FORTÉ
FAMILY LAWYERS

PROPERTY

Effect of overseas divorce on Australian property settlement

JACKY CAMPBELL

Effect of overseas divorce on Australian property settlement

Jacky Campbell
Forte Family Lawyers

An overseas divorce, although recognised under Australian law by s 109 *Family Law Act 1975* ("the Act"), does not have the same effect on the rights of the parties under the Act as an Australian divorce. An overseas divorce is not a "divorce order" within s 44(3) of the Act. Therefore, even if parties have been divorced for more than 12 months, leave is not required to institute Australian property or maintenance proceedings.

This position was recently confirmed by the Full Court in *Anderson & McIntosh* (2013) FLC 93-568. The Full Court in *Savage & Hodgson* [1982] FLC 91-281 had earlier reached the same conclusion, but subsequent amendments to the Act resulted in some uncertainty. The trial Judge in *Cain & Cain* (1987) FLC 91-808 followed *Savage & Hodgson* but the trial Judge in *Taffa & Taffa (Summary Dismissal*) [2012] FamCA 181 distinguished *Savage* on the basis that the wording of the Act had changed.

Anderson & McIntosh

The parties married in Australia in 1988 and separated in country B in 2009, where they had been living since 2006. They were divorced in B in December 2010. They had three children, two under the age of 18. The wife, with two of the children, largely remained living in B after separation. The husband lived in Australia with the other child.

An agreement as to the division of property in B was approved by a Court in B at the same time as the divorce decree. The property in Australia was not dealt with by the Court in B.

The wife applied for a property settlement under the Act in relation to Australian property. The husband sought to have her application dismissed. He argued that the wife had to seek leave under s 44(3) of the Act before proceeding with her application for a property settlement as they had been divorced for more

than 12 months. The trial Judge dismissed his application and the Full Court dismissed the husband's appeal. However, the Full Court refused to order costs against the husband because of the divergence of previous authority and because the Full Court had not previously considered the current wording of the Act.

What could the husband have done?

The question arises as to whether the husband and his lawyers could have done anything to protect him from further claims by the wife in Australia. The Full Court did not state what assets the parties held in Australia and the financial circumstances of the parties. There were three main options with respect to property claims:

1. If the court in B was able to deal with the Australian property, the husband could have sought orders in that country to deal with it. However, if the Australian property was real estate, many overseas jurisdictions will not deal with it. The Mozambique Rule applies, for example, in England, and prevents the English Courts from making orders in relation to immovable property not located in England. The Mozambique Rule is not applied by Australian Courts. Furthermore, the Australian Family Law Courts do not consider themselves strictly bound by overseas orders, but may refuse to make further orders on the basis of *res judicata* or that the Australian Family Law Court is a clearly inappropriate forum.

2. At around the time that the orders were made in B, the husband could have sought orders in Australia or entered into a financial agreement under the Act to deal with the Australian property.

3. The husband could have obtained a divorce order in Australia rather than in B. They had been separated for 12 months at the time of the divorce in B, which is the main requirement for an Australian divorce. Even if both parties were resident overseas at the time of the divorce, the Australian Courts had jurisdiction if at least one of the parties:

- was an Australian citizen; or
- was living in Australia at the time the Application was filed and had done so for the past 12 months; or
- regarded Australia as their home and intended to live in Australia indefinitely.

If the husband was working and had the capacity to pay spousal maintenance, and the wife had a need for spousal maintenance, the husband might have been at risk of a spousal maintenance claim being made by the wife as well as an application for a property settlement in Australia. To reduce the risk, he could have:

1. Entered into a financial agreement with the wife under the Act dealing with maintenance (or maintenance and property); or

2. Sought consent orders under the Act dealing with property and spousal maintenance. Whilst designating a lump sum of the property retained by the wife or transferred to her as spousal maintenance under s 77A of the Act, is not an absolute barrier to a spousal maintenance application it is a hurdle; or

3. Obtained a divorce order in Australia rather than in B. After the expiration of 12 months from the divorce becoming final, the wife would have required the leave of a court to institute spousal maintenance proceedings.

Conclusion

The consequences of the Full Court's decision in *Anderson & McIntosh* are significant for parties with property both in Australia and in an overseas jurisdiction. Parties may consider that they have finalised property and maintenance rights, but they may have not done so.

It is prudent to seek legal advice in both jurisdictions as to the best venue and whether steps need to be taken in both jurisdictions.