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Recent Case Law Precedent Under Part III Of The Matrimonial And Family Proceedings Act 1984

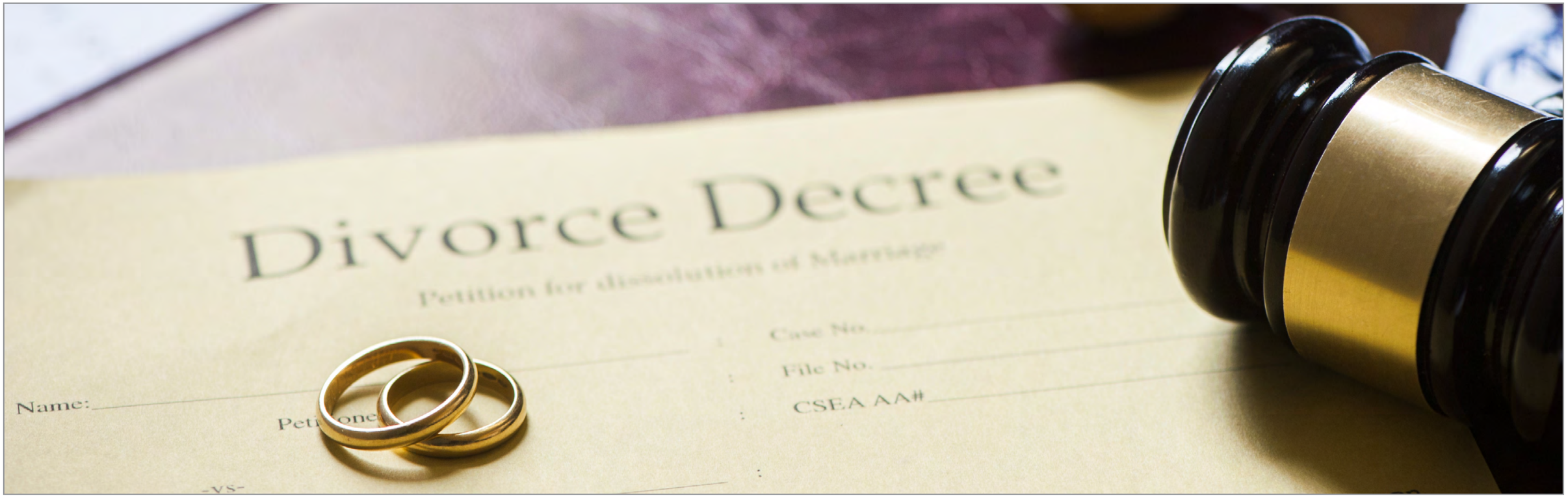
By Pauline Fowler

The publicity surrounding the case of Christina Estrada, in which this firm acted for Ms Estrada, has highlighted the possibility of making financial claims in this country following an overseas divorce. It was Part III of the Matrimonial and Family Proceedings Act 1984 that provided a mechanism for someone who has not remarried or entered into a civil partnership to bring a claim in England and Wales against a spouse or former spouse even if a court has already made a financial order in divorce proceedings in another jurisdiction. The thinking behind the Act was to alleviate the adverse consequences of no or inadequate financial provision being made by an overseas court in circumstances where there are substantial connections with England and Wales. The leading Supreme Court authority on this provision (*Agbaje v Akinnoye-Agbaje* [2010] UKSC 13) was clear, however, that the courts should not be deciding whether it would be appropriate for an order to be made in England and Wales as opposed to a foreign court – its purpose is to provide a financial remedy in circumstances where proceedings have already taken place in a foreign court.

The party seeking to make a claim has to obtain the permission of the court to proceed, and has to show a sufficient connection to England and Wales for the court to have jurisdiction. This means that either spouse must have been domiciled or habitually resident for 12 months either on the date of the application for permission or on the date the divorce took effect in the overseas country. If either or both parties to the marriage has at the time of the application for permission an interest in a property located within England and Wales that was once the matrimonial home, that provides a sufficient connection to satisfy the jurisdictional requirements, although the range of orders the court can make if that is the only connection is then restricted to the value of that property. Where relevant, the applicant must also satisfy the requirements of the European Maintenance Regulation.

