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International Law Series Part 1: Where to Divorce? Your Clients' Options in Anglo-Antipodean Separations

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Family Law Specialists

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Why an article series on international family law? Far from being 'niche', 'exotic' or (in the language of the old SIPS form, for those who remember it) 'special', international elements have become a typical feature of matrimonial disputes. The experiences of many are that these features are no longer limited to the apartment on the Costas, but involve interests across the globe.

The focus of this article series is the position of clients with interests in England and Wales ('England'), Australia or New Zealand.

There is a growing need for Australian lawyers to be equipped to assist clients with English family law issues. A remarkable 1.2 million Britons call Australia home.[1] Those 1.2 million expatriates make up almost 5% of 'the Lucky Country's' entire population and are the country's largest migrant community. In the last full year before COVID-19, some 13,700 permanent visas were granted to British citizens – the equivalent of 37 people getting on planes and migrating from the UK to Australia *every day*.

English lawyers too need to be prepared to advise clients who have an Australian or New Zealand dimension to their cases. Of all those emigrants to Australia from the UK many thousands return every year. Between 2005 and 2010 as many as 30,000 Britons boomeranged back,[2] bringing their financial ties Down Under with them. Meanwhile, it was estimated by the UK Office of National Statistics that 138,000 Australian born nationals and 59,000 New Zealand nationals live in the UK.[3] In New Zealand, 68% of its population identified as being European by ancestry and of that number 64% identified as being ethnically British and 26% as ethnically English.[4] An estimated 17% of Kiwis can claim British citizenship by descent.[5]

Part 1 studies the basis for divorce jurisdiction in England, Australia and New Zealand and concludes with recommendations on how best to ascertain whether jurisdiction exists.

Jurisdiction in England and Wales

There are subtly different legal regimes depending on when the petition for divorce was issued:

- Petitions issued before the end of the Brexit Transition period.
- Petitions issued since the end of the Brexit Transition Period.

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[1]https://www.homeaffairs.gov.au/research-and-statistics/statistics/country-profiles/profiles/united-kingdom.
[2]https://www.bbc.co.uk/news/magazine-15799571.
[3]https://www.ons.gov.uk/file?uri=/peoplepopulationandcommunity/populationandmigration/internationalmigration/datasets/populationoftheunitedkingdombycountryofbirthandnationality/januarytodecember2017/populationbycountryofbirthandnationalityjan17todec17.xls.
[4]https://web.archive.org/web/20080219232357/http://www.stats.govt.nz/census/2006-census-data/quickstats-about-culture-identity/quickstats-about-culture-and-identity.htm?page=para017Master.
[5]https://web.archive.org/web/20110524131442/http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/asia-oceania/new-zealand?profile=intRelations&pg=4.

Divorce Petitions Issued During EU Membership and the "Transition Period"

The jurisdiction of the English court to hear divorce petitions issued during the UK's membership of the EU is governed by Brussels II Revised.[6]

Jurisdiction under Article 3 of Brussels II Revised could be established in England provided that is where:

- The spouses are habitually resident; or
- The spouses were last habitually resident provided one of them still resides there; or
- The respondent is habitually resident; or
- The petitioner is habitually resident and he/she resided there for at least 1 year immediately preceding the petition; or
- The petitioner is habitually resident, he/she has resided there for at least 6 months and it is his/her domicile; or
- The spouses are both domiciled.

The Brussels II Revised grounds for jurisdiction continued for petitions issued during the Brexit transition period between 1 February 2020 to 31 December 2020.[7]

Post-Brexit Jurisdiction

The source of jurisdiction for divorce petitions issued since the end of the Transition Period is section 5 of the Domicile and Matrimonial Proceedings Act 1973. Section 5(2) incorporates the Brussels II Revised Article 3 grounds for jurisdiction. To those 6 grounds it adds a seventh: that England is the domicile of one of the parties (provided no other Brussels II Revised member state has jurisdiction under that instrument).

Habitual Residence & Domicile in English Law

Establishing habitual residence or domicile is likely to be critical to invoking the English court's jurisdiction. For Australian and New Zealand expatriates living in England their likely (although not only) recourse will be habitual residence. For the English client who relocated to Australia or New Zealand on a permanent (or even semi-permanent) basis habitual residence is unlikely to be available. Establishing that the client has retained English domicile is therefore likely to be the necessary route to establishing the jurisdiction of the English court.

