

## JURISDICTION IN INTERNATIONAL FAMILY LITIGATION: A CRITICAL ANALYSIS

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### I INTRODUCTION

The 20<sup>th</sup> century saw a tremendous increase in the volume and frequency of international trade, commerce and transport, and a corresponding decrease in the cost of international communication and travel. As a consequence, individuals are now much more likely to travel, study and work abroad, and in the course of doing so, to form personal relationships, marry, acquire property and have children. When these relationships break down, a range of difficult issues must be addressed and resolved. The first of these issues, in the order in which transnational family disputes are addressed in litigation, is determining the venue for trial. Many writers, especially in England, acknowledge that jurisdiction is the most important issue in international litigation.<sup>1</sup> There is a substantial body of evidence which demonstrates that it is very unlikely that litigation will proceed beyond jurisdictional challenges.<sup>2</sup> It is somewhat surprising then that jurisdiction

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1 Adrian Briggs, *The Conflict of Laws* (2002) v; Peter North, 'Private International Law: Change or Decay?' (2001) 50 *International and Comparative Law Quarterly* 477, 499–500; James Fawcett, 'The Interrelationships of Jurisdiction and Choice of Law in Private International Law' [1991] *Current Legal Problems* 39, 39.

2 Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (2003) 14–19; Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments* (2<sup>nd</sup> ed, 1997) 194 fn 36; David Robertson, 'Forum non Conveniens in America and England: "A Rather Fantastic Fiction"' (1987) 103 *Law Quarterly Review* 398, 418–20; *The Al Battani* [1993] 2 Lloyd's Rep 219, 221; *Spiliada Maritime Corporation v Cansulex* [1987] AC 460, 468–9.

in international family litigation has attracted little attention in Australia.<sup>3</sup> This article addresses this deficit.

In Australian law, two issues must be addressed in determining jurisdiction. The first is whether the court is jurisdictionally competent. This is determined according to the municipal rules of the forum, which outline the extent of the court's authority. I refer to this as establishing jurisdiction. The second issue is whether the court will in its discretion decline to exercise its jurisdiction. I refer to this issue as declining jurisdiction. In Part II of this article, I critically outline the rules on establishing the courts' jurisdiction in family matters. These rules permit Australian courts to take jurisdiction in an unjustifiably broad range of cases. In Part III, I explain and criticise the principles applied to determine whether the court might decline to exercise its jurisdiction. The most important of these in international family litigation is the principle of *forum non conveniens*. This principle gives the courts a broad and largely unconfined discretion. This lack of certainty makes it difficult to predict how the principle will be applied in practice. Part IV explains the relationship between jurisdiction and choice of law in international family problems. Jurisdictional rules in international family disputes are effectively required to fulfil the function normally performed by choice of law rules, and this is another reason why reform to the principles of jurisdiction is necessary. In Part V, reforms to the principles on establishing and declining jurisdiction are suggested. Part VI is a conclusion.

In this article, I critically evaluate the principles of jurisdiction which are applied in resolving international family disputes where the care for and welfare

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3 The Australian texts on family law give very little attention to this topic. Most only briefly address the extent of jurisdiction under the *Family Law Act 1975* (Cth): see, eg, Anthony Dickey, *Family Law* (4<sup>th</sup> ed, 2002) 263–4; Patrick Parkinson and Juliet Behrens, *Australian Family Law in Context: Commentary and Materials* (3<sup>rd</sup> ed, 2003) 432; Tom Altobelli, *Family Law in Australia – Principles and Practice* (2003) 72–3. Few consider the issue of declining jurisdiction, although see Anthony Dickey, *Family Law* (4<sup>th</sup> ed, 2002) 57–8. The standard texts on conflict of laws generally address jurisdiction in family disputes briefly, although the discussion of jurisdiction is entirely descriptive: See Peter Nygh and Martin Davies, *The Conflict of Laws in Australia* (7<sup>th</sup> ed, 2002) 477–8, 503–4, 510; Michael Tilbury, Gary Davis and Brian Opeskin, *Conflict of Laws in Australia* (2002) 654–8. There are very few articles addressing jurisdiction in international family law particularly. The exceptions of which I am aware are Peter Nygh, 'Voth in the Family Court: *Forum Conveniens* in Property and Custody Litigation' (1993) 7 *Australian Journal of Family Law* 260 and Peter Nygh, 'Voth in the Family Court Revisited: The High Court Pronounces *Forum Conveniens* and *Lis Alibi Pendens*' (1996) 10 *Australian Journal of Family Law* 163.

of children are not directly in issue. Issues directly concerning children raise complex and distinct issues which are beyond the scope of this article.<sup>4</sup>

## II ESTABLISHING JURISDICTION IN INTERNATIONAL FAMILY LITIGATION

The grounds of Australian courts' jurisdiction in family matters are exhaustively set out in the *Family Law Act 1975* (Cth). Under the Act, the court's jurisdiction is established if, and only if, either party to the litigation has one of the specified personal connections to Australia.<sup>5</sup> The relevant time for ascertaining the existence of particular connections is the time at which the relevant application was filed in the court.<sup>6</sup>

There are some differences between the personal connecting factors which suffice to establish jurisdiction in the different types of applications which may be brought in the family jurisdiction. For all applications, if either party is a citizen of Australia at the time of filing the application, this suffices to ground jurisdiction.<sup>7</sup> Citizenship indicates a strong formal and often unique connection between an individual and a state, and is an important connecting factor between individuals and states in public international law and political theory. It is, however, infrequently applied in international litigation.

Ordinary residence of either party at the time the application was filed is also a ground of jurisdiction in all cases,<sup>8</sup> but if the application is for dissolution of marriage, that party must have been ordinarily resident for one year immediately preceding the date on which the application was made.<sup>9</sup> Ordinary residence

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4 The court's jurisdiction in family disputes involving children is established using similar principles to those applicable when the dispute does not involve issues of the care and welfare of children – that is, the court's jurisdiction is dependent upon the existence of a personal connection between the forum and one of the parties, or another interested person (in cases involving children, for example, the personal connections of the children are relevant): see *Family Law Act 1975* (Cth) s 69E(1). However, the principles applicable in determining whether the court should decline to exercise its jurisdiction may be quite different. In *ZP v PS* (1994) 181 CLR 639, the High Court held, referring to the provisions of the *Family Law Act* prior to the 1995 amendments, that the paramouncy principle was applicable and that the usual rule of *forum non conveniens* should not be applied: at 651. In *B and B (Re Jurisdiction)* (2003) 31 Fam LR 7, the Full Court of the Family Court of Australia held that, following the 1995 amendments to the *Family Law Act 1975* (Cth), the paramouncy principle did not govern, but that the 'ordinary' *forum non conveniens* principle applied: at 15. However, they also held that the best interests of the child were a relevant factor in determining whether the court was clearly inappropriate and thought that it 'may, in many situations, be the most important matter': at 17. It is a matter of debate therefore whether *B and B (Re Jurisdiction)* has substantively changed the relevant test. Entirely different considerations apply in the case of international child abduction: see *Family Law (Child Abduction Convention) Regulations 1986* (Cth), made pursuant to *Family Law Act 1975* (Cth) s 111B.

5 The fact that the applicant's connections to the forum may be used to establish the court's jurisdiction significantly distinguishes family litigation from other types of civil litigation, in which it is only the defendant's connections which suffice to establish the court's jurisdiction. See text accompanying n 42.

6 *Family Law Act 1975* (Cth) ss 39(3), (4), (4A).

7 *Family Law Act 1975* (Cth) s 39(3)(a) (dissolution), ss 39(4)(a), (b) (other matrimonial causes).

8 *Family Law Act 1975* (Cth) s 39(3) (dissolution), s 39(4) (other matrimonial causes).

9 *Family Law Act 1975* (Cth) s 39(3)(c).

‘refers to a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of long or short duration.’<sup>10</sup> Residence usually indicates a unique connection to a legal system<sup>11</sup> and an actual physical presence.<sup>12</sup>

In applications for dissolution, domicile also suffices to establish jurisdiction.<sup>13</sup> Domicile is a technical term which refers to a person’s legal home.<sup>14</sup> Broadly speaking, it is established by proof of actual residence and an intention to make one’s home indefinitely in a particular country.<sup>15</sup> It denotes a very strong personal connection and was historically the most commonly used connecting factor in international litigation. It is the only jurisdictional ground for family matters at common law.

