Chambers AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Family Law 2025

Definitive global law guides offering comparative analysis from top-ranked lawyers

Contributing Editor
Alex Carruthers
Hughes Fowler Carruthers

Chambers

Global Practice Guides

Family Law

Contributing Editor

Alex Carruthers

Hughes Fowler Carruthers

2025

Chambers Global Practice Guides

For more than 20 years, Chambers Global Guides have ranked lawyers and law firms across the world. Chambers now offer clients a new series of Global Practice Guides, which contain practical guidance on doing legal business in key jurisdictions. We use our knowledge of the world's best lawyers to select leading law firms in each jurisdiction to write the 'Law & Practice' sections. In addition, the 'Trends & Developments' sections analyse trends and developments in local legal markets.

GPG Director Katie Burrington
Content Management Director Claire Oxborrow
Content Manager Jonathan Mendelowitz
Senior Content Reviewer Sally McGonigal, Ethne Withers, Deborah Sinclair and Stephen Dinkeldein
Content Reviewers Vivienne Button, Lawrence Garrett, Sean Marshall, Marianne Page, Heather Palomino and Adrian Ciechacki
Content Coordination Manager Nancy Laidler
Senior Content Coordinators Carla Cagnina and Delicia Tasinda
Content Coordinator Hannah Leinmüller
Head of Production Jasper John
Production Coordinator Genevieve Sibayan

Published by
Chambers and Partners
165 Fleet Street
London
EC4A 2AE
Tel +44 20 7606 8844
Fax +44 20 7831 5662
Web www.chambers.com

CONTENTS

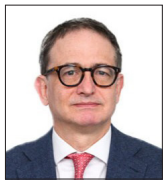
CONTENTS

INTRODUCTION

Contributed by: Alex Carruthers, Oliver Heeks and Sian Brooks, **Hughes Fowler Carruthers**

Hughes Fowler Carruthers has been based on Chancery Lane at the heart of legal London since 2001 and is widely regarded as one of London's leading divorce and family law practices. All partners are internationally acclaimed for the exceptional standard of their work and share a considerable breadth of experience, which enables them to offer the full gamut of skills needed to navigate complex litigation, expert and discreet negotiation, and alternative forms of dispute resolution to suit the individual demands of each client. Work is conducted with a high degree of professionalism and dedication. All solicitors in the practice are members of Resolution. The firm is part of an extensive international family law network through membership of the International Academy of Family Lawyers and the International Bar Association. This means Hughes Fowler Carruthers can provide a full international service through the partners' close connections worldwide.

Contributing Editor



Alex Carruthers is a founding partner at Hughes Fowler Carruthers and specialises in complex divorce and financial work and children's work – in particular, in international cases. His clients are high net worth individuals with complex legal issues, including trusts and jurisdictional disputes. In Chambers UK 2023, a source commented that Alex has "really good judgement on cases and he is also very intelligent".

Co-Authors

Oliver Heeks joined Hughes Fowler Carruthers in January 2024 after qualifying as a family solicitor at a leading firm in 2022. He is an associate solicitor and advises on a wide range of family law matters, including divorce, financial relief, emergency injunctions, and private law children matters. Oliver is adept at working with international and domestic clients from a wide range of backgrounds, including high net worth individuals. He deals regularly with complex financial disputes often involving high-value business assets, offshore assets, trusts and inherited wealth.

Sian Brooks joined Hughes Fowler Carruthers in December 2024 as a paralegal. Sian assists the associates and partners on a broad range of cases – ranging from high net worth financial remedy matters to divorce and children matters, often with multi-jurisdictional elements.

INTRODUCTION

Contributed by: Alex Carruthers, Oliver Heeks and Sian Brooks, **Hughes Fowler Carruthers**

Hughes Fowler Carruthers

Academy Court
94 Chancery Lane
London
WC2A 1DT
UK

Tel: +44 (0) 20 7421 8383
Email: a.carruthers@hfclaw.com
Web: www.hfclaw.com

Hughes Fowler Carruthers

HUGHES FOWLER CARRUTHERS HARPER LABI

SOLICITORS

Family Law: A Global Overview

Family law is an important part of a country's legal and social fabric. The rules and norms of society are reflected in the laws that dictate what happens on relationship breakdown. As such, family law is an interesting insight into how a country views relationships and the financial impact of their breakdown. This guide, hopefully, is not only useful for professionals when considering international aspects of family law but also provides an informative guide for the layperson when considering how professionals deal with these issues in each country and offers an insight into the society of each country.

Although the term "family law" is broad, it is most commonly interpreted as dealing with issues arising from relationship breakdown. This guide deals with three main areas arising from relationship breakdown, as follows.

- Change in status – if a relationship breaks down then, depending on the formal status of the parties, there may be a change in status going forwards. If the parties are married, then there may be divorce proceedings or (in some countries) nullity and judicial separation proceedings. Similarly, some countries have different forms of legal partnerships (eg, civil partnerships, which are dissolved upon the relationship ending). Other, less formal arrangements (eg, cohabitation) may not require a change in legal status.
- Financial consequences – when a relationship breaks down, where there have been dependencies on either side, there will inevitably be financial consequences on its dissolution.
- Childcare arrangements – in most countries, child arrangements are normally kept separate from financial issues, but clearly there are some linkages (eg, financial support for the benefit of children).

These issues are separate and distinct but there can be linkages between them. By way of example, if there is a formal dissolution of the status of the parties in one country, then it is normally that country that deals with the financial consequences that arise. There is at least one notable exception to this rule – namely, England and Wales, where the financial consequences of the breakdown of a marriage can be dealt with in that country even if the divorce itself happened abroad. However, this is the exception that proves the rule.

In some countries, there are further linkages between these issues; some jurisdictions pro-

Contributed by: Alex Carruthers, Oliver Heeks and Sian Brooks, **Hughes Fowler Carruthers**

vide for better or worse financial relief depending on the circumstances under which the relationship broke down. In Austria, for example, if there is a finding that one party is the cause of the breakdown of a relationship then the other party is entitled to significant maintenance.

It is worth examining each of these areas in more detail here.

Change in status

One of the most striking aspects witnessed in this area during the past ten years is the significant increase in the number of jurisdictions that recognise relationships between individuals of the same sex. Thirty or so years ago, there was no jurisdiction in the world that legally recognised these relationships but now the majority of jurisdictions in the world do so. As a result, countries must have laws in place to determine what will happen when such relationships break down.

The sensitive nature of this evolution is a classic example of the trend that this overview highlights – namely, that the law has to reflect the society in which it is embedded. As society has evolved, so too has the law. In countries where same-sex relationships are recognised (and thus those jurisdictions deal with the breakdown of such relationships), there can be differences between the legal terminology – ie, whether it is a civil partnership or a marriage and therefore whether it is a formal "divorce" – but the similarities normally outweigh the differences.

Another change that has happened in some countries concerns the grounds on which a dissolution of the relationship can take place. In simplistic terms, there are generally two forms of "grounds" – in some countries, the relationship can only be dissolved following the actions of the party who caused the breakdown. In other words, "fault" needs to be found. Some jurisdictions are not "fault"-based and only require a period of time to have elapsed before a divorce is allowed or require a statement that the marriage has broken down. In at least one jurisdiction (England and Wales), there has been a recent move away from a "fault-based" system to a non-fault-based system.

In a global world, where parties move from country to country with ease, another issue that must be considered when advising on these matters is the jurisdiction in which proceedings can be issued to dissolve the relationship. In general, jurisdiction in all countries is either founded on the parties' nationality (or, in some countries, their domicile) or residency.

Given that some countries can have significantly different financial regimes upon relationship breakdown, the question of whether a party can get divorced in different jurisdictions can be of the upmost importance. Deliberately choosing one country over another to issue proceedings has given rise to the colloquial term "divorce tourism".

This generates a multitude of legal issues that may arise, including how either jurisdiction deals with the claims of the competing jurisdiction, and may evolve into complicated and sophisticated legal disputes that can clog up the courts for many months or years. The money at stake for ultra high net worth parties may, however, justify this expense.

Financial consequences upon relationship breakdown

The difference in financial consequences if a couple's finances are dealt with in different jurisdictions can be vast. The laws that determine the

Contributed by: Alex Carruthers, Oliver Heeks and Sian Brooks, **Hughes Fowler Carruthers**

division of money may reflect the societal norms of the different countries.

By way of example, where there is a sophisticated and well-funded welfare state in which mothers are encouraged to go back to work after the birth of their child, there may not be laws for the provision of spousal maintenance on divorce because it is expected that the mother will be working anyway and supported by the State. The financial award for mothers in those countries might be vastly different to those countries where it has been expected that mothers looking after children at home are as productive as the person who goes out to work and should be provided with support from their ex-partner to allow it to continue.

There is a further fundamental difference in a number of countries around the world when considering the financial consequences of a relationship breakdown. In civil countries that use the Napoleonic Code or variations of it, upon relationship breakdown, the marital regime that the parties had entered into on their marriage comes to an end. And the law must regulate how the assets are to be divided according to the marital regime and whether there is any compensation to be paid as well as maintenance.

On the other hand, in common law countries, parties do not enter into a "marital regime" when they marry. Instead, they continue to act as individuals but – upon the breakdown of the relationship – there is an equitable distribution of assets and incomes between them to reflect the fact that the relationship has come to an end.

Furthermore, in several countries around the world (including those in the EU), there is a rule of "applicable law" whereby the court may not use their own native laws to determine how finances are to be distributed but instead may use law from other countries. If the individuals are from a different type of regime (eg, a common law rather than a civil code country), then the court where the divorce is taking place will have to interpret how the different structure "works". This may well lead to confusion and misinterpretation.

Particular areas of contrast between countries, as well as those involving capital distribution, concern whether an ex-spouse should receive maintenance after the divorce has ended – and, if so, for how long – and the level of child support that must be paid by the parties. These are matters in respect of which there can be significant differences between neighbouring countries – for example, Scotland (where there is very limited spousal support) and England and Wales (where spousal support is much more generous).

Some countries have financial structures that are embedded within them and therefore relationship breakdown has developed ways of taking them into account and/or dealing with them. By way of example, trust structures are more easily dealt with in common law countries than in civil code countries, where they are less common.

Childcare arrangements

This is one of the most important – and, at times, controversial – areas that must be resolved following the breakdown of the relationship. This guide sets out the general rules that the court will consider when dealing with this issue, including the weight that the child's voice has in each country. One area not dealt with in detail is the relocation of children from one country to another, which is covered in a separate guide.

INTRODUCTION

Contributed by: Alex Carruthers, Oliver Heeks and Sian Brooks, **Hughes Fowler Carruthers**

Transparency in courts

Finally, a hot topic of debate in several countries at the moment is transparency regarding the family court process. There is a fierce debate in many countries about whether it is in society's best interests for there to be open justice so that a light can be shone on the judicial process to cleanse it of any imperfections or whether the rights of the individual to have their personal affairs kept secret and their rights to a private family life must be protected. This is an issue that occurs in many areas of the law but is most acute in family law, given that the issues debated are extremely personal. In some jurisdictions (eg, California), it is acknowledged that the proceedings will take place within the glare of publicity, whereas in a number of others – for example, in quite a number of EU countries – there are strict rules about publicity.

This, as with various issues addressed in this guide, reflects the evolution of society in each country and provides a snapshot of the present laws and norms of that society.

ARGENTINA

Law and Practice

Contributed by:
Herberto Robinson
McEWAN

Contents

McEWAN is a pioneer in the provision of legal and tax services to private clients in Argentina. The firm's lawyers and accountants have extensive experience of assisting ultra high net worth individuals with all areas of tax and civil law, as well as assisting banks, private bankers, family offices, trust companies, investment banks, and private equity funds. In addition to their vast knowledge of family law, McEWAN professionals also have significant expertise in handling matters involving complex family conflicts. McEWAN is recognised for its work on succession and complex tax litigation and addresses ADR concerning personal and family wealth issues within the scope of family law. Its services encompass integral family wealth planning (including planning for the protection for minors and vulnerable beneficiaries), creation of simple and complex trust structures, simple and complex probate proceedings, divorces and liquidation of shared/marital property, compensation agreements, prenuptial agreements, mediation proceedings, lawsuits and claims involving international structures, and preparation and drafting of wills.

Author

Herberto Robinson is a civil and corporate law attorney and a partner at McEWAN, with 20 years of experience representing families and their companies in a variety of cross-border transactions in Argentina and Latin America. Herberto collaborates with individuals and families on structuring matters arising from the management of wealth during life and after death. He also assists clients with estate planning and family-business succession planning and has a depth of experience in family litigation matters.

Estudio McEwan

Esmeralda 1061 PB
C1007ABM
Buenos Aires
Argentina

Tel: +54 11 7078 1112
Fax: +54 11 7078 1112
Email: info@estudiomcewan.com.ar
Web: www.estudiomcewan.com.ar

1. Divorce

1.1 Grounds, Timeline, Service and Process

In Argentina, there are neither grounds for terminating marriage nor a required period of personal separation before for filing a divorce.

Argentina is a codified law jurisdiction. Its Civil and Commercial Code (CCC) has eliminated any form of fault-alleging by either of the spouses and, therefore, the possibility of initiating claims for damages (against the other spouse) is not allowed.

Divorce Proceedings

Either spouse may file, unilaterally or jointly, a divorce procedure. If a unilateral procedure has been filed, the parties may have an uncontested divorce. However, the judge will rule the same way as in a joint procedure, as there are no grounds for divorce.

Argentine law has recognised marriage between same-sex couples since 2010, so the same marital regime will apply in such cases. Adoption is also allowed for same-sex couples under the same terms as those required for heterosexual couples. Same-sex marriage and cohabitation have been recognised and enforced since 2015, with the sanction of the CCC.

The divorce process is initiated by filing a petition with the court based on the principle of the last marital domicile. This can be done by both spouses together (joint petition) or by one spouse alone (unilateral petition). A divorce petition can be filed at any time after marriage, as there are no required separation periods or specific grounds needed to request a divorce. If both parties agree on the terms, the court can issue a divorce decree within a period of two to three months. The divorce becomes official once the court's decision is registered in the Civil Registry of the jurisdiction where the marriage took place.

The rule for service of divorce proceedings is the last effective marital domicile or the domicile of the defendant spouse, at the plaintiff spouse's discretion. If one of the spouses does not have a domicile in Argentina, the action may be brought before the court of the last domicile they had within Argentina, provided the marriage was celebrated there. If the location of the last marital domicile cannot be established, the general rules of jurisdiction will apply.

Religious Marriages

Religious marriages have no legal effects in Argentina. In the Catholic Church, there is no divorce or separation. However, there is the annulment of marriage. Divorced Catholics can marry in the church only if it has been demonstrated through the church's internal process that they are free to marry. This also applies to non-Catholics who wish to marry a Catholic or convert to Catholicism.

Marriage Annulment

The annulment of a marriage is another process that spouses may file in relation to ending a marriage. When any of the grounds established by law arise, it is possible to request the annulment of a civil marriage, meaning it will be rendered null and void. Unlike divorce, when a marriage is declared null, it is as if it never existed. The grounds for declaring the annulment of a civil marriage are:

- if there was an error regarding the identity of the person with whom the marriage was contracted;

- when both or one of the spouses are under 18 years of age;
- when the marriage was entered into under the influence of force or fear strong enough to prevent the free exercise of decision-making;
- when there was no freedom of consent because one of the spouses was abducted;
- when one of the spouses was involved in the crime of spousal homicide in a previous marriage;
- when a prior marital bond still exists;
- when the marriage was contracted between:
  (a) kinship in a straight line in all degrees, regardless of the origin of the relationship;
  (b) kinship between bilateral and unilateral siblings, regardless of the origin of the relationship; and
  (c) affinity in a straight line in all degrees.

The annulment is processed through legal proceedings before a judge. The process begins with a lawsuit, for which presenting the marriage certificate is a fundamental requirement. Once the marriage is annulled, all reciprocal rights and obligations arising from it cease as of the same day. If bad faith is proven in one of the spouses, they will be obligated to compensate the other for all damage caused.

Separation of Assets

Under the CCC, there is no judicial process under which spouses can obtain a separation sentence other than liquidation of marital assets. Separation of assets refers to a resolution by which the communal marital assets are divided between the spouses, who continue to be married under a different marital asset system (the separated patrimony system).

However, a process of judicial separation of marital assets may be filed in case spouses intend to extinguish the marital assets and for some reason (ie, religious) they do not want to file for divorce. The judicial separation of assets may be requested by one of the spouses:

- if the other spouse's mismanagement threatens to cause the loss of their eventual rights over the community property;
- if the other spouse is declared in a state of preventive insolvency or bankruptcy;
- if the spouses are living apart without the intention to reunite;
- if, due to incapacity or excuse of one spouse, a third party is appointed as the curator of the other.

1.2 Choice of Jurisdiction

The law of the last marital domicile determines the applicable law and court jurisdiction in divorce cases and all matters concerning marriage nullity. Argentina adopted a federal system of government in which each of the 23 provinces (and the Autonomous City of Buenos Aires) has its own procedural law. Thus, the applicable law is always the CCC, and the court with jurisdiction is the provincial court where the last marriage residence was settled. The same grounds apply to same-sex marriages.

A party to a divorce may contest jurisdiction if the last marriage domicile is not in Argentina.

Marriage dissolution procedures are governed by the spouses' last marital residence law. However, if the last marital residence was in a foreign country, the parties may file for divorce in that country and then register the resolution at the local register. An Argentine judge's intervention is needed to receive all foreign-certified divorce documents.

Foreign divorces are recognised when the sentence is issued according to the last marital

domicile principle. Therefore, if the last marital residence is located in a different jurisdiction, spouses must register the divorce resolution before the Argentine Civil Registry with the intervention of an Argentine judge who will have received all certified divorce documents filed by the interested party.

Notably, if there are proceedings in another jurisdiction, said proceedings filed in Argentina can be stayed until the jurisdictional dispute has been resolved. The CCC incorporates the international legal principle of avoiding contradictory rulings over the same matter passed by different courts.

