International family law

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BINDING FINANCIAL AGREEMENTS WITH INTERNATIONAL ELEMENTS

The laws regulating binding financial agreements remain fraught with difficulty and there have been several cases dealing with various aspects of financial agreements. Agreements can be further complicated by international elements. As families become more globalised we can anticipate that agreements will attempt to deal with assets in several jurisdictions.

One of the essential elements to making a financial agreement binding is the requirement that each party obtain independent legal advice. In *Ruane v Bachmann-Ruane* [2009] FamCA 1101 an English lawyer provided the certificate of advice to the husband. The lawyer was not qualified in Australian law and had no knowledge of Australian law. In *Murphy v Murphy* [2009] FMCAfam 270 the wife went to a lawyer in the Philippines. The lawyer was not entitled to practice anywhere in Australia. In both cases the court held that the agreement was not binding.

The requirement that legal advice must be independent is clear. These cases focus on the *nature* of legal advice that a party must receive in order to comply with the requirements of s 90G of the *Family Law Act 1975* (Cth). Section 90G requires both parties to obtain independent legal advice about the advantages and disadvantages of entering into the agreement and the effect of entering into the agreement on the parties' rights. It follows that this advice goes beyond simply explaining the meaning and effect of each of the clauses of the agreement.

In order to advise about the advantages and disadvantages of the agreement the advisor must be able to advise about the alternatives to entering into the agreement. This involves an assessment of what a party would be entitled to if he or she proceeded with an application under the *Family Law Act*. Providing advice as to the effects of entering into the agreement on that person's rights touches on the same issues. It must necessarily involve a discussion about the alternatives to entering into the agreement and the options available under the *Family Law Act*.

In both of the above cases the court expressed the view that foreign lawyers would not be able to provide the type of advice required by the *Family Law Act* as to do so requires knowledge of the law of a jurisdiction and it was conceded neither lawyer practiced in any Australian jurisdiction (*Ruane* at [41] and *Murphy* at [27]). Cronin J stated that to find this level of advice satisfactory would defeat the purpose of the *Family Law Act* (*Ruane* at [41]).

Section 90G requires both parties to receive advice from a "legal practitioner". The term legal practitioner is not defined by the *Family Law Act*. Section 4 of the Act defines a lawyer to mean a person enrolled as a legal practitioner of a Federal Court or a Supreme Court of a State or Territory.

Section 90G refers to parties obtaining legal advice. Parties do not have to accept that advice. Part of the advice goes to a party understanding that the agreement will oust the jurisdiction of the court to adjust the parties' property interests. Cronin J expressed the view that this means that not only must the person who gives the advice have the relevant knowledge, they must also be accountable as an officer of the court (*Ruane* at [76]).

Section 15AB of the *Acts Interpretation Act 1901* (Cth) enables a court, when interpreting a provision, to have regard to explanatory memoranda. Cronin J went on to refer to the Explanatory Memorandum which stressed that parties must not just receive independent advice, but must also have advice so that they are aware of the implications of the agreement and do not unknowingly enter into an agreement which is not in their interests.

In *Murphy v Murphy*, Coates FM said legal advice is advice about the law of a particular jurisdiction. He concluded that this must mean that the legal practitioner is entitled to practice in the jurisdiction. This excludes academic lawyers and international lawyers (at [75]).

For the purpose of Pt VIIIA of the *Family Law Act* a legal practitioner must fit the description of a person in s 4 of the *Family Law Act* (*Ruane* at [82]). Presumably, if these lawyers were qualified to

practice in Australia and held a current practicing certificate in an Australian State or Territory they would meet the requirements.

NEW ZEALAND SUBPOENAS

The *Law and Justice (Cross Border and Other Amendments) Act 2009* (Cth) introduced welcome changes for Australian practitioners dealing with family law matters with a New Zealand connection. It expands the range of proceedings which are covered by the cooperative scheme between New Zealand and Australia to include most family law proceedings. Previously, family law proceedings were excluded from the types of proceedings where Australian practitioners could use the cooperative scheme to issue subpoenas in New Zealand and vice versa.

The *Evidence and Procedure (New Zealand) Act 1994* (Cth) has been amended to include a new definition of "excluded family proceedings". There are now only two types of family proceedings which are excluded from the cooperative scheme. Those proceedings are applications under the *Hague Convention on the Civil Aspects of International Child Abduction 1980* and proceedings relating to a person who is or may not be able to manage his or her own affairs (*Law and Justice (Cross Border and Other Amendments) Bill 2009*, Explanatory Memorandum at [27]). The reasoning behind the exclusion of Hague Convention proceedings is the concern that the ability to issue subpoenas may compromise the aim of these proceedings, which is to dispose of the proceedings quickly. Proceedings relating to property of a person who is not or may not be able to manage his or her own affairs are excluded because the cooperative scheme among Australian States and Territories does not include interstate service of subpoenas issued by State and Territory guardianship tribunals (*Law and Justice (Cross Border and Other Amendments) Bill 200*9, Explanatory Memorandum at [28] and [29]).

The practical requirements for issuing subpoenas in trans-Tasman cases are set out in Div 15.3.4 of the *Family Law Rules 2004* (Cth). A party must seek leave to issue a subpoena in New Zealand. The subpoena can be for documents or for a person to give evidence. It is necessary to file an affidavit addressing matters set out in r 15.36E(3). These matters include the nature and significance of the evidence to be given or document to be produced and an undertaking to pay reasonable expenses. Division 15.3.4 of the *Family Law Rules* also addresses service of the subpoena, hearing of the application, compliance with the subpoena and setting aside the subpoena.