Habitual residence

Habitual residence is a question of fact. A person will be habitually resident in England if they have established England as their habitual centre of interests.[8] England must be the place where they are intentionally settled. A person cannot be habitually resident in England if they are habitually resident in another country,[9] although simply retaining a home in another country will not prevent a person being habitually resident in England.[10]

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[6]Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.
[7]Article 67(1)(d) of the UK-EU Withdrawal Agreement.
[8]*Marinos v Marinos* [2007] EWHC 2047 (Fam) at [33]; *Inland Revenue Commissioners v Lysaght* [1928] AC 234, *per* Viscount Sumner.
[9]*Tan v Choy* [2014] EWCA Civ 251 at [51] *per* Macur LJ.
[10]*Ikimi v Ikimi* [2001] EWCA Civ 873.

Domicile

Domicile, like habitual residence, is a question of fact. A domicile is the jurisdiction where a person intends to reside indefinitely – for the remainder of their years – as opposed to being the place where they are settled and conduct their day-to-day interests.[11] Every person must have a domicile and no one can have more than one domicile at the same time.

There are two species of domicile in English law: a domicile of origin and a subsequently acquired domicile of choice.

Every person acquires a domicile of origin when they are born. That domicile of origin is more 'tenacious' and difficult to dislodge than a subsequently acquired domicile of choice.[12]

If a person leaves the country of their domicile of *origin*, intending never to return to it, they continue to be domiciled there until they acquire a domicile of choice in another country. The acquisition of a domicile of choice requires physical presence, although it need not be long, plus an intention to remain permanently or indefinitely in the new jurisdiction.

In English law, if a person leaves the country of their domicile of *choice*, intending never to return to it or to reside there indefinitely, they immediately cease to be domiciled in that country; and unless and until they acquire a new domicile of choice, their domicile of origin revives.

In deciding whether a person intends to reside permanently or indefinitely in a place, the court may consider the motive for which residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious. Any circumstance that is evidence of a person's residence (or their intention to reside permanently/indefinitely in a county) must be considered when deciding whether they have acquired a domicile of choice.

Jurisdiction in Australia

Proceedings for divorce can be commenced in Australia if, at the time of the application being filed, either party to the marriage is:[13]

- An Australian citizen; or
- Domiciled in Australia; or
- Ordinarily resident in Australia and has been so for 1 year immediately preceding that date.

<u>Ordinary Residence & Domicile in Australian Law</u>

Ordinary Residence

Ordinary residence is defined in s 4(1) of the *Family Law Act 1975* (Cth) simply as 'including habitual residence'. Ordinary residence in Australian law requires more than mere residence in Australia. Australian law recognises ordinary residence to be the pace where a person, in the ordinary course of their life, regularly or customarily lives.[14] There must be an element of permanence and 'habit of life' as opposed to a casual or intermittent presence.

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[11] *Divall v Divall* [2014] EWHC 95 (Fam) at [26] *per* Moor J citing Arden LJ in *Clowes v Henwood* [2008] EWCA Civ 577 at [8].
[12] *Divall* at [27-29].
[13] *Family Law Act 1975*
[14] *Retailer; ex parte Nat West Australia Bank Limited* (1992) 37 FCR 194 at 198, *per* Lockhart J.

There is limited material difference between the Australian conception of habitual residence and English conception. Indeed, the English approach has been adopted by the Family Court of Australia.[15]

Domicile

The English common law was partly displaced by the *Domicile Act 1982* (Cth). The position is:

- The starting point is to consider where a person was domiciled as a child.
- A child has the domicile of his/her parents or, if his/her parents are separated, the domicile of the parent with whom the child has their principal home.[16]
- A person, once they attain 18, retains the domicile they had immediately before turning 18.[17]
- A person has the capacity to have a domicile independent of their parents once they attain 18 years.[18]
- The domicile a person had as a child or immediately on becoming an adult does not revive when the domicile of choice is abandoned. The existing domicile of choice is maintained until a new domicile of choice is acquired.[19]
- A domicile of choice is acquired by being in another country with the intention to make their home there indefinitely.[20]

Jurisdiction in New Zealand

In New Zealand, marriages are terminated by dissolution, rather than divorce. The New Zealand court has jurisdiction to dissolve a marriage where, at the time the proceedings are commenced, at least one of the parties is domiciled in New Zealand.[21]

Domicile in New Zealand Law

New Zealand national law, like Australian national law, has displaced some common law domicile principles applied in England. There are nuances in the approaches of the two Antipodean nations.