2. Financial Proceedings

2.1 Choice of Jurisdiction

It is important to mention that the court's role in divorce proceedings is limited to supervision that rules of public order (*normas de orden público*) have not been infringed and to ensure, upon petition, a fair resolution of the unresolved effects of the divorce (either patrimonial or not). Having said that, upon petition, financial orders to enforce child support and financial orders to liquidate and distribute marital assets can both be made on divorce.

The choice of divorce orders and how to obtain them from the courts are ruled in the CCC and in each province's Civil and Commercial Procedure Codes.

The divorce decree shall rule regarding the communication regime when minors are involved (under 18 years old) and the attribution of the family home (according to the rules established in the CCC). If petitioned, the court will only order temporary and exceptional spousal maintenance or compensation obligations.

Any spouse may file preventive measures on child support or custody before or during the divorce procedure to ensure financial orders.

First, a foreign divorce decree needs to be recognised in Argentina – for which, summary information known as an "exequatur" must be made whereby an Argentine judge, once they have verified that all the requirements are met (ie, no breach of public order rules and does not oppose another decree passed in Argentina), orders the registration of the divorce in the corresponding Argentine Civil Registry. If bilateral international treaties have been signed, said rules shall apply.

Financial claims may be related to immovable assets located in Argentina and to enforcing child maintenance.

It is important to mention that a foreign financial decree duly certified in its jurisdiction can be enforced if:

- the defendant (or paying party) is domiciled in Argentina; or
- the defendant's (or paying party's) property is located in Argentina.

2.2 Service and Process

Financial settlements must go through a prejudicial mediation process before filing in court. If no agreement is reached, filing the complaint in court is permitted in order to be served. There is no arbitration in family law matters.

2.3 Division of Assets

Under the CCC, when a divorce occurs, assets can be divided either through the court or pri-

vately. The court does not have to address marital regimes in the divorce decree; instead, the parties can privately settle the liquidation of their marital property. They can agree on how to distribute the assets between themselves. Alternatively, if needed, either or both parties may file a petition for a judicial liquidation and distribution procedure.

The CCC includes two forms of marital estate: property earned or purchased by the husband or wife during the marriage. This marital property can then be classified as marital estate administered by the husband during the marriage and marital estate administered by the wife during the marriage, regardless of who holds title over the specific good. This means that any spouse can hold the title of a property, which is still considered marital estate – although it will be administered by the spouse holding its title. The marital estate also comprises all assets under the names of companies or third parties that have been established using marital assets or because of the liquidation of marital assets.

When a marriage is terminated (due to death or divorce), the assets that qualify as shared/marital property are grouped together. After the applicable liabilities and claims of each spouse have been worked out (which may include compensation for the differences in the value of the property), they are divided and distributed equally between the spouses (in case of divorce) or between the heirs and the surviving spouse (in case of death).

Trusts

Argentine law recognises the concept of trusts. Although Argentina has not signed the Hague Convention on the Law Applicable to Trusts and Their Recognition (1985), some court precedents acknowledge the existence and enforceability of foreign trusts, provided that such trusts do not violate Argentine public order (eg, rules regarding inheritance for descendants and spouses).

Regulations or by-laws of a trust cannot override the forced heirship rule. As this rule is part of public order, any provisions or structures (such as trusts) that conflict with it can be challenged in court. Argentine law offers legal remedies for cases where a forced heir has been negatively affected regarding the forced share they are entitled to receive. In this context, any heir is entitled to file a collatio bonorum claim, which involves joining the assets together into a common fund.

There are precedents from Argentine courts where forced heirship claims have been admitted against trust assets where the legitimate portion of one of them was infringed.

The case of Vogelius, Angelina y otros c/ Vogelius, Federico y otros

In this case, the Supreme Court of Argentina ruled that even though a trust was established in the UK with assets located there, the succession must be governed by Argentine civil law. The court addressed the issue of collatio bonorum (accounting for gifts made during the settlor's lifetime) and determined that a trust created to benefit a forced heir of the settlor might be classified as a gift to that heir made prior to the settlor's death. Consequently, this trust must be included in the estate's accounting, as its implications go beyond what is allowed under inheritance law.

Regarding private international law matters, the court established that even though the trust was governed by UK law, the succession was subject to Argentine law because the deceased was last domiciled in Argentina.

2.4 Spousal Maintenance

The CCC establishes spousal maintenance or economic compensation in exceptional and temporary circumstances, including:

- in case of illness, or where a clear economic disadvantage means a worsening of their situation and the marital bond and its break-down is a likely cause;
- when experiencing difficulty in obtaining a job (generally in relation to the parent that holds custody of children); or
- in case of potential loss of pension rights, they have the right to claim compensation.

Compensation may consist of a one-time benefit, an income for a specified time or, exceptionally, an income for an indefinite period. Financial compensation claims have a six-month statutory limit after the divorce decree has been issued.

2.5 Prenuptial and Postnuptial Agreements

Under the CCC, marital agreements (conventions) are accepted under Argentine law. For such agreements to be valid, the marriage must be celebrated, and the agreements are required to determine:

- an inventory of assets of each spouse;
- donations between spouses before marriage; and
- the adoption of one of the matrimonial property regimes.

Said agreements need to be signed by public deed. Argentina has only two marital property regimes: the community property and the separate property regime. The community regime acts principally as the default regime if spouses keep silent on which regime they adopt. Also, spouses may change the matrimonial property adopted (only from a community regime to a separate regime and vice versa) within a year of marriage or once a year has passed since the last change.

If foreign prenuptial agreements are made, they must adhere to CCC regulations and be filed and registered with the Civil Registry if the marriage celebrated in another country is also registered in Argentina.

No postnuptial agreements are recognised by law. However, some private postnuptial agreements may be agreed upon by the spouses when a private separation and liquidation of the marital assets is signed.

For (pre)marital agreements to be enforceable, they must be documented through a public deed, and their content must comply with legal requirements. Courts have seen cases challenging whether the proper formal procedures were followed. Due to the variety of clauses included in these agreements, there is no significant case law.

2.6 Cohabitation

The CCC recognises certain rights for cohabitants, provided they have been together for at least two years. Through “cohabitation agreements” (*pacto de convivencia*), domestic partners can regulate different aspects of their lives together, such as economic aspects for distributing property and other responsibilities.

The CCC also provides protection for the family home and, if one partner dies, the survivor is granted the right to free housing in the home they shared for a period of two years. The law recognises other partial effects on partners (ie, social security and pension rights); however, the legal recognition provided for them is restricted.

Partners or cohabitants do not have inheritance rights; therefore, a testator/testatrix may dispose of their wealth to the partner up to the disposable portion (one-third of the estate).

Under the CCC, a cohabitant with no children who suffers a clear imbalance in their economic situation (due to the end of the cohabitation) may claim economic compensation before the court within six months of the breakdown.

Upon petition, to ensure financial orders regarding enforcement of child support or economic compensation, the execution of a court's ruling may include seizure, lien or restraint of assets.

2.7 Enforcement

Execution of a court's ruling may include seizure, lien or restraint of assets (depending on the local jurisdiction where the procedure has been filed).

In Argentina, traditional methods to ensure child support fulfilment had been ineffective. For this reason, additional approaches were adopted to ensure that those responsible fulfil their obligation. Following the commitment adopted by Argentina to the Convention on the Rights of the Child, a Registry of Child Support Debtors was created.

In this way, the Registry seeks to ensure that debtors fulfil their obligation to pay child support, with a focus on the well-being of minors. Due to the challenges in achieving positive outcomes through enforcement actions, sanctions are applied to encourage debtors to rectify their situation.

International enforcement of a financial order is permitted in Argentina, following international regulations and special procedures.

2.8 Media Access and Transparency

When minors are involved, the law prohibits the publication, dissemination or advertising of certain facts related to individuals under the age of 18.

Processes are public files. However, family processes are reserved files, and only the parties involved have access to said files.

2.9 Alternative Dispute Resolution (ADR)

There is no ADR in Argentina.

3. Child Law

3.1 Choice of Jurisdiction

For children proceedings, the jurisdictional grounds are the same for marriage and financial cases.

It is important to note that the last domicile will give the judge grounds to decide the children's proceedings and which of the spouses will remain in the family home. As such, the judge considers the following concepts:

- who will take care of the children;
- the best interests of the children
- who is in a better financial situation to maintain a home on their own;
- the health condition and age of the spouses; and
- the interests of other individuals who are part of the family group.

3.2 Living/Contact Arrangements and Child Maintenance

Communication and Contact Arrangements

If there is no (private) agreement between the parents through a parental agreement, the judge will decide on the "communication agreement".

The contract agreement shall address the following:

- the place and time the children spend with each parent;
- the responsibilities each parent assumes toward the children (taking them to school, paying for health insurance, taking them to medical check-ups, etc);
- how the children will spend holidays, public holidays, and other important dates; and
- how will the children communicate with each parent.

When courts approach an application for child support or related matters in the context of family law, they generally follow a process that ensures the child's best interests are prioritised. For a general overview of how courts typically handle such applications, please see **3.1 Choice of Jurisdiction**.

Following the breakdown of a relationship or marriage, the legal approach to custody and parental responsibility focuses on ensuring the children's best interests are upheld. The courts typically follow a structured process determined by the CCC when determining custody and the allocation of parental responsibility.

In Argentina, there are certain restrictions on the court's ability to make orders regarding a child's living and contact arrangements, particularly to ensure the child's best interests are always the primary consideration. These restrictions are in place to protect the child's welfare and ensure that decisions regarding custody and visitation are not harmful to the child's emotional, physical or psychological development.

Child Maintenance

In Argentina, child maintenance (*alimentos*) is defined as the financial support that one parent provides to the other for the care, upbringing, and welfare of their children after the breakdown of a relationship or marriage. The obligation to provide maintenance arises from the legal duty of parents to support their children, ensuring they have access to the basic needs necessary for their development, such as food, clothing, education, health, and shelter.

The child maintenance applies to both biological parents, regardless of marital status or relationship. *Alimentos* shall include:

- education (school fees, books, extracurricular activities, etc);
- healthcare (medical expenses, dental care, insurance);
- clothing; and
- housing (when the child lives with the custodial parent, maintenance also contributes to the housing expenses related to the child's needs).

Parents are expected to share the responsibility for maintaining their children, and the law recognises that these duties do not end when the child reaches adulthood in certain situations – for example, if the child is still studying or is unable to support themselves.

The parents' incomes and the financial agreements between the spouses in a divorce directly affect the calculation of child maintenance.

While there is no fixed formula for calculating child maintenance in Argentina, the law typically sets out a percentage of the non-custodial parent's income, which the court may adjust based on the child's needs and the financial ability of

both parents. By way of example, child maintenance may range between 15% and 25% of the non-custodial parent's income, depending on the number of children and other relevant factors. The percentage may increase or be adjusted if there is more than one child. In cases where the parents are not in agreement about the amount of maintenance, a judge will evaluate the parents' incomes, the needs of the child, and other factors to determine an appropriate maintenance amount.

In joint or shared custody cases, where the child spends an equal amount of time with both parents, the amount of maintenance may be adjusted, with both parents contributing proportionally to the child's needs. The court will consider both parents' incomes and the practicalities of care and financial support.

As described previously, parents may address child maintenance arrangements privately and then seek the judge's acknowledgement.

Permanent and temporary maintenance orders

In Argentina, the court can issue both temporary and permanent maintenance orders, which are granted while a case is still pending, ensuring that the child's needs are met before a final decision is made. The weaker party typically requests this type of order. Conversely, permanent maintenance orders are established once a final decision is reached and remain in effect until the child turns 18 or until there is a change in circumstances.

In Argentina, child maintenance orders generally last until the child reaches the age of 21 (unless the adult child has sufficient resources to provide for themselves). However, there are exceptions and, in some cases, the maintenance obligation can extend beyond this age limit until the child reaches the age of 25 (for children attending university or vocational school and if they cannot support themselves). Moreover, beyond the age of 21, if the child is incapacitated or unable to work due to a physical or mental condition, the parent may still be required to provide maintenance, regardless of the child's age (on a case-by-case basis).

The minimum age for a child to be able to apply for maintenance directly in Argentina is 18 years old, as this is the age of legal majority and the capacity to make independent legal decisions.

Medical treatments

It is important to highlight that under the CCC, there is a presumption that children between the ages of 13 and 16 can make decisions regarding non-invasive medical treatments that do not compromise their health or pose a serious risk to their lives or physical integrity.

For invasive treatments that do compromise their health, or when their integrity or life is at risk, the adolescent must give their consent with the assistance of their parents. In the event of a conflict between the parents, the matter is resolved by prioritising the adolescent's best interests based on medical opinions regarding the consequences of carrying out or not carrying out the medical procedure.

3.3 Other Matters

Courts in Argentina have the authority to issue orders regarding the upbringing of a child when parents have not reached an agreement regarding schooling, medical care, religion, and holidays.

In Argentina, courts consider allegations of parental alienation to be a restrictive matter that

considers the best interests of the child (as a public order rule). The factors to be considered are:

- the child's behaviour and relationship patterns – changes in the child's behaviour towards the alienated parent (such as sudden hostility, fear, or rejection) that cannot be reasonably explained; and
- parental conduct – evidence is examined to determine whether one parent has engaged in alienating behaviours, such as:
  (a) making disparaging remarks about the other parent;
  (b) limiting contact or access without valid reasons; and
  (c) manipulating the child to develop negative feelings towards the other parent.

In respect of parental alientation, the court may also:

- order evaluations by mental health professionals to identify signs of alienation and its impact on the child; and
- consider whether the alienation has negatively affected the child's emotional health, self-esteem, or ability to form stable relationships.

When parental alienation is established, the court can take measures such as adjusting custody or visitation arrangements, mandating therapy, or imposing penalties on the alienating parent to safeguard the child's welfare.

Once again, the principle of protecting the child's well-being applies to children giving evidence in court. The CCC grants children the right to be heard in legal proceedings affecting them – taking into account their age, maturity, and level of understanding.

Ultimately, the court uses the child's testimony as one of several factors to determine the course of action that best aligns with the child's rights and welfare.

3.4 ADR

Mediation is a well-established mechanism that helps parties resolve all family disputes (including child support, spousal maintenance, and marital asset division). It is a widely used ADR method in Argentina. Mediation involves a neutral third party (the mediator) who facilitates communication and negotiation between the parties to reach a mutually agreeable solution. The rule of confidentiality allows parties to negotiate freely without fear that their discussions will be used against them in court.

The law also allows private agreements to be settled by the parties with the participation of legal advice as a requirement.

In many provinces in Argentina, both mediation and private agreements are mandated by law as a prerequisite to filing certain types of court cases, including financial disputes.

3.5 Media Access and Transparency

In Argentina, reporting cases involving children is highly restricted to protect their privacy and safeguard their best interests. The applicable regulations are:

- The Convention on the Rights of the Child, incorporated into Argentina's Constitution, guarantees children's rights to privacy.
- The Civil and Commercial Code and Law 26,061 on the Comprehensive Protection of the Rights of Children and Adolescents explicitly prohibit the publication of any information that may directly or indirectly identify a child involved in judicial proceedings.

Media outlets are prohibited from publishing names, photographs, or any identifying details about the child or their family. Violations of these rules can result in legal penalties, including fines or sanctions for the publication.

Anonymity

All case reports will anonymise children's information to protect their identity. Names and other identifying details, such as addresses, school names, or photographs, will be redacted or replaced with initials or pseudonyms in all official records and public communications.

In family law cases, proceedings involving children are automatically anonymised as a matter of law to protect their privacy and dignity. Parents may still wish to ensure further anonymisation or privacy.

If any party, media outlet, or individual breaches confidentiality rules, the court may impose fines or sanctions. The offending party may face additional legal consequences.

Trends and Developments

Contributed by:
Herberto Robinson and Micaela Cagnoli
McEWAN

McEWAN is a pioneer in the provision of legal and tax services to private clients in Argentina. The firm's lawyers and accountants have extensive experience of assisting ultra high net worth individuals with all areas of tax and civil law, as well as assisting banks, private bankers, family offices, trust companies, investment banks, and private equity funds. In addition to their vast knowledge of family law, McEWAN professionals also have significant expertise in handling matters involving complex family conflicts. McEWAN is recognised for its work on succession and complex tax litigation and addresses ADR concerning personal and family wealth issues within the scope of family law. Its services encompass integral family wealth planning (including planning for the protection for minors and vulnerable beneficiaries), creation of simple and complex trust structures, simple and complex probate proceedings, divorces and liquidation of shared/marital property, compensation agreements, prenuptial agreements, mediation proceedings, lawsuits and claims involving international structures, and preparation and drafting of wills.

Authors

Herberto Robinson is a civil and corporate law attorney and a partner at McEWAN, with 20 years of experience representing families and their companies in a variety of cross-border transactions in Argentina and Latin America. Herberto collaborates with individuals and families on structuring matters arising from the management of wealth during life and after death. He also assists clients with estate planning and family-business succession planning and has a depth of experience in family litigation matters.

Micaela Cagnoli is an attorney-at-law and an associate at McEWAN. She works with individuals and families on a variety of legal matters, with a focus on civil and corporate law. Micaela specialises in public international law and serves as a teaching assistant in Human Rights and Guarantees at the University of Buenos Aires. She manages a number of the firm's succession cases and has experience in family law.

Estudio McEwan

Esmeralda 1061 PB
C1007ABM
Buenos Aires
Argentina

Tel: +54 11 7078 1112
Fax: +54 11 7078 1112
Email: info@estudiomcewan.com.ar
Web: www.estudiomcewan.com.ar

Restrictions On Capacity: Complexities and Challenges at a Global Level

The issues surrounding estates – and the capacity to make decisions regarding the estates – have garnered attention from people in many countries. This is primarily due to the increasing life expectancy of the human population worldwide. More importantly, various mental changes are observable but do not lead to significant alterations in a person's mental status. These subtle changes can pose challenges for lawyers and notaries when it comes to determining whether an individual has full awareness of their actions.

Planning is crucial when individuals who may have a disability are involved in decision-making. Additionally, family law professionals face challenges in establishing consistent rules to assess the validity of decisions made by individuals with limited capacity – or, when necessary, by their relatives – in order to safeguard their personal and financial interests. This is where the emphasis should be placed.

