"SO CLOSE AND YET SO FAR: THE TYRANNY OF DISTANCE OF FAMILY LAW ISSUES IN ENGLAND AND WALES AND AUSTRALIA"

20 April 2023

Anglo Australasian Lawyers Solicitors Society
Event hosted by Branch Austin McCormick LLP
With Julius Brookman and Professor Rebecca Bailey-Harris (1 Hare Court)
and Professor David Hodson OBE KC (Hons.) MCI Arb (International Family Law Group)

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PRESENTATION BY JULIUS BROOKMAN, A PARTNER AT BRANCH AUSTIN MCCORMICK ON NO-FAULT DIVORCE DIFFERENCES BETWEEN ENGLAND AND WALES AUSTRALIA

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Trivia question: any guesses on distance Sydney to London?

- ..... kms/
- ..... miles (hence the "Tyranny of Distance" title)
- And some basics:
- New South Wales was originally founded as a British penal colony in .....
- Subsequently it was settled and adopted English law
- Australia became a nation ..... but continued to follow Common Law traditions and the highest route to appeal was the House of Lords until .....
- The Australian Federal Parliament enacts Family Law

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A LITTLE BIT OF HISTORY: HOW ENGLAND AND AUSTRALIA HAVE SHARED BACKGROUNDS

- Divorce has a bit of a long history and can be traced back to Ancient Mesopotamian tablets.
- Arguably, no-fault divorce has some of its earliest and most-liberal origins in Roman culture where it was either party could divorce and it was deemed a private affair where notifying the other party was advisable but not essential!
- Famously, Julius Caesar had three wives and divorced his second wife (Pompeia) when she went a political rival's gathering as she should be "beyond suspicion!"
- After the Norman conquest in Britain divorce was given to the ecclesiastical courts and, as most of you probably know, it proved rather difficult even for Henry VIII to divorce! The Catholic Church still do not recognise divorce today.
- In 1850 an English Royal Commission recommended the establishment of separate divorce courts and the Matrimonial Causes Act 1857 followed. Grounds for divorce included bigamy, adultery, cruelty and desertion but husbands could claim "compensation" from an adulterer.
- Australia had no ecclesiastical courts but The Colonial Office invited the Australian Colonies to produce their own Laws.
- The Australian colonies did between 1860-1873 with similar but occasionally more liberal provisions as the basis for divorce.

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MORE RECENT DEVELOPMENTS

- After Federation in 1901 Australia created a written Constitution based on both the American and British models, Section 51 gave the Commonwealth (ie: Federal Parliament) the ability to legislate on marriage and divorce.
- The First significant piece of legislation produced by the Australian Parliament was the Matrimonial Causes Act 1945 (Cth). This was later replaced by the Matrimonial Causes Act 1959 (Cth), often known as the "Barwick reforms," which allowed divorce after separation.
- In England & Wales various attempts were made to reform Family Law and the, often overlooked, Divorce Reform Act 1969 which extended the basis for divorces and also allowed for divorce on the basis of "irretrievable breakdown of marriage."

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THE TROUBLE WITH FAULT BASED DIVORCE AND WHY NO-FAULT IS MORE SENSIBLE

- Historically there was an emphasis on proof, so for example, a faithful man would have to sleep in a dubious hotel in order for his wife to petition on his adultery and the use of private investigators would often be necessary to prove adultery and/or evidence of different addresses might have to be called in the case of separation.
- Practically, clients take comments made on Petitions to heart and would often want to deny or defend.
- Here, practitioners developed something of a "work around" by agreeing to show draft Particulars and developing a "Family Law Protocol" drafted by an organisation called Resolution which allowed for comments on draft Petitions. Hence Particulars are usually agreed and, in reality, few petitions are defended.
- In reality, event an agreed Petition took the focus away from client's main concerns on child arrangements and finances.
- Fault-based petitions encouraged hostility and tended to heighten costs.

