



## **IAFL Asia Pacific Chapter and Malaysian Bar Council Symposium**

### **Burning Issues and Trends in International Family Law Kuala Lumpur, Malaysia**

Tuesday 19 May 2026

### **What is HOT in Jurisdiction & Forum Issues in Cross- Border Disputes?**

3:00-4.45 pm

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James Stewart is top ranked in the legal directories and is described as having ‘astonishing skills in international financial matters’ and ‘undoubtedly one of the leaders in family law globally’.

A Fellow of the IAFL since 2005, James is General Editor of the IAFL-supported Blue Book (Family Law: A Global Guide, 6th ed., Thomson Reuters 2024), the seminal comparative guide covering 62 jurisdictions, including Malaysia.

A Visiting Professor at Ulster University, James has received numerous industry awards, including Chambers HNW Family Partner of the Year, Citywealth Family Lawyer of the Year, and the European Legal Award for Family Law 2025.

He specialises in complex, international family disputes, with extensive experience in forum disputes and Asia-Pacific cases, often involving Malaysia. Renowned for achieving results in the most challenging cases, James is described as *‘warm and engaging...his ability to handle even the most difficult of cases is legendary’*.

## **HONEY TAN LAY EAN**

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Honey Tan graduated with an LLM from Warwick University, and is a member of The Honourable Society of the Middle Temple since 1989. She was called to the Malaysian Bar in 1990.

She was elected to serve on the Malaysian Bar Council for several terms. Over the years, she had chaired the Family Law Committee, Human Rights Committee and IMLC Committee. She was instrumental in establishing the Malaysian Bar's Women's Rights Committee, and served as the Chairperson.

Honey works primarily in the area high conflict family law. As an accredited member of the Malaysian International Mediation Centre (MIMC), she is focused on settling difficult matters through mediation. She is also a member of the International Academy of Collaborative Professionals (IACP).

Apart from law practice, Honey was involved in reforming and amending the Law Reform (Marriage & Divorce) Act 1972, the Domestic Violence 1994 and the Penal Code in relation to stalking laws.

## **JACKY CAMPBELL**

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Jacky is a founding partner of Forte Family Lawyers, the largest “boutique” family law practice in Melbourne. Jacky’s partners are Wendy Kayler-Thomson and IAFL Fellows - Jason Walker and Jemma Mackenzie.

Jacky is Accredited as a Specialist in Family Law. In 2025 she received a Distinguished Service Award from the Law Institute of Victoria.

Jacky is annually recognised by Doyle’s Guide as a Leading Prenuptial Agreement Lawyer, a Leading Family and Divorce Lawyer, a Leading Family Lawyer (High-Value & Complex Property Matters) and a Recommended Parenting & Children’s Matters Lawyer. Jacky is also recognised by Best Lawyers.

Jacky is the Consultant Editor of Wolters Kluwer/CCH Australian Family Law and Practice and Contributing Author to the Property, Superannuation and Financial Agreements (including pre-nuptial agreements) chapters. She writes for the Australian Master Family Law Guide, and the Australian Master Superannuation Guide.

Jacky has been an IAFL Fellow since 2004 and is on the Pensions Committee.

## **JAEREY VELASCO**

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Jaerey was born and raised in the Philippines and then moved to Hong Kong to read law. She now leads the Family and Matrimonial team at Payne Velasco, where she is recognized for her expertise in both contentious and non-contentious family law matters, often involving complex international elements.

Her practice spans pre- and post-nuptial agreements, divorce, child custody, care and control, access arrangements, and international relocation of children. She regularly advises on ancillary relief applications, including interim maintenance, litigation funding, spousal and child maintenance, and division of matrimonial assets. Jaerey is also highly experienced in handling cross-border jurisdiction disputes, guiding clients through the challenges of multi-jurisdictional family law cases.

Beyond matrimonial disputes, she assists clients with Probate and Estate Planning.

## **ANIL MALHOTRA**

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Anil Malhotra is a Senior Advocate in India with over four decades of distinguished legal experience. He holds a BSc and LLB from India, an LL.M from the University of London, and has pursued advanced studies in Comparative Family Law at the London School of Economics and Law and Society in South Asia at SOAS. An IAFL Fellow, he serves as Secretary of the IAFL International Child Relocation Committee.

For 40 years, he has represented non-resident Indians in civil, constitutional, matrimonial, criminal, and overseas litigation before all Indian courts, including the Supreme Court of India. He is frequently consulted by foreign courts and legal professionals to provide expert evidence on Indian family law and has authored around 150 expert reports. A prolific scholar, he has co-authored 10 books on international family law and private international law. He has argued approximately 1,000 reported matters and served as Amicus Curiae in about 35 constitutional cases.

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Stacy Heard is an accomplished and well-respected family law attorney in Seattle, Washington who has served clients for nearly 30 years.

Stacy specializes in matrimonial and international family law. She handles matters of divorce, high-conflict parenting plan/child custody issues, international custody disputes and Hague Convention cases, complex financial issues, relocation, restraining orders, child support, and modifications of Parenting Plans and Child Support Orders. She is also trained in cross-border mediation.

Throughout her career Stacy has been a speaker on national and international stages, providing thought leadership to her peers and industry professionals on the matters of Family Law Litigation, Parenting Plans and Complex Custody Issues, and Property Settlements.

Stacy is the Financial Officer for the ABA Section of Family Law and on the Board of Managers for the International Academy of Family Lawyers, USA Chapter. She has been recognized by Super Lawyers Magazine and by the Washington State Bar Association for her Pro Bono work.

## **FOO YET NGO**

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Foo Yet Ngo is one of Malaysia's foremost family law practitioners, with over four decades of experience devoted almost exclusively to matrimonial and family law. She is widely respected for her advocacy in complex and contentious litigation, including multi-jurisdictional disputes involving children, international child abduction, relocation, high-value matrimonial assets, and cross-border enforcement.

Foo was the first Malaysian invited to become a Fellow of the International Academy of Family Lawyers, following her representation of the Australian Government in the highly publicised 1992 parental child abduction case of *Jacqueline Gillespie v Raja Bahrin*, involving a Malaysian prince.

She is the founder of Messrs Y. N. Foo & Partners, one of Malaysia's earliest specialist family law firms, and is frequently instructed in landmark and precedent-setting cases. Foo remains a leading authority in Malaysian family law, combining advocacy with scholarship and law reform engagement.

## What is Hot in Jurisdiction and Forum Issues in Cross-Border Disputes?

IAFL Symposium  
19 May 2026  
Kuala Lumpur  
Malaysia

Jacky Campbell  
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### 1. Introduction

- Enforcement of family law property orders can be difficult.
- Parenting orders are easier. Reciprocating jurisdictions in Sch 2 of the Family Law Regulations 2024 include:
  - Hong Kong
  - India
  - Malaysia
  - New Zealand
  - Singapore
  - Sri Lanka
  - UK
  - Ireland
  - USA
- Divorce is a standalone application.

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## 2. Forum

- Not enough that a party is present in, or owns property in, a jurisdiction for an Australian court to have jurisdiction to determine the matter.
- The relevant forum test must be met. What is that test?
- Will an anti-suit injunction be ordered?
- Will a stay be granted?

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## 2. Forum

Jurisdictional requirement set out in s 39(4)(b) *Family Law Act* 1975 (Cth):

- For proceedings other than divorce and declarations as to validity of marriage, divorce and annulments

*any party to the proceedings is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, at the relevant date*

- “relevant date” is the date on which the application is filed - s 39(4A)

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## 2. Forum Test in Australia

### Financial matters (except regarding NZ):

A stay of Australian proceedings will be granted if the Australian court is “a **clearly inappropriate forum**”

- *Voth & Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538
- *Henry v Henry* (1996) 185 CLR 571

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## 2. Forum Test in Australia

### *Voth & Manildra Flour Mills Pty Ltd* (1990)

1. Prima facie right to insist upon exercise of jurisdiction once invoked
2. “*general principle empowering a court to dismiss or stay proceedings which are oppressive, vexatious or an abuse of process and the rationale for the exercise of the power to stay is the avoidance of injustice between parties*”
3. “*mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction will provide a more appropriate forum does not justify the dismissal of the action or the grant of a stay*”
4. “*the jurisdiction to grant a stay or dismiss the action is to be exercised “with great care” or “extreme caution”*”

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## 2. Forum Test in Australia

### **Financial matters - “a clearly inappropriate forum”**

Many factors may be relevant, including:

- What “connecting factors” are there?
- Legitimate personal or jurisdictional advantage in a particular forum. e.g. discovery, s 106B-like processes, limitation period
- Parallel proceedings should be avoided if possible
- Local professional standards where they are in question
- The law of the local forum in determining the rights and liabilities of the parties
- The *lex causae* - the substantive governing law which applies to the proceeding may be foreign law

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## 2. Forum Test in Australia

### **Financial matters – “a clearly inappropriate forum:**

Factors cont'd:

- Any agreement to have disputes resolved in a certain court or jurisdiction
- Recognition of orders and the ease of enforcement
- Which forum can provide more effectively for the complete resolution of the parties' controversy?
- The order in which the proceedings were instituted and current status
- The current stage of the proceedings, time to finalise and costs incurred
- The issues on which relief may depend in each jurisdiction

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## 2. Forum Test in Australia

### Parenting matters in Australia (except regarding NZ):

- The question is **what is in the best interests of the child.**
- *ZP v PS* (1994) 181 CLR 639:
  - High Court determined that the rule in *Voth* applied to all matrimonial proceedings **except parenting matters**

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## 2. Forum Test in Australia

### Parenting matters in Australia (except regarding NZ):

- Jurisdictional connection requirements under s 69E.
- Proceedings may be instituted under the FLA in relation to a child only if:
  - the child is present in Australia, an Australian citizen, or is ordinarily resident in Australia;
  - a parent of the child is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day;
  - a party to the proceedings is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day;  
or
  - in accordance with a treaty or arrangement or the common law rules of private international law for the court to exercise jurisdiction

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## 2. Forum Test in Australia

### **New Zealand – the “more appropriate forum test”**

- s 19(1)(b) of the *Trans-Tasman Proceedings Act 2010* (Cth)
- Applies to all family law matters (parenting and financial) except:
  - Divorce
  - Enforcement of spousal maintenance
  - Enforcement of child support
- s 19(2) sets out factors for consideration

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## 2. Jurisdiction of the FCFCOA

### **Jurisdiction of the FCFCOA**

- Set out in ss 25 (Div 1) and 131 (Div 2) FCFCOA Act
- Formerly s 31 FLA
- Specifically provides that the FCFCOA has original jurisdiction which “*may be exercised in relation to persons or things outside Australia*”
- This is subject to any restrictions and conditions in:
  - s 111AA FLA - excludes child and spousal maintenance obligations where the payee is habitually resident in New Zealand
  - Regulations under the FLA and Rules of Court

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### 3. Jurisdiction for divorce application

#### Requirements

1. Court is satisfied that parties have lived separately and apart for 12 months (s 48(1))
2. As of the date of the filing of the application, either party to the marriage:
  - (a) is an Australian citizen; or
  - (b) is domiciled in Australia; or
  - (c) is ordinarily resident in Australia and has been so resident for 1 year immediately preceding that date (s 39(3))

NB: Foreign divorce does NOT start 2 year time limit for property and maintenance proceedings.

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### 4. Stays and Anti-Suit Injunctions

- **Stay:** an order which halts part or all of a court proceeding
- **Anti-suit injunction:** order to prevent a person from commencing or continuing a proceeding in another court, including in an overseas jurisdiction
- *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345
- *Kent & Kent* [2017] FamCAFC 157; (2017) FLC ¶93-792

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## 4. Stays and Anti-Suit Injunctions

### ***Adams & Marchenko* [2025] FedCFamC1A 197**

- Parties were residents of Australia but citizens of Singapore (wife) and Country D (husband).
- Parties held assets in Australia and Singapore:
  - Singapore – E\$254 million (AUD)
  - Australian – E\$20 million (AUD)
- Singaporean court's ability to determine financial cause was contingent on divorce being granted in Singapore (Australian divorce application filed first)

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## 4. Stays and Anti-Suit Injunctions

### ***Adams & Marchenko* [2025] FedCFamC1A 197 (cont)**

- June 2025: Primary judge permanently stayed Aus proceedings on the basis that the Singaporean courts were better suited to determining the dispute.
  - Neither Australian nor Singaporean courts could make orders *in rem* for property in the other country.
  - Overwhelming majority of property was in Singapore.
  - Australian property adjustment order compelling the wife to pay the husband a sum of money was enforceable in Singapore.
- Australia held to be “clearly inappropriate forum”

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## 4. Stays and Anti-Suit Injunctions

### ***Adams & Marchenko* [2025] FedCFamC1A 197 (cont)**

Australian proceedings were **advantageous to the husband** as they offered him **forms of relief not available in the Singaporean proceedings**:

1. Australia treats the wife's inherited wealth in Singapore as part of the property available for distribution. In Singapore would be disregarded unless inherited property had been converted into matrimonial property. Wife's contention was that all \$254 million of the Singaporean property was her inheritance.

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## 4. Stays and Anti-Suit Injunctions

### ***Adams & Marchenko* [2025] FedCFamC1A 197 (cont)**

2. Husband could not pursue application for spousal maintenance in Singapore.
3. Husband could not pursue application for interim property settlement/litigation funding in Singapore.
4. Singapore unlikely to consider the husband's arguments that the wife perpetrated economic abuse and coercive control.

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## 4. Stays and Anti-Suit Injunctions

### ***Adams & Marchenko* [2025] FedCFamC1A 197 (cont)**

- Appeal allowed.
- Consent orders made between the parties to finalise proceedings in FCFCOA.
- Part of the settlement was that the wife discontinued the Singaporean proceedings.

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## 4. Anti-Suit Injunctions

### **Grounds upon which an anti-suit injunction can be granted:**

1. The inherent jurisdiction of the court to protect the integrity of the court's processes. This ground is usually used when the forum is in dispute;
2. The court's equitable jurisdiction to restrain unconscionable conduct or the unconscientious exercise of legal rights e.g. financial agreement has a choice of jurisdiction clause.