In applications for all matrimonial causes other than dissolution,<sup>16</sup> mere presence of either party in Australia at the time of initiating proceedings is also a ground of jurisdiction.<sup>17</sup> Although it has been very widely criticised, presence of the defendant at the time of service is the main ground of jurisdiction at common law in other areas of civil law.<sup>18</sup>

To summarise, in applications for dissolution, the court is competent where, at the time of filing the application, either party is an Australian citizen or domiciliary, or is an Australian ordinary resident of one year’s standing. In all other applications, the court is competent if, at the time of filing the application, either party is an Australian citizen or domiciliary, or is present within Australia. Unless one of these requirements is satisfied, the court lacks jurisdiction to deal with any application.<sup>19</sup> Thus, the parties cannot submit to the jurisdiction of the Family Court.

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10 *Shah & Akbarali v Brent London Borough Council* [1983] 2 AC 309, 343; applied *Re Vassis*; *Ex parte Leung* (1986) 64 ALR 407, 413–4 and *In the Marriage of Woodhead* (1997) 23 Fam LR 559, 563–4.

11 *Re Taylor*; *Ex parte Natwest Australia Bank Ltd* (1992) 37 FCR 194; Peter Stone, ‘The Concept of Habitual Residence in Private International Law’ (2000) 29 *Anglo-American Law Review* 342, 348–9.

12 *Adams v Cape Industries Plc* [1990] Ch 433, 515.

13 *Family Law Act 1975* (Cth) s 39(3)(b). It is not clear why domicile is not included as a jurisdictional ground for other matrimonial causes.

14 For a comprehensive explanation of domicile as it applies in private international law generally, see Nygh and Davies, above n 3, 248–62.

15 *Domicile Act 1982* (Cth) s 10.

16 ‘Matrimonial cause’ is fully defined in the *Family Law Act 1975* (Cth) s 4.

17 *Family Law Act 1975* (Cth) s 39(4) (matrimonial causes aside from applications for dissolution). Presumably, presence is not included as a sufficient connecting factor in relation to dissolution with a view to preventing resort to Australia by forum shoppers looking for a divorce (a sort of Nevada of the Pacific).

18 See, eg, Albert A Ehrenzweig, ‘The Transient Rule of Personal Jurisdiction: The “Power” Myth and *Forum Conveniens*’ (1956) 65 *Yale Law Journal* 289. It is expressly excluded as a permissible basis of jurisdiction in the European Community Regulation which governs the allocation of jurisdiction and recognition of judgments within the European Community in civil and commercial matters (not including family disputes): *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [2001] OJ L 12/1 art 3 (this regulation is commonly referred to as the ‘Brussels I Regulation’).

19 *In the Marriage of Woodhead* (1997) 23 Fam LR 559.

## A The Suitability of the Personal Connecting Factors as Foundations of Jurisdiction

Citizenship of either party is a superficially attractive basis of jurisdiction, as it indicates membership of the forum community. It could be argued that membership of the community should justify that individual's entitlement to access, and subjection to the process of, that community's legal system. However, because it is a formal status, citizenship does not necessarily denote a real connection between an individual and a state. More significantly, the formal status of citizenship of one party to the marriage at a time when the marriage has broken down may not indicate an actual connection between the subject of the controversy (the parties' relationship) and the forum, particularly in international cases. This is demonstrated in the leading case of *Henry v Henry*.<sup>20</sup> Although the applicant in this case was at all times an Australian citizen, Brennan J found that the parties' marriage had 'no connection' to Australia,<sup>21</sup> and the High Court unanimously held that Australia was a clearly inappropriate forum for resolution of the dispute. Citizenship is likely to be an unsatisfactory basis of jurisdiction if this is the only connection that either party, or their relationship, has to Australia.

Domicile, which is the basis of jurisdiction in family disputes at common law, has become increasingly irrelevant in private international law.<sup>22</sup> Lord Scarman stated that the rules for ascertaining domicile 'impose great difficulties of proof' and that determining a person's domicile was therefore 'frequently very expensive'.<sup>23</sup> Leaving this difficulty aside, the local domicile of either party may be justified as a connecting factor as it indicates an intentional association with the forum, and it may also indicate a substantial connection to that forum. Membership of the Australian community might be inferred from domicile, which would justify permitting the applicant to access the Australian courts, and subjecting the respondent to the Australian courts' processes. However, domicile is also an unsatisfactory basis of jurisdiction because the domicile of one party at the time of commencing proceedings may well be marginally relevant to the circumstances of the relationship considered more globally. For example, in *Ferrier-Watson v McElrath*, the Full Court of the Family Court found that the applicant was domiciled in Australia,<sup>24</sup> and therefore that the Court was jurisdictionally competent. However, the majority of the Court found that 'the wife is intimately connected to the Fijian jurisdiction and the husband has many connections with it. The parties married in Fiji and spent their marital years there'<sup>25</sup> and therefore they declined to exercise jurisdiction. This case, like *Henry v Henry*, shows that a global consideration of the parties' relationship, and its connection to the potential forums at the times relevant to the controversy, are very important to the court's decision as to whether it will exercise jurisdiction.

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20 (1996) 185 CLR 571. In this case, the main issue in dispute between the parties was whether the Court should in its discretion decline to exercise jurisdiction. It is fully discussed below, in Part III.

21 Ibid 580.

22 Edward I Sykes and Michael C Pryles, *Australian Private International Law* (3<sup>rd</sup> ed, 1991) 346.

23 *Shah & Akbarali v Brent London Borough Council* [1983] 2 AC 309, 345.

24 (2000) 26 Fam LR 169, 190–1 (Holden and Jerrard JJ), 172 (Finn J agreeing on this point).

25 Ibid 195.

Ordinary residence is a preferable basis of jurisdiction to citizenship and domicile, in that it is more likely to indicate a real and substantial connection between the forum and at least one of the parties. It arguably represents the most practically significant connection between individuals and states, and the fact that it requires proof only of a short-term intention to remain within a particular jurisdiction means it is more responsive than domicile to the conditions of modern life.<sup>26</sup> According to Stone, '[h]abitual residence may fairly be regarded as having eclipsed domicile, so as to become the most important personal connection of an individual used by English private international law.'<sup>27</sup> It could be argued that Australian residents, who are liable to Australian taxation on the basis of their residence, have a particularly good claim to access the courts which are indirectly funded through revenues raised by Australian taxation.<sup>28</sup>

Like citizenship and domicile, ordinary residence is a flawed basis of jurisdiction in that it requires only a personal connection of either party at the time of commencing proceedings. This is not necessarily a good indication that the court is a suitable forum for resolution of a dispute in which the ordinary residence of one party is hardly a centrally important factor. If ordinary residence is relied on as the basis of jurisdiction in an application for dissolution, it is necessary to show that the relevant individual has been ordinarily resident for a year prior to the application being filed. This limitation is the most worthwhile aspect of the jurisdictional provisions, as it shows a reasonably substantial connection, at least at the time proceedings are commenced.

Presence is a highly problematic ground of jurisdiction because it indicates only a very weak connection. Jurisdiction invoked solely on the basis of a party's presence is very likely to be subsequently stayed on the ground of *forum non conveniens*.<sup>29</sup> In other civil cases, the presence of the defendant at the time of service suffices to establish the court's jurisdiction. While this rule has been widely criticised as an inadequate justification for asserting jurisdiction, it has recently been affirmed by the High Court,<sup>30</sup> and is still regarded by some judges as the most legitimate basis of jurisdiction.<sup>31</sup> With respect, it is an unsatisfactory basis of jurisdiction, and it is possible and desirable to develop more accurate and less wasteful jurisdictional grounds. The strongest justification for the defendant's presence as a ground of jurisdiction in other civil cases is that it is simpler for the plaintiff to ascertain and prove than the other personal

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26 Ordinary residence is commonly used as a jurisdictional factor in other legislation: see, eg, *Bankruptcy Act 1966* (Cth) s 43(1)(b)(i); *Income Tax Assessment Act 1997* (Cth) s 6.5(2). Habitual residence, which is functionally equivalent to ordinary residence (it is treated as actually equivalent in the *Family Law Act 1975* (Cth) s 4(1)), is very commonly used in international conventions.

