FOLEY'S LIST

ANTI SUIT INJUNCTIONS

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Introduction

1. There are many families who hold more than one citizenship or foreign citizenship and permanent residence in Australia. They may have lived outside of Australia for a substantial part of their relationship, one or both of the parties and the children may have been born overseas. Parties may hold substantial assets both inside and outside Australia.

2. The law in the event of a marriage or relationship breakdown differs around the world. After separation, where the parties are no longer both living in Australia, it may be more convenient for each of them to deal with their family law dispute in the country where they are residing, but this would see them involved in two court proceedings about the same issues. A party may believe that they will achieve a better outcome in a particular jurisdiction and prefer to have their case heard in Australia, or in another country depending upon the circumstances.

3. The Federal Circuit and Family Court of Australia ("the FCFCOA") may, in some circumstances, be able to restrain a party from continuing with proceedings in state courts, however the focus of this paper is on managing concurrent proceedings in Australia and the court of a foreign country.

Purpose of Anti-suit Injunctions

4. An anti-suit injunction is a court order that restrains a party from initiating or continuing legal proceedings in another jurisdiction. In family law, these injunctions serve to prevent a party from pursuing divorce, parenting, or

property proceedings in a foreign court, when an Australian court already has jurisdiction over the matter.

Relationship Between Anti-Suit Injunctions and Stay Orders

5. Anti-suit injunctions and stay orders both enable the courts to manage competing jurisdictions, but they serve different purposes:

    a. **Anti-Suit Injunctions** prevent a party from initiating or continuing proceedings in a foreign jurisdiction;

    b. **Stay Orders** a stay order temporarily halts proceedings in Australia, allowing proceedings in another jurisdiction to take precedence. For example, if a party initiates proceedings in Australia while parallel proceedings are already underway in a foreign court, an Australian court might issue a stay to allow the foreign court to resolve the matter.

6. The power to grant a stay arises from the general powers in s 45(1) of the *Family Law Act 1975* (Cth) ("the Act") and is an aspect of the inherent or implied power of every court *"... to prevent its own processes being used to bring about injustice"*[1].

7. In *Kent & Kent* (2017) FLC ¶93-792 the Full Court held at [27]:

    "[27]It was contended by each of the parties below that the husband's application for a stay needed to be determined prior to a consideration of the competing claims for an anti-suit injunction. That approach is in accordance with principle; the power to grant an anti-suit injunction "should not be exercised without the court concerned first considering whether its own proceedings should be stayed".

[1] *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 391

[28]It was, and is, not in contention that, emerging from decisions of the High Court, the test for determining whether the Family Court should permanently stay proceedings before it, is whether it is a "clearly inappropriate forum."

Is the Australian Court Clearly the Inappropriate Forum

8. In *Voth & Manildra Flour Mills Pty Ltd* [1990] HCA 55; (1990) 171 CLR 538 ("*Voth*") the High Court of Australia held a party who has properly instituted proceedings in Australia has a *prima facie* right to have those proceedings determined by an Australian court, unless the Australian court is a "*clearly inappropriate forum*".

9. When a dispute arises about whether a foreign court or an Australian court is the appropriate forum to determine a dispute between parties, the Australian court should remain seized of the proceedings, unless it is satisfied it is a clearly inappropriate forum. Conversely, if the court is a clearly inappropriate forum, it should stay its own proceedings and yield the controversy to the alternative jurisdiction.

10. In *Henry v Henry* [1996] HCA 51; (1996) FLC 92-685, 576 (*"Henry"*) the High Court adopted the test, previously enunciated by the High Court in *Voth,* for family law proceedings. A court is clearly an inappropriate forum "*if continuation of the proceedings in that court would be oppressive, in the sense of 'seriously and unfairly burdensome, prejudicial or damaging', or vexatious, in the sense of productive of serious and unjustified trouble and harassment*".

11. In *Henry* at 565, the plurality set out a non-exhaustive list of considerations relevant to a stay of proceedings and emphasised that *"the question of whether Australia is a clearly inappropriate forum... is one that depends on the general circumstances of the case, taking into account the true nature and full extent of the issues involved*".

12. In *Yeo & Huy (No 2)* [2012] FamCA 541 at [35], Murphy J summarised the *Henry* considerations as follows:

    a. Whether each court will recognise the others orders and decrees;

    b. Which forum can provide more effectively for complete resolution of the matters involved in the parties controversy;

    c. The order in which the proceedings were instituted;

    d. The stage at which the proceedings have been reached;

    e. The cost that has been incurred by the parties;

    f. The connection with the parties and their marriage with each of the jurisdictions; and

    g. The resources of the parties and their understanding of language and enabling the parties to participate in respective proceedings on an equal footing.

Anti-suit Injunctions are made "*In Personam*"

13. Anti suit injunctions are made *in personam* and not *in rem*. They are not directed to the court in the foreign jurisdiction, but to a party.

Anti-suit Injunctions in Parenting Matters

14. In *ZP v PS* [1994] HCA 29; (1994) 181 CLR 639, the High Court determined that when a child is brought to Australia and a dispute over the child's custody falls within the jurisdiction of the Act, the doctrine of *forum non conveniens* has no application to the dispute. Nothing subsequently said by

the High Court in *Henry v Henry* [1996] HCA 51; (1996) 185 CLR 571 about the *forum non conveniens* test impinges upon the principles developed in *ZP v PS*.

15. As stated in *ZP v PS*, the child's best interests are the paramount consideration.

16. In *Pascarl & Oxley* (2013) FLC ¶93-536 the Full Court held *"where an application is made under provisions of the Act which prescribe the best interests test, whether or not a child is within the jurisdiction, then it is that test, and not the test of forum conveniens, which will apply"*.

Can Anti-Suit Injunctions be made against a Third Party?

17. In *Hunt v Hunt & Lederer & Ors (2006) 208 FLR 1; (2006) 36 Fam LR 64* the wife sought orders under ss 106B and 90AE(2)(a) of the Act against her husband and 3 third party respondents. The wife's application was opposed by the respondents on the basis that the court had no jurisdiction to make the orders, as the provisions relied on are unconstitutional and that there was no reasonable likelihood of success. The primary judge dismissed the objections to jurisdiction. On appeal, the Full Court upheld the primary judge's decision. However, the validity of s 90AE powers were not challenged on appeal. The appellate decision upheld the primary judges' decision to grant an anti-suit injunction against third party companies under the court's inherent jurisdiction and in equity.

Some Recent Cases

18. In *Sweeney & Burniss [2024] FedCFamC1A 145* (12 September 2024) the Full Court dismissed an appeal from a decision at first instance by Carew J: *Sweeney & Burniss [2023] FedCFamC1F 1032* (5 December 2023). At first

instance the court held that Australia was clearly an inappropriate forum and permanently stayed the Australian proceedings.

19. *Bajek & Bajek [2024] FedCFamC1F 466* was a first instance decision of Austin J. Parenting proceedings were pending in Australia and other country. The mother and children were living in another country, the father sought a determination of parenting issues in the FCFCOA. The court found that the parenting proceedings should be heard in Australia.

20. *Mittelman & Eilerts [2024] FedCFamC1F 115* (5 March 2024), Williams J granted an anti-suit injunction to restrain the husband from proceeding with his proceedings in another country.