The notion of disability as such has undergone changes over time, and it is thus conceived of as "a permanent or prolonged functional alteration – whether this is a motor, sensory or mental alteration – that, when weighed with age and social environment, implies considerable disadvantages hindering family, social, educational or work integration".

According to the United Nations Convention on the Rights of Persons with Disabilities, persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments that – in interaction with various barriers – may hinder their full and effective participation in society on an equal basis with others (United Nations, 2006).

There are situations in which a person may not be classified as having a disability, yet they experience some level of change or decline in their intellectual capacity. This can affect their decision-making, especially regarding their property and assets, in a manner similar to the challenges faced by elderly adults.

In Argentina, a person is presumed to have capacity; this is a general principle. Any restrictions on capacity will be exceptional, will be prescribed either by statute or by a judge, and will inure to the benefit of subjects themselves (Chapter 2 of the Civil and Commercial Code of the Nation (CCCN)).

Restrictions may apply to certain simple acts or specific legal actions, limiting what is considered necessary for an individual for a certain period. To address this, a judge may appoint support personnel or caregivers to help convey the wishes of the restricted person.

Some of the circumstances bringing about disability may be either inherent to the person, self-inflicted, or from birth. Some can develop over time as a person ages – for example, neurodegenerative diseases. External factors, such as addictions, may cause others.

How can a person in such a state plan their estate? Is that planning treated as valid? Or, on the contrary, is it likely to be invalidated? Legal scholars have no consensus on this matter, and positions and decisions are sometimes inconsistent in comparative law. Some specific aspects are analysed here.

Reduction of capacity over time

Global life expectancy has been steadily increasing, as follows.

- In Argentina, men have an average life expectancy of 73 years, whereas women live to an average age of 79.
- In Spain, men live an average of 70 years, whereas women have a significantly longer life expectancy of 86 years.
- In Mexico, men reach an average age of 72 years, whereas women live six years longer (reaching an average age of 78 years).
- Overall, the world averages are slightly lower – with men living to about 70 years and women to about 75 years.

The increase in life expectancy does not prevent some neurodegenerative diseases from appearing during adulthood. Neurodegenerative diseases are disorders that affect the brain and nervous system, causing progressive and irreversible deterioration, even to the extent of neuronal death. These disorders can affect memory, mobility and cognitive function, thus taking their toll on the life quality of those who suffer from them by causing the progressive loss of mental and/or physical faculties, and even lead to death.

Progressive neurodegeneration can lead to significant disabilities, as it results in limited functions and an increasing inability to manage environmental demands, which often require varying degrees of external support and assistance. When people begin to detect a deterioration of this type, they often take proactive steps to secure their wishes for the future, entering into agreements that reflect their intentions for times when they can no longer express them.

In light of these challenges, the most effective solution is to seek legal tools that enable individuals to plan for their later years, prepare for their succession, and proactively distribute their assets. This involves assessing their belongings and ensuring that each heir is fairly compensated. Several options (such as testamentary trusts, trusts for inheritance purposes, agreements on future inheritance, advance directives, or wills) have been analysed in previous iterations of this Chambers guide, which is worth returning to.

Elderly people as vulnerable testators

What happens when a person disposes of their assets, such as by drafting a will, while their mental capacity is uncertain? In Argentina, a will can be drafted in handwritten form (in the testator's own handwriting) or by public instrument before a notary. When creating a will through a public deed, the notary must verify the testator's capacity, confirm their condition, and ensure

they express their genuine last wishes. However, what occurs when the testator writes the will by hand? In this case, no one can confirm the testator's capacity or ensure that the will was made freely and without coercion.

What happens when the testator makes a will while in a hospital? Is this factor sufficient to invalidate it? Not really, as the mere fact of being hospitalised in an institution does not merit challenging the validity of an act. To do so, it is necessary to analyse the general condition of the testator.

An interdisciplinary assessment of the patient must be executed prior to granting the act per se. If, after this assessment, the medical doctors decide that the patient is conscious and their autonomy of will is not affected, the notary could attest that the person is fully capable of making a will.

The age of the patient – combined with an illness for which drugs, morphine, or anaesthesia must be administered – weakens the patient's general state and psychic functions, thus substantially reducing their capacity to reason, understand, and express their will. Under this state, the testator could be influenced to make the will in the way that they do.

The term "vulnerable testator" is commonly used in Spain to describe a situation where an elderly person may be influenced to create a will that is not entirely their own or a true reflection of their intentions. This does not necessarily imply that the testator lacks the mental capacity to make a will; rather, owing to their age and condition, they may be susceptible to influences that compromise their freedom and autonomy when making the decision.

For this reason, the Code of Civil Laws of Catalonia, Section 412, subsection 5 establishes that they are incapable of creating a succession unless the following situations are configured: "Natural or legal persons and the caregivers who depend on them who have provided assistance, residential or similar services to the deceased under a contract may only be favoured in the succession of this if it is ordered in an open notarial will or a succession agreement."

That is to say, testators who wish to favour professional caretakers or the persons in charge or employees of the care centres where they are admitted must necessarily resort to a notarial will. This way, the notary will attest to the testator's capacity and their own will.

Undue influence

Under common law, "undue influence" refers to the excessive pressure that one person exerts on a testator, leading them to create a will that differs from what they would have chosen if such strong influence had not been present. This situation typically arises in relationships built on trust with the testator, such as those involving a friend, neighbour, partner, or caretaker (excluding relatives). This makes it different from testamentary fraud, as no physical or mental will is exercised, nor has fraud in the inducement been provoked.

According to Madoff, there are four elements that American case law takes into account to determine undue influence:

- a relationship of trust between the testator and the person who allegedly exerts the influence;
- the person being relied on has been involved in the making or drafting of the will;

- the testator was vulnerable to undue influence and, by this, their age and mental and physical conditions are taken into consideration;
- the testator makes some "unnatural" attribution in favour of the trusted person, so that the more unexpected the testamentary attribution is, the greater the likelihood of undue influence.

As with the vulnerable testator, undue influence does not necessarily presume the lack of natural capacity of the testator because – if such is the case – the will will be held completely unenforceable. However, as there is no legally established legitimacy in the United States, the testator could distribute their assets as they wish. So, if the theory of undue influence was commonly applied (thereby invalidating the will), the testator's ability to express their will would be limited and therefore the freedom to make a will would be curtailed.

In this dubious situation, judicial precedents in Spain reflect that if the will is granted to a legitimate heir, even if it goes against equal distribution, the court will not determine the testator's lack of capacity or undue influence. On the other hand, when the beneficiary is not a legitimate heir, there is a higher chance of influence; even so, courts usually declare them valid. In conclusion, unlike in the United States, the annulment of the will based exclusively on the deceit or distortion of the will of the vulnerable testator is not applied. The freedom to make a will prevails, as opposed to undue influence.

In cases of nullity or a contested will, American law is inclined to be more prone to maintaining assets within the family, whereas European law values the autonomy of the will.

Solutions

This article briefly discusses the complexity of restrictions on individuals' capacity and the limited solutions available to professionals, including lawyers and public notaries. The above-mentioned can vary significantly and may even contradict one another. This presents a considerable challenge, highlighting one of the primary issues that must be addressed in family law at an inter-jurisdictional level.

In the meantime, and as effective as it may be under these circumstances, the best alternative is to be one step ahead and conduct estate planning in advance so as to avoid future inconveniences for relatives and future generations.

By way of example, effective planning might involve granting powers of attorney to trusted relatives or individuals who can carry out a person's wishes in the event that the person is unable to do so. Granting powers of attorney for use during the grantor's lifetime is commonly practised in situations involving degenerative mental illness. The appointed agent can manage and oversee the grantor's assets when the grantor has limited capacity and cannot freely manage their own affairs.

Alternatively, advance directives may be issued – through which, a person can define their wishes in all aspects not involving their valuable assets. Examples of such wishes include:

- how they want to spend their final days;
- if they want to reject invasive treatments; or
- if they prefer to receive medical care at home.

AUSTRALIA

Law and Practice

Contributed by:
Paul Doolan, Melinda Winning, Carly Middleton and Jeff Marhinin
Barkus Doolan Winning

Contents

Barkus Doolan Winning is the leading specialist family law firm in Australia, with a reputation for acting for high net worth individuals on both an advisory and litigation basis. The negotiation and resolution of family law settlements involving corporate and trust entities, third parties and cross-border issues is a substantial part of the firm's practice. Barkus Doolan Winning is highly regarded for its advice and court work in complex parenting matters involving international child abduction. The firm also advises on a bespoke basis on the drafting and review of select prenuptial and cohabitation agreements, known in Australia as financial agreements.

Authors

Paul Doolan has been a partner at Barkus Doolan Winning for more than 20 years and is the immediate past chair of the Family Law Section of the Law Council of Australia, an accredited family law specialist and a long time fellow of the International Academy of Family Lawyers, as well as the former editor of the Australian Family Lawyer journal and director of the Australian Institute of Family La Arbitrators and Mediators. Regarded as the market leader among Australian family lawyers, Paul is a sought-after speaker and commentator in academic, continuing legal education and media circles, and the author of more than 65 articles and presentations on family law.

Melinda Winning has been with Barkus Doolan Winning since 2001 and became a partner of the firm in 2011. She has practised exclusively in family law for more than 24 years, including property, spousal maintenance, child support, international child abduction, complex parenting cases, and proceedings involving trustees in bankruptcy. Melinda regularly presents papers at legal conferences throughout Australia and internationally. She is trained in collaborative practice and is a member of the Australian Association of Collaborative Professionals, as well as being a qualified arbitrator.

Carly Middleton is a partner at Barkus Doolan Winning. Carly's practice has a particular focus on complex property settlement matters and high net worth clients, and she often acts for third parties to marital disputes. Carly maintains a specialised practice associated with difficult parenting cases with an international aspect, including Hague Convention abduction cases. She is a qualified collaborative lawyer and an accredited specialist in family law.

Jeff Marhinin is a partner at Barkus Doolan Winning and an accredited family law specialist who has practised exclusively in family law for more than 20 years. He has represented clients across the spectrum of family law issues, with a special focus on property settlement cases and relocation/Hague Convention matters. Jeff is a qualified and sought-after arbitrator. He is regularly asked to present at conferences and seminars and has appeared in the media when family law issues have involved public debate and consideration.

Barkus Doolan Winning

Level 24
66 Goulburn Street
Sydney
NSW 2000
Australia

Tel: +61 2 9265 0111
Fax: +61 2 9261 5114
Email: Paul_Doolan@famlaw.com.au
Web: www.familylawyers.com.au

1. Divorce

1.1 Grounds, Timeline, Service and Process

Grounds for Divorce

Australian law recognises both marriage between parties of the opposite sex and same-sex spouses.

The sole ground for a divorce order is that the marriage has broken down irretrievably. That ground is established if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for divorce order. A divorce order shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.

Where there are children of the marriage who have not attained 18 years of age, then a divorce order does not take effect, unless the court has declared that it is satisfied that proper arrangements in all the circumstances have been made for the care, welfare and development of those children or there are circumstances by reason of which the divorce order should take effect even though the court is not satisfied that such arrangements have been made.

Although Australian family law recognises the existence of de facto relationships, there is no process akin to a divorce order that applies to the ending of a de facto relationship. The question of whether a de facto relationship existed, its duration and when it ended, is a question of fact and law.

Process and Timeline for Divorce

The parties to a marriage can, whether separately or jointly, apply to a court for a divorce – provided there has first been a period of 12 months of separation.

Separation can take place under the one roof, provided that there is independent evidence that the relationship has broken down, even though the parties remained living (separately and apart) for some or all of that period in the same household.

An application for divorce is filed with a court exercising jurisdiction under the Family Law Act. A divorce hearing is ordinarily held electronically (rather than in person) approximately eight to 12 weeks after the divorce application is filed.

Rules for Service of Divorce Proceedings

An application for divorce in Australia can be made by one party to the marriage or by the parties jointly.

Where the application is filed by one party to the marriage alone, then service of the divorce application must be in accordance with court rules for service. Ordinarily, service is effected personally on the respondent, but can be via a legal representative of that person where they have instructions to accept service of those proceedings. In the ordinary course, service should be effected no fewer than 28 days prior to the date of the divorce hearing – although time for service can be abridged by consent.

Treatment of Religious Marriages and Divorces in Australia

Marriage and divorce in Australia are governed by the Marriage Act and Family Law Act, respectively. Although parties are free to undertake religious marriages or religious divorces, to be

recognised under Australian law, the marriage and/or divorce must comply with the Australian legislative provisions. By way of example, even though parties of the Jewish faith may obtain a Gett, that Gett would not constitute a divorce for the purposes of Australian law.

Separation

The question of when parties to a marriage separated, for the purposes of the start date of the 12-month period of separation for making an application for divorce, is one of fact and of law. There is no requirement to register a separation, nor is there any process of obtaining a decree of judicial separation.

Divorce in Australia is on a "no fault" basis and separation can occur notwithstanding that the cohabitation was brought to an end by the action or conduct of only one of the parties to the marriage.

Nullity of Marriage

It is possible to make an application for a decree of nullity of marriage.

The only ground is that the marriage is void. This applies in only extremely rare cases, such as where a party was mistaken as to the identity of the person they were marrying or where the consent to marriage was procured by duress.

1.2 Choice of Jurisdiction

Jurisdiction to Commence Divorce Proceedings in Australia

Proceedings for a divorce order under the Family Law Act may be instituted if, at the date on which the application for divorce order is filed in the court, either party to the marriage is:

- an Australian citizen;
- domiciled in Australia; or
- ordinarily resident in Australia and has been so resident for one year immediately preceding the date of filing.

These grounds apply to all marriages, including same-sex marriages.

Citizenship, Domicile and Residence

Proof of Australian citizenship can be established either by birth of a party to the marriage in Australia (by which they have therefore obtained Australian citizenship) or by a subsequent grant of Australian citizenship to persons born overseas.

A party is taken to be domiciled in Australia if it is the country in which they have made their home and they have formed an intention to remain in Australia for an indefinite future period.

A person will be taken to be ordinarily resident in Australia if they are in Australia, intend to reside in Australia permanently and, for example, are not in Australia merely for the purposes of a holiday. Matters such as the intention or purpose of presence in Australia, family ties, business and employment connections, location of assets, and length of period in Australia are all factors that may be given weight in determining whether a party is ordinarily resident in Australia.

Challenging Jurisdiction to Grant a Divorce

A respondent to a divorce application can challenge the Australian court's jurisdiction to determine divorce proceedings. That is, submitting that the requirement of citizenship, domicile or ordinarily resident has not been made out.

Applications for a Stay of an Australian Divorce Application to Pursue Divorce Proceedings in a Foreign Jurisdiction

Circumstances can arise where more than one country has jurisdiction to hear and determine a divorce application.

The respondent to an Australian divorce application may acknowledge that the Australian court has jurisdiction to hear a divorce application but – if they have filed an application for divorce proceedings in a foreign jurisdiction – they can seek a stay of the Australian proceedings, arguing that Australia is a clearly inappropriate forum.

Leaving aside cases where the competing jurisdiction is New Zealand, the Australian courts do not apply a forum test of ascertaining what is the natural forum; rather, the issue is whether Australia is a clearly inappropriate forum to hear and determine the matter. A series of factors are considered, which may include but not be limited to questions such as:

- the order in which divorce proceedings were commenced in Australia and overseas;
- the date on which service of each of those divorce proceedings was effected;
- the date allocated for the hearing of each divorce application;
- the connection of the parties to Australia;
- the place of marriage;
- the effect of a divorce order under foreign law;
- whether there are other proceedings on foot in another jurisdiction referable to the marriage;
- whether there is a legitimate juridical advantage to proceeding in a particular country; and
- questions of time and cost associated with divorce proceedings.

2. Financial Proceedings

2.1 Choice of Jurisdiction

Jurisdictional Grounds to Commence Financial Proceedings

Financial proceedings (property settlement and/or spousal maintenance) can be commenced in Australia between the parties to a marriage if, on the date the application instituting the proceedings is filed in a court, either party to the marriage is:

- an Australian citizen;
- ordinarily resident in Australia; or
- present in Australia.

As can be seen by the last of these grounds, the jurisdictional base is very broad.

Grounds for Jurisdiction for Commencing Financial Proceedings Between De Facto Couples

Different and more complex jurisdictional grounds apply for parties to a de facto relationship who wish to commence proceedings in Australia.

Geographical Connection

A court can only make a declaration about the existence of a de facto relationship if it is satisfied that one or both of the persons referable to the de facto relationship were ordinarily resident in a participating Australian jurisdiction when the application was commenced. Further, the court must be satisfied either that both parties to the de facto relationship were ordinarily resident in Australia during at least a third of the de facto relationship or that the applicant made substantial contributions in relation to the de facto relationship of the kind referable to the Australian legislation. An alternative condition for the making of an order for property settlement or spousal

maintenance in relation to a de facto relationship is if the parties to that de facto relationship were ordinarily resident in Australia when the relationship broke down.

Other Requirements Including Length of De Facto Relationship, Birth of a Child

Above and beyond the geographic requirement, a court may only make an order for property settlement or spouse maintenance in a de facto relationship if it is satisfied:

- that the period, or the total of the periods, of the de facto relationship is at least two years;
- that there is a child of the de facto relationship;
- that a party to the relationship, being the applicant, made substantial contributions and that a failure to make such an order or declaration would cause them serious injustice; or
- that the de facto relationship is or was registered under a prescribed law of a state or territory of Australia.

If parties to a de facto relationship marry each other, then their rights to any de facto property settlement or spousal maintenance cease and their rights are instead governed by the marital provisions of the Australian Family Law Act.

Effect of a Binding Financial Agreement

Australian law enables parties to make binding financial agreements (BFAs) between them, whether before, during or even after a marriage has ended, which cover any or all of their property and or spousal maintenance rights. Strict rules apply to the making of those BFAs (see **2.5 Prenuptial and Postnuptial Agreements**).

If a BFA is recognised by Australian law as binding and has not been set aside, then the effect of such a binding agreement is that the provisions of the Family Law Act do not apply to any of the following matters insofar as the agreement covers them:

- the maintenance of one of the parties;
- the property of the parties or either of the parties; and
- the financial resources of the parties or either of the parties.