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## 5. De facto and other relationships

- The rights of couples who are not legally married vary greatly between jurisdictions
- Important matters to consider include:
  - Do couples who are not legally married have any rights at all?
  - Are same sex couples covered?
  - What types of relationships are covered?
  - What is the definition of the relationship?
- The factors to be considered for a de facto relationship are the same in Australia and New Zealand (s 4AA FLA and s 2D PRA)  
**BUT** in NZ a relationship must generally be for 3 years to create property rights. Under the FLA it is only 2 years.

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## 6. Pensions/Superannuation

- May be of significant value in some countries.
- IAFL has spreadsheet summarising different countries.
- A property settlement order made in one country may not cover pensions/superannuation in another country. May need extra order/agreement/steps.
- Be wary of USA, Australia, Japan, UK and Canada
- If not split, may increase non pension entitlements.

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## 6. Australian Superannuation

- If Australian superannuation is to be split, an Australian order or financial agreement is required.
- Generally easier to use a superannuation agreement rather than a court order if orders are already made are elaborate.

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# **Cross-border Jurisdiction and Forum Issues in Family Law Disputes - Australia**

**IAFL Symposium  
Kuala Lumpur  
Malaysia**

**19 May 2026**

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**FORTÉ**  
FAMILY LAWYERS

Today's increasing globalisation means that the numbers of couples and families who are temporary or permanent residents, own property, have property interests and/or run businesses in other countries is on the rise. This paper looks at how jurisdictional and forum issues are dealt with in cross-border family law disputes in Australia.

## 1. Scope of this paper

This paper focuses on property settlement and certain parenting matters which may arise under the *Family Law Act 1975* (Cth) ('FLA').

It is beyond the scope of this paper to deal with enforcement of child support, child maintenance, spousal maintenance, divorce, pre-nuptial agreements and international relocation. Enforcement of orders is not dealt with in detail but may be a factor in deciding where litigation should occur. In most jurisdictions, family law property orders can only be enforced by non-family law means. Child support obligations are frequently recognized in other jurisdictions. For example, Hong Kong, New Zealand, India, Malaysia, Singapore, Sri Lanka, the United Kingdom, the Republic of Ireland and the United States of America are listed in Schedule 2 of the *Family Law Regulations 1984* as reciprocating jurisdictions for the purpose of s 110 FLA. Parenting orders are more likely to be easier to register in overseas jurisdictions than property orders.

Also not dealt with in this paper are:

- Service – see the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965*; with respect to New Zealand - the *Trans-Tasman Proceedings Act 2010* (Cth) (TTPA) (s 9), the *Family Law Regulations 2024* (Pt 10, Division 2 for Service Convention countries and Pt 10 Division 3 for non-Service Convention countries) and bilateral treaties.
- Evidence gathering abroad – see the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, TTPA, the *Foreign Evidence Act 1994* (Cth) and bilateral treaties.

## 2. Forum

The mere fact that a party is present in a particular jurisdiction, or has property there, may not be enough in itself for a particular court to exercise jurisdiction. The relevant forum test for the jurisdiction must be met.

The jurisdiction under the FLA for proceedings (other than divorce and declarations as to validity of marriage, divorce and annulments), is set out in s 39(4)(b) FLA and requires that:

*(b) ... any party to the proceedings is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, at the relevant date.*

The “relevant date” is defined in s 39(4A) and is the date on which the application is filed.

Where proceedings could be determined in two or more different jurisdictions it may be necessary to consider such factors as which jurisdictions have forum, which jurisdiction will likely give a more favourable outcome, whether one court will grant an anti-suit injunction against a party trying to litigate in the other jurisdiction and in which jurisdiction the proceedings might be heard and determined first. With respect to the last point, a party seeking to litigate in Australia can be at a considerable disadvantage as our proceedings are often viewed as being slow.

### 3. Forum tests in Australia

#### ***Financial matters***

The forum test in Australia for financial matters (except as regards New Zealand) is that a stay of Australian proceedings will be granted if the Australian court is “a clearly inappropriate forum”. This is the same test as in most non-family law matters in Australia. The leading case is *Voth & Manildra Flour Mills Pty Ltd* (1990) 171 CLR 35, [1990] HCA 55 and *Henry v Henry* [1996] HCA 51; (1996) 185 CLR 571. The test in *Voth* was stated at [30]:

*First, a plaintiff who has regularly invoked the jurisdiction of a court has a prime facie right to insist upon its exercise. Secondly, the traditional power to stay proceedings which have been regularly commenced, on inappropriate forum grounds, is to be exercised in accordance with the general principle empowering a court to dismiss or stay proceedings which are oppressive, vexatious or an abuse of process and the rationale for the exercise of the power to stay is the avoidance of injustice between parties in the particular case. Thirdly, the mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction will provide a more appropriate forum does not justify the dismissal of the action or the grant of a stay. Finally, the jurisdiction to grant a stay or dismiss the action is to be exercised “with great care” or “extreme caution”.*

Some of the most recent Full Court of the Federal Circuit and Family Court of Australia (FCFCOA) cases to consider *Voth* are *Bakshi & Mahanta (No 2)* [2022] FedCFamC1A 90, *Beng & Kwok* [2022] FedCFamC1A 117, *Pathak & Hardikar* [2022] FedCFamC1A 163 and *Kornfield & Wehinger* [2023] FedCFamC1F 817. These cases apply the relevant factors from this list:

- What “connecting factors” are there? These include the availability of witnesses and whether a forum is the “natural forum” as having the most real and substantial connection, such as the law governing the transaction and the places where the parties respectively reside and carry on business;
- Legitimate personal or jurisdictional advantage in having the proceedings heard in a particular forum. These advantages may include for family law matters: a better discovery process, causes of action not available in the other jurisdictions (eg. s 106B) of the FLA, a better financial outcome and a more generous limitation period;
- Parallel proceedings in different jurisdictions should be avoided if possible;

- Local professional standards where they are in question;
- The law of the local forum in determining the rights and liabilities of the parties;
- The *lex causae*. The substantive governing law which applies to the proceeding in a particular court may be foreign law. Foreign law is not commonly applied in Australia;
- Any agreement to have disputes resolved in a certain court or jurisdiction. Potentially relevant here is the Hague 2005 *Convention on Choice of Court Agreements*. Australia is not yet a signatory although work has been done towards Australia becoming one. In any event, family law matters are not covered by the Convention;
- Whether each court will recognise the other's orders and decrees and the ease of enforcement;
- Which forum can provide more effectively for the complete resolution of the parties' controversy;
- The order in which the proceedings were instituted and their current status;
- The stage to which the proceedings have reached;
- The costs that have been incurred;
- The issues on which relief may depend in each jurisdiction.

An Australian court can grant an anti-suit injunction prohibiting a person from initiating or continuing an action in another jurisdiction if an Australian court has held that the case should be determined in Australia. Recent examples are *Kwok & Beng (No 2)* [2022] FedCFamC1F 263 (parenting proceedings in Australia and China) and *Bhasin v Bhasin* [2023] FedCFamC1F 96. *Kwok & Beng (No 2)* is discussed later in this paper.

### ***Parenting matters***

The forum test for parenting matters is not the clearly inappropriate forum test which usually applies in Australia. Instead, as with all parenting matters, the question is what is in the best interests of the child. In *ZP v PS* [1994] HCA 29; (1994) 181 CLR 639 at [8] the High Court determined that the principle in *Voth* applied to all matrimonial proceedings **except** parenting matters. Mason CJ, and Toohey and McHugh JJ held:

*In exercising the parens patriae jurisdiction or a statutory jurisdiction which makes the welfare of the minor the first and paramount consideration, that Court always makes an independent judgment on any question concerning the custody of a child and cannot blindly follow an order made by a foreign court. Because the welfare jurisdiction of the Family Court is similar to the parens patriae jurisdiction of the Court of Chancery, the Family Court must also form an independent judgment as to what the welfare of the child requires notwithstanding the existence of any custody order made by a foreign court. Moreover, proceedings for custody or access are not disputes inter partes in the ordinary sense of that*

*expression because the Court is not enforcing a parental right to custody or access. Its duty is to make such order as will “best promote and protect the interests of the child”. It follows that, when a child is within the jurisdiction of the Family Court, the doctrine of forum non conveniens has no application to a dispute concerning the custody of the child. Injustice to one or other of the parties, expense, inconvenience and legitimate advantage, which are always relevant issues in a forum non conveniens case are not relevant issues in a custody application. In some cases, those matters may bear on issues which touch the welfare of the child but they are not themselves relevant issues when the question arises whether the welfare of the child requires the making of an order that the issue of custody be determined in a foreign forum. When the Family Court is seized of jurisdiction in relation to the custody of child, its duty is to exercise its jurisdiction. (Footnotes omitted)*

The jurisdictional connection with Australia that is required for the institution of proceedings under Pt VII is set out in s 69E. Proceedings may be instituted under the FLA in relation to a child only if one of the following applies:

- (a) *the child is present in Australia on the relevant day (as defined in subsection (2));*
- (b) *the child is an Australian citizen, or is ordinarily resident in Australia, on the relevant day;*
- (c) *a parent of the child is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day;*
- (d) *a party to the proceedings is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day; or*
- (e) *it would be in accordance with a treaty or arrangement in force between Australia and an overseas jurisdiction, or the common law rules of private international law, for the court to exercise jurisdiction in the proceedings.*

The term “child” is defined in s 4(1) to include an adopted and a stillborn child, and “relevant day” is defined in s 69E(2) as the day on which the application is filed.

### **New Zealand**

The test for jurisdiction as between Australia and New Zealand for matters caught by Part 3 of the *Trans-Tasman Proceedings Act 2010* (Cth) (TTPA), is set out in s 19(1)(b) of the TTPA, and is the “more appropriate forum” test. This test applies to all family law matters (both parenting and financial) except:

- Divorce
- Enforcement of spousal maintenance
- Enforcement of child support

Section 19(2) lists the matters which the Australian Court must take into account:

- (a) *the places of residence of the parties or, if a party is not an individual, its principal place of business;*
- (b) *the places of residence of the witnesses likely to be called in the proceeding;*
- (c) *the place where the subject matter of the proceeding is situated;*
- (d) *any agreement between the parties about the court or place in which those matters should be determined or the proceeding should be commenced (other than an exclusive choice of court agreement to which subsection 20(1) applies);*
- (e) *the law that it would be most appropriate to apply in the proceeding;*
- (f) *whether a related or similar proceeding has been commenced against the defendant or another person in a court in New Zealand;*

- (g) *the financial circumstances of the parties, so far as the Australian court is aware of them;*
- (h) *any matter that is prescribed by the regulations;*
- (i) *any other matter that the Australian court considers relevant;*

This test applies in determining whether Australian proceedings should be stayed because New Zealand is the “more appropriate forum”. Part 3 of the TTPA deals with “civil proceedings” which are defined in s 4 to be proceedings that are not criminal proceedings, therefore the term “civil proceedings” covers family law proceedings. Part 5, which deals with subpoenas, specifically excludes Hague Child Abduction proceedings. Part 7 deals with the recognition and enforcement in Australia of certain New Zealand judgments. New Zealand judgments which can be registered in Australia include those:

- requiring a person to pay money
- ordering a person do to something (for example, to return specific property)

These two categories are types of orders which may be made in FLA proceedings.

New Zealand has similar legislation which applies to certain FLA judgments, the *Trans-Tasman Proceedings Act 2010* (NZ).

#### **4. Forum test in overseas jurisdictions**

In most countries besides Australia, the forum test is the *forum non conveniens* or “more appropriate forum” test. Australia only applies this test for matters caught by the TTPA.

##### ***In rem or in personam***

Courts exercising jurisdiction under the FLA do so *in personam* rather than *in rem*. This means that the courts make orders against a person rather than against property. For example, the wording of an order that a property be transferred from one person to another is along the following lines:

“Mabel transfer to Peter her right, title and interest in the Sandringham property.”

An order made *in rem* would be:

“The Sandringham property be transferred from Mabel to Peter.”

The latter form of order is unenforceable in Australia.

As the parties to orders made *in personam* are bound, they are easier to enforce if the party against whom enforcement is sought is in Australia.

For example, in *Gresham & Gresham (No 2)* [2023] FedCFamC1F 51 the parties disputed whether the overseas pension funds of the husband should be treated as property divisible between the parties, as contended by the husband or whether, as contended by the wife, they should be treated as a financial resource. The husband agreed that the English pension could not be accessed and he

proposed that the wife's share be added to the amounts to be provided to her from the Country Q pensions. The expert evidence confirmed that the only way in which the parties could obtain a pension sharing order under English law was if either of them were domiciled there on the relevant date. The English pension was therefore held to be a financial resource rather than property. The husband sought a different approach with respect to the Country Q pensions than with respect to the English pension.

The husband reminded the court that his pension fund entitlements had a total value of \$4,703,770, which comprised more than a one-third of the value of the assets the husband contended was divisible between the parties. The husband conceded that the superannuation-splitting provisions of the FLA did not apply to overseas pension fund entitlements. Notwithstanding that, he contended that part of the value of his interest in the Country Q pension funds might be transferred to the wife, subject to the trustees' discretion. The husband invited the court to accept that the expert evidence indicated this was so and accordingly contended that the court might compel the husband to do all acts and things necessary to facilitate a splitting of the Country Q pension schemes. The husband's entitlement to access the pension schemes arose from age 55, but was dependent on his retirement. He was 54 years old at the time of trial.

The court concluded that both the Country Q funds constituted property for the purposes of the FLA. The court found that it was just and convenient to make an *in personam* order in favour of the wife in relation to the Country Q funds, which it had the power to make against the husband under s 114(3).

### ***Mozambique Rule***

The Mozambique Rule is a rule of private international law which limits jurisdiction in respect of actions to title, possession and damages of trespass to foreign land. This rule was established by the House of Lords in *British South Africa Co v. Companhia de Moçambique* [1893] AC 602 and was based on the difficulties of enforcing orders in relation to land as it is immovable property. The Mozambique Rule does not apply in Australia, which means that Australian Courts, unlike some foreign courts (such as in England), are prepared to make orders with respect to land in foreign jurisdictions. Of course, if neither the property nor the party against whom enforcement is sought are in Australia, enforcement of the order may be impossible.