27 Stone, above n 11, 342.

28 See the comments of Mason P of the NSW Court of Appeal to this effect in *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20, 43.

29 *Spiliada Maritime Corporation v Cansulex* [1987] AC 460, 477 (Lord Goff). See also Ehrenzweig, above n 18, 312.

30 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 517.

31 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559; *Regie Nationales des Usines Renault SA v Zhang* (2002) 210 CLR 491, 527.

connections.<sup>32</sup> This is likely to lead to savings of both private and public costs associated with litigation. However, given the close relationship between the parties in family disputes, difficulties of ascertaining and proving personal connections are less likely than in other civil cases.

In family litigation, jurisdiction in all cases other than applications for dissolution may be asserted on the basis of the mere presence of the applicant at the time of filing the application. This rule permits an individual who has no substantial connection to Australia to commence proceedings in Australia. The only possible justifications for this rule are promoting general access to the Family Court and promoting the interests of local lawyers. There is little evidence that the former is regarded as an important objective of jurisdictional principles in international family litigation. The latter should be given little, if any, weight.

In short, none of the jurisdictional grounds in the *Family Law Act* are satisfactory. The rules on establishing jurisdiction are insufficiently focused on the substance of the disputes to which they relate, and it is likely that they will permit the applicant to invoke an Australian court's jurisdiction in cases where the court is unsuitable, relative to other forums. The court will then be required to stay proceedings which are properly brought. This lack of consistency between the applicable legal principles undermines the certainty and predictability of the law, creates confusion for litigants and their legal advisors, and creates significant public and private costs.

## B Recognition of Foreign Decrees

The principles which establish the forum court's jurisdiction and the principles regulating the recognition of foreign judgments are indirectly related. One of the main preconditions to the recognition of foreign judgments is that the jurisdiction of the foreign court must be recognised according to the forum's rules of 'international jurisdiction'.<sup>33</sup> The *Family Law Act* contains specific provisions which determine whether the foreign court's jurisdictional competency should be recognised for decrees of dissolution, annulment and legal separation.<sup>34</sup> It is ironic that these provisions, contained in the same piece of legislation, require substantially stronger connections in order to justify recognition of foreign decrees than those which are required to justify the Australian courts' jurisdiction.

Although these provisions also apply the connections of domicile, citizenship and residence, they appropriately distinguish the situation of applicants and respondents. Those provisions impose additional requirements if the citizenship or ordinary residence of the applicant is relied on as demonstrating the foreign court's jurisdiction.<sup>35</sup> If the applicant's ordinary residence is relied on as the

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32 *Perrett v Robinson* [1985] 1 Qd R 83, 89.

33 For a detailed discussion of recognition of foreign judgments both under statute and at common law, see Nygh and Davies, above n 3, 479–89.

34 *Family Law Act 1975* (Cth) pt XII.

35 *Family Law Act 1975* (Cth) s 104(3).

foundation of jurisdiction, it must be shown that the applicant was ordinarily resident for one year at the date proceedings were commenced, or that the place in which the applicant was ordinarily resident was the last place in which the parties cohabited.<sup>36</sup> If the applicant's citizenship is relied on, additional requirements of ordinary residence<sup>37</sup> or presence together with unavailability of relief in another forum<sup>38</sup> apply. Notably, presence *simpliciter* of either party is not recognised as a permissible ground of international jurisdiction.

The jurisdictional rules for recognition of foreign decrees are better than the primary jurisdictional rules in this respect, and should be taken into account in developing reforms to the jurisdictional rules in international family law. It is surely undesirable that the local court is permitted to take jurisdiction in circumstances in which it would refuse to recognise the jurisdiction of a foreign court.

### C Establishing Jurisdiction in Other Civil Cases

The rules establishing the courts' jurisdiction in international family matters differ from the rules applicable in other civil cases. Although those rules are also defective,<sup>39</sup> they should be taken into account in the improvement of jurisdictional rules in the family jurisdiction. The rules applicable in other civil disputes are superior to the rules in family disputes in two important respects. First, most of the rules in non-family disputes are based on specific, rather than general, jurisdiction.<sup>40</sup> Specific jurisdiction requires a connection between the subject matter of the dispute and the forum, whereas general jurisdiction requires only a personal connection between a party and the forum which may well be irrelevant to the substance of the parties' dispute.<sup>41</sup> Specific jurisdiction is more likely to indicate that the court is an appropriate one to determine the dispute than general jurisdiction is. Family litigation involves disputes arising from relationships which are often lengthy. In such cases, basing jurisdiction on the

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36 *Family Law Act 1975* (Cth) s 104(3)(b).

37 *Family Law Act 1975* (Cth) s 104(3)(e): the applicant must have been ordinarily resident at the time proceedings were commenced, or must have been ordinarily resident for a continuous period of one year where that one year falls at least partly within the two years prior to the commencement of proceedings.

38 If relief is unavailable in the legal system in which the parties last cohabited, the applicant's citizenship of the foreign forum together with presence at the date of commencing proceedings suffice.

39 A detailed discussion of these defects is beyond the scope of this article, but essentially they permit the plaintiff to invoke the courts' jurisdiction in an unjustifiably broad range of cases.

40 In other civil cases, the main common law default rule bases jurisdiction on service of process, which is only permitted if the defendant is present at the time of service: *Laurie v Carroll* (1958) 98 CLR 310. In practice, this rule is seldom relied on as most defendants in international litigation are not present within the forum. It is common for jurisdiction to be invoked on the basis of jurisdictional grounds provided in the rules of court which permit service out of the jurisdiction. Almost all of the rules of court exemplify specific jurisdiction – that is, they require some connection between the relevant aspects of the particular controversy and the forum. For example, service out of the jurisdiction is permitted in tort cases if the tort occurred within the forum: see, eg, *Federal Court Rules 1979* (Cth) O 8, r 1(ac); *High Court Rules 1952* (Cth) O 10, r 1(g); *Supreme Court Rules 1970* (NSW) pt 10, r 1A(1)(d).

41 The distinction between general and specific jurisdiction was first explicitly drawn by Arthur T von Mehren and Donald T Trautman, 'Jurisdiction to Adjudicate: A Suggested Analysis' (1966) 79 *Harvard Law Review* 1121, 1136ff.



connection of a single party to the litigation, determined at the time of commencing proceedings, is likely to lead to jurisdiction being invoked in inappropriate cases. This is aptly demonstrated in the cases of *Henry v Henry* and *Ferrier-Watson v McElrath*.

Second, in other civil cases, it is only the personal connections of the defendant which are sufficient to ground jurisdiction;<sup>42</sup> whereas, in family cases, the personal connections of either party suffice. Permitting jurisdiction to be established on the basis of a connection between the applicant and the forum is highly questionable, particularly when the connection need only exist at the time that litigation is commenced. It facilitates forum shopping, which is generally derided in Australia by courts and commentators.<sup>43</sup> As noted above, the provisions of the *Family Law Act* which govern the recognition of foreign decrees restrict recognition of orders granted on the basis of a jurisdictional connection between the applicant and the foreign forum, in order to ensure that there is a reasonably substantial connection between the forum and the parties.<sup>44</sup>

### D Establishing Jurisdiction – Conclusion

The grounds of jurisdiction in family disputes are too broad. They only require proof of a personal connection between one party to the litigation to the forum at the time proceedings are commenced. Those connections have very little to do with the parties' marital relationship and its incidents which are the subject of the dispute. Permitting jurisdiction to be established on the basis of factually limited connections, such as either party's presence at the time of commencing proceedings, or connections which may well demonstrate no actual connection between one party and the forum, such as citizenship, is likely to mean that the court is jurisdictionally competent in cases where it is not an appropriate forum.

Given the width of the rules on establishing jurisdiction in family matters, it may be expected that the court will stay proceedings in a relatively high proportion of cases to correct this problem. This issue is discussed in detail in the following part.

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42 At common law, jurisdiction is based on service, which at common law can only be effected within the territory of the forum and therefore the defendant's presence at the time of service is the main jurisdictional ground: *Laurie v Carroll* (1958) 98 CLR 310, 323. Under the rules of court, service out of the jurisdiction is permitted if the defendant is domiciled or resident in the forum: see, eg, *Federal Court Rules 1979* (Cth) O 8, r 1(e), *High Court Rules 1952* (Cth) O 10, r 1(1)(c), *Supreme Court Rules 1970* (NSW) pt 10, r 1A(1)(g).