Applications Contesting Financial Jurisdiction of Australian Courts

A respondent to proceedings for property settlement or spousal maintenance in Australia may challenge the jurisdiction of the Australian court to hear and determine that case.

The Australian court can make a preliminary ruling on the question of whether or not it has jurisdiction to hear and determine some or all of the proceedings. It is a prerequisite to the making of any order for property settlement or spousal maintenance that the court first be satisfied that it has jurisdiction.

Applications to Stay Financial Proceedings in Australia on Forum Grounds

It is not uncommon for the courts of one or more country to have jurisdiction in respect of matters arising out of a marriage or de facto relationship.

The respondent to financial proceedings in Australia (whether between married or de facto parties) who has instituted proceedings in the courts of a foreign jurisdiction can make an application seeking a permanent stay of the Australian proceedings on the grounds that Australia is a clearly inappropriate forum to determine some or all of those matters.

Leaving aside matters involving the courts of Australia and New Zealand (which are governed

by specific legislative provisions between the countries), the Australian family law courts apply the test in financial cases of whether Australia is a clearly inappropriate forum (as distinct from a natural forum test) for the determination of the matter. The applicant seeking the stay bears the onus of making out that ground.

Applications for a stay on forum grounds are ordinarily dealt with on an interlocutory basis. They often require that a single expert be appointed to give evidence to the court about the process and laws of the competing forum or forums. The Australian court has regard to a series of different factors in reaching a determination of whether Australia is a clearly inappropriate forum. Those matters may include but not be limited to questions such as:

- the connection of each party to the proceedings with each forum, including matters such as citizenship, domicile, and ordinary residence;
- the place of marriage between the parties;
- the nature and situs of the property and financial resources of the parties or either of the parties;
- the assets that may need to be valued, their situs, and the costs of that process in various jurisdictions;
- the order in which proceedings were commenced in different countries and the stage the proceedings have reached;
- when service was effected of those proceedings on the other party;
- the time and expense of proceedings in each country; and
- whether there is any legitimate juridical advantage to either party in either jurisdiction.

Applications in Australia for an Anti-Suit Injunction

A litigant may have commenced proceedings in the courts of Australia seeking financial relief. Their spouse, whether of a marriage or a de facto relationship, may have commenced proceedings in a foreign jurisdiction. In addition to potentially seeking a stay in the courts of the foreign jurisdiction of those other proceedings, a litigant in Australia can make an application to the Australian court seeking the grant of an anti-suit injunction against the other party personally, seeking to restrain them from taking any step in the foreign proceedings other than an order dismissing those proceedings or adjourning them pending the completion of the Australian proceedings.

Although the making of an order for an anti-suit injunction by the Australian courts is relatively rare (given judicial comity), the principles upon which an Australian court will proceed when determining such an injunctive claim are (in general terms) the same as those that apply when seeking an order for a stay of Australian proceedings on forum grounds.

Connection Between Australian Financial Proceedings and a Foreign Divorce

There is no requirement in Australia for proceedings for a divorce to be first instituted or a divorce order made to invoke the Australian jurisdiction for property settlement or spousal maintenance relief. Proceedings for financial relief in Australia can (subject to time limitation periods) commence even if the divorce order was obtained in a foreign jurisdiction.

If, however, financial relief is already granted in that foreign jurisdiction, then questions would arise as to whether the Australian financial proceedings should be permanently stayed, on

grounds that might include abuse of process or estoppel.

2.2 Service and Process

Commencement of Proceedings

Except in cases of urgency, parties seeking financial relief in Australia must take genuine steps to try and resolve matters outside the court system before instituting proceedings under the Family Law Act for property settlement and/or spousal maintenance. This requires, in general terms, that parties to a marriage or de facto relationship:

- exchange financial disclosure materials;
- make proposals for settlement;
- participate in ADR; and
- give prior notice of the intention to start a case, including identifying the matters in dispute and the orders that will be sought if proceedings need to be commenced under the Family Law Act.

Initiating Documents in Financial Proceedings

Parties to financial relief proceedings under the Family Law Act must file and serve material on the other party or parties at the start of the case.

The applicant for relief will file an initiating application (setting out the precise terms of the final and/or interim relief sought) together with a financial statement (detailing income, expenses, assets, liabilities, superannuation, and financial resources). If interlocutory relief is sought, a supporting affidavit or affidavits will also be filed.

The respondent to the proceedings will generally serve "mirror" documentation where they oppose the relief being sought or if they seek different interim or final orders from the court.

Service Requirements

Except in those rare cases where a party commences proceedings seeking urgent ex parte relief, the applicant must otherwise as soon as reasonably practicable after filing serve sealed copies of the initiating proceedings on each respondent. The rules generally require personal service; however, service can be effected on a legal representative for the other party where they have instructions to accept service.

In cases where a party cannot be served or is avoiding service, an interlocutory application can be made to the Australian court for substituted service (for example, deeming service to be effected by service of the documents by email or other electronic means, or at a workplace, or at the last known residential address of the other party).

Timeline for Financial Proceedings in Australia

There is a heavy emphasis in Australia, both prior to the commencement of the proceedings and even after proceedings are commenced, on the resolution of matters through negotiation, mediation or arbitration rather than through court determination. Except in cases where it is impracticable or safety concerns make it impossible, the courts by and large require that parties participate in one or more mediations to try and resolve some or all of their dispute without there being a requirement for a final determination by a court.

Parties can by consent, whether by private agreement or by an order made by consent in the court, also agree to participate in binding arbitration. A final arbitral award can then be registered with the Australian court and be enforced as if it were an order made by the court. There

are (limited) rights of appeal from arbitral awards where an error of law can be established.

The timeline for Australian court proceedings is as follows.

- Where interlocutory relief is sought, the court will generally allocate an interim hearing of those matters approximately four to eight weeks after the application is filed. The precise timing can be shorter or longer, depending upon the urgency, complexity and the court's diary. Interlocutory hearings are often conducted by Microsoft Teams videolink rather than in person – although there is a move back towards in-person court hearings for interim matters.
- At the first return date, the court will look at matters of disclosure and valuation, and make procedural directions designed to ensure that parties have given full and frank disclosure and that the relevant property and financial resources have been identified, as well as to facilitate the appointment of single experts to resolve valuation disputes.
- Parties will usually be "required" to participate in mediation and directions are made to facilitate the conduct of a mediation.
- If matters cannot be resolved through negotiation or mediation, then – depending upon the complexity of the issues – they can be allocated to different levels of the Australian court system. The Federal Circuit and Family Court of Australia (Division 2) deals with the vast majority of financial cases of the "run of the mill" variety. Those cases with multiple parties, complex issues, difficult valuation issues, large asset pools or requiring an extended hearing will be heard by the superior court (ie, the Federal Circuit and Family Court of Australia (Division 1)).
- Within that superior court, there is also a major complex financial proceedings list operating on the eastern seaboard of Australia, where cases of greater complexity or substantial asset pools are allocated for hearing before assigned judges.
- As a general observation, the timeline for a reasonably complex financial proceeding case – from the date of filing to the date of hearing on a final basis – is presently approximately 14–24 months.

2.3 Division of Assets

The Australian system of property settlement following a breakdown of the marriage is governed by the Family Law Act.

Australia does not have a community of property regime. There are no presumptions or starting points of equality of division of assets.

The High Court of Australia has made clear that courts exercising jurisdiction to alter property interests under the Family Law Act shall not make an order for property settlement, unless it is just and equitable to do so. That is, there must be a principled reason for altering the property holdings of one or both parties to the marriage. That being said, in the vast majority of cases – particularly those where the marriage has been of reasonable duration and/or there are children born of the marriage – the court will quickly accept that an order for property settlement should be made.

General Approach to Property Settlement in Australia

It is often said that there are essentially four steps to determining what order, if any, should be made for property settlement, as follows.

- The first step is to identify and value the property of each of the parties to the marriage or both of them, and to identify their financial resources.
- The second step is to assess the contributions made by each party to the accumulation, conservation and maintenance of that property. This involves an assessment of the myriad of contributions, direct and indirect, financial and non-financial, as a homemaker and as a parent. Contributions of a homemaker and parent must be given substantial and not token weight. While there is no assumption or presumption that contributions are equal, it is often the case – in the absence of any significant initial financial contributions by a party or any major gift or inheritance – that contributions are found by the court to be equal.
- The third step is to have regard to the current and future circumstances of each party. This requires a court to have regard to a series of different factors, most particularly whether there is any income earning disparity between the parties to the marriage, any significant capital disparity, and whether one party has the primary care and control of the children of the marriage.
- The fourth step requires that any order made for property settlement should be just and equitable.

Some General Financial Principles and Guidelines

The Australian court will, in general, approach the identification of the asset pool and assessment of contributions on a global basis. It is not necessary for there to be any nexus between a particular contribution and a particular asset.

The Australian court does not exclude from the pool of property available for division assets that a party brought into the relationship at the start, nor does it exclude inherited or gifted assets. However, a party may receive a greater contributions weighting in their favour, because they were responsible for the introduction of assets of that nature or were the recipient of the inheritance/gift in question.

The balance sheet of the property of the parties is determined not as at the date of separation, but as at the date of settlement or final trial. That means that where there is a delay between final separation and trial/settlement, assets acquired and income earned even after separation will form part of the assets available for division under Australian law.

Full and Frank Disclosure

There is an absolute obligation on parties to the marriage to make full and frank disclosure of all matters relevant to the case. That disclosure obligation is imposed even prior to the commencement of the proceedings. As part of pre-action procedures, parties must make disclosure. The intention is to enable parties to resolve their dispute without court intervention, cognisant of the need to fully appreciate the financial circumstances of the other spouse before they make any interim or final settlement.

If a party fails voluntarily to make disclosure, then the court can make orders directed against that party requiring that they do so. There are also mechanisms available under the Family Law Act and the court rules for various mechanisms for disclosure whether against a party to the marriage or against third parties. These include but are not limited to:

- subpoenas to produce documents;
- subpoenas to give oral evidence;

- requests for answers to specific questions be given on oath or affirmation;
- notices to admit facts;
- notices to admit the authenticity of documents; and
- the making of lists of documents relevant to the case.

If a party fails to fulfil their obligations for full and frank disclosure, then significant penalties can apply. In extreme cases, a party may have a case against it dismissed if the other party has failed to give them proper disclosure. A judge can also be more robust when making final or interim orders, where they conclude that a party has failed to meet their disclosure obligations. Each party must, before a final trial, file with the court a document known as an undertaking as to disclosure, which sets out their acknowledgement of the existence of those obligations and confirms to the court that they have met those obligations.

Approach to Trusts

The Australian courts have the power to regard the corpus of a trust as the property of a party to a marriage, where it can be established that the trust is effectively controlled by one or both parties to the marriage and one or other party to the marriage can benefit from that trust. Control of a trust is generally determined by one of the following means:

- a finding that the trust is a sham;
- a finding that the trust is the alter ego of a party;
- a finding that a party controls the trust by virtue of their role as the appointor or protector of the trust, with the ability to replace the trustee; and
- by findings of control of the trustee by a party and the ability to benefit from the income or corpus of the trust.

Where a party to the marriage seeks that assets held within a trust structure be available for division, it is ordinarily necessary to join the trustee of that trust to the proceedings under the Family Law Act. This then enables the trustee to be bound by any final orders that are made and enforcement mechanisms.

Superannuation

The Australian courts have power under the Family Law Act to make orders for "superannuation splitting" in relation to interests in Australian superannuation funds. By way of example, if the parties have AUD2 million in non-superannuation assets and AUD1 million held in superannuation funds, a court might make an order requiring that the superannuation be split equally between the parties (so that each party has superannuation worth AUD500,000) and they each receive a similar percentage division of the non-superannuation assets.

The Australian courts, in general terms, have no power to make orders against pension or superannuation interests in a foreign country, as they are not superannuation interests for the purposes of Australian law. There are some limited exceptions, where an Australian court might, by the making of an injunction in personam directed against a party who has a foreign superannuation interest, require them to bring that interest into Australia and convert it into an Australian superannuation interest or an asset in Australia. However, this will generally only occur:

- where there are no other substantial assets from which a property settlement entitlement could be met;

- where such a transaction could take place under the laws of that foreign country; and
- where there were not significant adverse consequences (eg, tax or withdrawal penalties) that were imposed by the foreign country on such a transaction.

2.4 Spousal Maintenance

Australian Approach to Spousal Maintenance

Courts in Australia have the ability to make orders for spousal maintenance, whether on an interim or final basis, under the Family Law Act.

There is no automatic entitlement to spousal maintenance under Australian law.

The applicant for spousal maintenance must first establish that they are unable to meet their reasonable personal needs, owing to:

- a physical or mental incapacity;
- care of a child of the marriage; or
- another justifying reason.

If that threshold requirement is met, then the court must assess the capacity of the other spouse to make a payment towards the reasonable needs of the applicant, after allowances are made for the respondent's own living expenses, child support and any liabilities relevant to the marriage that the respondent is also still meeting.

By way of example, a court might assess a wife's reasonable needs, find that she is unable to meet those reasonable needs because she has care of children of the marriage and cannot work, but then find that her husband does not have the financial capacity to pay her spousal maintenance having regard to his own obligations to meet his personal living expenses, pay child support, and potentially pay – for example – the mortgage on the home or leases for motor vehicles that the wife and children have the benefit of.

Interim Spousal Maintenance

Although the Australian courts have the power to make final orders for spousal maintenance (ie, continuing even after final property orders are made), such orders are relatively uncommon. Australian courts tend to approach matters on the basis of seeking a "clean break" between parties on a final basis. What often occurs is that the financially weaker party (commonly the wife, if she has left the workforce and has the care of children under the age of 18 years) receives a larger percentage of the assets by way of property settlement, but no ongoing spousal maintenance on a final basis.

The making of interim orders, whether by informal agreement, consent order or court order, is more common in the Australian scenario on an interlocutory basis and pending final settlement. Often that spouse maintenance takes the form of payments that a spouse has the benefit of, rather than simply being a payment of cash. By way of example, the financially stronger spouse might make payments for a mortgage over a home, loan liabilities against other assets, lease obligations on motor vehicles, school fees for children, and other outgoings for children and/or the spouse.

How Spousal Maintenance is Quantified in Australia

Unlike child support (which operates under a statutory formula), there is no statutory formula or administrative scheme for the calculation of spousal maintenance under Australian law. It requires firstly an assessment of the reasonable weekly needs of the applicant spouse. This is not necessarily identical to the level of expenses

during the course of the marriage, as Australian law recognises that there are greater costs involved in running two households rather than one following the breakdown of the marriage.

A determination is then made as to whether that spouse has the capacity to meet some or all of their own expenses. To the extent that they cannot and there is a shortfall, the court then assesses the reasonable weekly expenses of the respondent and measures that against their own income and at times property or financial resources. This requires consideration of what expenses the respondent spouse might be paying for the benefit of the applicant, such as mortgage, loans, leases, and school fees. To the extent that there is a surplus income available, then the court has the power to make an order for spousal maintenance against that surplus.

Interlocutory spousal maintenance proceedings are generally conducted by a judicial registrar of the Federal Circuit and Family Court of Australia Division 2 (save in Western Australia). They are ordinarily done "on the papers", with the family court hearing submissions from the parties or their legal representatives, reading the material filed and having regard to documents produced under subpoena, but without cross-examination taking place at that interlocutory stage.

2.5 Prenuptial and Postnuptial Agreements

Australian law recognises prenuptial and postnuptial agreements if they meet the stringent technical requirements imposed by the Family Law Act. These documents, known under Australian law as BFAs, will oust the jurisdiction of the court to make orders for property settlement in respect of those matters covered by the agreement and/or prevent a court from making orders for spousal maintenance following the breakdown of the marriage.

Financial Agreements in Relation to Married Persons

A BFA can be entered into prior to marriage, following the date of marriage, after separation or even after the divorce. The BFA can cover some or all of the property of the parties to the marriage. If its terms are binding, and the BFA is not later set aside by a court, then the court's power to make orders is ousted in respect of those matters covered by the BFA.

To be binding, a BFA must be in writing, have certainty as to its terms, and specify the legislative provision that it is made pursuant to. In addition, each party must receive a statement of independent legal advice from an Australian qualified legal practitioner.

Challenges can also be made to BFAs seeking to set them aside on grounds that largely reflect those found when challenges are made to contracts or agreements. By way of example, a BFA may be set aside owing to undue influence, unconscionable conduct, duress, fraud, or misrepresentation.

The technical requirements under the Family Law Act are strictly imposed by the court. BFAs are binding if, and only if, they meet the exacting statutory requirements contained in the Family Law Act unless a court finds it would be unjust and inequitable not to enforce the agreement and notwithstanding its technical failings.

Can Parties to a De Facto Relationship Enter Into a Similar Agreement?

Australian law permits parties to a de facto relationship to enter into a BFA. Such an agreement can be made either prior to the commencement

of the de facto relationship, during the de facto relationship, or after the termination of the de facto relationship. They are subject to the same style statutory regime that applies to BFAs for married persons. They are binding if, and only if, the statutory requirements under the Family Law Act are met unless a court finds it would be unjust and inequitable not to enforce the agreement and notwithstanding its technical failings.

BFAs between de facto couples are also liable to challenge and to be set aside on similar grounds that apply to married persons. Again, submissions based on grounds such as undue influence, unconscionable conduct, duress, fraud, or misrepresentation may be raised.

Is There an Obligation to Make Disclosure Prior to Entering into a BFA?

Although there is no specific statutory or rule-based requirement that a party must give full and frank disclosure before a BFA is made, best practice of legal practitioners and the general attitude of the judiciary is to the effect that disclosure is an integral part of the making of any such agreement, and failure to give proper disclosure renders any BFA liable to challenge as either not binding or that it be set aside.

By way of example, case law recognises that in order for legal practitioners to fulfil their obligations to give advice to a client about the nature and effect of the BFA and its advantages and disadvantages, they can only fulfil that legal duty if the lawyer is cognisant of the assets and liability position of each party. In the absence of that knowledge, it is difficult to see how a lawyer can provide advice in the terms required by the Family Law Act before their client enters into such a BFA. Further, it is difficult to see how a lawyer can provide a statement of independent legal advice to the client if they do not have that information upon which their advice can be based.