Some countries consider the related principle of only exercising jurisdiction over moveable property, not immoveable property. The Australian court may have jurisdiction to make such an order, but enforceability will still be a factor that the court will consider in deciding whether it can exercise jurisdiction. If the court decides to exercise jurisdiction, whether the order is able to be enforced may be a factor in determining whether the discretion to exercise the power should be exercised.

### ***Jurisdiction of the FCFCOA***

The jurisdiction of the Federal Circuit and Family Court of Australia (both Division 1 and Division 2) can include persons or things outside Australia. It has been replaced by the similarly worded s 25 (for Div 1) (and the similarly worded s 131 for Div 2) *Federal Circuit and Family Court of Australia Act 2021* (Cth) (FCFCOA Act) states:

- (1) *The Federal Circuit and Family Court of Australia (Division 1) has original jurisdiction:*
  - (a) *if a matter, being the subject of a family law or child support proceeding, is transferred to the Court by the Court under section 51—as set out in paragraphs 132(1)(a), (b), (c) and (d); or*
  - (b) *if a matter, being the subject of a family law or child support proceeding, is transferred to the Court by the Federal Circuit and Family Court of Australia (Division 2) under section 149—as set out in paragraphs 132(1)(a), (b), (c) and (d); or*
  - (c) *as is conferred on the Court, or in respect of which proceedings may be instituted in the Court, by any other Act.*
- (2) *Subject to such restrictions and conditions (if any) in:*
  - (a) *section 111AA of the Family Law Act 1975; or*
  - (b) *regulations made under that Act; or*
  - (c) *the Rules of Court made under this Chapter;**the jurisdiction of the Federal Circuit and Family Court of Australia (Division 1) may be exercised in relation to persons or things outside Australia.*

Section 111AA of the FLA excludes child and spousal maintenance obligations where the payee is habitually resident in New Zealand.

In *Gould & Gould v Swire Investments Ltd* (1993) FLC 92-434; [1993] FamCA 126 the former section, which was similarly worded (s 131 FLA) was examined in the context of foreign corporations and the extra-territorial reach of that provision was confirmed.

The order may still need to be registered in the foreign country to be enforceable and this will depend upon the existence of co-operative legislation (eg. TTPA), international treaties or the local law of the other country.

The FCFCOA may be reluctant to make orders with respect to foreign jurisdictions, if there are enforcement concerns even if the Australian forum test is satisfied.

## 5. Stays and anti-suit injunctions

A stay is an order which halts part or all of a proceeding before the court in which the stay order is made. An anti-suit injunction is an order which prevents a person from commencing or continuing a proceeding in another court, including in an overseas jurisdiction. The court may require the person who is the respondent to an anti-suit injunction to seek a stay or dismissal of the proceedings they instituted in other jurisdictions.

In *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; [1997] HCA 33 the High Court of Australia developed the principles governing the exercise of the discretion to grant anti-suit injunctions. The two grounds upon which an anti-suit injunction can be granted are:

- The inherent jurisdiction of the court to protect the integrity of the court's processes. This ground is usually used when the forum is in dispute;

- The court's equitable jurisdiction to restrain unconscionable conduct or the unconscientious exercise of legal rights. An example of where this ground may be used is where a financial agreement has a choice of jurisdiction clause.

*Kent & Kent* (2017) FLC 93-792; [2017] FamCAFC 157 is the leading family law case. The Full Court of the Family Court discussed the test for stays and anti-suit injunctions in family law proceedings, although the same test applies as in non-family law matters. Leave to appeal against the stay application was dismissed but leave to appeal in respect of the anti-suit injunction was allowed. The Full Court re-exercised its discretion applying the correct test and granted an anti-suit injunction to protect the integrity of the court's processes.

The husband commenced proceedings in Papua New Guinea (PNG) for divorce relying upon only one ground, adultery. Three months later, the wife commenced proceedings for settlement of property in the Family Court of Australia but did not apply for a divorce. The wife contended that the parties had, at that time, not been separated continuously for twelve months.

The husband filed a Notice of Motion and Application for Ancillary Relief in PNG, seeking leave to file an Amended Petition for Decree of Dissolution of Marriage to include a claim for property settlement. He also sought to add the grounds of desertion and separation, and sought an anti-suit injunction in the PNG court to restrain the wife from continuing with the Australian proceedings until the final determination of the proceedings commenced by him in PNG.

The husband then sought an order in Australia that the wife's Australian proceedings be stayed pending the decisions of the PNG court regarding his application for dissolution of marriage and his application for leave to amend that application and apply for ancillary relief.

The primary judge dismissed the husband's application seeking an order that the wife's proceedings be permanently stayed, and granted an anti-suit injunction restraining the husband from prosecuting his proceedings in the PNG. The primary judge dismissed the husband's application for a stay on the basis that such an outcome would be oppressive and vexatious in the sense of *Voth*.

The husband successfully sought leave to appeal and his appeal was successful. He asserted that issues significant to the determination of whether the Family Court was a clearly inappropriate forum were not in the primary judge's listing of those factors. He further argued that the primary judge failed to consider relevant considerations in the exercise of her discretion. The Full Court of the Family Court held:

- *For those reasons we consider that it was not open to her Honour to find on the evidence before her that the husband's proceedings for dissolution and leave in PNG 'would be oppressive and vexatious in the Voth sense' and/or that an injunction restraining the husband from pursuing those proceedings was 'necessary to protect the integrity of [the Family] Court's processes'. (at [62])*
- *If that part of the husband's application in PNG is not enjoined, its continuation would constitute a challenge to the Family Court's decision not to stay its own proceedings and*

*thus should be construed as a challenge to the integrity of the Australian proceedings. For reasons explained in Teo & Guan, [(2015) FLC 93-653; [2015] FamCAFC 94] the Family Court has power to grant an injunction to protect its own processes, and one manifestation of the exercise of that power is the granting of an injunction to enjoin, as being vexatious or oppressive, foreign proceedings 'which have a tendency to interfere with the due process of the domestic court'. (at [67])*

## 6. Hague Convention on the Civil Aspects of International Child Abduction 1980

This is a significant topic in itself. The general principle is that as between countries which are signatories to the Convention and have acceded to the other country's accession, children who have been removed from a jurisdiction without the consent of a parent with rights of custody should be returned to that jurisdiction to enable the dispute to be determined as to the country in which the child should live.

These cases are usually hotly contested and often involve highly technical arguments as to rights of custody, consent, acquiescence and habitual residence. The defences under the Convention are:

- the applicant was not exercising their rights of custody of the child at the time of the removal or retention;
- the applicant consented to the removal or retention, or subsequently acquiesced to the removal or retention;
- there is a grave risk that the child's return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation;
- the key requirements of the convention have not been met;
- the child has been in the new country for more than twelve months and is settled there;
- the child objects to being returned to its home country, and is old enough and mature; enough for its views to be considered;
- returning the child would breach their fundamental freedoms and human rights.

More information is on the following websites:

- <https://www.ag.gov.au/families-and-marriage/families/international-family-law-and-children/information-responding-parents>
- <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction>

Importantly, the best interests of the child is not a relevant factor. The “grave risk of harm” defence is particularly pertinent in Australia as amendments made in December 2022 to the *Family Law (Child Abduction Convention) Regulations* 1986 expressly state the risk of the child being subjected to, or exposed to, family violence, is relevant to the defence of “grave risk” of exposure to physical or psychological harm or otherwise placing the child in an intolerable situation (reg 16(3)).

## 7. Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children 1996

The Child Protection Convention came into force in Australia on 1 August 2003. It provides for international cooperation between convention countries to recognise protective measures for children. Court orders made in one convention country may be recognised and enforced in other convention countries.

Section 111CD is a lengthy provision which sets out when a court may exercise jurisdiction for a Commonwealth personal protection measure. Section 111CA defines “Commonwealth personal protection measure” in relation to a child as “a measure within the meaning of the Child Protection Convention under this Act that is directed to the protection of the person of the child.” Under s 111CD(1) of the FLA, the court has jurisdiction to grant personal protection measures if the child is habitually resident in Australia or in certain circumstances where the child is a refugee child and present in Australia. The effect of s 111CD has been to qualify the broad jurisdiction conferred on Australian courts by s 69E of the FLA in regard to parenting orders. As indicated above, determining habitual residence can involve highly technical arguments and it is not a simple concept to apply. A number of authorities confirm that a party must establish the child's habitual residence in Australia for the court to have jurisdiction to grant personal protection measures e.g. *Bunyon & Lewis (No 3)* [2013] FamCA 888.

In *Sterling & Sterling* [2022] FedCFamC1A 3 the Full Court of the Family Court discussed the operation of the Child Protection Convention in Australia. The *Family Law (Child Protection Convention) Regulations 2003* (Cth), were made under Pt XIII AA, Div 4 of the FLA to give statutory recognition to the *Child Protection Convention*. The child was present in Australia when the father commenced the Australian proceedings, so jurisdiction existed to entertain his application (s 69E(1)(a)). The question was then whether or not the jurisdiction under s 111CD could be exercised to make the orders for which the father applied, as they fit the description of Commonwealth personal protection measures.

Further complicating issues may arise if the child is habitually resident in a non-convention country. For example, the court has noted that the effect of s 111CD is that it appears that Australian courts do not have jurisdiction unless the child is habitually resident or present in Australia. This has led to somewhat troubling conclusions where the court has been unable to find jurisdiction despite, as in *Ahmad & Hadi* [2020] FamCA 1041, the child being an Australian citizen and both parents being present in Australia.

As Justice Tree said in *Ahmad & Hadi* at [69]-[70]:

*I should acknowledge that there are some mildly disturbing aspects to this conclusion, not least of which being that an Australian citizen child, of Australian resident and citizen parents, is not amenable to the jurisdiction of Australian courts. More, and rather counter-intuitively, it seems odd that the jurisdiction over him will therefore be exercised by a Pakistani court, by virtue of the ostensible effect of the 1996 Convention, to which that country is not a signatory.*

*However in reality, that outcome is the result of s 111CD of the Act, which I am not free to ignore or subvert. Whether that provision in its terms was necessitated by the 1996 Convention is a matter I will leave to others to consider; suffice to say it is the binding statutory law of Australia, and no challenge to its constitutionality was advanced before me.*

More information is on the following websites:

- <https://www.ag.gov.au/families-and-marriage/families/international-family-law-and-children/international-child-protection>
- <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-protection>

## 8. Recent case examples

### ***Lan & Hao* [2017] FamCAFC 175**

The wife appealed against a refusal to grant an anti-suit injunction which would restrain the husband from pursuing proceedings in China. The appeal was dismissed, and the wife was ordered to pay the costs of the husband. Proceedings continued in both Australia and China.

The trial judge was faced with competing applications for anti-suit injunctions. Both applications were dismissed as the property of the parties was spread across Australia and China. The trial judge found that neither court could appropriately deal with the property located in the respective foreign jurisdictions and thus, proceedings should continue in both Australia and in China. Australia was not a “clearly inappropriate forum” for determining the wife’s claim, nor were her proceedings vexatious or oppressive.

The trial judge’s reasoning for refusing to grant the anti-suit injunction in favour of the wife was that the husband had a “legitimate juridical advantage” in prosecuting proceedings in China. The trial judge also found that there was no utility in granting an anti-suit injunction as it would not be recognised by the Chinese courts.

On appeal, the Full Court found that the trial judge had erred in concluding that the injunction would have no utility. The injunction could be enforced by contravention or contempt proceedings taken against the husband personally in Australia. However, the trial judge was correct in deciding that the husband had a juridical advantage from his proceedings in China and therefore, they could not be held to be vexatious and oppressive. This was the more important ground and so, overall, the trial judge did not err in her decision not to grant the injunction.

The appeal was dismissed.

### **Gong & Zao [2021] FamCAFC 110**

This was an appeal of a decision by the Family Court of Australia not to dismiss an application for a property settlement in Australia. The wife contended that property orders made in the People's Republic of China already covered the parties' property in Australia. All of the parties' assets were held in China apart from an investment of AUD \$5,030,000 which remained in Australia. The appeal was dismissed despite a finding by the Full Court that the primary judge had erred.

The Full Court found that the primary judge had applied the wrong test with regard to summary dismissal under s 45A(3) of the FLA. The primary judge had used the test of whether the application was "doomed to fail". The primary judge should have applied the less stringent test from *Ritter & Ritter and Anor* [2020] FamCAFC 86 – whether the party had no reasonable prospect of success in prosecuting their application, taking their case at its highest.

Further, the primary judge did not apply the correct principles regarding the claims of estoppel by the wife. The Full Court found that there was no *res judicata* and in relation to the claim of estoppel it said (at [28], [40]-[41]):

*In this case, this required the appellant, who bore the onus of proof to establish "a factual foundation for the operation of one or other forms of those forms of estoppel" so as to prove that the ruling of the Court in China "had the meaning and determinative operation" for which she contended ... . Thus, in order to show that the proceedings in China had dealt with the division of the funds in Australia the appellant had to prove that the division of that asset was an issue before the Court in China, that the Court had legal authority to deal with that division and, finally, that it exercised that authority. ...*

*As we have already explained, the evidence before the Court did not enable us to form the view that there was the requisite correspondence between the proceedings in China and the proceedings in Australia, so that the decision of the Court in China had "the meaning and determinative operation" ... which meant that the issues raised in Australia had already been determined.*

*It follows that there will be a grant of leave but the appeal will be dismissed.*

### **Beng & Kwok [2022] FedCFamC1A 117**

The wife sought leave to appeal an anti-suit injunction in regard to proceedings in China. She sought a stay of all Australian proceedings except for those regarding parenting matters. In considering whether to grant leave to appeal, the Full Court relied on the test from *Medlow & Medlow* (2016) FLC 93-692 (at [57]). Leave will only be granted where the:

*decision is attended by sufficient doubt to warrant it being reconsidered by the Full Court and whether substantial injustice would result if leave were refused, supposing the decision to be wrong*

No grounds of appeal were found to be of merit, including the ground related to a stipulation in a financial agreement between the parties that matters under dispute should be resolved in China. There was also an assertion that the trial judge failed to consider difficulty in the ability of the wife to

investigate the husband's financial position in China through the Australian courts. The Full Court agreed with the trial judge's reasoning (at [136]) that:

*an injunction is necessary to protect the Court's own proceedings and processes to avoid the very outcome that the wife's counsel submits is possible. A single proceeding will reduce cost and avoid duplicated and inconsistent results. They each deal with the same subject matter arising out of the marriage and complete relief is available in this Court to quell the controversy arising out of their marriage.*

The application for leave was rejected and the wife ordered to pay the costs of the husband up to a fixed sum of \$7,000.

