notice for a parenting order ("live with" order under the FCA). Such orders can be made within 24 hours and then subsequently enforced. Applications should usually be filed in the court closest to where the child/children are being held to expedite the role of lawyer for child (Independent Children's Lawyer) if required.

Either upon registration of an Australian order, or contemporaneously with an application for a parenting order, an application can be made for a warrant to enforce the order for the police or a social worker to uplift a child.[12] In a practical sense, it is unlikely that such a warrant would be acted upon by the police until the parent residing in Australia or another appropriate adult is present in NZ to take over care of the child once uplifted from the abducting parent.

If there are no grounds to make an application without notice, an application for a parenting order will be placed on notice and will generally take a minimum of six weeks to reach a hearing.

Enforcement of child support and spousal maintenance

Child support or spousal maintenance obligations (by order or Binding Financial Agreement or by administrative assessment) that arise in Australia and are registered with the Child Support Agency, can be enforced in NZ by the NZ Inland Revenue Department.[13] The respective parties must be habitually resident in each country, that is, one party cannot simply be on holiday in NZ.

Summary

The present situation is that the following can be enforced in NZ:

- Parenting orders
- Child support (by order or Agreement)
- Spousal maintenance (by order or Agreement).

Property orders from the FCA or FMC are not enforceable and a subsequent NZ order is required to make enforcement possible. B

Family Law Orders in New Zealand

Endnotes

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2 Reciprocal Enforcement of Judgments Act 1934 (sub part 3 – Superior Courts)
3 Reciprocal Enforcement of Judgments Act 1934 (sub part 3A – Inferior Courts)
4 See *Saunders v Saunders* [1994] BCL 451 where a costs order was rejected by the High Court. Also see In the Marriage Of: Janice Adeline Gilmore Appellant/ Wife and Charles Richard Gilmore Respondent/ Husband [1993] FamCA 3 (3 February 1993)
5 s54 of Trans-Tasman Proceedings Act 2010.
6 s43 Property (Relationships) Act 1976.
7 s7 Property (Relationships) Act 1976.
8 s31 of Trans-Tasman Proceedings Act 2010 – this will depend upon the particular relief sought, and the Courts that are included in s31 by Order in Council.
9 s54(2)(i) of Trans-Tasman Proceedings Act 2010.
10 s81 of Care of Children Act 2004.
11 s94 and Part 2, Subpart 4 Care of Children Act 2004.
12 s72 Care of Children Act 2004.
13 Child Support Act 1991, and Child Support (Reciprocal Agreement with Australia) Order 2000.

Family Law Case Notes

By Robert Glade-Wright, The Family Law Book

Children – Same sex parenting – Order under s 19(2) *Births, Deaths and Marriages Registration Act 1995* (NSW) to register both mothers as parents

In *Dent & Rees* [2012] FMCAfam 1303 (19 December 2012) Terry FM heard a parenting dispute as to three children after a same sex de facto relationship of 17 years. The biological mothers were Ms Dent (for child Y) and Ms Rees (children X and Z), the father of each child being an anonymous sperm donor. Only the birth mother could be registered as parent but the children were all given the surname Dent-Rees. Terry FM at para 238 said that in 2008 retrospective legislation was introduced in NSW which permits two parents of the same sex to both be named on a child's birth certificate. Terry FM determined the matter by ordering pursuant to s 19(2) of the *Births, Deaths and Marriages Registration Act 1995* (NSW) that both parents be registered as parents of both children. Terry FM's reasons are set out at paras 250-257 of the judgment.

Children – Interim hearing – Mother not required to return to Sydney after her unilateral relocation to Adelaide

In *Chapa* [2012] FMCAfam 1420 (18 December 2012) the mother unilaterally relocated from Sydney to Adelaide with two young children, alleging child abuse and family violence by the father. At the interim hearing Halligan FM did not require her to return to Sydney, concluding at paras 73-76:

> *" … I am concerned about the potential adverse effect upon the mother and, through her upon the children, of ordering a relocation back to Sydney. The father's case [e.g. he produced a suicide note written by the mother] … is that the mother has … significant issues with anxiety (…) … [his] own evidence is that the mother has difficulty making friends in Sydney. There is no other maternal family in Sydney. (…) On the father's own case [requiring her to return there] would seem to be highly likely … to compromise significantly the mother's ability to parent these children … "*

Property – "Unusual relationship" that began as a business association declared a de facto relationship

In *Gissing & Sheffield* [2012] FMCAfam 1111 (18 December 2012) O'Sullivan FM described (para 2) as "unusual" the relationship between the 48 year old applicant who alleged a 17 year relationship with the respondent, a 65 year old business proprietor, that began as a business association and became a personal one. After considering much evidence, in particular as relevant to the factors set out in s 4AA(2) of the *Family Law Act* and reviewing the authorities, O'Sullivan FM at paras 192-198 cited the factors to which weight was given and declared that the parties were in a de facto relationship.

Children – Alleged mental illness and child abuse – Single expert preferred to two experts as sought by mother

In *Swefford & Tarbell (No. 4)* [2012] FamCA 888 (22 October 2012) the mother supported then opposed a psychiatrist Dr R as single expert, before seeking the participation of a second expert, a Ms V. Before stating Dr R's qualifications and experience as a single expert Watts J said at paras 12-13:

> *"Ms V has an honours degree in social work. She has no relevant experience in psychiatry and the mother, to be fair, does not suggest that she has the qualifications to give the Court any opinion in relation to the issues as to the mental status of either of the parents or the history of their mental status. I am of the view that I would be assisted if the one expert did the whole report."*

Children – "Contact" may be used interchangeably with "spend time with" according to context – Relocation case

In *Abrahams & Rathbone* [2013] FMCAfam 1 (9 January 2013) Roberts FM allowed the mother to relocate from northern Tasmania to Melbourne where her new partner worked. Roberts FM referred at paras 32-34 of the judgment to the use of the term "contact" in a parenting case, citing the following statement of the Full Court in *Carpenter & Lunn* [2008] FamCAFC 128 at para 4, applied in *Chappell* [2008] FamCAFC 143 at para 5:

> "The new legislation replaced the legal concept previously known as 'contact' with the concept of a child 'spending time' with someone. The legislation, however, does not prohibit the use of the noun 'contact' in its everyday sense. In these reasons, we propose to use 'contact' interchangeably with expressions such as 'spend time with'. In doing so, we have not ignored the legislative intent, but rather have avoided the linguistic gymnastics that would otherwise have been necessary."