The absence of disclosure material also makes submissions that a BFA should later be set aside on the basis of misrepresentation or fraud more common.

Will an Australian Court Recognise a Foreign Prenuptial or Postnuptial Agreement?

The jurisdiction of an Australian court to make orders for property settlement and/or spousal maintenance will only be ousted by a BFA that meets the requirements under the Australian statute (ie, the Family Law Act). Australian courts will not regard their jurisdiction as being ousted by the existence of a prenuptial agreement made in a foreign jurisdiction, notwithstanding that such an agreement may be perfectly valid and enforceable in that foreign country.

The existence of a foreign prenuptial agreement – particularly one that contains a forum clause or choice of law clause in favour of that foreign jurisdiction – may, however, be a powerful reason why an Australian court might stay its proceedings in favour of the foreign jurisdiction.

Jurisdictional Requirements for the Making of BFAs

Although there are no specific jurisdictional requirements that apply to BFAs made as between parties to a marriage or intended marriage, there are important jurisdictional requirements that apply to BFAs for parties to a de facto relationship. In overly simplistic terms, foreign persons who are cohabiting and not residing in Australia could not enter into or make a BFA that is valid and binding under Australian law, unless and until they are both parties who are present in and ordinarily resident in Australia.

Can Parties to a Same-Sex Marriage or Same-Sex De Facto Relationship Make a Prenuptial Agreement or Postnuptial Agreement?

Parties to same-sex relationships, whether of a married nature or a de facto relationship, can enter into BFAs pursuant to Australian law. The same statutory regime applies to questions of whether such agreements are binding, and the same laws apply to the question of whether any such agreement should be set aside.

2.6 Cohabitation

Australian law grants recognition to de facto relationships, provided certain preconditions are met, including:

- geographical nexus;
- length of relationship; and
- the existence of a child or children of such a relationship.

The law relating to parties to a de facto relationship largely mirrors that applicable to married persons, save for these stringent jurisdictional requirements before proceedings can be instituted.

Western Australia has its own laws that apply to de facto relationships. For the balance of Australians, their rights in respect of property settlement and/or spousal maintenance arising from the breakdown of the de facto relationship are based in Commonwealth law (ie, the Family Law Act).

Property Settlement Rights for De Facto Parties

Parties to a de facto relationship, provided it is a qualifying relationship (see above-mentioned jurisdictional criteria), are governed by legislative provisions that replicate those applicable to married persons.

There is no greater award made in favour of a party to married relationship, as distinct from a de facto relationship, by mere virtue of the distinction between the two different styles of relationship.

Spousal Maintenance Claims Arising From De Facto Relationships

A party to a de facto relationship can bring a claim for de facto spousal maintenance upon the same terms that apply to married persons. There is no greater or lesser right for de facto parties than for married persons in that respect.

Binding Financial Agreements and De Facto Relationships

The court's jurisdiction to make orders in relation to property settlement and/or spousal maintenance arising from a de facto relationship can be ousted in part or in whole if there is a BFA in place (see **2.5 Prenuptial and Postnuptial Agreements**).

2.7 Enforcement

Where an order for financial relief has been made pursuant to the Family Law Act, and a person fails to comply with its terms, a variety of mechanisms exist for its enforcement. The ability to successfully enforce is dependent in part on the clarity of the order made and it is obviously easier to enforce a mere monetary order than it is to enforce a non-financial order.

Examples of enforcement mechanisms available under the Family Law Act and court rules include the following.

- A party may be in contempt of court, depending upon the nature of the breach, if that party

fails to comply wilfully with the terms of an order.
- A party may be liable to a contravention application if they fail to meet their obligations pursuant to a financial order. Punishments for a contravention range depending upon the nature and severity of the breach and the extent of its wilfulness.
- Orders for enforcement can be sought against a defaulting party, including for the garnishment of wages, sale of assets, injunctions on the disposal of assets pending making good the breach, appointment of trustees for sale, appointment of administrators or liquidators to relevant entities, and for the winding-up of companies.
- In circumstances where there is a risk of a party seeking to leave the Australian jurisdiction to avoid the payment of monies, a court may be willing to grant an injunction in the form of a departure prohibition order, preventing a party from leaving Australia until compliance.
- Depending upon the nature of the breach, if there are other proceedings under the Family Law Act ongoing, the court may take the view that the party should not be entitled to prosecute those further proceedings unless and until they remedy the breach of an existing order.
- A party who defaults on a financial order, causing the other party to bring enforcement proceedings, is likely to be subject to an order to pay the costs of the innocent party of those subsequent proceedings.
- The rules of court provide for penalty interest to apply from the date of a default.

Enforcement in Australia of Financial Orders Made in a Foreign Jurisdiction

Australian law provides for the enforcement in Australia of some foreign orders where there are assets situated within the Australian jurisdiction. In overly simplistic terms, such enforcement is available to enforce a monetary as distinct from a non-monetary order.

The question of whether a particular foreign order is capable of enforcement in Australia is very much a question that needs to be examined on a case-by-case basis and depends upon:

- the identity of the country in which the order is made;
- the court that issued the order;
- the form of the order; and
- the nature of the order in question.

By way of a simplistic example, an Australian court would not recognise an order from a foreign court that provided for sale of Australian real property, but may enforce an order of a relevant convention country if the order provided for payment of a monetary sum only.

2.8 Media Access and Transparency

Although Australia has a system of open justice, it is an offence (subject to various exceptions) under the Family Law Act to publish or disseminate the name or identity of a party or witness to proceedings of any nature under the Family Law Act. That means that, even though a case of public interest might be reported by the media as to its general terms, it is a criminal offence for any media organisation (or any third party, for that matter) to publish the actual names of the parties or witnesses involved in the case or to undertake any other reporting that would enable the identification of those persons.

Decisions made by judges of the Federal Circuit Court and Family Court of Australia Division 1, the Federal Circuit and Family Court of Australia Division 2, and the Family Court of Western Aus-

tralia are regularly published by legal services and on the internet. However, the case names are anonymised, as are any other identifying features such as the names of most witnesses and the names of the businesses or suburbs/cities in which litigants may reside.

Further Anonymisation of Proceedings

In appropriate cases, an application can be made to an Australian court in respect of proceedings for financial or parenting relief under the Family Law Act, to provide further confidentiality to the parties. Examples include the following.

- An application can be made to remove the names of the parties from any published court list.
- An application can be made to anonymise the names of the parties to the proceedings in any published court list.
- In exceptional cases, an application can be made to "close" the court to any person who is not a member of the legal firm involved in the proceedings, a party to litigation, or a witness involved in the case. Such an application generally needs to be made formally by written application, together with a supporting affidavit explaining the need for further confidentiality or security, and will usually be determined by the relevant trial judge or judicial officer hearing the matter.

2.9 Alternative Dispute Resolution (ADR)

Parties to Australian proceedings are required, before they start any case in the court, to make genuine steps to resolve the matter. There are a number of exceptions to that requirement for the taking of genuine steps – the primary being where there are issues of family violence that would prevent a party from safely participating in ADR such as mediation or negotiation.

Pre-Action Procedures

Except in cases of urgency, parties seeking financial relief in Australia must take genuine steps to try and resolve matters outside of the court system before instituting proceedings under the Family Law Act for property settlement and/or spousal maintenance. This requires, in general terms, that parties to a marriage or de facto relationship:

- exchange financial disclosure materials;
- make proposals for settlement;
- participate in ADR; and
- give prior notice of the intention to start a case, including identifying the matters in dispute and the orders that will be sought if proceedings need to be commenced under the Family Law Act.

Enforceability of Settlements

Australian law provides for a limited number of ways in which parties can make an enforceable agreement between them.

The first of those is the making of a BFA in accordance with the provisions of the Family Law Act, whether that agreement is made prior to marriage or a de facto relationship, during a marriage or de facto relationship, or after the breakdown of the marriage and subsequent divorce or the end of the de facto relationship.

The second is the making of an order, whether by consent or by court determination, pursuant to the Family Law Act.

Informal agreements between parties, even if on an open basis and in writing, are not of themselves capable of enforcement such as to bring to an end litigation. Courts are protective of their jurisdiction and Parliament, by Australian

law, limits the ways in which parties can bring an end to their legal rights.

A BFA can only be made where the parties have had independent legal advice. An order for financial relief under the Family Law Act, even where made by consent, will only be made by the court where it considers the terms of the order are proper or just and equitable. The intention is to stop parties from being subject to terms of settlement negotiated by a former partner or spouse who is in a stronger bargaining position due to circumstances such as family violence.

There may, however, in appropriate cases, be a submission available that a party should not be able to bring a claim for financial relief and that they are estopped from doing so by virtue of the informal agreement made, depending upon the circumstances in which that agreement was made and the reliance upon it by the other party.

3. Child Law

3.1 Choice of Jurisdiction

The commencement of proceedings in Australia under the Family Law Act for orders in relation to a child involve different jurisdictional considerations to those that apply to the commencement of financial proceedings.

Jurisdictional Requirements to Commence Parenting Proceedings in Australia

Proceedings may be instituted under the Family Law Act in Australia in relation to a child only if one or more of the following conditions are met:

- a child is present in Australia on the date the application instituting proceeding is filed in a court;
- the child is an Australian citizen or is ordinarily resident in Australia on the date the application commencing the proceedings is filed in a court;
- a parent of the child is an Australian citizen, is ordinarily resident in Australia, or is present in Australia on the date the application instituting proceedings is filed in a court;
- a party to the proceedings is an Australian citizen, is ordinarily resident in Australia, or is present in Australia on the relevant day; or
- it would be in accordance with a treaty or arrangement in force between Australia and an overseas jurisdiction, or the common law rules of private international law, for the Australian court to exercise jurisdiction in the proceedings.

The bases upon which jurisdiction can be established in Australia in relation to parenting proceedings are extremely broad. Circumstances can arise, however, where both the courts in Australia and a foreign country each have jurisdiction in relation to the parenting relief sought. In those circumstances, an application can be brought seeking a permanent stay of the Australian parenting proceedings on forum grounds. In determining whether or not to stay the Australian proceedings, the court is guided not by the "clearly inappropriate" test (ie, that which applies in relation to financial relief), but rather by consideration of what is in the best interests of the child. In the general run of matters, the presence of the child or children in Australia for any reasonable period of time (leaving aside cases where there are Hague Convention Applications on foot) will lead to the determination that is in the best interests of the child that the proceedings be determined by the Australian court.

3.2 Living/Contact Arrangements and Child Maintenance

The Family Law Act governs questions of parenting arrangements in relation to children born both of a marriage and outside of marriage. That legislation also applies in relation to parenting disputes between same-sex couples and in circumstances where a child may have been born as a consequence of surrogacy arrangements.

Genuine Steps Requirement Before Starting Parenting Proceedings

Unless an exemption applies – for example, because there is an urgency or where there are risks of family violence, child abuse or safety considerations – a party cannot start a parenting case in the Australian court without first:

- complying with pre-action procedures mandated by court rules;
- attempting to resolve a parenting dispute using family dispute resolution; and
- taking genuine steps to attempt to resolve the issues in dispute about the child.

Decisions about children are governed by the paramount consideration of what is in the best interests of the child. Both during negotiations or during court proceedings about children, parties and lawyers are guided by matters including:

- the need to protect and safeguard the interests of the child;
- the importance of a continuing safe relationship between the child and both parents and the benefits the child gains from the parents co-operating with one another;
- the potential damage to a child involved in a dispute, particularly if a child is encouraged to take sides or take part in any dispute between the parents;
- the importance of identifying issues early and exploring options for settlement; and
- their duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute.

Legal representatives have obligations under the Family Law Act, the court rules and the Court's Central Practice Direction to assist clients in parenting matters, and must as early as practicable take steps such as:

- advising clients of ways of resolving disputes without starting legal action;
- advising clients of the obligations and requirements imposed concerning family dispute resolution where it is safe to participate in that process;
- advising clients of their duty to make full and frank disclosure and the possible consequences of breaching that duty;
- endeavouring to reach an agreement rather than starting or continue legal action, provided that it is in the best interests of the client and any child;
- encouraging clients to engage meaningfully in dispute resolution; and
- actively discouraging clients from making ambit claims.

Approach to Parenting Proceedings in Australia

There is no presumption or starting point, under Australian law, in relation to the living arrangements for children.

Decisions about parental responsibility, where a child lives, and the time the child spends with the other parent or interested persons are governed by the paramount consideration of what is in the best interests of a child. The Family Law Act sets out a series of factors that the court takes into

account in reaching that decision. Significant importance is placed by the court on ensuring that children are kept safe from harm and protected from the risk of abuse, family violence or neglect. The Australian courts have the power – both at the Commonwealth level through the grant of injunctions for personal protection and at a state and territory level by the making of protective orders (commonly known as Apprehended Domestic Violence Orders) – to protect both children and a parent.

In the absence of a court order to the contrary, each of the parents of a child have parental responsibility for making decisions in relation to the care, welfare and development of that child. If the court determines that the best interests so dictate, an order can be made that gives to one parent sole parental responsibility for some or all of those aspects of the child's long-term interests (eg, education, health, or religious upbringing).

Overview of Parenting Proceedings in Australia

If court determination is necessary, whether on an interlocutory or final basis about parenting arrangements, applications are generally heard by the Federal Circuit and Family Court of Australia Division 1, the Federal Circuit and Family Court of Australia Division 2, or in the Family Court of Western Australia (the latter having its own state-based system).

The legislation requires, where it is safe to do so, that parties first participate together in "family dispute resolution" services to try to reach an agreement on what is in the best interests of their children. If the parties participate and agreement cannot be reached, then a certificate is issued entitling the commencement of proceedings under the Family Law Act in relation to the child.

Australia has a court system that offers specialised services in cases involving complex parenting issues or significant risk issues, including the Lighthouse Project and the Majellan List. Australian courts can also appoint an independent children's lawyer to represent the interest of children in contested parenting proceedings where the matter is of a significantly complex nature such that the court would be assisted by the involvement of an independent representative rather than simply the parties or lawyers for the parties appearing in the hearing.

Before any final trial in relation to parenting matters, the court usually requires that a report be prepared for the court by a suitably qualified expert – ie, either a psychologist, psychiatrist and/or medical expert, depending upon the needs of the particular child and/or family under consideration.

Child Support

Child support in Australia is primarily governed by the Child Support (Assessment) Act (ie, federal legislation). There is an administrative governmental body, Services Australia (Child Support Division), that oversees and administers questions of liability for child support and determination of quantum in the first instance.

There are a series of administrative review and appeal processes that can follow a decision by Services Australia on child support matters. In some circumstances the question of child support can be determined by the Federal Circuit and Family Court of Australia if there are concurrent proceedings in respect of other financial relief before the court and it would be just and equitable for the court to hear and determine

both the financial relief and child support matters simultaneously.

How Child Support is Calculated

Child support is initially determined by a formula that takes into account a series of factors, including the number and age of children, whether a parent has the responsibility to support any other children, the respective taxable income of each parent, and the number of nights of care each parent has for the child or children. Services Australia issues an administrative assessment of child support based upon the application of that formula to the circumstances of the particular case.

The application of the formula can, however, result in outcomes that do not reflect the needs of the children or the capacity of the particular parent to make payments. The formula is essentially geared to relatively standard circumstances, and it is largely unsuitable for cases involving high net worth individuals, children who attend private schools, and/or where the children have additional needs that cannot be met from the usual application of the formula. Applications can be made for a departure from the formula, in the special circumstances of a case, on a series of grounds such as the educational needs of children, the income of each parent, and where children have special needs.

How Parties Can Agree Child Support Arrangements Outside the Court System

There are a variety of methods by which parents reach agreement about child support.

Many parents do not go through the child support system conducted by Services Australia, instead reaching an informal (non-binding) agreement between themselves as to what level of periodic and/or non-periodic child support will be paid. By way of example, one parent may agree to meet private school fees, or they might agree to share health insurance costs and school fees between them. If that agreement later breaks down, then they can enter the child support administrative assessment system.

Parents wishing to formalise a child support arrangement can do so by a series of mechanisms, as follows:

- making a Limited Child Support Agreement, ostensibly enforceable for a period of three years, which is registered with Services Australia;
- making a Binding Child Support Agreement, which operates unless and until it is terminated by agreement or set aside by a court, and which generally operates until a child turns 18 or – if they finish secondary education in the year they turn 18 – then at the end of such year; and
- where there are child support matters before a court, having an order made by consent by the Federal Circuit and Family Court of Australia for a departure from the administrative provisions under the Child Support (Assessment) Act.

Adult Child Maintenance

Parents have an ongoing obligation to support their children even after they turn 18, in certain specified situations. In general terms, this often involves circumstances where a child:

- is undertaking a full-time tertiary education course for a first degree or qualification; or
- where the child has a physical or mental incapacity.

Applications for what is often termed “adult child maintenance” can be brought before a court

pursuant to the Family Law Act by either the other parent or by the child themselves after a child turns 17 years old. Such proceedings are relatively rare, because most parents and their "adult" children usually reach an agreement about the level of support. The case law suggests that courts are not inclined to make substantial monetary awards in relation to adult child maintenance, as "adult" children have an obligation to try and support themselves through paid employment if that can feasibly be undertaken.

3.3 Other Matters

Parenting Responsibility Under the Family Law Act

Each of the parents of a child has parental responsibility for the making of decisions in relation to the care, welfare and development of that child.

Where parties are separated, they are encouraged to try and reach agreement, whether directly or through family dispute resolution, about issues that might arise in relation to the long-term care of a child such as education, medical treatment or religious upbringing. If parties cannot reach agreement about those matters, then courts exercising jurisdiction of the Family Law Act can make orders allocating parental responsibility in whole or in part to one of the parents or to another person who has an interest in the welfare of the child.

Determination of what is in a child's best interests is undertaken on a case-by-case basis, and is governed by the paramount consideration of what is in the child's best interests. If the case requires expert evidence, then the court will ordinarily appoint an expert in the relevant field to provide a written report to the court, giving consideration to the matter and making a recommendation where appropriate. Recommendations by an expert may be persuasive, but they are not determinative of the outcome. They simply constitute evidence that, if relevant, is to be taken into account by the court in reaching its conclusion as to what is in the best interests of the child.