### ***Kwok & Beng (No 2) [2022] FedCFamC1F 263***

The mother had commenced proceedings in China concerning the one child of the relationship, and the father resided in Australia. The mother sought a stay of the Australian proceedings. The trial judge, Schonell J, relied on the clearly inappropriate forum test from the case of *Henry v Henry* (1996) 185 CLR 571 and said (at [50]) that examination of a non-exhaustive list of factors was required to determine whether Australia was a "clearly inappropriate forum". These factors are listed below:

- (1) *Whether both courts have jurisdiction. No issue arises unless the courts of each country have jurisdiction;*
- (2) *If yes, will each country recognise orders made by the other? "If the orders of the foreign court will not be recognised in Australia that will ordinarily dispose of any suggestion that the local proceedings should not continue". If they will be recognised, then "whether any orders may need to be enforced in other countries and, if so, the relative ease with which this can be done" (at 592);*
- (3) *which forum can provide a complete resolution of the matters involved in the parties' controversy;*
- (4) *"the order in which the proceedings were instituted, the stage which they have reached and the costs that have been incurred" (at 592);*
- (5) *the connection of the parties and their marriage to each jurisdiction;*
- (6) *"whether, having regard to their resources and their understanding of language, the parties are able to participate in the respective proceedings on an equal footing" (at 592–593);*
- (7) *Whether each party has a legitimate, personal or juridical advantage to the forum in which they chose to litigate; and*
- (8) *Any other relevant matter in the circumstances of the case.*

Justice Schonell dismissed the application for a stay of the mother's application for orders but granted an anti-suit injunction against the mother. He held that the mother was unable to establish that the Australian court was "a clearly inappropriate forum" for the proceedings and that all proceedings should take place in Australia. Further, Schonell J held that it was in the best interests of the child for the proceedings to be determined by the Australian court. This was because the child had resided in Australia since the age of 18 months old and attended school in Australia.

An anti-suit injunction was made to restrain the wife from continuing proceedings in China as parallel proceedings would be "an entirely undesirable outcome". This was despite the fact that parenting orders from either jurisdiction were unlikely to be enforceable in the other.

***Lorde & Chu (No 2) [2018] FamCA 688***

The wife had a small superannuation interest in Australia, but otherwise the only identified property (including the parties' family home) was in China. Justice Gill held that where there was uncertainty as to each step under s 79 including as to the value of the property and the nature and extent of contributions made by each of the parties, it could not be determined that any particular order was either just and equitable or appropriate as required by s 79 and *Stanford & Stanford* [2012] HCA 52; (2012) FLC 93-518. In other words, if the bulk of the parties' property is overseas this may result in the court determining that no property settlement order should be made after a consideration of the basic principles for the alteration of property interests.

***Kornfeld & Wehinger [2023] FedCFamC1F 817***

The wife filed proceedings for divorce and financial relief in the United Kingdom in March 2023. Subsequently, in April 2023, the husband filed proceedings in Australia for financial and parenting orders as well as an Application for Divorce. The wife was living in Australia with the children and the husband resided in the UK. The wife was an Australian and British dual citizen. The husband was a British citizen and a permanent resident of Australia. The parties married in Australia and lived periods of their relationship in both Australia and the UK.

The husband sought an anti-suit injunction against the wife with respect to her proceeding in the UK. The wife subsequently applied to stay the husband's proceedings on the ground that the Australian forum was clearly inappropriate. Both parties agreed that the courts in both Australia and the UK had jurisdiction to determine the financial issues between them. During the hearing, the wife conceded the appropriate forum to determine the parenting proceedings was Australia.

The bulk of the parties' property was in England. The husband had assets exclusively in the UK which included real properties, entitlements to pension and/or superannuation funds and an entitlement as a beneficiary to a trust. The wife's assets were located in Australia and comprised a real property purchased by her subsequent to separation, entitlements in an accumulation superannuation fund and an entitlement as a beneficiary of her father's discretionary family trust.

The enforceability of an FLA order in England was discussed in the judgment. The three experts agreed that, in relation to capital, the wife had two options. First, she could rely on the *Foreign Judgments (Reciprocal Enforcement) Act 1933* (UK) to which Australia is a participating country. This would enable her to register any final lump sum orders made in Australia in the King's Bench Division. By this route, registration was a right as the UK court had no discretion not to register. The process was relatively straightforward. The application was made to the King's Bench Division and made without notice to a Master supported by written evidence. The registration order was then drawn up by the judgment creditor and served on the debtor. The order would be enforceable as if it had been made in the United Kingdom.

Additionally, the wife could apply under Part III of the *Matrimonial and Family Proceedings Act 1984* (UK) for orders to be made by way of natural provision following a foreign divorce, in a similar manner as pension sharing orders could be obtained. In relation to the husband's UK pension, the wife needed pension sharing orders to be made in the UK as she could not rely upon an Australian order to be effective. A further application would need to be made to the UK court under the *Matrimonial and Family Proceedings Act 1984* (UK) in relation to the UK pension. That application was a two-step process requiring leave of the court.

All three experts agreed the procedure prescribed by the *Foreign Judgments (Reciprocal Enforcement) Act 1933* (UK) was theoretically open to the wife in the event of a default, however none were able to provide any authority or were aware of any cases when such a procedure had been successfully utilised to enforce a foreign judgment for payment of a capital sum. There was no evidence as to the efficacy of the procedure in terms of timeframe, ease, complexity and potential costs. The registration process did not provide any other relief such as transfers of property on default or the enforcement procedure available under s 106A of the FLA.

The issue of the husband's pension interest in his family company superannuation fund was held by Justice Williams as likely to be contentious as the husband asserted that other family members had interests in it. Justice Williams considered that the wife might face significant hurdles in relation to disclosure regarding the superannuation fund and the husband's family trust, although she acknowledged that the husband's position was that he would comply with his disclosure obligations. The wife's financial position in Australia appeared to be more straightforward than the husband's position in the UK.

Justice Williams held (at [117], [122]-[124]):

*There is a real and cogent difficulty in relation to property orders if they are made in Australia. The only order which all experts agree is likely to be readily recognised and enforced in the UK is an order in relation to payment of money...*

*The difficulty of recognition and enforcement of interests in real property and pension funds is particularly pertinent in this matter because of the husband's asserted interest in his family's superannuation fund, as opposed to the wife's interest in an accumulation fund in Australia.*

*In regard to the competing applications to stay the other parties divorce applications, if the wife's divorce application proceeds in the UK court, then that court will have the unfettered power to make a raft of orders in the financial proceedings, albeit in a staggered timetable. That will result in one set of financial proceedings in the UK.*

*On the other hand, if the husband is permitted to proceed with his divorce in this jurisdiction, then at the conclusion of financial proceedings in Australia one of the parties, presumably the wife, will have to seek leave to apply for orders in relation to property in the United Kingdom to obtain a full range of orders to enforce any property orders made by this Court or to possibly obtain orders splitting the husband's UK pension entitlements. According to Mr K, that involves a two-stage process with two distinct applications and two separate statements of evidence which will result in the wife incurring further costs and consists further delay. This will result in the wife being required to sequentially conduct two sets of financial proceedings. The further set of financial proceedings which the wife will face is seriously and unfairly burdensome and will incur significant costs for both parties. It will also delay the final resolution of the controversy between them.*

A determination was made that Australia was a clearly inappropriate forum for the divorce and financial proceedings and the Husband's application was permanently stayed.

### ***Draper & Corwin [2022] FedCFamC1F 626***

The contested issue was the appropriate forum to determine for the parties' divorce and extant property settlement proceedings. Parties had already agreed that parenting proceedings occur in Australia. The wife sought that any property settlement proceedings be litigated in Melbourne, Australia where she was residing with the child of the relationship. The husband sought that the proceedings be litigated in State J of the United States of America which was where he was residing.

Justice Harnett applied the "inappropriate forum test" from *Voth*. The husband argued that if the divorce proceedings were to occur in Australia, it would restrict him from having the parties' financial proceeding heard in J State. The wife sought an equal split of property and asserted that the husband had not put forward any financial issues to be heard in Court proceedings in J State. The husband argued that the parties had assets, debts and property in J State. The wife denied that the parties had any property of any significance in J State and none that could not be dealt with in Australia.

Harnett J said that proceedings in J State would be extremely costly, particularly given the parties would require two sets of legal fees as a result of the parenting proceedings taking place in Australia. Further, Harnett J found that the parties would be on a *fairly equal* footing if the property proceedings were heard in Australia with the parenting proceedings. Should the property proceedings occur in J State, the wife would incur significant difficulty, particularly given her care of the parties' child in Australia.

The FCFCOA was held not to be a "clearly inappropriate forum" nor would it be vexatious or oppressive for the property proceedings to occur in Australia. The husband was ordered to withdraw his property and divorce proceedings in J State.

### ***Adams & Marchenko [2025] FedCFamC1A 197***

In *Adams & Marchenko* both parties were permanent residents of Australia, however neither were citizens. The wife was a citizen of Singapore, and the husband was a citizen of Country D. The parties lived predominantly in Australia during their relationship. Whilst the husband remained in Australia post-separation, the wife returned to Singapore. The parties held property in both Australia (estimated \$20 million) and Singapore (estimated \$254 million). The wife's case was that the property held in Singapore consisted entirely of the inheritance she received upon her father's death.

In July 2024, the husband commenced proceedings in Australia, seeking interim and final property orders. In October 2024, the wife applied for a stay of the Australian proceedings. In February 2025, the wife commenced proceedings in Singapore. Among the orders sought by the wife was an anti-suit injunction against the husband, restraining him from continuing proceedings in Australia. In response, the husband sought an anti-suit injunction against the wife in the FCFCOA, to restrain her from continuing the Singaporean proceedings.

The wife's stay application was heard before the FCFCOA in May 2025. The primary judge granted the stay application. The primary held that the FCFCOA was a clearly inappropriate forum on the basis that Singaporean courts were better suited to resolving the dispute. The primary judge's reasoning was largely based on the fact that neither the Singaporean or Australian courts could make orders *in rem* for property held in the other country, and the majority of the property was held in Singapore. As the stay had been granted, the need to determine the husband's anti-suit injunction fell away.

The husband successfully appealed. The Full Court (consisting of Chief Justice Alstergren and Justice Austin and Schonell) unanimously held that the primary judge had erred in applying the "clearly inappropriate forum" test, based upon the primary judge's finding that the Australian courts were clearly inappropriate merely because the Singaporean courts were better suited to resolving the dispute. At [39], their Honours pointed to a number of factors/features identified by the primary judge that suggested that, whilst the Singaporean courts may be better suited, the Australian courts were not clearly inappropriate. These included:

1. That the husband had commenced proceedings in Australia some seven months before the wife commenced proceedings in Singapore. Their Honours clarified that this is not, of itself, a dispositive feature.
2. The ability for the Singaporean court to resolve the property dispute between the parties was contingent on a divorce being granted in Singapore. Conversely, in Australia property proceedings are not contingent on a divorce order. It was noted that divorce applications had been filed in both jurisdictions, but in Australia first.
3. That the parties were permanent residents of Australia, lived in Australia for the majority of their marriage, still conducted business in Australia and had valuable property interests in Australia.

4. The Australian proceedings were advantageous to the husband as they offered him forms of relief not available to him in the Singaporean proceedings:
  - 4.1. In Australia, the wife's inherited wealth could be treated as part of the property available for distribution. Conversely, in Singapore, the inheritance would be treated as separate unless it had been converted into matrimonial property. This was important, given the wife's position that her inheritance made up the entirety of the property held in Singapore.
  - 4.2. The husband could pursue an application for spousal maintenance in Australia, but not in Singapore.
  - 4.3. The husband could not pursue his applications for an interim property settlement/litigation funding in Singapore.
  - 4.4. The expert evidence was that Singaporean courts would be unlikely to consider the husband's argument that the wife had perpetrated family violence through economic abuse and coercive control.
5. The courts were equal in their powers in that neither could make orders *in rem* for property held in the other country, but could make orders *in personam*. Neither jurisdiction was therefore advantageous in
6. The husband was seeking a generalised 40% of the net asset pool, rather than specific assets. It was possible for the Australian court to order a lump sum payment, calculated by reference to the entire property pool (inclusive of the property held in Singapore).
7. A property adjustment order in Australia compelling the wife to pay the husband a sum of money would be a money judgment capable of registration and enforcement in Singapore.

The Full Court also considered that the primary judge had made a number of factual errors, including:

1. That the wife's mother had asserted an interest in the Singaporean property;
2. That the legal costs of the parties were approximately equal and around \$140,000 to date (when they were, in fact, \$382,000 and \$350,000);
3. That the parties could litigate on equal footing. The Full Court noted this was unlikely in circumstances where much of the value Australian property was not readily available to the husband (ie contained in businesses and trusts) and the wife controlled the property in Singapore; and
4. That if Australian proceedings continued there would likely be a duplication of efforts and costs in Australia and Singapore. The Full Court pointed out that the primary judge had failed to consider the possibility of the Singaporean proceedings being discontinued, particularly in light of the husband's anti-suit injunction.