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EXAMPLE OF A FAULT-BASED PETITION

- A slightly-neutralised example of a historic petition I had to draft some years ago read something like:
  a) From early on and throughout the marriage the Respondent would often leave his dishes in the sink and not clean up after himself causing the Petitioner inconvenience and upset and increasing strains in the marriage.
  b) On frequent occasions throughout the later stages of the Respondent would frequently go out for what he called "wild nights out", drink to excess and attend strip clubs which offended the Petitioner's Christian faith and caused her great distress.
  c) During the evening of 20th January 2010 the Petitioner confronted the Respondent about his "wild nights out" and the Respondent told the Petitioner to "chill out and stop being such a God botherer" and questioned, "What have you got against funky strip clubs anyway?" The Respondent then proceeded to regularly go out and increasingly lead his life without reference to the Petitioner causing the Petitioner to conclude the marriage was over.
  d) As a result of the Respondent's behaviour, the Petitioner asked the Respondent to leave and he moved to a flat in Soho on 30th January 2010. The Petitioner suggested marriage-guidance and the Respondent refused and said he preferred "wild living to puritanical zealots" forcing the Petitioner to conclude the marriage was at an end.
- The above example would possibly have fallen foul of the principles in the case of *Owens v Owens* [2018] 41
- This was where the Supreme Court ruled Mrs Owens had to stay married to Mr Owens as the petition grounds were not sufficiently unreasonable.

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Australia's Family Law Act 1975 (Cth)

- The Australian Government under Prime Minister Gough Whitlam (Australian Labor Party) had campaigned for social changes on divorce and children legislation. This was brought in the 1975 Family Law Act which was introduced by Senator Lionel Murphy and established the Family Court of Australia.
- Under section 44 of the Act a Divorce Order could be applied for on a "no-fault" basis provided there were 12 months of separation.
- As we shall find out, the 1975 Act proved a popular piece of legislation and there was a rush to the courts after its introduction.
- Divorce rates in Australia have risen to around 50% and the level of work and number of specialist practitioners is similar to here and particularly international work in the main state capitals.

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HOW NO-FAULT DIVORCE DEVELOPED IN ENGLAND AND WALES

- The situation here remained under s1 of the Matrimonial Causes Act 1973 that there was one ground for filing a petition: that the marriage had broken down irretrievably and various proving facts with the most frequently pleaded being unreasonable behaviour, adultery (provided the petition was brought within 6 months of discovering the adultery), two years' separation with the Respondent's consent and five years separation without consent. Mrs Owens, for example had to wait for five years as did a recent client of mine in late 2021.
- Over the years there have been numerous calls for reform particularly from practitioners and groups like Resolution, senior members of the Judiciary and the Mediation Council.
- The 1996 Family Law Act introduced no-fault divorce in Part 2 and required parties to attend "information meetings" but it was not implemented by the Labour Government as the then Lord Chancellor believed it was "unworkable".
- A further attempt was made by Baroness Butler-Sloss to introduce a Private Members Bill
- This never made any progress.

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THE AMENDMENTS IN ENGLAND UNDER THE MATRIMONIAL CAUSES ACT 1973

- In the wake of *Owens*, in September 2018, the Ministry of Justice commissioned a *Reform of Legal Requirements for Divorce* consultation paper which the Government responded favourably to in 2019.
- Finally(!), the Divorce, Dissolution and Separation Act 2020 amended the Matrimonial Causes Act 1973 removed bases for divorce and amended the Matrimonial Causes Act.
- The legislation also allowed parties the option of jointly or solely petitioning.
- The new Act came into force on 6 April last year. There was a spike in petitions then.
- In practice, this has proven popular with clients and there as a small increase in petitions. Clients will often run their own petition and effectively "nurse" their resources for the larger disputes children or finances.

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SUBSEQUENT DEVELOPMENTS HERE AND IN AUSTRALIA

- As we shall find out from our other speakers, Australia has forged ahead on principles for cohabitants of "de-factos" whereas it was slower to introduce same-sex marriage.
- It's still regarded as a contentious issue in Australia that what is traditionally termed a "Common Law Marriage" (ie: two partners staying together for a long period) gain so much legal recognition.
- As we shall find out, Australia is a little more flexible on financial claims after and the timing in bringing the same.
- By contrast, England & Wales amended the basic divorce procedures to initially include Civil Partnerships and later same-sex marriage.
- The Law Commission and practitioners continue to press for more rights for cohabitees here.