43 Most charges of forum shopping occur in personal injuries cases: see, eg, *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 552–3, 570–1; *Stevens v Head* (1993) 176 CLR 433, 452, 462. Commentators critical of forum shopping include Michael Pryles, 'Judicial Darkness on the Oceanic Sun' (1988) 62 *Australian Law Journal* 774 and Brian Opeskin, 'The Price of Forum Shopping: A Reply to Professor Juenger' (1994) 16 *Sydney Law Review* 14.

44 The European Community's Regulation governing jurisdiction in family matters imposes similar limitations: *Council Regulation (EC) No 1347/2000 of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses* [2000] OJ L 160/19, art 1(a).

### III DECLINING JURISDICTION IN INTERNATIONAL FAMILY CASES

In Australia, as in other common law legal systems, the courts are not bound to exercise jurisdiction when they are competent, but have a discretion to decline to exercise jurisdiction. There are three issues that should be considered in determining whether the court will decline to exercise jurisdiction. The first is that mandatory forum rules might require the court to retain or decline to exercise its jurisdiction, without regard to any other factor.<sup>45</sup> There are no mandatory forum rules which clearly have this effect in international family disputes not involving children.<sup>46</sup> The second issue is that, in commercial disputes, the courts, in principle, generally give effect to the parties' bilateral agreements as to forum. This factor has not been explored in the international family law context in Australia.<sup>47</sup> If the issue of declining jurisdiction is not determined by the application of mandatory forum rules or the parties' choice of forum, the default rule which applies is the common law principle of *forum non conveniens*, which is the focus of the discussion in this section.

The Australian principle of *forum non conveniens* provides that the court may decline to exercise its jurisdiction if the respondent establishes that the court is a clearly inappropriate forum for the resolution of the dispute.<sup>48</sup> The High Court in *Henry v Henry* treated the normal principle of *forum non conveniens* as applicable in family law proceedings where the care of children is not in issue.<sup>49</sup> In Australia, the discretion to decline to exercise jurisdiction is based on the

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45 An example of a mandatory rule which requires Australian courts to retain jurisdiction is the *Carriage of Goods by Sea Act 1991* (Cth) s 11. An example of a mandatory rule which requires Australian courts to decline to exercise jurisdiction is the *International Arbitration Act 1974* (Cth) s 7.

46 The only possibly mandatory rule which would affect the court's decision as to whether it should retain or decline jurisdiction is the *Moçambique* rule, which provides that the court lacks jurisdiction over some kinds of foreign immovables, especially foreign land and some kinds of intellectual property: *British South Africa Co v Companhia de Moçambique* [1893] AC 602. This rule probably does not limit the jurisdiction of the Australian courts in international family disputes: *Family Law Act 1975* (Cth) s 31(2). In international child abduction cases, the court is obliged to decline to exercise its jurisdiction in favour of the jurisdiction of the court in which the child was habitually resident at the time of wrongful abduction or retention: *Family Law (Child Abduction Convention) Regulations* (Cth) reg 16(1)(a). This is a good illustration of a mandatory jurisdictional rule, in the sense used here.

47 The parties cannot submit to the jurisdiction of the Family Court unless the Court would have jurisdiction under the *Family Law Act 1975* (Cth): *In the Marriage of Woodhead* (1997) 23 Fam LR 559. This indicates that autonomy is a less significant value in international family disputes than in international commercial disputes, in which the parties' unilateral and bilateral submissions to jurisdiction should normally be upheld.

48 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 247–8; affirmed and applied in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 564–5; *Henry v Henry* (1996) 185 CLR 571, 587; *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 390–1 and *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 596. The Australian principle of *forum non conveniens* is different to the English principle of the same name, which requires the respondent to show that there is another available forum for the resolution of the parties' dispute which is a more appropriate forum: *Spiliada Maritime Corporation v Cansulex* [1987] AC 460. This principle has been applied in England to family disputes: *de Dampierre v de Dampierre* [1988] AC 92.

49 *Henry v Henry* (1996) 185 CLR 571, 577 (Brennan CJ). The majority did not specifically address this issue but they did apply the normal rules applicable to a stay: at 587, 591.

responsibility of courts to prevent abuse of their processes. The respondent must show that continuance of proceedings within the forum would be oppressive (in the sense of being ‘seriously and unfairly burdensome, prejudicial or damaging’) and vexatious (in the sense of being ‘productive of serious and unjustified trouble and harassment’) to them.<sup>50</sup> This is achieved by establishing to the court, on the balance of probabilities, that it is a clearly inappropriate forum.<sup>51</sup> In deciding whether the court is clearly inappropriate, the court may have regard to factors connecting the dispute to the forum, including the parties’ places of residence, factors of convenience and expense to the parties (essentially, location of evidence), the governing law, and the existence of any legitimate advantage to the applicant of proceeding within the forum.<sup>52</sup> The only case in which the High Court has attempted to tailor the connecting factors to the specific area of law in question is *Henry v Henry*.<sup>53</sup>

The majority in *Voth v Manildra Flour Mills Pty Ltd* (‘*Voth*’) stressed that the decision whether to stay proceedings on the ground of *forum non conveniens* is a discretionary one and, in particular, stated that, ‘ordinarily’ the judge need not give detailed reasons for his or her decision.<sup>54</sup> This advice has been followed in many cases. Consequently, it is difficult in such cases, including the leading High Court ones, to discern which of the factors is particularly relevant to the court’s decision whether or not to stay proceedings, and why. It is therefore difficult to predict with any certainty how the court will apply this principle in any particular case.

There is some confusion in the High Court cases about whether the Australian *forum non conveniens* principle entails or permits a comparative consideration of the relative merits of foreign forums. In *Voth*, the majority emphasised that the test focuses on whether the local court is clearly inappropriate rather than a comparative evaluation of the merits of litigation in the local and foreign courts.<sup>55</sup> In *Henry v Henry*, the majority clearly envisaged that the inquiry was comparative.<sup>56</sup> The majority in *Regie Nationale des Usines Renault SA v Zhang* (‘*Renault v Zhang*’) recently stressed that the inquiry is not a comparative one.<sup>57</sup>

## A Parallel Litigation and Declining Jurisdiction

It is characteristic of international litigation that in almost all cases there are at least two forums available for the hearing and resolution of the dispute. In some cases, parallel proceedings have been commenced in more than one forum, and

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50 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 247.

51 *Ibid* 248.

52 These factors were identified by Lord Goff in *Spiliada Maritime Corporation v Cansulex* [1987] AC 460, 478; and approved as relevant to the Australian principle by Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 251. This statement was later confirmed by majorities of the High Court in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 564–5; and *Henry v Henry* (1996) 185 CLR 571, 587.

53 (1996) 185 CLR 571, 592–3. See below, Part IIIA.

54 *Voth* (1990) 171 CLR 538, 565.

55 *Ibid* 559.

56 (1996) 185 CLR 571, 592–3.

57 *Renault v Zhang* (2002) 210 CLR 491, 520–1.

this issue requires specific consideration in determining whether local proceedings should be stayed. In *Henry v Henry*, the applicant husband sought dissolution of his marriage to the respondent and orders as to distribution of property. At the time proceedings were initiated in Australia, related proceedings were already on foot in Monaco. The High Court held that the existence of parallel proceedings in relation to the same issue gives rise to a prima facie presumption that the proceedings which were commenced second in time are vexatious and oppressive, and therefore that they ought to be stayed.<sup>58</sup>

This factor should not solely determine whether the local court is clearly inappropriate, but is ‘highly relevant’ in that determination.<sup>59</sup> The majority identified a non-exhaustive list of factors which should ‘properly’ be taken into account in determining whether the local court is clearly inappropriate in a dispute arising from a matrimonial relationship.<sup>60</sup> All of the factors require a comparative evaluation of litigation in the forum and in the foreign court, which is incompatible with the fundamental basis of the *forum non conveniens* principle.<sup>61</sup> The majority recognised this in a footnote,<sup>62</sup> but did not explain why they introduced comparative factors. One might argue that the factors listed are of general relevance in determining stay applications in international family disputes, as most factors are not specifically limited to cases of parallel litigation. This list of factors therefore appears to have added some flesh to the bare bones of the general principle of *forum non conveniens*. In *Renault v Zhang*, an international tort dispute involving a claim for damages for personal injuries, the majority reaffirmed that the relevant inquiry in determining whether the local court is clearly inappropriate is not a comparative one.<sup>63</sup> They did not refer to *Henry v Henry*. Following the majority’s emphatic statement in *Renault v Zhang*, it is subject to some doubt whether it is permissible to conduct a comparative evaluation, even in family proceedings where there are parallel proceedings on foot in another forum. I argue that these factors should certainly be taken into account in reforming the principles applied in all cases of declining jurisdiction.