In allowing the appeal, the Full Court strongly reinforced the distinction between the "clearly inappropriate forum" and "more appropriate forum" tests, and rejected the primary judge's finding that the Australian court would be "clearly inappropriate" merely because the court of another

jurisdiction was more preferable. With respect to the primary judge's reasoning, their Honours stated (at [32]):

*The choice of language cannot be easily disregarded as merely semantic. It intimates established legal principles were not correctly applied. Basing the stay decision upon the Singaporean court being the preferable forum because it can "most comprehensively determin[e]" the issues in dispute represents a material error of law because the conclusion deflected attention from the proper question of whether the Australian court was a clearly inappropriate forum.*

Following the appeal being allowed, the parties entered into consent orders to finalise the Australian proceedings. Part of the settlement was that the Singaporean proceedings be discontinued and, as such, it was unnecessary to consider the husband's anti-suit injunction.

## 9. Effect of divorce

Although this paper does not cover divorce, there are some significant issues relevant to the jurisdiction of the Australian courts to make property and maintenance orders. Australia is a contracting state to the *Hague Convention on Recognition of Divorce and Legal Separations* enacted in 1970. Australia acceded to the Convention and s 104 of the FLA states:

*A foreign divorce will be recognised as being valid in Australia if it was effected in accordance with the laws of that foreign jurisdiction and at the date of those proceedings either one or both spouses had a sufficient connection with the foreign jurisdiction.*

Despite s 104, an overseas divorce can have a different impact than an Australian divorce on the ability of a party to seek a property settlement under the FLA. Section 44(3) provides that where a "divorce order" has been made, proceedings for property settlement shall not be instituted (except with leave of the court or the consent of both parties) after the expiration of 12 months following the order coming into effect. In *Anderson & McIntosh* (2013) FLC 93-568 the Full Court considered whether s 44(3) applied to applications made under s 79 where the parties had been divorced overseas. The parties were divorced and orders for property settlement were made overseas in relation to foreign property but not on relation to property in Australia. The wife's application for property settlement in the then Family Court of Australia was filed more than 12 months after the date of the foreign divorce. The husband sought that the wife's application be dismissed as she had not obtained leave pursuant to s 44(3). The trial judge determined that the wife did not need leave. The appeal against this decision was dismissed.

A second issue related to divorce is that in some overseas jurisdictions, such as Hong Kong, obtaining an Australian divorce may make it difficult or impossible to obtain a property settlement (or parenting orders) in the overseas jurisdiction because the property settlement and any parenting proceedings are considered to be ancillary to the divorce.

## 10. De facto and other relationships

The rights of parties who are not legally married can vary between jurisdictions. Important matters to consider include:

- Do couples who are not legally married have any rights at all? There is no jurisdiction in some countries eg. Italy, Poland, Spain, Philippines, Malta, many States of the USA and many countries in Asia and the Middle East.
- Are same sex couples covered?
- What types of relationships are covered? eg. common law marriages, cohabitants, de facto relationships.
- What is the definition. Comparing Australia and New Zealand, the factors to be considered as to whether a de facto relationship exists under s 2D of the PRA are the same as under s 4AA of the FLA. But there is still a significant distinction between the two countries. Under s 2E of the PRA the relationship must normally be for 3 years to create property rights, whereas under the FLA the relationship must normally be for 2 years.

## 11. Superannuation and pensions

If Australian superannuation is to be split, an Australian order or financial agreement is required and there are technical requirements which must be met. If orders are made overseas with respect to non-superannuation property, an Australian order or agreement will also be required to effect any split. It is generally easier and more straight-forward to use a superannuation agreement so the parties do not have to satisfy the court that the split is just and equitable under s 79 or s 90SM of the FLA.

## 12. References

- “Property Settlements Involving International Issues” Seminar Paper, 8 March 2018, John Spender, Kennedy Partners
- “Australian Treaties and International Agreements” Jacky Campbell, Introduction to International Law, IAFL Sydney, February 2019
- Chambers Practice Guides – Family Law 2024 [www.practiceguides.chambers.com](http://www.practiceguides.chambers.com)
- “Family Global Guide”, James Stewart, Thomson Reuters (“The Blue Book”) (This book was not used in the preparation of this paper)
- “Jurisdiction to Make Parenting Orders in Australia – The Impact of the 1996 Hague Convention” Amanda Humphreys, Australian Family Lawyer, August 2021, Volume 30/2

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# Hong Kong

WHAT IS HOT IN JURISDICTION & FORUM ISSUES IN CROSS-BORDER DISPUTES?

1



Jaerey Velasco  
Partner  
Payne Velasco

Hong Kong

2

## Establishing Jurisdiction in Hong Kong

Domicile

Habitually  
Resident for 3  
years

Substantial  
Connection

3

Test:

A) whether the party concerned  
has a connection with Hong Kong;

B) whether the connection is  
substantial

Substantial  
Connection  
in Hong Kong

4

## Factors the Court Considers:



5

## Case Law: *ZC v CN* [2014] 5 HKLRD 43



6

## Case Law: *JQ v CLH* [2022] 2 HKLRD 632



7

## Case Comparison

### *ZC v CN* [2014] 5 HKLRD 43

- No Actual Physical Presence in HK
- No Matrimonial Life in HK
- Economic Presence – not enough

### *JQ v CLH* [2022] 2 HKLRD 632

- HK home base of his finances and business
- Economic Presence ensured generous provision for the benefit of the family
- Maintained long-term 'economic and social' presence

8

## Forum Conveniens

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9

## Appropriate Forum

---

Is there another available forum, having competent jurisdiction, which is the appropriate forum to hear the action?

Question of fact.

10

## Juridical Advantage

---

Will the Petitioner be deprived of a legitimate personal or juridical advantage if the case is tried in a forum that is not Hong Kong?

Delays?

Fair trial?

No access to  
justice?

11

## Balancing Exercise

---

What are the advantages of the more appropriate forum vs. the disadvantages of the original forum?

12

## The principle of Forum Conveniens in action: Two Recent Cases

***YMLI v LTYS (also known as LSTY/ LST) [2025] HKFC 151***

Hong Kong Court had jurisdiction, and England Court was not shown to be clearly or distinctly more appropriate

***KCLM v GW [2026] HKFC 13***

Hong Kong Court had jurisdiction **but** proceedings were stayed in favour of the Beijing Court

13

## Challenges to Jurisdiction

Lack of Statutory Jurisdiction

Forum Non Conveniens and Submission to Jurisdiction

Concurrent Proceedings Overseas: Anti-Suit Injunctive Relief

Recognition of Overseas Divorce

14

# Cross-Border Disputes

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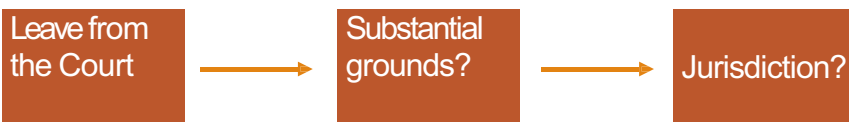
What if you are already divorced  
in another jurisdiction?

15

## Applications under Part IIA of the Matrimonial Proceedings and Property Ordinance

---

Under Part IIA, parties can apply for financial relief after an overseas divorce



16

## Cv H (Foreign Decree: Part IIA) [2012] HKFLR 199

---

The first leave application under Part IIA of the MPPO

Set the basis for how Hong Kong courts handle divorces where the divorce decree was obtained in a foreign jurisdiction, particularly when significant assets are situated within Hong Kong.

17

## Options for Recognising and Enforcing Foreign Judgments and Orders

---

1. Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap 188)
2. Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319)
3. Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (Cap 639)

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## **SYMPOSIUM 19 MAY 2026 (SESSION 3:00-4:45 PM)**

### **JURISDICTION AND FORUM ISSUES IN CROSS BORDER DISPUTES.**

**PRESENTATION BY ANIL MALHOTRA SENIOR ADVOCATE (KC)**

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## **INTRODUCTION**

A multifaceted diverse socio-cultural religion based society, with statutorily enacted personal laws, comprising of 1.4 billion Indians cohabit in 29 States and 8 Union Territories over 3.28 million kilometres. For its 35.42 million Indian diaspora domiciled in over 200 countries, global family law issues often pose a huge dilemma for resolution by Family Courts in a backdrop of outmoded codified domestic family laws. Regardless, all Indian Courts perform herculean exercises to adjudicate these issues for resolution. Jurisdiction is a vexed question. Overseas domicile, foreign nationality, residence abroad or permanent living status outside India does not displace personal (Hindu) law which has extraterritorial application. A jurisdictional crisis erupts with no resolution. Forum shopping is rampant and even anti-injunction suits do not deter parties from parallel Family law litigation in two different jurisdiction simultaneously.

Divorce of Hindu religious personal law marriages is legally permissible only by Indian Family Courts on fault grounds or by mutual consent. If dissolved abroad on no fault principle creates limping marriages as such Foreign Court divorce decrees are not

recognised in Indian law. It is a challenging agenda needing resolution. A fresh repeat divorce process by mutual consent becomes essential to validate the dissolution of marriage on Indian soil. Only then issues of maintenance, alimony, domestic violence, matrimonial cruelty and custody of children assumes finality in India.

India is not a signatory to the Hague Convention on Civil Aspect of International Child Abduction 1980. However, the Government of India has ratified the Convention of the Rights of the Child (CRC). Hence, all the beneficial provisions and general principles of Care and Protection of Children have been incorporated in the Indian Juvenile Justice (Care and Protection of Children) Act, 2015 (JJA) to define and secure “*the best interest of the child*”.

For resolving Interparental Child Custody disputes, by a unique constitutional remedy Superior Indian Constitutional Courts issue a writ of Habeas Corpus to determine the “*best interest of the child*” as an extraordinary measure. However, it is a purely discretionary exercise of jurisdiction by the High Court/Supreme Court & results vary on a case to case basis with no consistent precedent. This summary method is recommended to be the best possible option to be exercised expeditiously by a left behind parent in a foreign jurisdiction who is armed with a Foreign Court Order and seeks its implementation in India.

Children split across borders find solace in “*parens patriae*” jurisdiction of superior Constitutional Courts in the best interest and welfare of children. This finds a unique definition in the JJA to state it “*as the fundamental basis for any decision to ensure the child’s basic rights, identity, social well-being & holistic physical, emotional & intellectual development.*” For me, as a practitioner & Secretary of International Child Relocation Committee of IAFL, this concept finds immense favour in the Indian jurisdiction to balance child rights for the lack of a mirror order jurisprudence.

## **JURISDICTION & FORUM ISSUES IN INDIAN MARITAL CROSS-BORDER DISPUTES.**

### **INDIAN MARRIAGE LAW**

Marriages solemnised under codified personal law of two parties professing Hindu religion in India, require only a mandatory religious ceremony under Hindu Marriage Act, 1955 (HMA). Registration of Hindu marriages in India is optional & not mandatory or compulsory. Alternatively parties in India (Hindu/Non-Hindu), can solemnise a Civil marriage under the Special Marriage Act, 1954 (SMA), *dehors* religious ceremonies. If desired, even a ceremonial marriage solemnised under HMA can be additionally registered under the SMA.

### **APPLICATION**

If parties are Hindus by religion and they profess Hinduism, Hindu Marriage Act (HMA) i.e. their personal law is applicable to them even whilst they are residing in any country abroad, as also regardless of their nationality or current domicile/residence in any foreign jurisdiction. Hindu Law is applicable to Hindus irrespective of their current nationality, overseas residence or temporary domicile in any other foreign country. HMA is a personal law applicable to all Hindus irrespective of their present place of stay in a foreign jurisdiction. HMA has extra territorial application and applies to Hindus living outside India. There is no mandatory requirement under HMA that HMA applies only to Hindus who are living in India. Thus, those who are Hindus by religion and profess Hinduism, will be governed by Hindu Law irrespective of their present nationality or current domicile.

### **EXTRA TERRITORIAL EFFECTS**

- HMA has extra-territorial application, as it applies to Hindus domiciled outside India. It applies to Hindus irrespective of any foreign nationality or residence. Domicile does not bar maintainability of a petition under HMA in India. No statutory bar of jurisdiction is imposed by HMA to maintainability of petitions for divorce by non-resident Hindus under HMA filed in accordance with Section 19 HMA determining jurisdiction. No such adjudication is possible to reject a divorce petition as a

preliminary objection without filing reply on merits, issues being framed on pleadings of parties and evidence being led by respective persons concerned.

- HMA, as a personal law governing Hindus, applies to Hindus even when they are residing in foreign jurisdictions. The applicability of HMA is not confined to Hindus residing within the territorial boundaries of India; rather, it extends to Hindus domiciled outside India. This extra-territorial application underscores that HMA governs all Hindus irrespective of their place of residence, provided they are adherents of the Hindu religion. No stipulation within HMA limits its applicability solely to Hindus living within India. Consequently, Hindus by religion, are bound by the provisions of Hindu law as codified in HMA, irrespective of their current nationality or residence abroad.

## **DISSOLUTION UNDER HINDU LAW**

- A Hindu marriage solemnised under HMA, in or outside India and irrespective of current domicile of Hindus outside India, can be dissolved only under HMA i.e. personal law applicable to Hindus and under which they were married in India. Marriages solemnised under HMA can only be dissolved under HMA. However, under HMA, Hindus have the option of seeking contested divorce proceedings under Section 13 HMA on fault grounds set down in Section 13 HMA, for which either spouse can initiate divorce proceedings in India. No advance intimation, consent or prior notice is required to be given for seeking divorce on fault-based grounds.

- Hindus have also the option of arriving at a mutual settlement for divorce by mutual consent under HMA by presenting a joint petition to the District Court in terms of the provisions of HMA. A written mutual settlement can be placed before the District Court in India to record their terms of mutual consent of divorce in India. Such petition is to be presented jointly by both the Hindus by mutual consent.

- All decrees and orders made by the District Court in India under HMA shall be enforced as decrees and orders passed by the District Court in exercise of its original civil jurisdiction for being enforced in India.