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JURISDICTIONAL CONUNDRUMS AND SCENARIOS

- Prior to England and Wales' departure from the EU under the Brussels II Revised Treaty, the first valid proceedings in time would take precedence.
- With twelve months of separation an interesting scenario that we might want to consider if we have time is what would have happened if a petitioner here had filed divorce and financial proceedings before the separation period was up and country would take precedence. All three speakers today have discussed this but not had the scenario in practice.
- Currently petitions between here and Australia would be considered under traditional *Forum Conveniens* rules, ie: which jurisdiction would be the most suitable and appropriate on all the facts of the case.
- As we shall find out, because of the different way the jurisprudence between here and Australia the outcome for treatment of finances can be very different so often parties will spend money battling this out.

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THANK YOU FOR ATTENDING

It's now over to our two Professors Hodson and Bailey-Harri to discuss financial claims and various other aspects of the Anglo-Australian Family Law systems

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PROPERTY AND FINANCIAL MATTERS ON BREAKDOWN OF DE FACTO RELATIONSHIPS

THE LAW IN AUSTRALIA AND IN ENGLAND AND WALES

Introduction: policy issues and the differing approaches in law

Child support apart, this is the area of family law in which the two jurisdictions differ most markedly. The striking difference in the substance of the law stems from differing approaches to the underlying policy issues.

What should be the *function* of the law in relation to the breakdown of de facto relationships? The basic conflict is between:

- *legal paternalism*, whereby the law has a remedial role to achieve fairness of family breakdown across a range of family forms; and
- *individual autonomy*, which gives the individual the freedom to choose amongst the range family forms which are legally regulated in different ways.

Australia has taken the legal paternalism route and enacted legislation which has eventually equated the legal consequences of the breakdown of a de facto relationship (same-sex and opposite sex) very substantially with those of marriage breakdown. The court is given adjustive powers in respect of both assets and income.

England and Wales has adopted a very different approach. Despite calls for reform over decades, no bespoke legislation has been enacted. The breakdown of a cohabitation relationship remains governed by the general law of property and trusts and there is no direct claim to maintenance. The general law is complex and is not specifically designed for the context of family breakdown. The law is difficult for cohabitants to understand and is challenging for mediators and legal representatives. The absence of bespoke legislation in England and Wales is arguably the result of failure to address the policy dilemmas head-on, rather than a conscious decision in favour of party autonomy. In this jurisdiction there is also a fear on the part of successive governments (unjustified?) about undermining the sanctity of marriage.

The myth of the '*common law marriage*' remains widespread in England and Wales: many cohabitants simply believe that they have the have the same legal rights as spouses. Arguably this prevents them from taking advantage of even the limited legal safeguards available to them under the general law, until they have already separated and it is now too late.

The Law in Australia

Even prior to statutory intervention, in the general law the High Court of Australia pioneered the development of a new model of constructive trust which broke away from the traditional restrictive requirement of common intention and was based on unconscionability, i.e. the unconscionable attempt by the legal owner of property to retain the benefits of the other party's contributions. *Muschinski v Dodds* (1985) 160 CLR 583, *Baumgartner v Baumgartner* (1987) 164 CLR 137.

Until 2009, the financial relationship of separating cohabitants was governed by State and Territory laws. Dissatisfaction with the general law (even reformed) led to the enactment of State and Territory legislation in the 1980s and 1990s, beginning with the NSW *De Facto Relationships* Act 1984. The legislation gave the courts discretionary adjustive powers. The Acts of the various States and Territories differed in their approaches to the definition of the relationship (cohabitation or relationship based) and to the factors governing property distribution (whether solely contribution-based or also to take account of future needs).