The specific factors to which the majority referred as being relevant to litigation between spouses ‘with respect to their marital relationship’ were:<sup>64</sup>

- (a) Whether the orders of each court would be recognised in the other jurisdiction. This factor is not in principle relevant only to parallel litigation cases. The general approach to this issue is that the applicant assumes the risk that orders made in her or his favour might not be

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58 *Henry v Henry* (1996) 185 CLR 571, 591.

59 *Ibid* 590–1.

60 *Ibid* 592.

61 This point was made forcefully by Brennan CJ: *ibid* 581.

62 *Ibid* 592 fn 68, which states: ‘Note, however, the statement in the majority judgment in *Voth* (1990) 171 CLR 538, 558, to the effect that Australian courts should not concern themselves with “an assessment of the comparative procedural or other claims of the foreign forum”’.

63 (2002) 210 CLR 491, 520–1.

64 *Henry v Henry* (1996) 185 CLR 571, 592–3.

enforceable in another jurisdiction and is not a matter with which the courts should concern themselves.<sup>65</sup>

- (b) Which court can most effectively and completely resolve the issues in dispute? In principle, this factor is not limited to parallel litigation cases and should be taken into account in all family law cases. While it could be argued that this is the overall objective of the English *forum non conveniens* principle, it is not the focus of the Australian principle.
- (c) The order in which proceedings were commenced. This factor is only relevant to cases in which there is litigation pending in more than one jurisdiction. This consideration has the unfortunate propensity to encourage races to the filing counter,<sup>66</sup> and to discourage settlement.
- (d) The stages which litigation has reached in each jurisdiction. This factor is only relevant to cases of parallel litigation, and may be related to the previous factor.
- (e) The costs the parties have incurred in each jurisdiction. This factor is relevant only to cases involving parallel litigation, and will usually be directly related to the previous factor.
- (f) The connections between each forum and the parties and their relationship. This factor is not specific to cases involving parallel litigation and should certainly generally be taken into consideration in matrimonial disputes.
- (g) The parties' ability to participate in proceedings in each forum. This factor is not necessarily limited to cases of parallel proceedings, and is likely to be particularly relevant in most international family law cases. It may include a consideration of financial ability,<sup>67</sup> and other practical issues such as ability to travel to participate in litigation abroad.<sup>68</sup>

In principle, factors (a), (b), (f) and (g) are relevant in all applications to stay proceedings and not just those which involve parallel litigation. Reference to these factors would allow the court to take a broader view of the controversy as a whole, rather than merely focusing on the local litigation, as is required under the Australian *forum non conveniens* principle. These factors should be taken into account in reforming the principles of declining jurisdiction in international family matters.

A particularly important issue in international disputes is the existence of differences between the procedural and substantive laws that would be applied in each forum. These differences often influence the parties' preference for

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65 *Chapman v Travelstead* (1998) 86 FCR 460, 470.

66 Nygh, 'Voth in the Family Court Revisited', above n 3, 170.

67 For example, in *Ferrier-Watson v McElrath* (2000) 26 Fam LR 169, 185, the wife was financially unable to participate in proceedings in two jurisdictions at once.

68 *Steen v Black* (2000) FLC 93-005, 87-144.

particular forums.<sup>69</sup> The majority in *Henry v Henry* stated that differences in procedure, in substantive law, and in the remedies available are to be expected between legal systems. They held that the court should take a broad and substantive view in deciding if the same controversy was at the heart of litigation in each forum.<sup>70</sup> In *Ferrier-Watson v McElrath* the majority of the Full Court of the Family Court also took a broad view in determining whether the litigation in the two forums concerned the same issue.<sup>71</sup> In this regard, the courts exercising family jurisdiction have taken a much more substantive and cosmopolitan approach than courts in other areas of civil law.<sup>72</sup>

Under the general Australian principle of *forum non conveniens*, the court is unlikely to decline to exercise its jurisdiction because it is very difficult for the respondent to persuade the court that it is *clearly* inappropriate,<sup>73</sup> and because, strictly speaking, the court should not have regard to the merits of litigation in the foreign court. The principle therefore protects the applicant's unilateral selection of the forum at the expense of the respondent, and gives insufficient weight to the availability of relief in alternative forums. The Australian principle is chauvinistic and parochial, and poorly suited to addressing the real problems which commonly occur in international family disputes. The specific factors relevant to declining jurisdiction in family disputes where parallel litigation is on foot, as identified by the majority in *Henry v Henry*, are tailored to take into account the actual nature of international family disputes and appropriately recognise the availability of foreign tribunals. These factors should be further developed and should be incorporated into the principles of both establishing and declining jurisdiction.

## B The Relationship Between Establishing and Declining Jurisdiction

The issues of establishing and declining jurisdiction are conventionally addressed separately in Australian law,<sup>74</sup> although they are directly related.<sup>75</sup> The principles of declining jurisdiction have been developed to deal with problems caused by the principles on establishing jurisdiction, and in particular to deal

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69 This is especially so in international property disputes. See Nygh, 'Voth in the Family Court Revisited', above n 3, 165 (noting that Mr Henry's preference for an Australian forum was motivated by the difference between property distribution and maintenance regimes in Australia and Monaco) and Nygh, 'Voth in the Family Court', above n 3, 262–3 (noting that the real issue in *In the Marriage of Gilmore* (1993) 16 Fam LR 285 was the difference in property distribution regimes in New Zealand and Australia).

70 *Henry v Henry* (1996) 185 CLR 571, 591–2.

71 (2000) 26 Fam LR 169, 195.

72 See, eg, *CSR Australia v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 400–401.

73 In a study completed as part of my doctoral thesis, I analysed the decisions of all Australian superior courts (including the Family Court of Australia) that applied the *forum non conveniens* principle between 1991 and 2001. I found that the court held itself to be clearly inappropriate in only 22.5 per cent of cases: Mary Keyes, *A Critical Analysis of Jurisdiction in International Litigation* (PhD Thesis, Griffith University, 2004) 247.

74 See, eg, Nygh and Davies, above n 3, ch 4 (existence of jurisdiction), ch 7 (declining jurisdiction); Tilbury, Davis and Opeskin, above n 3, ch 2 (existence of jurisdiction), ch 3 (declining jurisdiction).

75 *Renault v Zhang* (2002) 210 CLR 491, 519; Michael Pryles, 'Liberalising the Rule on Staying Actions – Towards the Doctrine of *Forum non Conveniens*' (1978) 52 *Australian Law Journal* 678, 684.

with the fact that these principles permit the court's jurisdiction to be too easily established.<sup>76</sup> There remains an insufficient level of coordination between the principles of establishing and declining jurisdiction in Australian law. The court's jurisdiction can be established on the strength of weak and irrelevant connections, and in some cases it is foreseeable that those connections are so weak and irrelevant in the context of the overall dispute that the court will certainly decline to exercise its jurisdiction even though the applicant has properly commenced proceedings. This should not be permitted because it is wasteful of private and public resources and infringes the rule of law. The rules on establishing jurisdiction should be more closely tailored to the types of dispute to which they are applied.

#### IV JURISDICTION AND CHOICE OF LAW IN FAMILY CASES

In international litigation, jurisdiction and choice of law are conventionally treated as separate stages of resolving an international dispute.<sup>77</sup> Once the court's jurisdiction is established and it has decided that it should exercise its jurisdiction, the court applies choice of law rules to resolve the substantive issue in dispute. Governing law is relevant to the court's decision whether to decline to exercise its jurisdiction,<sup>78</sup> but is not decisive.<sup>79</sup> In international family disputes, the relationship between choice of law and jurisdiction is fundamental to understanding why the existing principles of jurisdiction are defective. The application of local jurisdictional and choice of law rules should, in conjunction, ensure that local law is applied only when it is appropriate. This is one of the central purposes of the conflict of laws.