- Any pendency or initiation, prior or subsequent of any divorce proceedings in any foreign jurisdiction whatsoever to dissolve a Hindu marriage solemnised in India would have no effect on or in any independent divorce proceedings initiated or pending in India under HMA. Only a court of competent jurisdiction under HMA in India will separately adjudicate the divorce petition regardless of any prior or subsequent petition in any foreign jurisdiction. Further, any decree of divorce passed by any Court in any foreign jurisdiction on the ground of irretrievable breakdown of marriage to dissolve a Hindu marriage solemnised in India under HMA, will not be valid or recognised in India as this ground is not available statutory ground for divorce under Hindu law, because of which such foreign court decrees are not recognised under Section 13 of The Indian Code of Civil Procedure (CPC).

## **JURISDICTION OF INDIAN COURTS**

- In a matrimonial dispute in a petition before the Indian Courts, the domicile is to be determined on the basis of when and where Hindus tied the nuptial knot under the Hindu Marriage Act and not on the subsequent date when an application is made in Court for matrimonial reliefs. Therefore, if Hindus were domiciled in India on the date of their marriage, the jurisdiction of the Indian Court cannot be taken away if after marriage a Non-Resident Indian (NRI) spouse has acquired a foreign domicile.
- Merely because a person has acquired citizenship of some other country does not necessarily mean that he has abandoned the domicile of India which is the domicile of his origin. An Indian by retaining his domicile in India may acquire citizenship of some other foreign country.
- The Indian domicile of origin is not displaced as a result of the acquisition of a foreign domicile of choice. The domicile of Indian origin remains in the background ever ready to revive and fasten the moment the foreign domicile of choice is abandoned by Non Resident Indian.

## **OBJECTIONS ON JURISDICTION OF INDIAN COURTS**

- Acquiring permanent residency in foreign territories does not equate to acquiring permanent domicile, which is a crucial factor in determining jurisdiction under HMA. As a general principle, it can be stated that absence of a matrimonial home in a foreign territory, coupled with lack of cohabitation between Hindus in that jurisdiction, will further reinforce conclusion that their permanent domicile remains in India. Consequently, domicile cannot serve as a basis to exclude the jurisdiction of Indian courts under HMA, particularly when it explicitly mandates its application to Hindus domiciled outside India, as per Section 1(2) HMA. In addition, HMA does not impose any statutory bar on maintainability of petitions filed by non-resident Hindus seeking divorce under HMA. Jurisdictional provisions of HMA, particularly Section 19, dictate that petitions for divorce may be filed in District Courts within local limits where marriage was solemnized, where respondent resides, or where Hindus last resided together.

### **KEY CONCLUSIONS**

- Absence of any statutory prohibition within HMA against petitions filed by non-resident Hindus affirms that such petitions are maintainable. Any objections to jurisdiction on the grounds of domicile should not be summarily adjudicated without the proper legal process, including the framing of issues and the presentation of evidence by the Hindu parties. A spouse's attempt to challenge jurisdiction of Indian Courts without it having framed any issues, is procedurally premature and cannot be resolved as a preliminary legal objection.
- Furthermore, matters of matrimonial cruelty and differences between parties are factual issues that must be examined on their merits within the framework of HMA. Competence of HMA as governing legislation provides appropriate forum in India for adjudicating such matters. Any spouse concerned by appearing before Indian Courts and seeking time to file a written statement on merits, has effectively submitted to jurisdiction of Indian courts. This conduct legally estops a spouse from subsequently contesting court's jurisdiction without addressing merits of case. Unconditional appearance of a spouse before a Family Court on multiple occasions further solidifies spouses acquiescence to court's authority.

- If marriage has been performed in accordance with Hindu religious rites and ceremonies, it can be registered with Registrar of Marriages. If marriage is solemnized and registered under HMA, any dissolution of marriage must also occur under same law, regardless of Hindu parties domicile outside India. Under HMA, Hindus have the option to seek a contested divorce under Section 13 on fault-based grounds or to pursue a mutual consent divorce by filing a joint petition under Section 13-B. These provisions allow either spouse to initiate divorce proceedings in India without the need for prior notice or consent from the other party. The law also permits the Hindu parties to present a written mutual settlement to the District/Family Court in India for recording terms of their mutual consent divorce. Furthermore, any decrees or orders issued by District/Family Courts in India under HMA are enforceable in same manner as those issued by courts in its original civil jurisdiction. This ensures that legal decisions made by Indian courts in matrimonial matters are fully executable within the country.
- Any ongoing or future divorce proceedings initiated in foreign territories to dissolve a Hindu marriage solemnized in India will not impact independent proceedings initiated or pending in India under HMA. Jurisdiction of Indian courts under HMA remains intact, and any foreign divorce decrees based on grounds not recognized under Hindu law, such as irretrievable breakdown of marriage, will not be valid or recognized in India. This is in accordance with Section 13 of Indian Code of Civil Procedure (CPC), which governs recognition of foreign judgments in India. Parties if Hindus by religion are governed by HMA in matters concerning their marriage and divorce. HMA, as their law, applies to them regardless of their current domicile in foreign territories, underscoring its extra-territorial application.
- Section 21 of HMA, which applies provisions of CPC to proceedings under HMA, divorce petitions in Family Courts in India will be fully maintainable. Section 9 of CPC further reinforces statutory jurisdiction of Family Courts in India to adjudicate divorce petitions involving Hindus parties. There is no legal bar or deficiency in inherent jurisdiction of Indian Family Courts to do so.

# **JURISDICTION & FORUM ISSUES OF CUSTODY & GUARDIANSHIP OF CHILDREN.**

## **1. INTRODUCTION**

The ongoing efforts by the Committee on the Rights of the Child to draft General Comment No. 27 on children's rights to access to justice and effective remedies are particularly significant in the context of the UN Convention on the Rights of the Child (UNCRC) and India's legal framework for child welfare. As highlighted in the concept note for General Comment No. 27, access to justice is crucial in combating inequalities, challenging discriminatory practices, and restoring denied entitlements. This aligns with India's commitments under the UNCRC, which it ratified on December 11, 1992. The Convention has profoundly influenced the development of domestic legislation, most notably the Juvenile Justice (Care & Protection of Children) Act, 2015 (JJA).

The Committee's concept note underscores the need for States to establish accessible and effective complaint mechanisms, a goal that resonates with the objectives of India's child welfare laws. This submission examines how Indian courts have incorporated these principles in their rulings, particularly in cases involving the welfare of children, such as inter-parental child removal. These cases often illustrate the balance that courts must strike between protecting the best interests of the child and ensuring that legal safeguards and protections are upheld. States should take to implement the right of all children to access justice and effective remedies when their rights under the UNCRC are violated in the face of lack of child-friendly legal processes and the barriers to legal standing. India's legal system, while robust in many respects, often struggles with ensuring that children's rights are fully justiciable and that appropriate remedies are accessible. This submission also discusses how India's judiciary is gradually addressing these challenges, aligning its practices with international standards to better protect children's rights.

## **2. DISCUSSION ON PROVISIONS AND THEIR APPLICATION**

The Preamble of the JJA 2015 emphasizes the Act's purpose to consolidate and amend the law concerning children alleged and found to be in conflict with the law, and those in need of care and

protection. It highlights the importance of catering to the basic needs of such children through care, protection, development, treatment, and social reintegration. The Act adopts a child-friendly approach in adjudication and rehabilitation processes to ensure the best interests of children. The Preamble references constitutional provisions that confer powers and impose duties on the State to protect children's rights.

Specifically, it cites Article 15(3), which allows the State to make special provisions for children; Articles 39(e) and (f), which require the State to ensure that children are not abused and are given opportunities for healthy development; Article 45, which mandates free and compulsory education for children; and Article 47, which concerns raising the level of nutrition and standard of living for all citizens, including children. The Preamble references constitutional provisions that confer powers and impose duties on the State to protect children's rights. Specifically, it cites Article 15(3), which allows the State to make special provisions for children; Articles 39(e) and (f), which require the State to ensure that children are not abused and are given opportunities for healthy development; Article 45, which mandates free and compulsory education for children; and Article 47, which concerns raising the level of nutrition and standard of living for all citizens, including children. However, the implementation of such legislation often encounters significant obstacles.

One of the main challenges is the inconsistency in the application of laws across different jurisdictions in India. All Courts have the authority to interpret and enforce laws, but the outcomes can vary significantly depending on the case specifics and the court's interpretation. In cases involving cross-border child custody disputes where one parent seeks to retain a child in India against the wishes of the other parent residing abroad, Indian courts have had to balance domestic legal principles with international obligations under the CRC and other treaties like the Hague Convention on the Civil Aspects of International Child Abduction, which India has not ratified. By joining, this approach, of membership, can lead to decisions that favor the more dominant parent, rather than genuinely reflecting the best interests of the child. Such determinations in India can benefit the abducting parent, undermining the role of the court in the child's home country, which is better equipped to consider the child's long-

term interests. The Hague Convention's approach quickly restores the status quo and ensures that custody decisions are made by the appropriate court in the child's country of origin.

India's non-membership in The Hague Convention may also discourage foreign courts from allowing children to visit India, as there is no guarantee of the child's swift return. Conversely, joining the Convention could facilitate the return of children abducted from India to member countries. The Hague Convention provides a structured framework for resolving custody and contact issues across borders, preventing conflicting decisions from courts in different countries and ensuring that such matters are adjudicated in the best interest of the child by the authorities in the child's habitual residence.

### **3. BARRIERS TO ACCESSING JUSTICE**

This position of law is binding on all Courts in India under Article 141 of the Constitution which is law laid down by the Supreme Court binding on all courts in India. However, in respect of an older child/ children, best interest and welfare of child/ children will be the determining factor for an Indian Court to adjudicate custody disputes of children. If the child/ children are old enough to make an intelligible preference, the court may ascertain the wishes of the child/ children for making a decision. Superior earning capacity of a parent may however, not be an influencing factor in determining child/ children custody rights.

Several barriers prevent children from effectively accessing justice in India. Legal barriers include the complex and often slow judicial process, which can be particularly daunting for children and their guardians. The requirement for legal standing, the costs associated with legal representation, and the procedural complexities can all serve as significant deterrents. Moreover, there is often a lack of child-friendly judicial processes, which can further alienate children from the justice system.

### **4. SPECIFIC CHALLENGES IN CROSS-BORDER CASES**

India's legal system faces particular challenges in handling cases involving the cross-border movement of children, such as when a parent unlawfully retains a child in India. In such scenarios, the parent seeking the child's return may face significant legal and

practical obstacles. The Indian courts, while considering the best interests of the child, may sometimes be hesitant to enforce foreign court orders, particularly if they perceive such orders as conflicting with domestic law or the child's welfare. In such scenarios, the parent seeking the child's return may encounter substantial legal and practical obstacles. Indian courts, while prioritizing the best interests of the child, may be hesitant to enforce foreign court orders if they perceive these orders as conflicting with domestic law or the child's welfare. This approach can lead to prolonged legal battles and uncertainty for the parties involved. One of the primary legal remedies available to the parent seeking the child's return is to file a petition for habeas corpus. However, Indian courts do not always summarily return the child to the requesting parent. Instead, they exercise their *parens patriae* jurisdiction, which allows them to act in the best interests of the child, even if it means deviating from the foreign court's ruling.

For example, in the case of *Surya Vadanam v. State of Tamil Nadu*, the Supreme Court of India held that while the principle of comity of courts—respecting the judgments of foreign courts—should be considered, the welfare of the child remains paramount. The Court ruled that it would not automatically return the children to the UK, despite the father having obtained a custody order there. The Indian courts conducted an independent assessment of the children's welfare and determined that they should remain in India, highlighting the complex interplay between respecting foreign judgments and prioritizing the child's welfare. Similarly, in *Nithya Anand Raghavan v. State (NCT of Delhi)*, the Supreme Court of India reiterated that the welfare of the child is the paramount consideration and that a foreign court's order is not conclusive in determining the child's custody. In this case, despite a UK court granting custody to the father, the Indian Supreme Court decided that the child should stay in India with the mother, as it was in the best interest of the child. The Court emphasized that each case must be judged on its own facts, and the foreign court's order, while persuasive, is not binding.

Moreover, children from minority communities and those living in poverty often experience intersecting forms of discrimination. In *Madhu Kishwar & Ors. v. State of Bihar*, the Supreme Court

recognized the challenges faced by tribal women, who were doubly marginalized due to their gender and socio-economic status. While this case primarily dealt with land rights, it reflects the broader issue of intersectional discrimination, which also affects children's access to justice. Children from such backgrounds may face bias from law enforcement and judicial authorities, who may be less likely to take their cases seriously or to provide the necessary accommodations for them to participate fully in legal proceedings. The lack of accommodations for children with special needs is another critical issue. In cases involving children with disabilities, the legal system often fails to provide the necessary support, such as sign language interpreters or materials in accessible formats. This exclusion can prevent children from fully participating in their own cases, leading to outcomes that do not adequately reflect their best interests.

These cases illustrate the challenges faced in cross-border child custody disputes within India's legal framework. The courts often conduct a thorough investigation into the child's situation before making a decision, which can delay the return process and cause additional stress for all parties involved. Moreover, India's non-ratification of the Hague Convention on the Civil Aspects of International Child Abduction exacerbates these challenges. Without the Convention's framework, there is no streamlined process for the return of children wrongfully retained in India.

## **5. RECOMMENDATIONS FOR ENHANCING ACCESS TO JUSTICE**

Addressing the challenges faced by children in accessing justice in India requires a comprehensive and multi-faceted approach. Several strategies can be implemented to improve the situation.

### **5.1. CONSISTENT & UNIFORM APPLICATION OF CHILD RIGHTS LAWS**

One of the primary issues in the Indian legal system is the inconsistent application of child rights laws across different jurisdictions. To address this, it is crucial to establish a more uniform approach. Training for judges, law enforcement officials, and legal professionals on child rights and the specific needs of children in the justice system is essential. For instance, in *Sampurna Behura v. Union of India*, the Supreme Court of India highlighted the need for effective implementation of the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJA) across

all states. The Court directed state governments to ensure that juvenile justice boards and child welfare committees are constituted and functional, emphasizing the importance of uniform application of the law. This case underscores the need for consistent enforcement of child protection laws and the importance of specialized training for those involved in the juvenile justice system.