Concept of Parental Alienation

The term "parental alienation" is one often raised by parties, but is not a phrase endorsed by the courts nor reflected in the Australian legislation.

The Family Law Act requires consideration, on a case-by-case basis, of what is in the best interests of the child and the focus of the court is on the conduct and behaviour of the parties and the parties' children, rather than on imposing simplistic labels on behaviour. The intention is to avoid the imposition of labels, such as "parental alienation", which may be suggestive of an outcome.

Courts are at times faced with a situation where a child rejects one parent and there are series of considerations under the Family Law Act to analyse the circumstances giving rise to the situation. Tools can be deployed to try and readdress matters including through family therapy.

Australian courts are alive to the potential misuse by some parents who deploy the term "parental alienation" as a step in coercive control. By way of example, studies have shown that parents who act protectively in the best interests of their children by limiting the contact that child or children have with a perpetrator of family violence are often accused by that other parent of engaging in "parental alienation" (finding of the Queensland Women's Safety and Justice Taskforce).

Wishes of Children

Children do not give direct evidence in Australian court proceedings. Questions of the wishes of children, or what they say about particular incidents, are placed before the court through a variety of other means. These include:

- submissions made by an independent children's lawyer in appropriate cases;
- statements the children make and wishes they express to a parent or other witness in the proceedings; and
- statements the children express to an expert who is providing a report to the court.

It is often the case that the independent children's lawyer will interview children, so they can actively canvas (where appropriate) the wishes of the children. It is also permissible for judges to interview children in chambers; however, this only occurs in extraordinarily rare cases, as it is a process often fraught with difficulty and is counter-productive. Where an independent children's lawyer has been appointed, then courts often ask the independent children's lawyer to explain to the children the final decision made by the court.

3.4 ADR

Parties to Australian parenting proceedings are required, before they start any case in the court, to make genuine steps to resolve the matter. There are however a number of exceptions – the primary being where there are issues of family violence that would prevent a party from safely participating in ADR.

Pre-Action Procedures

Except in cases of urgency, parties seeking parenting relief in Australia must take genuine steps to try and resolve matters outside of the court system before instituting proceedings under the Family Law Act for parenting matters. This requires, in general terms, that parties:

- exchange disclosure materials;
- make proposals for settlement;
- participate in ADR; and
- give prior notice of the intention to start a case, including identifying the matters in dispute and the orders that will be sought if proceedings need to be commenced under the Family Law Act.

Enforceability of Settlement

Australian law only recognises a limited number of ways in which parties can make an enforceable agreement between them. Informal agreements between parties, even if on an open basis and in writing, are not of themselves capable of enforcement such as to bring to an end litigation.

Parties can make a parenting plan, which is signed and dated, about some/all of parenting matters. There is no requirement that each party first take legal advice. Although not an enforceable agreement, the terms of a parenting plan will be taken into account by a court in subsequent proceedings.

To make an enforceable agreement, parties need to record its terms in an order, which is submitted to the court for consideration. The parties do not need legal advice, but must sign a document acknowledging their right to obtain prior independent legal advice. The parties must also file with the court a notice identifying any issues of risk, abuse or neglect and how the proposed order addresses those matters.

3.5 Media Access and Transparency

Under Australian law, it is an offence (subject to various exceptions) to publish or disseminate information that identifies the parties to a pro-

ceeding or the identity of children who are the subject of proceedings. Although Australia has an open court system, and media and members of the general public can sit in court during the conduct of parenting proceedings, they cannot then publish or disseminate information in breach of those obligations. By way of example, the Australian media can report the general facts of the case and the ultimate decision, provided that the reporting does not breach any of the identification conditions imposed by the Family Law Act.

Decisions made by judges of the Federal Circuit Court and Family Court of Australia Division 1, the Federal Circuit and Family Court of Australia Division 2, and Family Court of Western Australia are regularly published by legal services and on the internet. However, the case names are anonymised, as are any other identifying features such as the names of most witnesses and the names of the businesses or even cities in which litigants may reside.

Further Anonymisation of Proceedings

In appropriate cases, an application can be made to an Australian court in respect of proceedings for financial or parenting relief under the Family Law Act, to provide further confidentiality to the parties. Examples include the following applications.

- An application can be made to remove the names of the parties from any published court list.
- An application can be made to anonymise the names of the parties to the proceedings in any published court list.
- In exceptional cases, an application can be made to “close” the court to any person who is not a member of the legal firm involved in the proceedings, a party to litigation, or a witness involved in the case. Such an application generally needs to be made formally by written application, together with supporting affidavit explaining the need for further confidentiality or security, and will usually be determined by the relevant trial judge or judicial officer hearing the matter.

BELGIUM

Law and Practice

Contributed by:
Larissa De Wulf, Carolyn Vanthienen and Alexandra Goossens
Tiberghien

Contents

Tiberghien is a leading independent law firm with offices in Antwerp, Brussels, Ghent, Hasselt, Luxembourg, Geneva and Zurich, from which it supports its clients with advice, mediation and dispute resolution in the fields of taxation and family (patrimonial) law. Tiberghien is a trusted adviser to prominent families and business owners. Its civil law team, consisting of 15 people, specialises in litigation and mediation and advising (international) private clients on: prenuptial agreements and modifications of matrimonial property regimes, as well as on gifts and bequests; governance structures (civil law partnerships, holdings, Dutch/Belgian trust office foundations, etc); family governance, wills, and succession agreements; transfers of family businesses to the next generation; inheritance or divorce disputes; cross-border migration of individuals (global mobility); family law (parentage, adoption, parental authority, custody, governance, marriage, divorce); private international law; and family foundations, trusts and philanthropy. Tiberghien's lawyers are active in various (international) professional organisations and are regularly invited to speak at conferences.

Authors

Larissa De Wulf is a counsel at Tiberghien and has been an attorney since 2003. A member of the family litigation team, Larissa advises clients in negotiations and proceedings before Belgian courts, particularly in the areas of estate or inheritance cases, wills, gifts, divorce or separation, filiation and adoption, child support and maintenance, as well as division and distribution of assets after divorce or death. She has significant expertise in international cases, especially those involving inheritance law and divorce. She also has expertise in tax relating to inheritance, divorce/separation, alimony/maintenance, and child support. She is a member of the International Academy of Family Lawyers (IAFL). Larissa speaks French, Dutch and English.

Carolyn Vanthienen is a counsel at Tiberghien and has been an attorney since 2014. Carolyn specialises in international family and family property law, including divorce, registered partnership, financial provisions, cohabitant claims, and incapacity. She also has expertise in issues regarding children, such as residence and contact. Carolyn has particular interest and experience in estate and private international law disputes involving multi-jurisdictional estates and international clients, often entailing high net worth or complex matters. She is a member of the International Association of Young Lawyers (AIJA) and the International Academy of Family Lawyers (IAFL) and has written multiple family property law-related articles. Carolyn speaks Dutch, English and French.

Alexandra Goossens has been an attorney since 2018 and joined Tiberghien in 2022 as an associate. Alexandra specialises in family law and family property law. As a member of the family litigation team, she assists clients in negotiations and in proceedings before Belgian courts, particularly in the areas of estates or inheritance, wills, gifts, divorce or separation, filiation and adoption, child support, alimony or maintenance between ex-spouses, distribution, and division of assets after divorce and death. Alexandra speaks Dutch, English and French.

Tiberghien

Havenlaan 86C B.419
1000 Brussels
Belgium

Tel: +32 2 773 40 00
Fax: +32 2 773 40 55
Email: info@tiberghien.com
Web: www.tiberghien.com

Tiberghien.
Advocaten / Avocats / Lawyers

1. Divorce

1.1 Grounds, Timeline, Service and Process

In Belgium, a couple may live in a free union or opt for a legal status. In the latter case, they may opt for registered partnership (legal cohabitation) or marriage.

Only civil marriage is legally recognised in Belgium and confers married status with all the rights and obligations that entails. Religious marriage is not legally recognised in the Belgian legal system. A marriage may be between heterosexual or homosexual couples.

When a married couple's relationship ends, either spouse may apply for a divorce, under the conditions set out here. However, they may also decide not to apply for a divorce (or not immediately), but instead to opt for a de facto separation or a legal separation.

De Facto Separation

De facto separation does not require legal proceedings. However, as long as the divorce (or judicial separation) is not final, the spouses remain married and continue to be bound by their obligations arising from the marriage (eg, duty to cohabit and duty to provide maintenance). Consequently, if one of the spouses fails to fulfil their obligations (eg, regarding maintenance), the other may apply to the court for provisional measures.

Legal Separation

One or both spouses may want to put an end to some of their obligations arising from the marriage (eg, cohabitation or fidelity). In this case, they can ask the family court to order a legal separation. In this way, the spouses remain married but their rights and duties as spouses are reduced.

Divorce

Divorce is one of the ways of terminating a marriage. It can be requested from the family court, either by one spouse or by both spouses together (this is known as "divorce on grounds of irretrievable breakdown"). Divorce can also be agreed upon between the parties and pronounced by the court at their request (this is known as "divorce by mutual consent").

There is no longer a fault-based divorce in Belgium. Nevertheless, the question of fault may reappear in maintenance debates between ex-spouses in certain cases, or to establish irretrievable breakdown.

Divorce on grounds of irretrievable breakdown

The family court may grant a divorce if it establishes that the spouses' relationship has irretrievably broken down. Disunion is irretrievable when it makes it reasonably impossible for the spouses to continue living together or to resume living together.

Irretrievable breakdown may be proven by any legal means. The law considers that irretrievable breakdown is established, either:

- when the application for divorce is made jointly by the two spouses after more than six months of de facto separation or, when this application is repeated, the second time being three months after the initial hearing; or
- when the application is made by one spouse after more than one year of de facto separation or, when it is repeated, the second time being one year after the hearing at which the application was made.

Irretrievable breakdown may be proven by other facts, such as duly established acts of domestic violence, adultery, or any other fact that makes it impossible to resume or continue living together.

In some cases, the court may order the parties to appear in person at the hearing. In addition, the application initiating proceedings may also contain:

- requests for urgent and provisional measures concerning the parties and any minor children (or children still in education) for the duration of the divorce proceedings;
- a request for the appointment of a notary to carry out the liquidation of the matrimonial property regime once the divorce has been granted by the judge; and
- a claim for post-divorce maintenance in favour of one of the parties.

These other claims may also be lodged separately, following the application for divorce.

The decision granting the divorce only has effect:

- for third parties, from the date on which the divorce decision is recorded in the database for civil registry records;
- for the parties, with regard to the personal effects of the divorce, from the date on which the decision granting the divorce acquires the force of res judicata (ie, it is no longer subject to appeal or opposition); and
- as regards the parties' assets, from the date of filing of the divorce application or serving the divorce summons.

An appeal may be lodged before the appellate court.

Divorce by mutual consent

The parties may decide together to divorce and reach an agreement on all aspects related to their joint minor children, as well as on all aspects concerning their personal rights and all aspects of matrimonial law, including the division of their matrimonial assets. If the conditions are met, the court will grant the divorce and approve the agreement relating to the children.

The decision granting the divorce only has effect:

- for third parties, from the date on which the divorce decision is recorded in the database for civil registry records;
- for the parties, with regard to the personal effects of the divorce, from the date on which the decision granting the divorce acquires the force of res judicata; and
- as regards the parties' assets, from the date on which the divorce petition is filed.

An appeal against this decision is possible under certain conditions.

Timeline

Divorce proceedings based on irretrievable breakdown can take between six months and one year. If an appeal is lodged against the decision granting the divorce, it can take up to one year to obtain a decision on appeal. Once the petition for divorce by mutual consent is filed, in general, the order confirming divorce is made within six weeks.

These delays may be longer in certain courts of first instance or certain courts of appeal (in the event of an appeal).

Service of Divorce Petition

An application for divorce on the grounds of irretrievable breakdown may be filed:

- by writ of summons served on the defendant by a bailiff on behalf of the plaintiff; or
- by petition served on the defendant by the clerk of the family court upon request of the plaintiff.

The court is seized from the date of service by the bailiff in the first case and from the date the application is lodged at the court office in the second case.

An application for divorce by mutual consent will be filed with the clerk of the family court via a joint petition of the spouses. The court is seized from the date the application is lodged at the court office.

Annulment of Marriage

On certain grounds, the marriage may be annulled by the family court. An annulment may be requested, particularly in the event of:

- a lack of valid consent; or
- a breach of legal requirements for marriage (eg, impediments to marriage between certain persons).

1.2 Choice of Jurisdiction

Jurisdictional Competence for Divorce

In cases involving foreign elements (such as the foreign nationality of the parties), the Belgian court will apply the rules of its private international law.

In terms of jurisdiction, the court will apply:

- the Council Regulation (EC) No 2201/2003 of 27 November 2003 (the "Brussels II bis Regulation") for applications lodged before 1 August 2022; or
- the Council Regulation (EC) 2019/1111 of 25 June 2019 (the "Brussels II ter Regulation") (Article 3 – habitual residence and nationality) for divorce applications lodged on or after 1 August 2022.

Other legal rules apply to applications lodged before the Brussels II Regulations came into force.

Concepts of Domicile, Residence and Nationality

The Brussels II ter Regulation uses the concepts of habitual residence and nationality. Under this regulation, a place will be considered to be a habitual residence when the person intends to establish the centre of their interests there and their presence in that place presents a sufficient degree of stability.

If the Belgian court has no jurisdiction, the judge investigates whether a court from another EU member state has jurisdiction. If this is not the case, the Belgian court applies the Belgian Code of Private International Law and uses the concepts of domicile and residence to determine which courts have jurisdiction. Belgian law recognises several notions of domicile, which differ depending on the subject matter.

Opportunity to Contest Jurisdiction

Either party to a divorce proceeding may contest the jurisdiction, as may the judge (ex officio) – for example, for non-respect of the rules of attribution of internal or international jurisdiction or for non-respect of the grounds and conditions for divorce.

The question of jurisdiction must be decided by the judge before the merits of the case.

Lis Pendens

Belgian internal procedural law and Belgian private international law (including the Brussels II

Regulations) recognise the concept of lis pendens. Under certain conditions, this may justify an application for a stay of proceedings to the Belgian court that is handling a divorce application, where another foreign court has previously been seized of the same divorce application.

In divorce cases where the Brussels II ter Regulation applies, Article 20 states the following.

- "Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are instituted before courts of different member states, the court second seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established."
- "Where the jurisdiction of the court first seized is established, the court second seized shall decline jurisdiction in favour of the court first seized. In that case, the party who instituted proceedings before the court second seized may bring those proceedings before the court first seized."
- "Where a court of a member state on which an acceptance of jurisdiction as referred to in Article 10 confers exclusive jurisdiction is seized, any court of another member state shall stay the proceedings until such time as the court sei[z]ed on the basis of the agreement or acceptance declares that it has no jurisdiction under the agreement or acceptance."
- "Where and to the extent that the court has established exclusive jurisdiction in accordance with an acceptance of jurisdiction as referred to in Article 10, any court of another member state shall decline jurisdiction in favour of that court."

In divorce cases where the Belgian Code of Private International Law applies (because no EU or other international instrument applies), Article 14 of this code states the following: "Where a claim is pending before a foreign court and it is foreseeable that the foreign decision will be likely to be recognised or enforced in Belgium, the Belgian judge seized subsequently of a claim between the same parties involving the same cause of action may stay the proceedings until the foreign decision has been given. [The judge] shall take into account the requirements of the good administration of justice. [Jurisdiction shall be declined] where the foreign decision is likely to be recognised by virtue of this law."

2. Financial Proceedings

2.1 Choice of Jurisdiction

In family matters, a variety of financial claims can be made, including:

- liquidation of the matrimonial property regime and division of matrimonial property after a divorce;
- maintenance between spouses (during the marriage) or between ex-spouses (after the divorce); and
- child support.

In Belgium, the grounds for jurisdiction to commence financial proceeding in family matters vary based on the specific financial claim. For each claim, it is necessary to check that the court seized has jurisdiction, both internationally and under domestic procedural law. The claims concerning child support will be discussed in **3. Child Law**.

Grounds for Jurisdiction

In cases involving foreign elements, the Belgian court will apply the rules of its private international law.

Maintenance

Regarding jurisdiction, the judge will apply the rules dictated in the Maintenance Regulation No 4/2009. The Belgian courts have jurisdiction if the defendant or the creditor is habitually resident in Belgium. In addition, the Belgian courts with jurisdiction under the Brussels II ter Regulation (Article 3(c) (see **1.2 Choice of Jurisdiction**) in matrimonial matters generally have jurisdiction to decide on ancillary spousal or post-marital maintenance. Parties may designate the Belgian court as the competent court in a written agreement if one of them is habitually resident in Belgium or if they are of Belgian nationality. Spouses or former spouses may also still choose the Belgian court if they had their last common habitual residence in Belgium for at least one year or if a Belgian court has jurisdiction over their matrimonial disputes.

Belgian courts can hear (separate) financial claims after a foreign divorce if the Belgian court has jurisdiction and the divorce is recognised in Belgium. However, international jurisdiction is excluded for a new action or for an action to modify a maintenance obligation, as long as the creditor still resides in the other EU member state where the original decision was made.

Other legal rules are applicable to applications lodged before the Maintenance Regulation No 4/2009 came into force (ratione temporis).

Liquidation of property regime of spouses after a divorce

The Belgian courts will apply the rules of the Matrimonial Property Regulation No 2016/1103 for legal proceedings instituted on or after 29 January 2019.

If a Belgian court is seized to rule on an application for divorce pursuant to the Brussels II bis Regulation (or, as of 1 August 2022, the Brussels II ter Regulation), the Belgian court will have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application. This jurisdiction should not be allowed without the spouses' agreement (Article 5) if it is based on the following grounds:

- the Belgian court is seized because Belgium is the habitual residence of the applicant (for at least one year before application was made or for at least six months before the application and the applicant is a Belgian national);
- the Belgian court is seized in cases of conversion of legal separation into divorce; or
- the Belgian court is seized in cases of residual jurisdiction.