Various solutions were proposed to remedy the problems caused by different regimes operating across Australia, including the adoption of model legislation. The solution was finally found in the referral of relevant legislative power by the States to the Commonwealth under s 51 (xxxvii) of the Constitution. Only WA did not refer, the relevant powers already existing under the *Family Court Act 1997 (WA)*. The result of referral was the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth).*

Section 4AA of the Family Law Act 1975 (Cth) provides:

(1) A person is in a ***de facto relationship*** *with another person if:*

(a) the persons are not legally married to each other; and

(b) the persons are not related by family; and

(c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

'The circumstances' to be considered are flexibly and non-exclusively defined in s 4AA(2). The definition has produced case law but has not proved too problematical.

An application for property adjustment or maintenance is subject to the gateway requirement that the relationship has lasted two years, or that there is a child, or substantial contributions have been made and serious injustice would result, or registration: s 90SB. Thereafter, the application is determined on the same principles as an application by a spouse. Maintenance

is governed by s 72 and property adjustment by s 79. The court's powers are discretionary and adjustive.

Like spouses, de facto couples can enter into a Binding Financial Agreement prior to, during or after their relationship: Division 4 of Part VIIIAB of the *Family Law Act 1975 (Cth)*.

The Law in England and Wales

Here there is no bespoke legislation for property and finances on breakdown of cohabitation.

Property rights on breakdown of cohabitation are governed by the general law of property and trusts. The general law gives a former cohabitant no direct right to *maintenance*. All that can be claimed in respect of maintenance (in practice only in big money cases) is a limited 'carer's allowance' (now renamed as a component of a Household Expenditure Child Support Award) in a claim for financial provision for the benefit of a child under Sched 1 to the Children Act 1989. See *Re P (Child: Financial Provision)* [2003] EWCA Civ 837 [2003] 2 FLR 865, *Re Z (No 4) (Sched 1 Award)* [2023] EWFC 25.

A claim to real property on breakdown of cohabitation is brought under the Trusts of Land and Appointment of Trustees Act 1996. The Family Court has no jurisdiction: the claim must be brought under the general jurisdiction of a County Court or the High Court. The claim is governed by Civil Procedure Rules 1998 both as to pleadings and costs. This is unfamiliar territory to some family law practitioners.

As is well known, registered legal ownership of real property is not conclusive: equitable/beneficial ownership may be different. LPA 1925 s 53(2) 'saves' the operation of equitable doctrines from the requirement of writing for the creation of an interest in land. If there is an express trust, it is (absent a vitiating factor) conclusive of beneficial ownership. An express declaration of trust may be found in a deed or, where a property is registered in the name of more than one person, in Form TR1.

The problem cases arise where there is no express declaration of trust. This can be where a property is in a sole name, or in a joint name case where the requisite box in the TRI has not been filled in. In such cases, the dispute about equitable ownership usually falls to be determined under *constructive trust* or *proprietary estoppel*. The resulting trust has lost favour in cohabitation cases.

The equitable doctrines are complex and recent years have produced difficult case law, some at the highest appellate level. The equitable doctrines are of general application and are not designed to achieve justice on family breakdown. Furthermore, cases are heavily evidence-dependent and if litigated take many days of trial, even for a modest claim. The state of the law thus poses formidable challenges to cohabitants and to their legal advisors. With the normal rule of costs following the event under CPR Part 44, this can be very risky litigation.

It is equally challenging for the mediation process, since the legal framework may well be complex and uncertain and simply not understood by the couple who wish to settle.

Constructive Trust

The parties' c*ommon intention* as to how beneficial (equitable) ownership is to be held remains fundamental to the concept of constructive trust in English law. No 'remedial' constructive trust based on unconscionability here! Further, the court's powers are strictly declaratory, not adjustive: the court only declares existing rights in property and has no adjustive power of transfer of ownership to achieve a fair outcome.

A common intention constructive trust is based on evidence that, at the time of acquisition of the property or later, the parties have a *common intention* that it is to be jointly owned, in reliance on which common intention there was *detrimental reliance/change of position* by the claimant.