Establishing child-friendly courts and procedures is another crucial step. These courts, designed to be less intimidating and more supportive of children, can help ensure that children's voices are heard and that they are treated with sensitivity throughout the legal process. The Supreme Court's directives in *Sampurna Behura* also called for the establishment of child-friendly courts, recognizing the need for a justice system that is accessible and responsive to the needs of children.

## **5.2. ADDRESSING SOCIO-CULTURAL BARRIERS**

Socio-cultural barriers, including discrimination and exclusion, present significant challenges in ensuring that all children have equal access to justice. These barriers require a multi-faceted approach, including public awareness campaigns to educate communities about children's rights and the importance of protecting these rights.

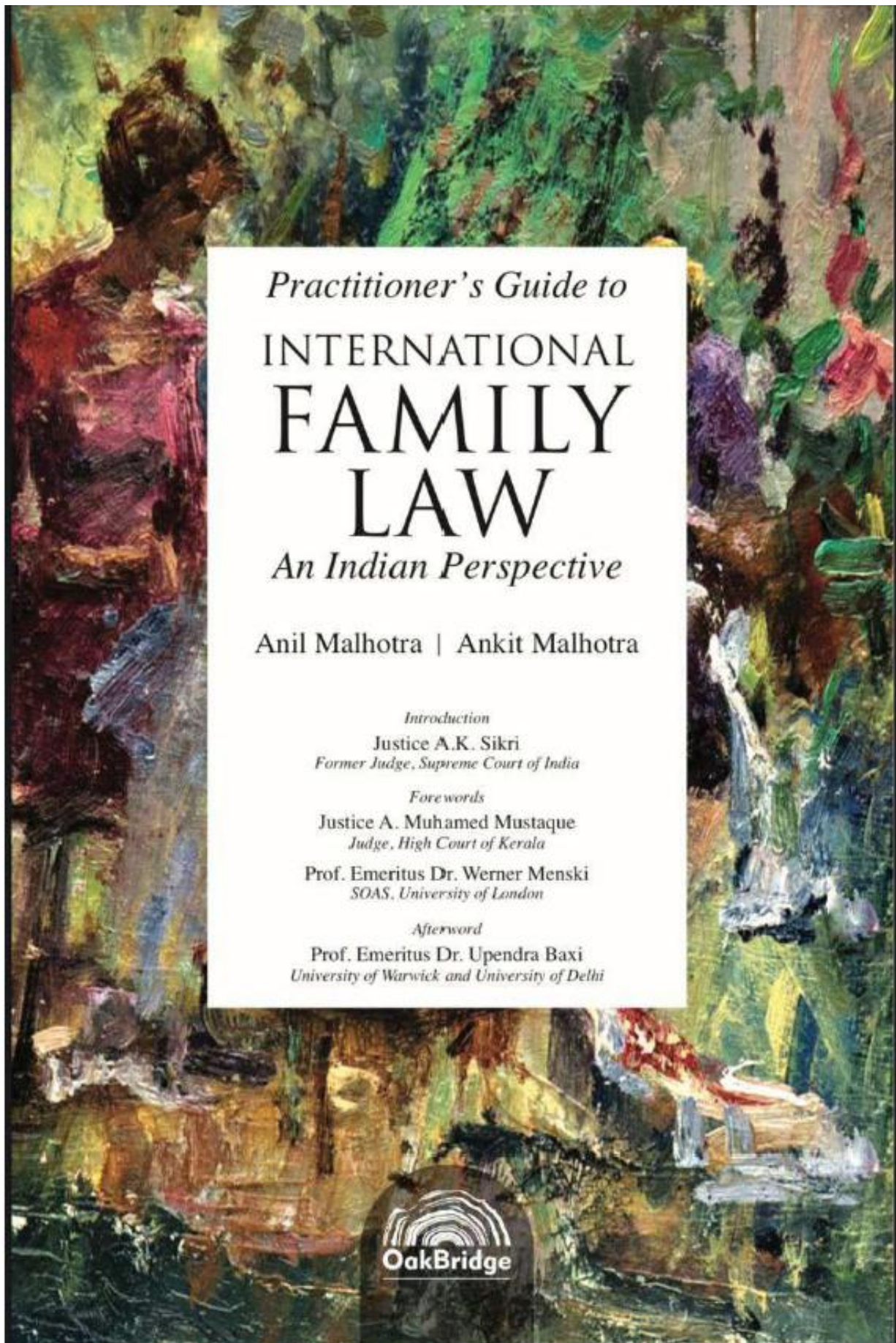
The Supreme Court's ruling in *Vishaka & Ors. v. State of Rajasthan*, is an example of how public awareness and education can play a role in addressing socio-cultural issues. While the case primarily dealt with sexual harassment in the workplace, the guidelines issued by the Court emphasized the need for awareness-raising and education to change societal attitudes. A similar approach can be taken to address socio-cultural barriers affecting children, with campaigns designed to inform communities about the rights of children and the importance of ensuring their protection. Efforts to reduce discrimination and exclusion must also be prioritized. In *Madhu Kishwar & Ors. v. State of Bihar*, the Supreme Court addressed the intersectional discrimination faced by tribal women, highlighting the need for legal reforms that take into account the unique challenges faced by marginalized groups. Applying this principle to children, it is essential to ensure that legal reforms and policies are inclusive and address the specific needs of children from marginalized

communities, including those with disabilities, from minority groups, or living in poverty.

## 6. CONCLUSION

In addressing the challenges faced by children in accessing justice in India, it is essential to recognize the multifaceted nature of the barriers that exist. From the inconsistent application of child rights laws across different jurisdictions to the significant socio-economic and practical barriers that many families encounter, the need for a more structured and unified approach is evident. Case law in India has demonstrated the judiciary's willingness to protect children's rights, as seen in landmark cases such as *Sampurna Behura v. Union of India* and *Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar*, but these efforts must be supported by systemic reforms. The establishment of child-friendly courts, enhanced legal aid services, and training for legal professionals on the specific needs of children are crucial steps in this direction. Furthermore, India's handling of cross-border child custody disputes, as highlighted in cases like *Surya Vadanam v. State of Tamil Nadu* and *V. Ravi Chandran v. Union of India*, underscore the need for a centralized authority to manage such cases & ensure compliance with international obligations. Ratifying international conventions such as the Hague Convention on Civil Aspects of International Child Abduction would provide a clear framework for resolving these disputes and protecting the best interests of the child.

Finally, addressing socio-cultural barriers through public awareness campaigns and efforts to reduce discrimination and exclusion is vital to ensuring that all children, regardless of their background, have equal access to justice. Strategic litigation, as seen in *Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors.*, can be a powerful tool in driving these necessary reforms. In conclusion, a coordinated effort involving legal reforms, capacity building, public education, and international cooperation is essential to enhance access to justice for children in India. The alignment of national efforts with the Committee's recommendations in General Comment No. 27 will ensure that all children in India are afforded the protection and support they deserve, ultimately contributing to the creation of a more just and equitable society.



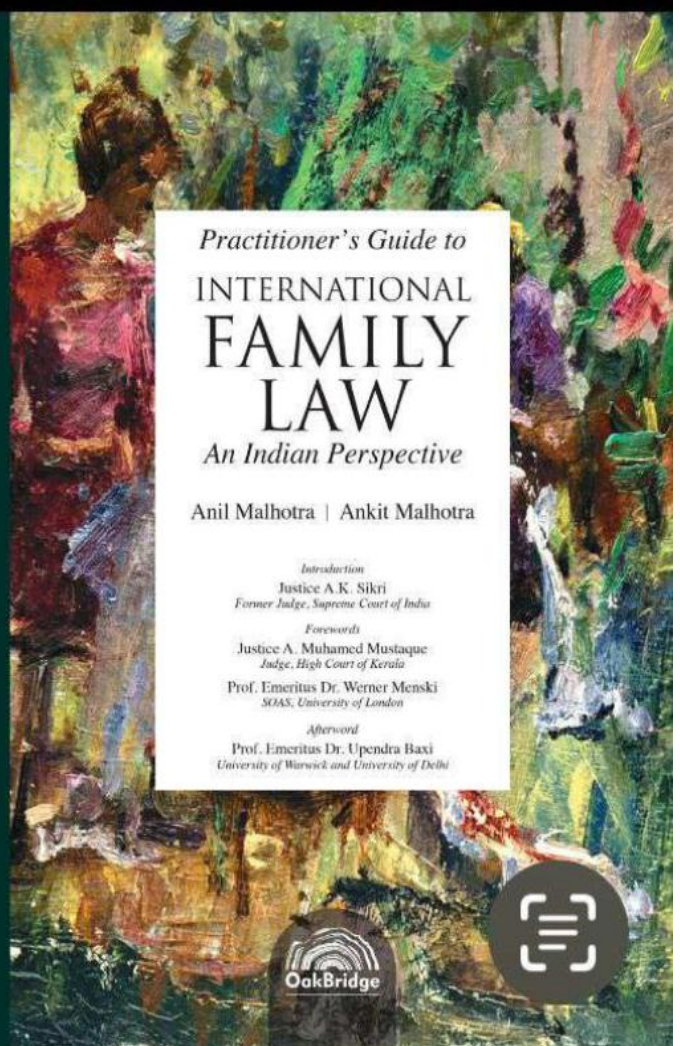
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Practitioner's Guide to  
INTERNATIONAL FAMILY LAW  
An Indian Perspective

Anil Malhotra  
Ankit Malhotra



# Practitioner's Guide to International Family Law An Indian Perspective



Advocate  
Anil Malhotra



Advocate  
Ankit Malhotra

*Practitioner's Guide to International Family Law: An Indian Perspective* is an authoritative and comprehensive resource that bridges the complexities of Indian family laws with the evolving challenges of international family law. Designed for practitioners, judges, academics, and students, the book addresses key issues such as cross-border marriage, divorce, child custody, maintenance, adoption, and the enforcement of foreign judgments and arbitral awards. It explores the interplay between Indian personal laws—covering Hindu, Muslim, Christian, Parsi, and secular legal frameworks like the Special Marriage Act—and international legal instruments, including the Hague Conventions and other bilateral treaties governing family law matters.

The book provides in-depth guidance on jurisdictional dilemmas, forum shopping, conflict of laws, and the recognition of foreign decrees under Indian law, highlighting critical provisions and contemporary case law. The book highlights significant judicial interpretations and landmark decisions, ensuring readers remain updated with the latest legal developments. Special emphasis is placed on procedural consistency, including uniform citations and updated provisions from the new legal codes such as the Bharatiya Nyaya Sanhita (BNS) and Bharatiya Sakshya Adhinyam (BSA). By bridging domestic family law with international instruments, treaties, and comparative case studies, the guide provides solutions to complex cross-border family disputes, in context of issues of jurisdiction, forum shopping, and recognition of foreign judgments. Further focus is given to cases involving non-resident Indians, expatriates, and cross-border families, offering clarity on topics such as habitual residence, domicile, and the enforcement of maintenance and custody orders abroad. It incorporates significant judicial decisions from Indian courts and international tribunals, presenting a comparative analysis of legal systems to equip readers with tools to address globalized family disputes effectively.

With its focus on harmonizing domestic and international legal principles, this guide also engages with contemporary challenges, including inter-country child abduction, international surrogacy agreements, and cross-border domestic violence. Written with procedural precision and supported by practical examples, updated citations, and legislative reforms, the book is a definitive tool for navigating international family law issues while considering India's unique legal and cultural contexts. It is an essential reading for those seeking to understand and resolve complex, multi-jurisdictional family law matters in an increasingly interconnected and legally pluralistic world.

## TOPICS COVERED IN THE BOOK

- ◆ Marriage, Divorce and Ancillary Reliefs
- ◆ Issues Related to Children: Welfare, Removal, Guardianship, and Adoption
- ◆ Maintenance, Alimony and Family Settlement
- ◆ Citizenship, Passport and Nationality Laws
- ◆ Laws Applicable in Goa, Daman and Diu
- ◆ Laws Applicable for Muslims in India
- ◆ Indian Laws of Domicile, Wills and Succession
- ◆ Remedies for Foreign Nationals
- ◆ Surrogacy in India: Status Quo

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**Honourable Mr. Justice Augustine George Masih, Judge, Supreme Court of India**

“... a most impressive work of scholarship which provides detailed and practical guidance on all aspects of family law in India... This book, ... provides a comprehensive guide to the practice of family law in India across a broad spectrum of topics and will be an invaluable guide for all those who work in or are involved in or need to understand any aspect of family law. I envisage this becoming the go-to book on Indian family law for international family lawyers in other jurisdictions.”

**The Right Honourable Lord Justice Andrew Moylan, Judge, British Court of Appeal of England and Wales, U.K.**

“... when I consider the extent of the task that Anil and Ankit Malhotra have undertaken in stating the International Law from the perspective of a jurisdiction so vast and so diverse as India. It is greatly to their credit that they have so evidently succeeded in their objective and I have no doubt that their labours will provide an essential tool for all in India and the lands of the Indian diaspora who practice in this increasingly important area of the law.”

**The Right Honourable Sir Matthew Thorpe KC, former Lord Justice of Appeal (England and Wales)**

“...an in-depth analysis of international family law from an Indian perspective, offering a comprehensive examination of how India's diverse legal framework intersects with global legal standards. As globalization continues to shape family dynamics, the ability of Indian courts to navigate cross-border disputes will remain critical. Through its exploration of key issues, from marriage and divorce to inheritance and custody, the book aims to provide both a legal and cultural understanding of the complexities of international family law in India.”

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**Mr. K.K. Venugopal, Senior Advocate and Former Attorney-General for India**

“...an indispensable resource addressing the evolving complexities of family law in a globalized world...”

... The book captures the essence of Justice V.R. Krishna Iyer's vision of justice in law and is poised to become an essential resource for courts, practitioners, scholars, and anyone navigating the challenges of family law across jurisdictions. It stands as a testament to the authors' dedication to advancing both the practice and understanding of international family law from an Indian perspective.”

