

OVERSEAS PROPERTY

Eight tips for dealing with overseas property

JACKY CAMPBELL, OCTOBER 2019

In these increasingly mobile times, the family law courts are often faced with the question of how to deal with property which is located overseas, such as bank accounts, superannuation and real property.

1. Does Australia have jurisdiction to deal with part or all of the overseas property? The test is that Australia is not a “clearly inappropriate forum” (*Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538). Read more here: *The “Clearly Inappropriate Forum” test in Australian family law*.
2. No international treaties apply although some may be useful for service, obtaining evidence, etc. Australia has some bilateral treaties which may be useful with countries such as New Zealand and the United Kingdom. The *Foreign Judgments Act 1991* (Cth) may be able to be used to enforce Australian judgments in de facto property matters in certain overseas countries, but cannot be used where the parties are or were married. Read more here: *Treaties relevant to family law proceedings in Australia*.
3. With respect to superannuation:
 - Orders splitting Australian superannuation interests can only be made by Australian family law courts (s 90XS *Family Law Act 1975* (Cth) (FLA)).
 - An order made by an overseas court is ineffective to split Australian superannuation.
 - Superannuation in an overseas jurisdiction may need to be dealt with in that overseas jurisdiction, e.g. s 401K interests in the United States.
4. Australian family law courts are able to make orders about overseas property (s 31(2) FLA) or taking overseas property into account as part of the legal and equitable interests of the parties in property.
5. Australian family law courts will be cautious about making orders which cannot be enforced.
6. If the owner of the property is in Australia then the order can often be enforced.
7. Australia does not apply the “*Mozambique rule*” ([1893] AC 602) and will make FLA orders about overseas real estate if it can enforce the orders. This is because FLA orders are *in personam* rather than *in rem*. *In personam* orders require an individual

person to do something. FLA orders are not *in rem* orders which determine rights in the property which are conclusive against everyone.

8. An overseas divorce is not a bar to property or maintenance proceedings being instituted in Australia. Even if 12 months has expired, leave is not required to issue (*Anderson & McIntosh* (2013) FLC 93-568). Read more here: *Effect of overseas divorce on Australian property settlement*.

October 2019

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