When dealing with separate matrimonial property proceedings following a divorce, the Belgian court has jurisdiction in the following cases (Articles 6 and 7):

- where there is a choice of court agreement;
- where shared habitual residence is in Belgium at the time the court is seized;
- where the most recent habitual residence is in Belgium if one spouse still resides there at the time the court is seized;
- where the respondent is resident in Belgium at the time the court is seized; or
- where both spouses have Belgian nationality.

Other legal rules are applicable to applications lodged before 29 January 2019, when Regulation No 4/2009 came into force (ratione temporis).

Contesting Jurisdiction

The jurisdiction of the Belgian court may be challenged if the above-mentioned rules are not respected. Either party to the financial pro-

ceedings may contest the jurisdiction, as may the court (ex officio) – for example, for non-respect of the rules of attribution of internal or international jurisdiction or for non-respect of the grounds and conditions. The question of jurisdiction must be decided upon by the court before deciding on the merits of the case.

Lis Pendens

If a foreign court is already seized of one of the aforementioned claims in particular, the Belgian court second seized will have to apply – where appropriate – the lis pendens rules applicable in view of the subject matter of the claim.

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different EU member states, any court apart from the court first seized may of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established (Article 12 of the Maintenance Regulation No 4/2009; Article 18 of the Matrimonial Property Regulation No 2016/1103).

Forum Non Conveniens

In the absence of specific provisions in Regulation No 4/2009 or No 2016/1103 on the theory of forum non conveniens, the court seized may not refuse to exercise its jurisdiction in favour of a court better placed to rule on the matter.

2.2 Service and Process

Service Requirements in Financial Proceedings

If the application for a maintenance claim or for a division of the matrimonial property is filed at the same time as the divorce proceedings, the service procedure for the divorce proceedings will be followed (see “Service of Divorce Petition” in **1.1 Grounds, Timeline, Service and Process**).

When dealing with separate matrimonial property proceedings following a divorce, one of the ex-spouses must file a claim with the family court by writ of summons served by a bailiff on behalf of the plaintiff on the defendant.

When dealing with separate proceedings concerning maintenance, a claim may be filed:

- by writ of summons served by a bailiff on behalf of the plaintiff on the defendant;
- by petition served on the defendant by the clerk of the family court on request of the plaintiff; or
- by means of a joint petition.

Timeline

At the start of the proceedings concerning the judicial liquidation/division, the judge will appoint a notary to carry out the liquidation of the matrimonial property regime. The first phase of the procedure, led by the appointed notary, takes at least 18 months (unless the parties come to an agreement within a shorter period).

If the parties do not agree with the decision of the notary, they can appeal to the court – in which case, it could take at least another year to make a final decision, depending on the judicial backlog. If the parties subsequently disagree with the decision of the tribunal of first instance, they can make an appeal and – once again – it may take up to a year or longer to obtain a decision on the appeal.

The proceedings concerning maintenance will take six months to one year or longer, depending on the court and the judicial backlog. If an appeal is lodged against the decision, a decision on the appeal will also take at least another year or longer.

2.3 Division of Assets

Property Regimes and Possibility of Relocation by a Judge

The Belgian Civil Code sets out the various matrimonial property regimes. The statutory regime, in the absence of a prenuptial agreement, is a separation of assets with a community of acquisitions. If the spouses want to modify the statutory regime or wish to marry under a separation of property or a universal community of property, a marriage contract must be concluded.

The liquidation of the matrimonial property regime and the division of matrimonial property takes place once the divorce has been granted. In the case of a divorce by mutual consent, the parties must reach an agreement on the division of their matrimonial assets and then the court will grant the divorce. In the case of a divorce on the grounds of irretrievable breakdown, a notary will be appointed to carry out the liquidation and division.

The way assets are divided upon divorce is codified in the Belgian Civil Code and can be stipulated in the marriage contract. The Belgian court cannot regulate or reallocate assets or resources upon divorce.

However, in the case of a separation of property, the legal concept of a judicial fairness adjustment (Article 2.3.81 of the Belgian Civil Code) allows the court – under very strict conditions – to mitigate the consequences of the dissolution of the marriage. If spouses opt for the system of separation of assets, they must indicate in their marriage contract whether they choose to include the possibility of a judicial fairness adjustment, with or without different modalities. If they do, the court may – at the request of the aggrieved spouse – award compensation at the expense of the other spouse under certain circumstances.

Identification of Assets

In the case of a judicial liquidation of the matrimonial property regime and division of the matrimonial property, as previously stated, a notary must be appointed. The notary has the responsibility to oversee the various steps in the procedure of liquidation/division.

One such step is the inventory of the estate. Unless all parties waive this requirement and jointly indicate which assets depend on the estate and have to be divided, the appointed notary will draw up the inventory of the estate.

The ex-spouses are ordered to provide all information and documents useful for the fulfilment of the task of liquidating and dividing the matrimonial property. The parties are required to make full declarations under oath. If a spouse makes a false statement under oath, this spouse can be criminally prosecuted for perjury and risks losing all claims to the assets they have concealed with fraudulent intent.

Trust Under Belgian Law

Belgian law contains a definition of the legal form of a trust, in accordance with Article 122 of the Code of Private International Law, as follows: “The term ‘trust’ means a legal relationship created by an act of the settlor or by a judicial decision, by which assets are placed under the control of a trustee in order to be administrated in the interest of the beneficiary or for a certain purpose. This legal relationship presents the following characteristics:

- the assets of the trust form a separate estate and are not part of the estate of the trustee;

- the title to the assets of the trust is drafted in the name of the trustee or the name of another person on behalf of the trustee; [and]
- the trustee has the authority and the duty, in respect of which [they have] to justify [themself] to manage, administer or dispose of the goods in accordance with the provisions of the trust and the special duties imposed by law on the trustee."

Despite the existence of this legal definition, Belgian law does not provide a legal framework in terms of the setting-up of trusts. A trust that is validly established under foreign law could be recognised from a Belgian private international law point of view.

Assets validly contributed or transferred to a trust by (one of) the spouses are, in principle, not to be divided in the event of divorce, as these assets no longer belong to that spouse's estate. The other spouse, however, could – provided that certain criteria are met and depending on the applicable matrimonial property regime – take action with regard to the transfers made to the trust. The qualification of assets transferred by a trust to (one of the) spouses – and, thus, the question of whether these assets are to be divided in case of divorce – will be determined on the basis of the applicable matrimonial property regime and marriage contract, if any.

2.4 Spousal Maintenance

Interim Measures During Divorce Proceedings

The right to spousal maintenance arises from the obligation to support each other as well as contribute to the expenses of the marriage as laid down in the Belgian Civil Code (Articles 213 and 221 of the old Belgian Civil Code). These obligations are mutual. Failure to comply with these obligations may lead to legal action in the form of maintenance proceedings.

The obligations arising from the marriage continue during the divorce proceedings. Spouses still owe each other support. During divorce proceedings on the grounds of irretrievable breakdown, the family court may order interim measures (eg, maintenance payments) pending the final outcome. In a divorce by mutual consent, interim measures are agreed upon by the spouses.

Maintenance After Divorce Proceedings

In a divorce by mutual consent, the parties must agree on all issues, including maintenance payments (if any).

Following a divorce on the grounds of irretrievable breakdown, the economically weaker ex-spouse may be awarded maintenance under certain circumstances and conditions (Article 301 of the old Belgian Civil Code), such as the following.

- If the court finds that the economically weaker ex-spouse is entitled – in concreto – to a maintenance allowance, the judge will set the amount to cover at least the state of need of the benefit recipient. The term "need" is a relative concept, based on certain criteria. In some cases, "need" in the strict sense will be taken into account; in other cases, it is considered more in the specific context. The court takes into account the income and capabilities of the ex-spouses and the significant decline in the economic situation of the benefit recipient. The court will base its assessment of that regression on, specifically, the duration of the marriage, the age of the parties, their behaviour during the marriage with regard to the organisation of their needs,

and the dependent children during cohabitation or thereafter.
- The maintenance allowance may not exceed one third of the income of the debtor.
- Apart from in exceptional circumstances, the duration of maintenance should not exceed the duration of the marriage.
- If necessary, the court may decide that the benefit will be degressive and to what extent.

2.5 Prenuptial and Postnuptial Agreements

Belgian Pre- or Postnuptial Agreements

Spouses are free to deviate from the statutory regime by utilising a prenuptial or postnuptial agreement, thereby allowing them to customise their matrimonial property arrangements before and during the marriage. They are free to establish their own system, as long as the chosen arrangement complies with the law and public policy. If it does, the court will honour the provisions of the marriage contract.

This contract must be drawn up by a notary. In the contract, the parties can define their economic and financial relations, establish the rules for proving ownership of their goods, and determine how they will manage the assets. However, spouses cannot waive the rights to maintenance before the dissolution of the marriage (Article 301, Section 9 of the old Belgian Civil Code).

Foreign Pre- or Postnuptial Agreements

Recognition of foreign prenuptial and postnuptial agreements in Belgium is governed by the Matrimonial Property Regulation No 2016/1103 (Article 36) or the Belgian Code of Private International Law (Article 27) for pre- or postnuptial contracts from countries that are not member states of the EU (whichever one is applicable).

2.6 Cohabitation

In Belgium, partners can enter into a free union or opt for registered partnership (legal cohabitation).

To opt for registered partnership, the partners make a declaration together at the registrar of civil status. Registered partnership can be terminated unilaterally. Some obligations of married couples are applicable to registered partners, such as the obligation to contribute to family expenses in proportion to their income. As far as assets are concerned, they are not subject to a matrimonial property regime the way married couples are. Each of them remains owner of their property and maintains exclusive ownership. If neither of the partners can provide proof of ownership over an asset, said asset is deemed undivided property.

If the relationship between the registered partners is seriously disrupted, the Family Court can order interim measures (eg, maintenance) under certain circumstances. In any event, those measures expire on the day the registered partnership is terminated.

However, there is no legal basis for maintenance after separation for registered partners. Very exceptionally, a form of maintenance may be granted by the court – albeit for a very limited time – during a transitional period. However, the partners may provide for the possibility of maintenance payments under a registered partnership agreement (drawn up by a notary).

Unmarried partners in a de facto cohabitation arrangement lack legal rights and protections. Should they separate, there are no existing legal safeguards in place.

Registered partnership or de facto cohabiting partners can invoke the concept of enrichment without cause. This pertains to a transfer of assets from one individual (the impoverished person) to benefit the assets of another (the enriched person) without any accompanying legal cause (eg, a contractual, legal, or natural obligation).

2.7 Enforcement

National Enforcement

A maintenance decision is provisionally enforceable by operation of law unless the family court decides otherwise at the request of one of the parties. The creditors can pursue their claim – ie, a bailiff may seize the goods, bank account, or wages of a maintenance debtor so that the maintenance creditor can be paid.

A family court decision regarding a liquidation/division is provisionally enforceable. The interested party has the right to enforce the judgment, even though the other party may still appeal (albeit at its own risk).

International Enforcement

Decisions regarding matrimonial property law settlements from other EU member states are recognised in Belgium without additional procedures.

The Matrimonial Property Regulation No 2016/1103

If the Matrimonial Property Regulation No 2016/1103 applies, decisions given in an EU member state and enforceable in that state will be enforceable in Belgium when – upon the application of any interested party – they have been declared enforceable there in accordance with the procedure provided for in Articles 44 to 57 of the regulation (Article 42). If the regulation does not apply in the case of non-EU decisions, Belgian rules of international private law prevail. The date of the document or decision determines which rules apply.

The Code of Private International Law

For documents or decisions from 1 October 2004, onwards, the Code of Private International Law applies. Enforcement of an authentic document or decision concerning marital property requires judicial intervention, initiated by a petition to the family court.

The 2007 Hague Protocol

For maintenance under the Maintenance Regulation No 4/2009, the enforcement depends on whether or not an EU member state is bound by the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (the "2007 Hague Protocol"). If the member state giving the decision is bound by the 2007 Hague Protocol, the decision that is enforceable in that state will be enforceable in Belgium without the need for a declaration of enforceability (Article 17). If the member state is not bound and the decision is enforceable in that state, the decision will be enforceable in Belgium when – on the application of any interested party – it has been declared enforceable there (Article 26).

The 2007 Hague Convention

Between Belgium and a third country to which the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (the "2007 Hague Convention") applies (and the Maintenance Regulation No 4/2009 does not), a decision is enforced under certain conditions (Article 20).

The Lugano Convention

On judgments and deeds of countries to which the Lugano Convention on Jurisdiction and the

Enforcement of Judgments in Civil and Commercial Matters (the "Lugano Convention") applies, the Belgian court must be asked to declare this decision enforceable (Article 38 of the Lugano Convention).

If none of the other international instruments apply, the Belgian Code of Private International Law prevail and the enforcement of an authentic document or decision concerning spousal maintenance requires judicial intervention, which is initiated by a petition to the family court.

2.8 Media Access and Transparency

Court hearings are open to the public. This implies that the courtroom doors remain open, allowing not only involved parties but also members of the public (including journalists) to enter.

However, the law specifically mandates for certain proceedings to be held behind closed doors, such as:

- judicial conciliation proceedings addressing the claims of the spouses regarding their mutual rights and obligations and their matrimonial property regime;
- judicial proceedings concerning divorce or legal separation; and
- judicial proceedings concerning legal claims related to these proceedings, if they are dealt with at the same hearing (and, therefore, also proceedings related to the liquidation/division of matrimonial property).

In addition, there is also a specific provision to protect the privacy of the spouses in the case of a divorce on the grounds of irretrievable breakdown (and any associated claims for spousal maintenance and liquidation/division of assets). This is because reporting of such cases in the media is prohibited under penalty of a fine and/or imprisonment.

2.9 Alternative Dispute Resolution (ADR)

Belgian law recognises the concepts of mediation, collaborative negotiation and arbitration.

Mediation

Out-of-court mediation is conducted separately from court proceedings. The parties choose by mutual agreement to use a third party (the mediator) to help them resolve their dispute. After reaching an agreement, the parties can either content themselves with this agreement or reinforce its impact by having it made enforceable. If the parties or one of the parties so wishes, a court will homologate the mediation agreement. To do so, the parties must have used an authorised mediator.

Judicial mediation happens in the context of a court case where the court can order mediation ex officio unless both parties oppose it. This form of mediation can also take place at the request of one or both parties. In this case, court proceedings are suspended so that the parties can find a solution to the dispute together through mediation. In family cases, the court is required by law to promote an amicable resolution of disputes at any stage of the proceedings. With a view to reconciliation, the case can be submitted to the Family Court's amicable settlement chamber. Once they have reached an agreement, the agreement will be included in a judgment that will be ratified by the court and will be enforceable.

Collaborative Negotiation

A collaborative negotiation is a negotiation between parties, each assisted by a lawyer who has undergone special training and has been recognised as a collaborative negotiator. If the

process is successful, the parties sign an agreement that can be submitted by the parties' lawyers to the competent court for approval.

Arbitration

Parties having a dispute may agree to resort to an arbitral tribunal. This allows the parties to have their dispute resolved not by the courts of law but, rather, by one or more arbitrators chosen and remunerated by the parties. The arbitral tribunal makes an arbitration award after hearing the parties and studying the documents communicated on file.

3. Child Law

3.1 Choice of Jurisdiction

In cases with international elements, Belgian private international law determines the jurisdictional rules applicable to the Belgian courts.

The child's habitual residence is the main criterion. In some cases, the child's nationality or the location of the parents' property may also serve as a jurisdictional connecting factor.

Parental Responsibility and Protection of Minors

If the minor child is habitually resident in the territory of a member state of the Brussels II ter Regulation/Brussels II bis Regulation (depending on the date of the application), the court will apply that regulation.

As a general rule, the Brussels II ter Regulation states that the Belgian courts have jurisdiction in matters of parental responsibility over a child who is habitually resident in Belgium at the time the court is seized. The habitual residence of the child is the place where the child has the centre of their social life, which is determined based on the specific facts and circumstances of the case.

It is also important to note that the Belgian jurisdiction will be assessed at the time the court is seized. This means that the potential relocation of a child to another country during the Belgian proceedings will not affect the international jurisdiction of the Belgian court.

However, the Brussels II ter Regulation states some exceptions – for example, in the case of the lawful move of a child or wrongful removal or retention (Articles 8, 9, 10, 11 and 12). If the child has their habitual residence in the territory of a state that is not a member of the Brussels II ter Regulation, the Belgian court will apply the rules of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children (the "Hague Convention of 19 October 1996") if the state where the residence of the child is fixed is subject to it.

According to the Hague Convention of 19 October 1996, a court may have jurisdiction based on the following:

- the habitual residence of the child (Article 5);
- as regards refugee children, or children whose habitual residence cannot be established, the presence of the child (Article 6);
- in the case of wrongful removal or retention of the child, the habitual residence of the child immediately before the removal or retention of the child (Article 7);
- in exceptional cases, a contracting state that is better placed to assess the best interests of the child (Articles 8 and 9);
- the discretion of the court to protect the body or property of a child where the court is deter-

mining divorce or separation of the parents (Article 10); or
- exceptional jurisdiction limited to urgent and provisional measures (Articles 11 and 12).

If no state bound by the Brussels II ter Regulation or the Hague Convention of 19 October 1996 has jurisdiction under these instruments, the Belgian court will apply the rules of the Belgian Code of Private International Law, which has jurisdiction in the following cases:

- the defendant has their domicile or habitual residence in Belgium (Article 5);
- close ties with another case pending before a Belgian court – in which case, it is preferable to assess these cases together (Article 9);
- exceptional jurisdiction when there are very close ties to Belgium and proceedings in another country are impossible or it would be unreasonable to demand the proceedings be filed in another country (Article 11);
- the child has Belgian nationality (Article 32); and
- the management of assets located in Belgium (Article 33).

Maintenance Contributions for Children

With regard to maintenance contributions for the children, the Belgian court will apply the Maintenance Regulation 4/2009 of 18 December 2008. As a general rule, Article 3 of the Maintenance Regulation 4/2009 states that the Belgian courts have jurisdiction if:

- the defendant is habitually resident in Belgium;
- the creditor is habitually resident in Belgium; or
- the Belgian court, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person or concerning parental responsibility where the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

However, the Maintenance Regulation 4/2009 also puts a limit on proceedings. Where a decision is given in an EU member state or a 2007 Hague Convention contracting state in which the creditor is habitually resident, proceedings to modify the decision or to obtain a new decision cannot be brought by the debtor in any other member state as long as the creditor remains habitually resident in the state in which the decision was given. Exceptions apply (Article 8).