**Honourable Justice A. Muhamed Mustaque, Judge, High Court of Kerala, Ernakulam**

“...a landmark contribution to the evolving landscape of Indian family law in a globalized world. The authors have crafted a work that is as indispensable as it is innovative, serving as a guiding light for practitioners, scholars, and policymakers who seek to navigate the intricacies of cross-border familial disputes. This text transcends mere legal analysis, presenting a nuanced understanding of how Indian family law intersects with international norms and practices...”

**Prof. Emeritus Dr. Upendra Baxi, University of Warwick and University of Delhi**

“...Given that more and more Indians have been moving abroad and then –mostly without fully realising it – taking their personal law with them, Indian family law has been gaining wider practical application worldwide. ...This book is an extremely useful hands-on practice guide. It will especially help to sensitise young practitioners to the need to know more about Indian family laws, in India itself as well as abroad, and it is warmly welcomed as a practice-focused asset.”

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**The Right Honourable Lord Diljit Rana, MBE, Baron of Malone, Member British Parliament, U.K.**



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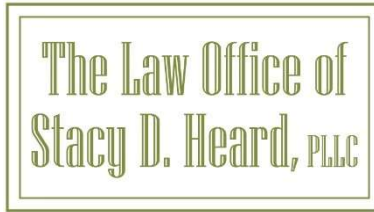
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## **Jurisdictional Frameworks in International Family Law: The Role of the UCCJEA in US Cases**

Navigating family law disputes involving international borders requires a clear understanding of which court has the authority to make binding decisions. In the United States, child custody jurisdiction is primarily governed by state law through a standardized act designed to prevent jurisdictional competition and "child snatching."

### **The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)**

The **UCCJEA** is a uniform state law adopted by 49 states, the District of Columbia, and the U.S. Virgin Islands. Its primary purpose is to ensure that custody litigation takes place in the state with the closest connection to the child.

#### **1. Home State Priority**

Under the UCCJEA, the "Home State" has exclusive priority to make an initial child custody determination.

- **Definition:** The state where the child lived with a parent for at least **six consecutive months** immediately before the commencement of the proceeding.
- **Exceptions:** If no state qualifies as the Home State, courts look to "Significant Connection" jurisdiction, assessing where substantial evidence regarding the child's care and personal relationships exists.

#### **2. Exclusive Continuing Jurisdiction (ECJ)**

Once a court has made a valid custody determination, that court retains **Exclusive Continuing Jurisdiction**. This means no other state (or often, country) can modify the order as long as:

- One of the parents or the child continues to reside in the issuing state.
- The issuing court determines it no longer has a significant connection with the child.

### 3. Temporary Emergency Jurisdiction

A court may take jurisdiction regardless of "Home State" status if the child is present in the state and has been abandoned or it is necessary to protect the child from mistreatment or abuse.

#### International Application of the UCCJEA

While the UCCJEA is a domestic state law, it contains specific provisions for international cases. **Section 105** of the Act mandates that U.S. courts treat a foreign country as if it were a state of the United States for the purposes of applying the jurisdictional rules.

- **Recognition of Foreign Decrees:** U.S. courts must generally recognize and enforce custody determinations made by foreign courts, provided the foreign court's jurisdictional laws were in substantial conformity with the UCCJEA.
- **Human Rights Exception:** A U.S. court may refuse to apply the UCCJEA to an international case if the child custody law of the foreign country violates fundamental principles of human rights.

#### Interaction with the Hague Convention

In international disputes, the UCCJEA often works in tandem with the **1980 Hague Convention on the Civil Aspects of International Child Abduction**.

Feature	UCCJEA	1980 Hague Convention
Scope	Determines which court has jurisdiction to decide custody.	Provides a mechanism for the return of a child wrongfully removed.
Focus	Best interests of the child and "Home State."	Restoration of the <i>status quo</i> and deterring forum shopping.
Enforcement	Provides procedures for registering and enforcing foreign orders.	Does not settle the underlying custody dispute; only the location of the trial.

## Key Challenges in International Jurisdiction

The complexity of these cases often arises from conflicting legal standards:

- **Habitual Residence vs. Home State:** The Hague Convention uses the concept of "Habitual Residence," which is a fact-intensive inquiry into where the child is "at home." This can sometimes conflict with the strict six-month rule of the UCCJEA.
- **Comity:** U.S. courts often apply the principle of *comity*, showing deference to foreign legal systems unless they are found to be fundamentally unfair.
- **Lis Pendens:** When cases are filed in two different countries simultaneously, the "first-in-time" rule (where the first court to properly exercise jurisdiction moves forward) is often applied to prevent inconsistent judgments.

## Conclusion

Effective representation in international family law requires a dual focus: strict adherence to the UCCJEA's statutory requirements at the state level and a broad understanding of international treaties like the Hague Convention. For practitioners and families, the goal remains consistent—ensuring that legal decisions are made in the forum most qualified to evaluate the welfare of the child.

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# WHAT IS **HOT** IN JURISDICTION & FORUM ISSUES IN CROSS BORDER DISPUTES? (MALAYSIAN PERSPECTIVE)

BY FOOYET NGO

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## JURISDICTION FOR DIVORCE

### Requirements:

- Marriage registered or deemed registered under the Law Reform (Marriage & Divorce) Act 1976 (“**LRA**”); **OR**
- Marriage contracted under a law providing for monogamous marriage; **AND**
- Parties domiciled in Malaysian when divorce petition filed (Note: wife’s domicile of dependence: follows that of the husband)

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## JURISDICTION FOR DIVORCE

### Additional jurisdiction for wife:-

- husband deserted her or deported from Malaysia and the husband was prior to the desertion/deportation, domiciled in Malaysia; **OR**
- wife ordinarily resident in Malaysia for two (2) years preceding the filing of the divorce.

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## FINANCIAL: PROPERTY DIVISION

- No bifurcation.
- Malaysian Court's power to order division contingent upon divorce being granted in Malaysia and power exercisable **ONLY** at time decree of divorce pronounced.
- Property division order final and conclusive.
- Court no power to make further division order or vary a division order.
- Malaysian court cannot make an order *in rem* for property in another jurisdiction. However, *orders in personam* can be explored.
- No provision in Malaysia to enforce a foreign division order *in rem*; must commence civil proceedings.

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## JURISDICTION FOR CHILD MATTERS

- Court has jurisdiction over Malaysian children; and
- Any foreign child in Malaysia when proceedings commenced - but its protection lasts as long as the child has the right to remain in Malaysia.
- Court plays the role of *parens patriae* (parent of the child).
- **Section 24(d) of the Courts of Judicature Act 1964** : jurisdiction over person and property of infants.

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## ORDERS RELATING TO CHILDREN

- **Paramount Consideration** in all child-related decisions is “**Welfare & Best Interest**” of the Child.
- This is the **overriding principle** applied in Malaysian courts.

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## ORDERS RELATING TO CHILDREN

### Foreign Child Orders

- No automatic recognition of foreign Orders involving a child- **Mahabir Prasad v Pusha Mahabir Prasad [1981] 2 MLJ 326**
- Order treated as evidence and not applied as of right.
- Malaysian Courts entitled to:-
  - Reject foreign orders
  - Reopen the matter and make a fresh determination
  - Always guided by welfare & best interest of the child

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## ORDERS RELATING TO CHILDREN

### International Parental Abduction

- Malaysia is NOT a party to the 1980 Hague Child Abduction Convention - No automatic return of child to country of habitual residence.

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## ORDERS RELATING TO CHILDREN

### International Parental Abduction

- Malaysia has a dual system in family law running parallel - **Civil** family law for non-Muslims AND **Syariah (Sharia)** family law for Muslims.
- This is the reason Malaysia has hesitation to accede to the Convention.
- From the Syariah law perspective;-
  - Compliance with Syariah law remains paramount even in child abduction cases.
  - Along with welfare and best interest of an abducted child, the religion of the child (i.e., Islam) must be part and parcel of that afforded protection, when deciding the return of an abducted child.

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## ORDERS RELATING TO CHILDREN

### International Parental Abduction

*Nedunchelian Balasubramaniam v. Kohila Shanmugam [1997] 4 CLJ 676*  
(Malaysian Court of Appeal)

- If **child a foreigner** (parent(s) foreigner and are only transient visitors to Malaysia with no right to lawfully remain in the country in the long term),
- Court will exercise discretion **to return the child to the child's country of habitual residence,**
- Court must be satisfied **no obvious, real or immediate harm would come to the child, if returned;**
- **No full inquiry into the custody dispute.**

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## ORDERS RELATING TO CHILDREN

### International Parental Abduction

Court also applied principle of forum non conveniens:-

- Country of habitual residence of child is forum with the most real and substantial connection, to make final decision re: custody.

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## CROSS BORDER DISPUTES

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## STAY: FORUM TEST

**Principles applicable in forum stay applications** where there are two (2) forums with jurisdiction over the matter:-

- Stay if “*there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.*”
- Word “conveniens” means suitability or appropriateness of the relevant jurisdiction and not one of convenience.
- Burden of proof on the defendant to satisfy the court the other forum is more appropriate.

See: Malaysian Supreme Court decision in ***American Express Berhad Ltd v Mohamed Taufic Al-Ozeir & Anor (1995) 1 MLJ 160*** endorsing the House of Lords decision in ***Spiliada Maritime Corporation v Cansulex Ltd (1987) A.C. 460*** (non-family matters)

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## FORUM TEST

In ***American Express***, our Supreme Court singled out:-

- whether it would be unjust to the Plaintiff to confine him to remedies elsewhere; and
- which is the forum with which the action has the most real and substantial connection.

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## FORUM TEST

- Spiliada principles also applicable in matrimonial disputes following English House of Lords case of ***De Dampierre v De Dampierre* [1988] 1 AC 92.**

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## FORUM TEST IN CHILD MATTERS

This doctrine of forum conveniens also applied in custody and parental abduction cases to return child to country where the case has the most real and substantial connection.

- In ***Herbert Thomas Small v. Elizabeth Mary Small (Kerajaan Malaysia & Anor, Interveners) [2006]*** 6 MLJ 372, parties were all Australian, daughter was brought to Malaysia and retained here by the father without the mother's consent.
- The mother had then initiated proceedings in Australia for the custody and return of the child.
- Mother's application in Malaysia followed the principles in ***Neduncheliyan*** and forum conveniens test.

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## ANTI-SUIT INJUNCTION

Malaysian Court has power to grant an anti-suit injunction to restrain a party from commencing proceedings (pre-emptive step) or continuing proceedings in a foreign jurisdiction.

See:

- Malaysian Court of Appeal case of ***Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd*** [2007] 3 CLJ 295
- Malaysian Court of Appeal in ***BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd*** [2000] 2 CLJ 197

\*(both non-family cases)

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## ANTI-SUIT INJUNCTION

**Three-stage test** for granting anti-suit injunction:-

- whether the foreign proceedings are **vexatious or oppressive**;
- whether the Malaysian Court or the foreign court is the **forum conveniens** to determine the dispute between the parties in fact whether the natural forum; and
- whether the **balance of justice** lies in favour of restraining the foreign proceedings, having regard to the interests of all parties and the interest of justice.

Burden on the applicant to prove the above.

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# RECENT FAMILY CASE: STAY & ANTI- SUIT

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## HAT V PAT [2025] 2 CLJ 571 & [2025] 3 CLJ 746

### Background

- Wife - Malaysian citizen, in Singapore on an employment pass (no PR) and staying with her 3 children (all three no longer minors).
- Husband - Malaysian citizen living in Malaysia for 16 years of 23 years of marriage, domiciled in Malaysia.
- Husband's business centered in Malaysia and even Singapore business and assets run from Malaysia.
- Assets in both jurisdictions.

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## HAT V PAT [2025] 2 CLJ 571 & [2025] 3 CLJ 746

### Proceedings filed

- Wife first filed for divorce in Singapore. Husband then filed for divorce in Malaysia.
- In Singapore: Husband sought stay of Singapore proceedings but stay dismissed by Singapore Court :-
  - Singapore judge placed greater weight and emphasis on the domicile of the Wife (unlike Malaysia, Singapore recognizes wife's separate domicile from husband) and the need to protect the best interest of the children.
  - Concluded - Singapore was the more natural and appropriate forum for the resolution of the divorce.

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### In Singapore:

- Wife filed an anti suit injunction application against Husband to restrain Malaysian proceedings.
- Anti-suit application dismissed by Singapore Judge on the basis that:-
  - No indication Malaysian case bound to fail.
  - Parties and their children all Malaysian citizens and Husband domiciled in Malaysia. He is fully within his rights to file for divorce in Malaysia.
  - Judge not persuaded by Wife's allegation that timing and circumstances of the Husband's filing were sufficient to raise a finding of bad faith.

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- Husband domiciled in Malaysia with business interests - legitimate reasons for him to exercise his preference to litigate in Malaysia and file fresh divorce proceedings in Malaysia – cannot be seen as vexatious or oppressive.
- Given the proximity of the jurisdictions and the parties' resources, both proceedings being at infant stages, the multiplicity of proceedings do not prejudice the Wife, she can advance her case in other jurisdiction, i.e. Malaysia.

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In Malaysian proceedings:

- Wife filed for stay of Malaysian proceedings.
- Malaysian High Court dismissed Wife's stay :-
  - Malaysia has the most real and substantial connection and the natural forum.
  - Both Malaysian citizens with Husband and his businesses deeply rooted here.
  - All documents and witnesses here.
  - Majority of assets in Malaysia or even if not here, managed and run out of Malaysia.
  - Husband's income here and hence enforcement of maintenance here.

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Husband filed for Anti-Suit:

- Granted by Malaysian High Court.
- Held - Singapore proceedings vexatious and oppressive in that Singapore adopts bifurcated approach - dissolution of marriage addressed first and property division and financial matters determined in subsequent proceedings.
- Once Singapore decree of divorce pronounced, Malaysian proceedings dead in water as Malaysian court no longer has any power to make any orders for asset division (Malaysian courts power to divide assets contingent on divorce being pronounced in Malaysia court)
- Anti-suit necessary as the ends of justice require it, otherwise prejudice to Husband.

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## HAT V PAT

- Malaysian Court of Appeal allowed Wife's appeal holding Malaysian court bound by comity as regards the findings of the Singapore court being the appropriate forum and need to protect best interest of the children.

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