At common law, the court's jurisdiction in most family disputes depends on the parties' domicile.<sup>80</sup> At common law, married women lack the capacity to acquire a domicile and their domicile is ascribed by reference to that of their husband's.<sup>81</sup> Therefore, jurisdiction at common law is based only on the

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76 *Airbus Industrie GIE v Patel* [1999] 1 AC 119, 132.

77 Nygh and Davies, above n 3, 6.

78 It is one of the connecting factors to which Lord Goff referred in *Spiliada Maritime Corporation v Cansulex* [1987] AC 460, 478; adopted by Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 251; subsequently approved in *Voth* (1990) 171 CLR 538, 564–5 and also in *Henry v Henry* (1996) 185 CLR 571, 587.

79 In *Voth* (1990) 171 CLR 538, the majority acknowledged that the governing law is a 'very significant factor ... but the court should not focus on that factor to the exclusion of all others': at 566. See also *Renault v Zhang* (2002) 210 CLR 491, 508, 521; *Dow Jones & Co Inc v Guinick* (2002) 210 CLR 575, 608. In family law, because the governing law for most issues is the law of the forum, this factor should be given little weight: *In the Marriage of Gilmore* (1993) 16 Fam LR 285, 292; *Steen v Black* (2000) FLC 93-005, 87–146. However, the Full Court of the Family Court clearly regarded the comparative advantage to the wife of securing the application of the property distribution provisions of the *Family Law Act* as significant in *In the Marriage of Gilmore* (1993) 16 Fam LR 285, 311. See also *Steen v Black* (2000) FLC 93-005, 87–146.

80 *Le Mesurier v Le Mesurier* [1895] AC 517, 540.

81 This rule has been repealed by statute. In Australia married women have full capacity to acquire domiciles of choice: *Domicile Act 1982* (Cth) s 6.

husband's domicile.<sup>82</sup> When the rules were developed, domicile may have been a sound jurisdictional principle. It requires both an actual and an intentional connection between a person and a legal system, and may at the time have reflected the circumstances of most peoples' lives.<sup>83</sup> Its main virtue is that it is a unique connection, so that jurisdictional clashes were impossible,<sup>84</sup> and therefore it was not necessary to develop rules for declining jurisdiction.

In family law, the governing law for almost every issue is the law of the forum per se.<sup>85</sup> This is unusual in the conflict of laws. Selection of the law of the forum is generally regarded as parochial and chauvinistic, if not completely unacceptable. Yntema stated that recourse to the law of the forum was 'a counsel of despair',<sup>86</sup> and the High Court recently criticised the use of the law of the forum in the context of international tort disputes, and over-ruled the choice of law rule for international torts which incorporated reference to the law of the forum.<sup>87</sup> Similar arguments could be made about the suitability of the law of the forum as the governing law in international family law.

The choice of law rule in family law which selects the law of the forum makes sense when one takes into account the strictness of the jurisdictional principle at common law. As the court's jurisdiction in family matters at common law depended on the parties' domicile, the law of the forum could only be applied to disputes where the parties were domiciled within the forum.<sup>88</sup> Effectively, forum law only applied to its domiciliaries. This is justifiable because the law of the domicile is applied to determine other issues concerning personal status and entitlement to personal property.<sup>89</sup> However, the choice of law rule, when applied in family matters, makes no sense when combined with jurisdictional rules which require only weak and possibly insubstantial personal connections of one party.

Where the choice of law rule is that the law of the forum should be applied, jurisdictional rules must perform the function normally performed by choice of law rules in order to ensure that the state's substantive law is not applied

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82 In applications for a declaration of annulment, the domicile of either party gives rise to jurisdiction.

83 That is, a general lack of personal mobility and an inclination to maintain very strong links to the place in which one was born.

84 *Indyka v Indyka* [1969] 1 AC 33, 65–6.

85 Subsection 42(1) of the *Family Law Act 1975* (Cth) has been interpreted as a choice of law principle. Subsection 42(2) allows the courts to refer to 'principles of private international law' where that is required under the *Marriage Act 1961* (Cth). The provisions of the *Marriage Act* are relevant to the issue of determining the validity of a marriage celebrated abroad. In general, the validity of a marriage is to be determined according to the law of the place in which the marriage was celebrated: *Marriage Act 1961* (Cth) ss 88C, 88D(1). However, even if a marriage is prima facie valid according to the law of the place of celebration, it is subject to the requirements of Australian public policy: *Marriage Act 1961* (Cth) ss 88D(2), (3) (the public policy limitations relate to existing marriages, prohibited degrees of relationship, age and lack of consent). The only constraint on the application of Australian public policy in this regard is the jurisdictional requirements of the *Family Law Act 1975* (Cth). Subjecting the marriage to the public policy requirements of a state whose only connection to the marriage may be one party's connection to that state at the time of litigation seems extraordinary.

86 Hessel Yntema, 'The Objectives of Private International Law' (1957) 35 *Canadian Bar Review* 721, 735.

87 *Renault v Zhang* (2002) 210 CLR 491, 509–520.

88 Fawcett, above n 1, 53–4.

89 For example, most issues of succession to personal property are determined by reference to the law of the place of the testator's domicile.



inappropriately.<sup>90</sup> While the common law jurisdictional principle might be defensible as discharging its double function as both jurisdictional and choice of law rule, the rules in the *Family Law Act* which establish the court's jurisdiction are completely unsuitable for this purpose and ought to be reformed for this reason alone. The alternative would be to reform the choice of law rules in family law, but such a proposal is beyond the scope of this article. Even if the choice of law rule were changed, the jurisdictional principles should also be reformed.

## V REFORM TO THE PRINCIPLES

In this part, I make some tentative suggestions for reform to the principles of establishing and declining jurisdiction in international family cases. These reforms should take into account the faults of the present principles as identified in the foregoing discussion, and should be founded on an understanding of the objectives of jurisdiction in international family litigation.

### A Objectives of Jurisdiction in International Family Disputes

The general purpose of the principles of jurisdiction in a world of multiple overlapping jurisdictions, where there will almost always be at least two available forums, should be to ensure that proceedings are heard in the forum which is the most appropriate to provide a complete, effective and efficient resolution of the parties' dispute. The principles should take into account the interests of both parties, the interests of the local state and the interests of other states whose courts would provide alternative forums.

The parties' interests in the case of international family disputes include minimising the cost of litigation and enforcing individual choices. Minimising the private costs of international litigation should be an important goal in the development of jurisdictional principles.<sup>91</sup> This is particularly so in international family disputes, in which the parties are always natural persons and for whom the relative burden of litigation costs is likely to be high.<sup>92</sup> This factor is specifically referred to by the majority of the High Court in *Henry v Henry* and is indirectly relevant in some of the other jurisdictional principles. For example, permitting the applicant to litigate in the place in which she or he is ordinarily resident is likely to minimise litigation costs. However, the existing principles are wasteful of private resources in several respects. In particular, it is wasteful to permit proceedings to be commenced on the strength of weak or irrelevant connections, when those proceedings are likely to be subsequently stayed. Lack of clarity in the statement of legal principles and excessive discretion are also wasteful of private resources, because these factors limit the parties' ability to predict the

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90 von Mehren and Trautman, above n 41, 1129.

91 Richard A Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 *Journal of Legal Studies* 399.

92 See *Family Law Rules 2004* (Cth) r 1.04.

outcome of litigation, extend the likely hearing time of disputes and inhibit settlement.

Relative to other areas of international civil law, giving effect to the parties' choices of forum is a minor issue in international family litigation, although the broad bases of establishing jurisdiction and the difficulty that respondents face in persuading the court that it is clearly inappropriate mean that the applicant's unilateral choice of forum is often protected under the Australian law. Party choice is also indirectly enforced in other aspects of international family law.<sup>93</sup> For example, the parties can choose where to celebrate their marriage, which according to Australian law, will dictate the law applicable to determining the validity of the marriage. Consent is a widely respected value in many legal systems<sup>94</sup> and can simplify decision-making. Giving effect to the parties' choices of forum could be developed in the jurisdictional principles applicable for international family law, although it must be recognised that the use of contract in family law is much more controversial than in other areas of civil law.<sup>95</sup> Protections against abuse and exploitation should of course be incorporated into the principles.