In New Zealand law, if the child's parents live together or the child lives with their father, a child under 16 has the domicile of his/her father, or alternatively, the domicile of his/her mother if the child lives alone with their mother.[22] On attaining the age of 16 a child's domicile becomes independent of their parents'.[23] The domicile that a person had as a child continues after they are 16 until they acquire a new domicile.[24]

A person acquires a new domicile if, immediately before acquiring it they:[25]

- Are not domiciled in that country;
- Are capable of having an independent domicile;
- Are in that country; and
- Intend to live indefinitely in that country.

As in Australia, New Zealand has abolished the common law rule that a domicile of origin revives when a domicile of choice is abandoned.[26]

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[15] *Woodhead v Woodhead* [1997] FAMCA 42.
[16] *Domicile Act 1982* (Cth), s 9(1).
[17] *Domicile Act 1982* (Cth), s 9(4).
[18] *Domicile Act 1982* (Cth), s 8(1).
[19] *Domicile Act 1982* (Cth), s 7.
[20] *Domicile Act 1982* (Cth), s 10.
[21] *Family Proceedings Act 1980* (NZ), s 37(2).
[22] *Domicile Act 1976* (NZ), s 6.
[23] Ibid, s 7.
[24] Ibid, s 8.
[25] Ibid, s 9.
[26] Ibid, s 11.

Conclusions

Ascertaining the client's and their spouse's place of habitual/ordinary residence and domicile are likely to be the critical fact-finding exercise in all separations with an international element. This requires a detailed forensic analysis of the history with the client in early meetings Asking the right questions is crucial and the writer suggests that useful lines of enquiry include:

- What were the parties' plans when they relocated?
- What have they discussed about the permanence of their relocation since moving?
- Where are their families located?
- Where do the parties spend their day-to-day outgoings (food, entertainment, etc)?
- Where do the parties draw incomes (earned or otherwise)?
- Where do they make pension and/or superannuation savings?
- Where are their other financial savings?
- Have assets (real and personal property) been 'left behind' in the former jurisdiction of residence?
- Where do any children go to school or university?
- Where are the parties registered with doctors? Where are any long-term health needs met? Do they continue to be under the care of a consultant in the former jurisdiction of residence?
- Have the parties acquired the right to permanently reside in their new country of residence or acquired citizenship there?
- Have citizenship or residence rights in the former country of residence been renounced or lost?
- How was it planned that their parents' care needs would be met in later years? Were they dependent on their son/daughter returning to the former jurisdiction of residence to care for them?
- Where have the parties settled any final wills or testaments?
- Have the parties made funeral plans (where do they expect to die)?

An investment in this exercise is likely to reap later savings in costs for the client by avoiding erroneously issued applications.

There are notable implications under the national law of these countries for practitioners to consider.

Expatriates from England, Australia and New Zealand living in one of the other countries will retain rights to divorce in their country of origin if they continue to be domiciled there, notwithstanding they do not live there. However, an expatriate living in New Zealand, who is only habitually resident there and is not domiciled there, will not be able to use the New Zealand courts to dissolve their marriage unlike an expatriate who is habitually resident (with additional requirements) in England.

That expatriate living in New Zealand must go to the expense of securing a divorce in their jurisdiction of domicile. In that sense, the New Zealand marriage dissolution regime is the strictest. On the other hand, the Australian courts have very broad jurisdiction to hear divorce applications. Australian citizens can rely on their citizenship as a basis for engaging the Australian court's jurisdiction *even* when they are not domiciled there. Clarifying the parties' circumstances early will equip practitioners well to identify the right forum to apply for divorce in international cases.

Coming up in the International Law Series Part 2: Jurisdiction for property disputes of married couples.

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