Common intention to share ownership can be based on express words or inferred from conduct: *Lloyds Bank plc v Rosset* [1991] AC 107.

Where a property registered in *joint names* but there is no express declaration of trust, the presumption is that equal shares was intended. In such cases, the sole issue is *quantification*– are the parties owners in equity in proportions other than equal? The presumption of equal ownership can rebutted by evidence of contrary intention: *Stack v Dowden* [2007] UKHL 17 [2007] 2 AC 432, *Jones v Kernott* [2011] UKSC53 [2012] 1 FLR 45. In *Marr v Collie* [2017] UKPC 17 [2018] AC 631 the Privy Council emphasized the crucial and central importance of the parties' common intention and the evidence required to establish it. The case was remitted for re-hearing, because the courts below had failed properly to consider evidence of common intention: the litigation proved disastrously drawn out and costly for the parties.

Where the property is registered in the *sole name* of one party and there is no express declaration of trust, the court must conduct a *two-stage enquiry*:

(i) Did the parties have a common intention to share beneficial ownership *at all* (the ownership issue)?
(ii) If they did, what are the *proportions* their respective shares (the quantification issue)?

It has been long established that the further element of *detriment/change of position* in reliance on the common intention must be proved. *'Equity will not assist a volunteer'*. Nevertheless, this was recently called in question in *Hudson v Hathaway* [2022] EWCA Civ 1648, at least in the context of common intention allegedly evidenced by an express agreement through emails between former cohabitants. The litigation went from a Circuit Judge on appeal to a QBD judge

cases. The son had worked for 32 years for low wages in the expectation that he would inherit a share in the farming property. The Supreme Court was concerned exclusively with the remedy required to satisfy the equity which had clearly arisen. Nevertheless, the judgment runs to 108 pages plus a supplement and its perusal is not for the faint-hearted. The Justices were split 3/2 on the *purpose of the remedy* in proprietary estoppel. To vastly over-simplify, the majority favoured a remedy based on (proportionate) fulfilment of the promise given, while the majority favoured the detriment basis. The width of judicial discretion is emphasised and the case was remitted to the Chancery Division for determination of the precise remedy – yet more costs! Where does this leave litigants in general – and former cohabitants in particular? Arguable cohabitation cases pre- *Guest* inclined towards the now discredited detriment-based approach to remedy. Will the majority ruling in *Guest* lead to more generous awards based on the promise expectation? However, the downside to the encouragement of early settlement remains the width of judicial discretion in fashioning the appropriate remedy.

Cohabitation contracts

Can cohabitants regulate the property and financial consequences of their relationship by agreement? Yes, but again – in the absence of any bespoke legislation – the only option is a contract under general law. The common law requirements of a valid contract apply, including intention to create legal relations, sufficiently precise terms, consideration (unless the agreement is contained in a deed or document under seal) and the formal requirements if the contract relates to an interest in land, i.e. it must be in writing: Law of Property (Miscellaneous Provisions) Act 1989, section 2.

These legal requirements may prove too much for cohabitants, particularly those who are unaware of their legal position. In the law of England and Wales – unlike that of Australia – there is no equitable doctrine of promissory estoppel to assist where there is no valid contract.

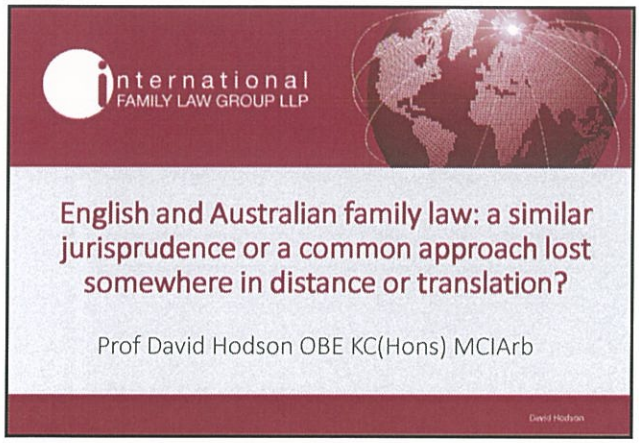
Future directions for the law in England and Wales?