The court must be satisfied that it is necessary to make an order for further financial provision. The statute itself requires the court to consider all the circumstances of the case but the following in particular: the connection the parties have with England and Wales and any other country including the country in which the overseas divorce was concluded; any financial benefit the applicant or a child of the family may receive as a result of an agreement or the operation of law in another country; any financial order made in an overseas divorce and the extent to which that order has been or is likely to be complied with; any right the applicant has to seek a financial order from the overseas court and if he or she has not made such an application the reason for that; the availability within England and Wales of any property in respect of which an order could be made; the extent to which any order made could be enforceable; and the length of time that has elapsed between the divorce and the application.

At the hearing of the application for permission, the court has to be satisfied there is a "substantial ground for the making of an application" – which test goes beyond the tests of "a serious issue to be tried" or "a good arguable case", and is generally described as a "solid case". An applicant does not have to show "hardship" or "injustice" to proceed but if either of these is present they increase the likelihood of permission being granted. Disparity between the financial award made by an overseas court and the order an English court would make is not enough by itself to trigger permission. Proceedings overseas that were superficial or not independent would increase the chances of permission being granted. An application for permission is normally made by the applicant alone, without the respondent present, although it is open to the court to fix a further hearing with both parties present.



The recent Court of Appeal case of *Renee v Galbraith-Marten* [2016] EWCA Civ 537 addresses the High Court judge's refusal of permission in an application made following an Australian divorce in which a mediated agreement had been reached that is fully enforceable in Australian law. The Court of Appeal concluded that the applicant had had legal advice throughout in Australia and had remedies in Australia to address her concerns about the mediated agreement, and so upheld the High Court judge's order. Once permission has been granted, it should be set aside only where there is a compelling reason, which is a very high test indeed. The husband succeeded in doing so in the case of *M v W* [2014] EWHC 925 (Fam), which was another case concerning a mediated agreement, this time in New Zealand.

Once permission has been granted, the full range of financial orders available to divorcing couples in the English court is available, including interim maintenance orders unless the connection with the English jurisdiction arose solely because of the existence of a matrimonial home. There are also provisions to prevent a spouse from transferring or disposing of assets to put them beyond the reach of the court.

So far as quantum is concerned, it was made clear in *Agbaje* that there is no principle that it should be limited to the minimum required to overcome injustice. Lord Collins in *Agbaje* provided three general principles: first that primary consideration must be given to the welfare of any children of the marriage; second that it will never be appropriate to make an order that gives the applicant more than he or she would have been awarded if all the proceedings had been in the English court; and third that, where possible, provision should be made for the reasonable needs of each spouse. Subject to these principles, the court then has a broad discretion to take into account all the circumstances of the case, including not only the principles set out in section 25 of the Matrimonial Causes Act 1973, but also the connections the parties have or had to England. The size of the award Christina Estrada received (*Juffali v Juffali* [2016] EWHC 1684 (Fam)), which was based solely on needs because the urgent circumstances of that case meant there was insufficient time for full financial disclosure to be made, is a clear indication that awards under this legislation do not have to be limited because the application follows an overseas divorce.

Pauline Fowler is one of the founding partners of Hughes Fowler Carruthers, widely recognised as the leading niche family practice in London, and described in Chambers HNW 2016 as "fantastic" and "one of the best…in London and the country".

With over 30 years' experience as a solicitor specialising in complex divorce and children's work, she has long been top rated in both Chambers and Legal 500 and was described most recently (in Legal 500 2016) as "just superb all round". A long standing Fellow of the International Academy of Family Lawyers, she chairs Resolution's Property Tax and Pensions committee.