

# INTERNATIONAL FINANCIAL ISSUES

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When a relationship breaks down, it is often a challenge to resolve how property and other assets will be divided between the divorcing spouses or separating partners.

These issues become even more complicated when the parties are living in different countries or some of the assets of the relationship are located outside of Australia.

## HOW DO AUSTRALIAN COURTS DECIDE HOW PROPERTY AND ASSETS IN A RELATIONSHIP SHOULD BE DIVIDED?

In Australia, courts address the following matters in deciding how the property and assets in a relationship should be divided between the parties:

- The net asset pool of the parties
- The financial and non-financial contributions of both parties
- The various adjustment factors, including the future needs of the parties
- The practical effect of the proposed property settlement, and whether the settlement is just and equitable for both parties.

It is important to understand that courts in other jurisdictions may take a different approach in determining how property and assets should be disclosed, valued, protected and distributed.

## WHAT ARE THE FINANCIAL IMPLICATIONS OF FILING FOR DIVORCE IN A PARTICULAR JURISDICTION?

### PROPERTY AND ASSETS HELD IN OTHER COUNTRIES

If you have property in another country, or even in multiple countries, you should be aware that Australian courts have a general power to make property adjustment orders in relation to assets outside of Australia. That being said, there are also often very technical issues in relation to enforcement, implementation and tax issues which you and your lawyer will need to consider.

There are also specific rules which deal with overseas superannuation funds which will require an order in their home jurisdiction in order to give effect to an order of the court. For instance, you will need an Australian court order to implement a superannuation split and a UK court order to enable you to split a UK pension fund. We can help you achieve both if appropriate.

You may also need specialist tax advice as some of the relief or exemptions will only apply if you have an Australian court order. This has the potential to create a substantial tax obligation, which your lawyers will need to consider carefully and possibly bring together a team to look

the settlement from a global perspective rather than a one-dimensional view.

## POWERS OF FINANCIAL DISCLOSURE

Family law cases are predicated on the basis of full, frank and open disclosure. This seems self evident. After all, how can you negotiate a financial settlement without knowing all the facts?

There are a range of court applications to compel financial disclosure but you will require evidence to demonstrate non-disclosure. Before making such an application, your lawyers will need to use strategic thinking, as well as their understanding of the court processes and, potentially, the particular judge who will decide the issue.

Your case may also require accounting, forensic accounting or asset tracing expertise. This may be necessary in cases where there are offshore companies and trusts that are incorporated and operate in certain tax haven countries around the world.

## ASSETS ACQUIRED BEFORE AND AFTER THE MARRIAGE

You also need to be aware of the key financial issues that relate specifically to your case.

There are some jurisdictions that will approach financial settlements in a different way or give more or less weight to certain factors when deciding a property settlement. For example, it is not uncommon for inheritance issues to arise during financial disputes. For these types of issues, you may potentially need specialist tax advice (for example, for countries, such as the UK, that have an inheritance tax regime).

The courts will also look at the contributions of the parties. The Australian courts tend to give more weight to contributions. However, where there are insufficient funds in the asset pool to meet the parties' needs, the parties' needs may trump contributions depending on the circumstances of your case. The courts will also prioritise the needs of children over that of their parents.

## SPOUSAL MAINTENANCE ORDERS

Australian courts do not, as a rule, provide for long-term spousal maintenance orders in property settlements because one of the objectives is to finalise matters between the parties as far as possible. Consequently, the property allocation will typically attempt to encompass future need rather than have orders with continuing effect. In contrast, in the UK, long-term spousal maintenance orders are relatively common.

## OTHER ISSUES TO CONSIDER

It is important to identify the strategic advantages and disadvantages of filing proceedings in certain jurisdictions. For instance, before you decide how to proceed, consider the following matters:

- Before you married, did you sign a pre-nuptial agreement (such as an Australian 'Binding Financial Agreement')? If you are currently living overseas, is the agreement enforceable in that jurisdiction?
- Do you have assets and property outside of Australia? What about superannuation and/or pension entitlements?
- What are the tax implications of filing for divorce in a particular jurisdiction?
- Are you seeking child support? Is your spouse residing in a reciprocating country as specified in the *Child Support (Registration and Collection) Regulations 1988*?

- Are you entitled to payments under an overseas spousal maintenance order? Can you have the order registered and enforced in Australia?
- How are the property and assets likely to be distributed in a particular jurisdiction?
- Does the court in the jurisdiction in which you are commencing proceedings have the power to grant protective-type orders that will prohibit your spouse from transferring assets out of the reach of the court?

## TIME LIMITS

If divorce proceedings are issued in Australia then financial and spousal maintenance proceedings should be commenced within 12 months of a divorce order taking effect. However, the court may grant permission to commence proceedings out of time in cases of 'hardship'.

In relation to foreign divorces it was held in the case of *Anderson & McIntosh* that permission is not required if financial proceedings are commenced 12 months after the date of a foreign divorce. You should always seek advice early to ensure that proper consideration is given to your case, including the timing of any court proceedings.

## HOW CAN WE ASSIST?

Are you dealing with a relationship breakdown where there are assets and property located overseas? Are you based overseas but have assets in Australia? Would you like to talk with a lawyer who is an expert in international family and can advise you on how to approach the financial issues in your case?

At Barry.Nilsson., we specialise in international family law and are extremely well equipped to assist you with any family law issue that crosses national boundaries.

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