Looking to neighbouring jurisdictions, Scotland (in 2006) and Ireland (in 2010) have legislated to provide remedies to cohabitants on relationship breakdown, albeit more limited than those for spouses.

Recommendations for statutory reform in England and Wales have long gone unheeded. Back in 2007 the Law Commission published its report *Cohabitation: The Financial Consequences of Relationship Breakdown.* It recommended a bespoke adjustive scheme based on financial and non-financial contributions to property (not future needs), with no entitlement to maintenance. The Law Commission recommended that couples should be able to disapply the statutory scheme by opt-out. Nothing was done about the recommendations. Many years later in August 2022 the Report of the House of Commons Women and Equalities Committee *The rights of cohabiting partners (HC 92)*saw the current law as 'costly, complicated and unfair'. It recommended that the Law Commission's 2007 proposals be adopted and that the Government commit to

publishing draft legislation for scrutiny in the 2003 Session of Parliament. The Government swiftly rejected this proposal, asserting that reform of cohabitation would be premature in advance of consideration by the Law Commission of the future of financial remedies law for spouses and civil partners. The Law Commission announced this in April 2023. The process will undoubtedly take several years.

So how long will cohabitants in England and Wales remain beneath the reform radar, even in respect of legal protection on family breakdown far more modest than that achieved many years ago in Australia?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English and Australian family law: a similar jurisprudence or a common approach lost somewhere in distance or translation?
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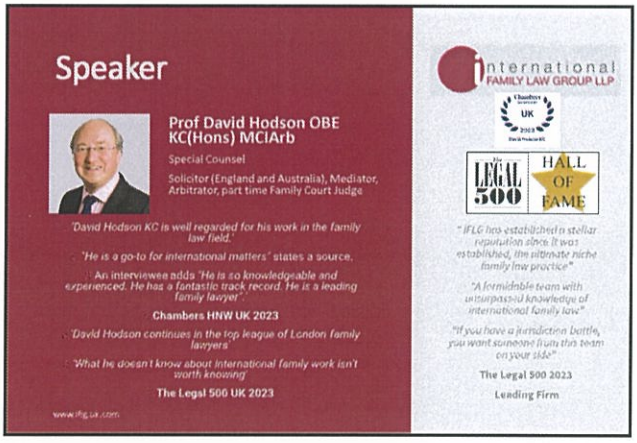
Speaker
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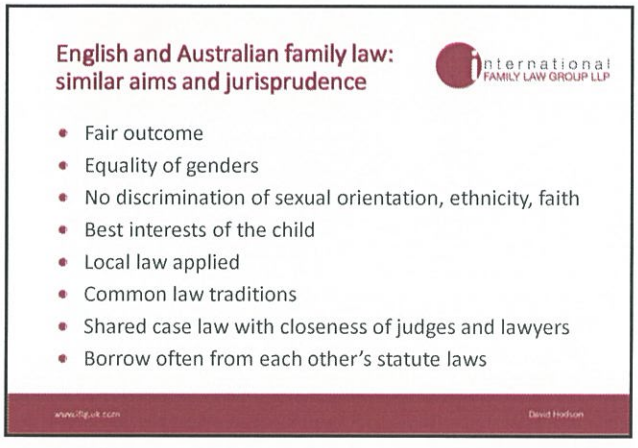
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English and Australian family law: similar aims and jurisprudence

- So why are there quite distinctive differences?
- What can be learned for other areas of Anglo Australian law?
- What can we learn from Australia to improve English law, whether law or practice or procedure?
- Are the differences increasing or narrowing and why?
- Can the close similarities blur the differences?