The state's responsibilities to resolve disputes which the parties cannot resolve without assistance, to minimise the public costs of international litigation, and to ensure that the principles of jurisdiction conform to the requirements of the rule of law should be taken into account in developing the law of jurisdiction.

The state has a responsibility to facilitate dispute resolution and to ensure that disputes are effectively resolved. This includes a responsibility to promote the private settlement of disputes.<sup>96</sup> Settlement is not possible unless the applicable principles are clearly stated and their application by a court can be predicted. The principle of *forum non conveniens* does not satisfy these requirements, and should be reformed. The effective resolution of disputes is more difficult to achieve in international than in domestic cases. In *Henry v Henry*, one factor to which the majority referred was whether the orders of each court would be enforced in the other court. This factor should be taken into account in every case in which the court must decide whether to exercise its jurisdiction.

The state subsidises the court system to an overwhelming degree and it is legitimate for the state to require that this cost should be justified.<sup>97</sup> The rule preventing continuance of parallel litigation shows a concern to minimise public costs. Minimising the public costs of international litigation requires that the law should be clearly expressed, which in turn requires that judicial discretion should be limited. Public costs are also reduced if settlement is promoted. It is difficult

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93 See Peter North, 'Choice in Choice of Law' in Peter North (ed), *Essays in Private International Law* (1993) 171, 173–9.

94 Lowenfeld stated that 'support of party autonomy is so widespread that it can fairly be called a rule of customary law': Andreas Lowenfeld, *International Litigation and the Quest for Reasonableness* (1996) 200.

95 See Mary Keyes and Kylie Burns, 'Contracts and the Family: Whither Intention?' (2002) 26 *Melbourne University Law Review* 577.

96 *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603, 623, 637–8, 651–2; *Family Law Rules 2004* (Cth) r 1.07(b).

97 *Family Law Rules 2004* (Cth) r 1.04.

to justify the expenditure of public resources in ‘resolving’ disputes if the court’s orders will not be enforced, and this is another justification for taking into account the enforceability of the orders of each possible forum.

As for all areas of law, the law of jurisdiction should conform to the requirements of the rule of law.<sup>98</sup> The relevant requirements are that the law should be clearly stated, certain, predictable and its expression should be congruent with its application by the courts.<sup>99</sup> The rule of law requires that judicial discretion should be limited. While the present principles of establishing jurisdiction in international family litigation are on their face certain and predictable, this is undermined by the operation of the principle of *forum non conveniens*, which may lead the court to decline to exercise jurisdiction when the applicant has properly commenced proceedings. The application of the principle of *forum non conveniens* is neither predictable nor certain, and this should be addressed in any reform to the principles.

The interests of foreign states should also be taken into account in the design of legal principles. It is desirable that the limitations of public international law on state authority, and the requirements of comity, should be observed in the principles of jurisdiction.<sup>100</sup> This entails that the interests of foreign states in adjudicating international disputes should be recognised by ensuring that the forum only asserts its adjudicatory authority when there is a genuine and substantial connection between the dispute and the forum.<sup>101</sup> The principles of establishing and declining jurisdiction do not satisfy this requirement, and should be reformed to take this into account. Foreign states may have valid interests in adjudicating, or in applying their law, in international disputes in which the Australian courts are jurisdictionally competent. The majority in *Henry v Henry* gave a significant amount of weight to the jurisdictional competence of foreign courts in parallel litigation.<sup>102</sup> This should be confirmed by legislation and extended to all cases in which the court has to determine whether to exercise its jurisdiction.

## B Reform to the Principles of Establishing Jurisdiction

The rules of establishing jurisdiction should be based on a substantial connection between the circumstances of the dispute and the forum; such that would justify the application of the law of the forum. Forum law should be applied when the parties’ relationship or its important incidents have a strong connection to the forum. There may also be circumstances, particularly where litigants lack access to resources which would permit them to litigate abroad,

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98 It is only a formal (such as that proposed by Fuller) and not a substantive (such as that proposed by Rawls) conception of the rule of law which is capable of application to international litigation: Lon L Fuller, *The Morality of Law* (revised ed, 1969) 33–94; John Rawls, *A Theory of Justice* (1971) 235–43.

99 Fuller, above n 98, 39. Fuller identified other requirements which are not relevant to this discussion.

100 *Renault v Zhang* (2002) 210 CLR 491, 528–9.

101 Cf *Council Regulation (EC) No 1347/2000 of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses* [2000] OJ L 160/19, Preamble [12].

102 (1996) 185 CLR 571, 591–2.

when it is appropriate to facilitate local proceedings even though there is no strong connection between the controversy and the forum. Family law directly affects a greater proportion of the population than other areas of law, and individuals are far more likely to be involved in litigation in family disputes than in any other area of law. Many litigants in family disputes lack the financial resources to litigate in foreign jurisdictions, and the consequences of denying jurisdiction may be to deny people the ability to get on with their lives. Jurisdiction might be established in exceptional cases even though the connection to the forum is not strong.

There should be two main jurisdictional grounds in family law. First, that the court has jurisdiction if either party has been ordinarily resident in Australia for a year prior to commencing proceedings and Australia is the place where the parties last cohabited,<sup>103</sup> or is one of the places where the parties' relationship was based,<sup>104</sup> identified by reference to a set proportion of the total time the parties were married. Second, the court should also have jurisdiction if either party has been ordinarily resident in Australia for a year prior to commencing proceedings and either the dependent children of the relationship or a substantial amount of the matrimonial property<sup>105</sup> are in Australia. These grounds would ensure a real connection between the dispute and the forum.

There should be two exceptional grounds of jurisdiction in family cases. If the respondent has been ordinarily resident in the forum for one year prior to commencement of proceedings, the Australian courts should have jurisdiction.<sup>106</sup> This ground of jurisdiction can be justified as convenient for the respondent, and consistent with other areas of civil litigation. Exceptionally, the ordinary residence of the applicant should suffice, but only if the applicant can show that they would suffer substantial financial, physical or other difficulties<sup>107</sup> if they were obliged to litigate in a foreign forum and that they would be prejudiced if they were therefore denied the relief sought.<sup>108</sup> They should also be required to show that they were ordinarily resident for one year at the time proceedings were commenced. In cases when the ordinary residence of either party alone is relied on to give the court jurisdiction, the law of the forum should not be applied as the governing law, because the mere ordinary residence of one party should not justify application of the law of the forum. Accordingly, reform to the choice of law rules would be required to deal with these two jurisdictional grounds.

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103 *Family Law Act 1975* (Cth) s 104(3)(b)(i).

104 *Henry v Henry* (1996) 185 CLR 571, 580; *Kemeny v Kemeny* (1998) 23 Fam LR 105, 137–8; *Ferrier-Watson v McElrath* (2000) 26 Fam LR 169, 195. See also *Family Law Act 1975* (Cth) ss 104(3)(b), (3)(e)(ii).

105 *Henry v Henry* (1996) 185 CLR 571, 580; *Steen v Black* (2000) FLC 93-005, 87–146; *Khademollah v Khademollah* (2000) 26 Fam LR 686, 727.

106 *Council Regulation (EC) No 1347/2000 of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses* [2000] OJ L 160/19, art 1(a).

107 For example, if the wife would suffer gender discrimination if obliged to litigate in the more appropriate forum.

108 For example, if they were unable to marry again.

It might also be desirable to permit the parties to submit by agreement to the jurisdiction of the court. The main reasons for denying them the ability to do so are that the law of the forum should not be applied in such a case, and that permitting the parties to select the court would be an unjustified drain on the courts' resources. The first objection could be met by reform to the choice of law rules, and the second objection could be met by introducing differential fees, so that applicants who were not ordinarily resident in the forum would be required to pay court fees on a higher scale.

The principles of establishing jurisdiction should be expressed precisely so that they are likely to only permit jurisdiction to be established when it is appropriate for the court to exercise its jurisdiction. The facts of international disputes are so various that it is impossible to articulate the principles with such precision that they will only give the court jurisdiction when it is the most appropriate court. Therefore, I recommend that the principle of *forum non conveniens* should be retained, but that its scope should be limited, and that legislation should comprehensively list the factors relevant to its decision in particular types of dispute.