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English and Australian family law: similar aims and jurisprudence

- Australian directive ADR: who needs arbitration
- What's it got to do with the children: separation of children and finance under English law
- What's a woman worth: proving the contribution of equality
- Marital agreements: protecting the vulnerable or providing certainty
- Forum: Australia almost alone in self-serving criteria
- Procedure: subpoenas and hearsay

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Australian directive ADR: who needs arbitration

- English family mediation from USA and Canada and from therapeutic professions
- Found in distinctive aspects of mediation practice
- Particularly in the passive approach, finding common ground and helping renew dialogue
- Australian family mediation (partly) found in and closely alongside the court process
- Focus on the resolution of a dispute
- Became directive, with strong lawyer input

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Australian directive ADR: who needs arbitration

- England later adopted the Australian directive approach, now running alongside traditional methods; more likely if conducted by lawyer mediators in finance work
- So England has learned and borrowed from Australia

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Australian directive ADR: who needs arbitration

- In 1991 Australia introduced family arbitration by statute law although rules not until 2016
- But never really took off, at least until very recent years
- In 2012 England launched a family arbitration scheme
- First draft Rules and Forms explicitly from Australian scheme
- But why was Australia not adopting it more?
- One reason given was greater use of directive mediation
- Will Australia now adopt early neutral evaluation (FDR)?

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What's it got to do with the children: separation of children and finance under English law

- England has completely separate children and finance proceedings; courts, sometimes lawyers, statements, laws, ways of working, timetables and hearings
- Avoids negotiation/bartering of children and money
- Concentrate on best interests of children
- Perceived as having many benefits and unlikely to revert
- Australia has similar filings, separate process, but crucially combined final hearings

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What's it got to do with the children: separation of children and finance under English law

- Practitioners are each happy with their own and no likelihood of any immanent change
- English position can work badly where the arrangements for children are so linked to the finances esp. in relocation cases. May be a case in England for some combination of hearings?

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What's a woman worth: proving the contribution of equality

- Following House of Lords decision of *White* (2000), starting point of spousal/gender equality. No need to show equal contribution, whether actual or deemed
- Australia has still not explicitly introduced such a provision either in statute or case law
- Australia finance law still strongly wedded to contribution whereas this is now a fairly rare element post *White*
- But in practice in many Australian cases, outcome (before needs based provision as England would understand it) is similar and close to equality

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Marital agreements: protecting the vulnerable or providing certainty

- Australia has had binding marital agreements since 2001, provided certain strong pre conditions exist
- Since then these pre conditions have been moderated
- England has no statute law. PMAs are persuasively binding following HOL decision of *Radmacher* (2010); opportunity to have separate legal advice and disclosure and meet needs
- Yet both countries have a concern for protecting the vulnerable party at time of entering into these agreements
- Contrast many civil law systems with no separate representation and with emphasis on certainty

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Forum: Australia almost alone in self-serving criteria

- Many international families have connections with two or more countries. Which forum? Big issue for specialist lawyers
- England has (post Brexit) a discretionary approach, balance of convenience (by stat law) and closest connection (case law)
- Australia will accept proceedings provided Australia is not *a clearly inappropriate forum*. Case of *Henry* (1996). Same as Malaysia. Not now used in OZ/NZ cases.
- Very partial and self serving
- Gives rise to risk of parallel proceedings of England and Australia

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Forum: Australia almost alone in self-serving criteria

- Incidental problem of Australia requires 12 months separation before divorce whereas England requires none – indeed respondent in English divorce may not know of existence of proceedings for many months after they have been commenced
- So England can gain an advantage before Australia can create a *lis*, for a forum dispute
- Yet Australia with free standing financial claims may be making good progress
- A potential problem yet to be litigated!

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Procedure: subpoenas and hearsay

- Two (of several) procedural differences
- Family law disclosure in Australia is externally corroborated often by third party subpoenas; major part of lawyers work
- In England it is almost entirely self produced and corroborated, with third party orders rare in most cases
- Both sets of practitioners find it hard to understand how the other works!
- Hearsay is a concept barely known to English family lawyers, never found at court. Australia writes its statements closely aligned with the textbooks of evidence.

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Any conclusions?

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Prof David Hodson OBE KC(Hons) MCIArb
Special Counsel
The International Family Law Group LLP
dh@davidhodson.com
+44 (0)20 3178 5668
www.iflg.uk.com

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