### C Reforms to the Principles of Declining Jurisdiction

In this section, I focus on proposed reforms to the principle of *forum non conveniens*. As noted above, the other two issues relevant to declining jurisdiction in other civil cases are mandatory rules which affect the court's decision whether to decline to exercise its jurisdiction, and the parties' bilateral contractual choices of forum. For reasons of space, it is not possible to develop those two issues in detail here, but they should be considered in a more detailed reform to the principles of jurisdiction. Consideration might be given to articulating circumstances in which the forum court claims, or should claim, exclusive jurisdiction, and in which the exclusive jurisdiction of foreign courts should be recognised.<sup>109</sup> The most likely candidates for inclusion in this category would be property disputes, in which the relief sought would require entries to be made or corrected in registers of interests in land or other immovable property. Consideration might also be given to developing rules which recognise and enforce the actual or implied choice of forum by the parties to the marriage. Clear benefits flow from encouraging parties to make bilateral, informed choices of forum, and enforcing those choices can simplify and expedite the resolution of international jurisdictional disputes. The present system of jurisdiction in family law permits and often upholds jurisdictional choice, but only the choice of the applicant at the time of commencing proceedings. It is preferable to give effect to fully informed bilateral choices, as long as the court retains a discretion not to enforce the choice if the party resisting its enforcement can show good reasons

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<sup>109</sup> A good illustration of this is in the case of international child abduction, in which case the exclusive jurisdiction of the place of the child's ordinary residence prior to the wrongful abduction or retention is recognised.

for non-enforcement.<sup>110</sup> Enforcing jurisdictional choices carries obvious risks, but these can be anticipated and provided for in the legislation.

The Australian principle of *forum non conveniens*, as it has been developed and applied in the non-family law context, is seriously flawed and has been widely criticised.<sup>111</sup> It is heavily forum-centric and fails to give effect to valid interests of defendants and foreign states. It is uncertain and therefore it is difficult to predict how it will be applied by the courts, aside from a general prediction that it will be difficult for the respondent to succeed in a stay application. The English principle of the 'more appropriate forum' is superior to the Australian principle. It recognises the valid interests of defendants and of foreign states, is better attuned to the modern circumstances in which international disputes occur, and is more likely to lead to fair results in international disputes.<sup>112</sup> It should be adopted in Australia, including in international family disputes. The court should decline to exercise its jurisdiction where the respondent identifies an available alternative forum which is more appropriate than the local court for the resolution of the dispute. This should be acknowledged to require the courts to undertake a comparative evaluation of the merits and demerits of litigation in the local and foreign forums.

The factors identified by the majority in *Henry v Henry* should be used in clarifying the factors which the court should have regard to in deciding whether to stay proceedings in all cases. Those factors are more specific than the connecting factors identified by Lord Goff in *Spiliada Maritime Corporation v Cansulex* which are presently used in Australia. The focus of the inquiry should be to identify the court which can most effectively, completely and efficiently resolve the issues in dispute.<sup>113</sup> This should include a consideration of the enforceability of each court's orders in the place where the judgment would have to be given effect.<sup>114</sup> Other factors which should be taken into account are:

Whether either party would face grave difficulties in litigation in the relevant forums; such as difficulties in physically travelling to another forum, or if either party is unlikely to get a fair trial in either forum.

Where the majority of activities giving rise to the dispute occurred, including where the parties' marital relationship was centred.<sup>115</sup>

Where the incidents of the parties' relationship, including any children of the relationship and the parties' property, are situated.

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110 The principles applicable in international commercial cases would provide useful assistance in developing these rules, although they should not be used without appropriate modification. See, eg, *Akai Pty Ltd v The People's Insurance Co* (1996) 188 CLR 418.

111 Richard Garnett, 'Stay of Proceedings in Australia: A Clearly Inappropriate Test?' (1999) 23 *Melbourne University Law Review* 31; Adrian Briggs, 'Wider Still and Wider: The Bounds of Australian Exorbitant Jurisdiction' [1989] *Lloyds Maritime and Commercial Law Quarterly* 216; Lawrence Collins, 'The High Court of Australia and *Forum Conveniens*: A Further Comment' (1989) 105 *Law Quarterly Review* 364; *Renault v Zhang* (2002) 210 CLR 491, 524–5 (Kirby J), 564 (Callinan J).

112 *Renault v Zhang* (2002) 210 CLR 491, 524, 565–6.

113 *Henry v Henry* (1996) 185 CLR 571, 592.

114 Nygh, 'Voth in the Family Court', above n 3, 264.

115 *Henry v Henry* (1996) 185 CLR 571, 592.

The applicable law in each forum. If both courts would apply the same law, the court of the legal system whose law would be applied is likely to be the most appropriate forum. If each court would apply its own law, this factor should be given no weight. If the Australian courts continue to apply the law of the forum to resolve family issues, this factor should not be given any weight.

The relative financial burden on each party of litigating in each forum.<sup>116</sup>

It should be difficult for a defendant who is ordinarily resident in the forum to show that there is a more appropriate forum available. The court should not give any weight to the applicant's choice of forum, to any advantages to the applicant of litigating in the local forum or to the respondent of litigating in the foreign court, the location of evidence (unless one party would face extreme difficulties in bringing their evidence to the relevant court), or to differences in the substantive or procedural laws applicable in each court. Under the *Spiliada* principle, the forum may retain jurisdiction even if the defendant identifies a more appropriate court, if 'there are circumstances by reason of which justice requires' that proceedings be stayed.<sup>117</sup> Given the infinite variety of circumstances which may arise in international disputes, especially in international family disputes, it may be wise to preserve this as a very exceptional ground for retaining jurisdiction.

#### D Application of the Proposed Reforms

The real test of the utility of the proposed reforms is whether they lead to better results in the cases. In this section, I apply the proposed reforms to the facts in *Henry v Henry* and to those in *Ferrier-Watson v McElrath*, both of which are referred to above (Part IIA). In *Henry v Henry*, the Australian court would have lacked jurisdiction, as none of the proposed grounds of jurisdiction were satisfied.<sup>118</sup> The consequence would be that this case could not have been commenced in Australia. This result makes sense. The parties' relationship had nothing to do with Australia and none of the incidents of the parties' relationship were in Australia. The husband had substantial means and would have suffered no hardship in litigating in the alternative forum. In *Ferrier-Watson v McElrath*, the Court would also have lacked jurisdiction at the time proceedings were initiated, as the applicant was not at that time ordinarily resident in Australia.<sup>119</sup> This result also makes sense. The parties' marital relationship had very little connection to Australia, and was very strongly connected to the alternative forum. As in *Henry v Henry*, the applicant husband evidently had substantial means and would not have suffered significant hardship if required to litigate in Fiji. In both these cases, improving the principles on establishing jurisdiction would have led to significant private and public cost savings.

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116 *Renault v Zhang* (2002) 210 CLR 491, 550, 569; *Henry v Henry* (1996) 185 CLR 571, 592.

117 *Spiliada Maritime Corporation v Cansulex* [1987] AC 460, 478.

118 The applicant was not ordinarily resident in Australia. At the time of filing his application, he had been present in Australia for one month and two days: *Henry v Henry* (1996) 185 CLR 571, 572.

119 (2000) 26 Fam LR 169, 186.

## VI CONCLUSION

International family litigation is an increasingly common occurrence and is the area of international litigation which is most likely to impact on private individuals. The law in this area should be as certain, predictable and rational as possible. Jurisdiction is in practical terms the most important issue in international disputes. The present Australian law governing jurisdiction in international family disputes has been shown in this article to be defective and in need of reform. The present principles of establishing jurisdiction are much too broad and do not indicate circumstances in which the Australian courts are likely to be appropriate forums. The principles of declining jurisdiction are intended to remedy defects in the principles on the establishment of jurisdiction, but the Australian principle of *forum non conveniens* is not particularly suitable to achieving this task. It gives the courts a discretion which is inappropriately wide. The court should only have jurisdiction in cases where there is a substantial connection between the controversy and the forum, or where there is some other clear interest in hearing the dispute in the forum. The existence of competent forums in other jurisdictions should be recognised, and the court should decline to exercise jurisdiction when another forum is shown to be more appropriate. The practical relevance of this area of law to so many individuals warrants these reforms.