3.2 Living/Contact Arrangements and Child Maintenance

Jurisdiction of the Family Court

Disputes between parents regarding a (minor) child's living arrangements, the right to personal contact, and maintenance fall within the jurisdiction of the family court.

An application regarding parental authority, a minor's living arrangements, the right to personal contact, or maintenance may be filed:

- by writ of summons served on the defendant by a bailiff on behalf of the plaintiff;
- by petition served on the defendant by the clerk of the family court on request of the plaintiff; or
- by joint petition by the clerk of the family court on request of both parents.

The applications are considered urgent by the court and judgment will be given as in interlocutory proceedings.

Appearance in Person

The appearance of both parties in person at the introductory hearing is obligatory in cases pertaining to:

- separate residence;
- parental authority;
- a child's living arrangements or the right to personal contact; or
- maintenance.

However, in all proceedings concerning minors, the requirement for both parents to appear in person is extended to all hearings in which questions regarding the minors will be discussed, and to all substantive hearings (hearings in which the case will be heard on its merits). In exceptional circumstances, the court can grant an exception to this obligation to appear in person.

Interests of the Child

In all applications regarding a minor, the interests of the child play a key role. In this regard, the Family Court can take all measures or necessary acts of investigation – for example, to understand the child's personality and the environment in which they are being brought up in order to determine their best interests and their most appropriate upbringing or care. As such, there are no restrictions on the court's ability to make an order as to a child's living and contact arrangements, except for the rule that the order must be in the best interests of the child.

The court may order a social examination through the competent social service or submit the child to a medical-psychological examination. Where appropriate, the court may also take into account the opinion of the minor themselves (see **3.3 Other Matters**).

Parental Responsibility and Custody

As a general rule, parental responsibility is exercised jointly by both parents. This means that the parents must decide together on the important issues relating to the care and upbringing of the children. In exceptional circumstances, the court can deviate from the general rule of joint parental authority, but this is rare and there must be a strong argument for imposing exclusive parental authority.

As regards custody, evenly divided housing or residence of the child is the preferred arrangement.

The rules of parental responsibility and custody are the same whether the parents are married, living together or separated.

In cases where the parents are no longer living together, and they do not agree on the children's residence, the court must examine as a matter of priority whether the preferred arrangement (ie, the evenly divided residence of the child) can be applied if at least one parent requests it. The court will take into account the best interests of the child and the quality of contact with each parent. The court can also take into account the interests of the parents, but only if this does not compromise the interests of the child.

In assessing the evenly divided residence of the child, the court can – among other things – take the following criteria into consideration:

- the need for a stable environment and stability in terms of relocations; and
- the financial feasibility, the way of life of the parents and their availability, and the educational capabilities of the parents.

Possible reasons to deviate from the evenly divided residence of the child are:

- considerable geographical distance;
- unavailability of one of the parents;
- manifest indifference;
- the young age of the child; and
- keeping siblings together.

Child Maintenance

The general rule when it comes to child maintenance is that all parents must provide housing, maintenance, health, supervision, education, training and development for their children in proportion to their means. This obligation lasts throughout the child's minority. However, if the child has not completed their education by the time they reach the age of majority (18 years old), the obligation continues until their education is completed.

The means of the parents include all professional, personal and fixed property income of the parents, as well as all benefits and other resources ensuring their standard of living and that of the children. And each parent must contribute to the costs of the children in proportion to the parent's respective share of aggregate resources.

A child has the right to share their parents' standard of living. If one of the parents does not fulfil their obligation to provide for their child or children, the other parent can claim child maintenance payments to cover these costs, which include ordinary costs as well as extraordinary costs. A minor (ie, a child younger than 18) cannot apply for maintenance from their parents.

Parameters defined by law

The Belgian legislature has imposed eight well-defined parameters to be taken into account by the court when deciding on maintenance. It also requires the court to include these eight parameters in its judgment and to clarify how it has taken them into account. These parameters include:

- the nature and amount of the resources of each of the parents;
- the ordinary costs that make up the child's budget as well as the way they are budgeted;
- the nature of the extraordinary costs to be taken into account, the portion of these costs to be borne by each of the parents, as well as the modalities for the use of these costs;
- the child's residence arrangement and the contribution in kind of each of the parents to the child's maintenance as a result of this residence arrangement;
- the income, if any, received by each of the parents from the enjoyment of the child's property;
- the share of each of the parents in bearing the costs arising from Article 203, Section 1 of the Civil Code and any maintenance contribution set thereon, as well as the modalities for its adjustment pursuant to Article 203 quater of the Civil Code; and
- the special circumstances of the case taken into account.

Courts are increasingly using calculation tools to help them determine the cost of children and the amount of maintenance due. However, they are not obliged to use these tools, nor are they bound by their results.

Payment of child maintenance can always be adapted according to the child's needs. One of the parents can file an application to change child maintenance payments determined in a previous judgment when there are new circumstances. It is important to note that the changes must be independent from the will of the parents.

This is to prevent, for instance, a parent deliberately taking measures to lower their income with the only goal being to reduce child maintenance payments.

The parents can always reach an agreement regarding child maintenance payments. However, given that the obligation of the parents to provide housing, maintenance, healthcare, supervision, education, training and development for their children in proportion to their means is a matter of public policy, it cannot be stated that one parent is relieved of this obligation. Nevertheless, this does not mean that it would not be possible to determine that no child maintenance is due. If the parents wish to be able to enforce this agreement, they can ask the court to homologate their agreement, whereby the court may assess the content of this agreement against the best interests of the child.

3.3 Other Matters

Components of Parental Authority

The upbringing of a child is part of parental authority.

Parental authority, as well as the housing of minor children, are matters of public policy. This means that the measures taken in this context should always correspond to the best interests of the child. When parents disagree on how to raise a child (eg, regarding schooling or medical choices), a parent can initiate a proceeding. When ruling on a dispute brought before the court, the judge will take the best interests of the child into consideration (see **3.2 Living/Contact Arrangements and Child Maintenance**).

Parental Alienation

There are no specific provisions regarding parental alienation under Belgian law, but the topic continues to gain attention. However, it is not easy for a court to establish parental alienation and the courts are therefore very cautious about citing parental alienation in their judgments and will only do so if this is confirmed by an expert.

In the case of parental alienation, the court can take certain measures – for example, imposing equally divided residence between both parents or, in very severe cases, the court may also decide to completely overturn the residence arrangement. Another option is to impose a visitation in a neutral visiting room. However, there is no sanction for non-compliance with this measure, unless a parent seeks a penalty payment. Another option is to engage family mediation. Some courts also apply the Cochem model, whereby the court tries to restore the parents' sense of responsibility in order to find an agreement in the best interests of the child. The court may also order psychological support for the child.

If Family Court proceedings are not sufficient, then – according to some judges – it is necessary to proceed under juvenile protection law. In that case, the juvenile court has a number of other tools at its disposal, such as counselling the child, and placement of the child in serious cases of parental alienation.

Hearing of a Minor by a Judge

If the minor is younger than 12 years old, they will be heard at their own request or at the request of the parents, of the public prosecutor or, ex officio, of the court. The judge may refuse to hear a minor under 12 years of age, except when such a request is made by the child or by the public prosecutor.

If the minor is 12 years old, they will be informed by a letter from the court of their right to be

heard. However, the child is never obliged to be heard and can refuse.

The court will hear the minor at a place it considers appropriate and, unless the court decides otherwise, the hearing will take place with no one else present except for the clerk of the Family Court. The record of the interview is attached to the court file and reflects what the minor has said. The minor is informed that the parties may take note of it. If, during the interview, the court finds that the minor does not have the necessary discernment, a note will be made of this in the report.

The interview with the minor will not have the effect of making them a party to the proceedings. Appropriate importance will be attached to the minor's opinion in accordance with their age and maturity.

3.4 ADR

See **2.9 Alternative Dispute Resolution (ADR)**.

3.5 Media Access and Transparency

As explained in **2.8 Media Access and Transparency**, court hearings are open to the public. Proceedings regarding parental authority, child maintenance, upbringing, education and cross-border custody and visitation rights (as well as legal claims related to these proceedings, if they are dealt with at the same hearing) are exceptions to the general norm and are not accessible to the public or the press.

BRAZIL

Law and Practice

Contributed by:
Cassio Namur and Roberta Toledo
Tortoro, Madureira & Ragazzi Advogados

Contents

Tortoro, Madureira & Ragazzi Advogados has a team of 15 attorneys and two senior partners handling family law with discretion and confidentiality. With four integrated offices in São Paulo, Brasilia, Ribeirão Preto and Campinas, the firm represents clients in complex issues within family and succession law related to international jurisdictions, in procedures concerning matters such as ratifying foreign decisions, definition of jurisdiction, custody and maintenance, and application of the Hague Convention. The practice deals with marriage, stable or de facto unions, prenuptial agreements and marital property regimes, as well as divorce, custody and visitation, search and seizure of minors, cases of multi-jurisdictional estate planning, guardianship, custody and interdiction, court-supervised and out-of-court succession processes, and estate planning in corporate matters. Recent cross-border cases the firm has dealt with include child abduction under the Hague Convention involving the UK, the USA, Argentina, Bahamas, Portugal, and Spain. The firm has also recently handled multi-jurisdictional succession matters.

Authors

Cassio Namur holds an MBA in corporate finance from the Business School of the University of São Paulo (FEA/USP). He practises in civil law, mainly family and succession law, at Tortoro, Madureira & Ragazzi Advogados and has national and international experience of complex cases. Cassio assists clients in issues related to property, family and business estate planning. He has held leadership positions in national and international associations, including currently acting as governor at large of the International Academy of Family Lawyers (IAFL) and first vice-director of international relations at the Brazilian Institute of Family Law (IBDFAM), as well as being past president of the International Association of Family Law Jurists (AIJUDEFA).

Roberta Toledo of Tortoro, Madureira & Ragazzi Advogados holds a doctorate in law from the Pontifical Catholic University of São Paulo (PUC/SP) and a master's degree in comparative civil law from the same institution. She also has both a degree in law and a degree in business administration from the Centro Universitário de Bauru – Instituição Toledo de Ensino (ITE). Roberta is a former dean of ITE, where she also acted as academic co-ordinator of the master's and doctorate programmes in Constitutional Systems for Guaranteeing Rights. She is currently a member of the board of the São Paulo Lawyers Institute (IASP), consolidating her influence in the legal and academic world.

Tortoro, Madureira & Ragazzi Advogados

Al Santos 787
7º andar
Jd Paulistano
CEP 01419-001
São Paulo
Brazil

Tel: +55 11 3018 4848
Fax: +55 11 3018 4800
Email: cnamur@tortoromr.com.br
Web: www.tortoromr.com.br

1. Divorce

1.1 Grounds, Timeline, Service and Process

Divorce is a Potestative Right

Considering that divorce is a potestative right, for the dissolution of heterosexual or same-sex couples, the will of one of the parties and the existence of a valid marriage are sufficient to apply for a divorce. A stable union must be proven and judicially recognised, if it has not been declared by the parties by means of a public deed or private instrument, in order for it to be dissolved, producing its patrimonial effects and consequences for the children, as well as for the ex-spouse/partner.

Currently, in order to carry out the dissolution of a marriage or stable union, there is no need to comply with prior separation deadlines or other requirements, except for the determination of one of the parties to terminate the relationship.

Bill No 4/2025, which is currently being processed in the Brazilian Senate, provides for changes in the area of family law with the option of unilateral divorce – that is, at the request of only one of the spouses – directly at a notary's office (administrative divorce), without the need for intervention by the judiciary. Debate over the bill must still be processed in both legislative houses, the Senate and the House of Representatives, and this is expected to occur during 2025.

Types of Divorce

In Brazil, two types of divorce are currently allowed:

- the extrajudicial or administrative route, which is always consensual; and
- the judicial route, which may be consensual or litigious.

Extrajudicial or administrative divorce

The extrajudicial divorce is processed before any notary public, by means of a public deed. There is no requirement for a prior period of separation or any other mandatory procedure.

The requirements are:

- capacity and consensus between the parties; and
- the existence of a valid marriage.

Since August 2024, by decision of the National Council of Justice, if the couple have minor or incapacitated children in common, the issuance of a public deed of divorce will be permitted – provided that the prior judicial resolution of all issues relating to their custody, visitation and alimony is duly proven, which must be recorded in such deed.

A lawyer or public defender assists the parties. In an extrajudicial or administrative divorce, there is no secrecy of justice, and the content is accessible to third parties because it is carried out in the form of a public deed. The extrajudicial or administrative modality is therefore a faculty of the spouses and, even if the requirements demanded for the extrajudicial or administrative route (which is faster) are fulfilled, the parties can opt for a consensual judicial divorce, as this modality guarantees the secrecy of justice according to its terms and conditions.

Judicial divorce

Divorce, even if consensual, must be processed before the judiciary and decreed by a judge when it involves incapacitated persons, minors and/or unborn children. The agreement must, therefore, consider:

- custody and co-residence of the parents with their children;
- maintenance for dependent or unborn children;
- the waiver or payment of maintenance to the ex-spouse/partner; and
- the use of the surname.

The agreement may also consider the division of assets, according to the regime adopted. The public prosecutor's office acts in the matter as a custos legis ("law inspector").

In the absence of consensus, the divorce will be litigious and processed before the judiciary. Even when a divorce is litigious, the request for it does not need cause or justification.

In the presence of incapacitated children or minors and unborn children, the public prosecutor's office acts as a law inspector.

When there is no consensus, one of the parties initiates the processes involving requests for:

- divorce, which may be combined with sharing assets;
- custody and co-parenting of the children; and
- alimony or maintenance for the children.

These processes are always represented by a lawyer and/or public defender and are not linked to each other, but distributed freely, according to procedural rules. This means that they can be analysed at different times and by different judges.

Once the judge who must analyse and decide on any preliminary measures – for example, blocking of assets, alimony, custody and co-existence of children – has received the case, the opposing party will be cited and summoned to defend themselves and/or attend a prior hearing, accompanied by a lawyer or public defender for the attempted composition. If there is no agreement, the process follows its own rite, with the presentation of defence, production of evidence, hearing of the instruction and court decision, and appeals, etc.

A prior mediation hearing is not required for subsequent access to the judiciary.

Citation and Subpoena

The rules for service of process and subpoena on the opposing party in family actions are provided for in Article 695 of the Brazilian Civil Procedure Code. Article 695 establishes, in summary, that the writ of service will contain only the data necessary for the hearing and must not be accompanied by a copy of the complaint. It must ensure the defendant the right to examine its contents at any time and, in order to be valid, the summons must occur at least 15 days before the date designated for the hearing and be served on the person of the defendant.

If there is no agreement after the due legal procedure and hearing involving the public prosecutor (in cases where there are incapacitated persons, minors, and/or unborn children), the magistrate will issue a decision to decree the divorce and deliberate on the other matters addressed in the process. In the litigious processing of the sentence, an appeal can be made.

Religious Marriage

As long as it does not contradict the rules of public law, religious marriage may be recognised – as long as it is registered within 90 days of its celebration – before the State (civil registry) as a civil marriage for the purpose of producing civil effects of religious marriage and therefore it may be dissolved by divorce, according to the secular rules of the legal system. In Brazil, there is no religious divorce before the State, because there is separation between the State, which is secular, and the various religions practised in the Brazilian territory.

Other Processes to End a Marriage

Although it is not configured as divorce, but as an option for ending a marriage, there are legal hypotheses of annulment and nullity in the act.

According to the law and the Brazilian Civil Code, civil marriage can be considered null or voidable, as follows.

- Null – where the following parties have married:
  - (a) ascendants with descendants, whether natural or civil kinship;
  - (b) in-laws in a straight line;
  - (c) the adopter with the adoptee's spouse and the adoptee with the adopter's spouse;
  - (d) siblings, unilateral or bilateral, and other collateral, up to and including the third degree of kinship;
  - (e) the adoptee with the adopter's child;
  - (f) already married persons; or
  - (g) the surviving spouse with the person convicted of murder or attempted murder of their spouse.
- Voidable – in the following cases:
  - (a) either of the parties have not reached the minimum age to marry;
  - (b) the parties to the marriage are minors of marriageable age, but are not authorised by their legal representative;
  - (c) the marriage is contracted under wilful misconduct (eg, error or coercion);
  - (d) a party to the marriage is incapable of consenting or unequivocally expressing consent;
  - (e) the marriage is performed by an agent, without the agent or other contracting party knowing of the revocation of the mandate, and where there is no co-habitation between the spouses; or

(f) due to the incompetence of the celebrant authority.

In both the above-mentioned cases, the requests are processed through a lawsuit before the judiciary and aim to dissolve the marriage bond as if it had never existed.

The nullity request cannot be subject to a statute of limitations, whereas the annulment request must comply with the following deadline rules for bringing the marriage annulment action (starting from the date of celebration):

- 180 days, in the case of item IV of Article 1550 (where the person is incapable of consenting or unequivocally expressing consent);
- two years, if the celebrant authority is incompetent;
- three years, in the cases of items I to III of Article 1557 (where item I concerns the spouse's identity, honour or good reputation; item II concerns ignorance of a crime prior to the marriage; and item III concerns ignorance, prior to the marriage, of an irremediable physical defect); or
- four years, if there is coercion.

The right to annul the marriage of minors under 16 years of age is extinguished in 180 days, counting from the day on which the minor reached that age and from the date of the marriage, for the minor's legal representatives or ascendants.

In the case of item V of Article 1550, the term for annulment of the marriage is 180 days, starting from the date on which the principal becomes aware of the celebration.

1.2 Choice of Jurisdiction

Access to the judiciary for filing divorce proceedings is immediate in Brazil because there is no requirement for prior attempts at consensual agreement, such as conciliation and private mediation. All that is required is for the interested party to take legal action. Judicial measures can be preparatory and of an urgent nature, in order to avoid the loss of rights of the interested party, and can involve the collection and blocking of assets, the establishment of provisional maintenance for the children and former partner, provisional custody and regulation of cohabitation. Measures of an urgent nature are followed by final requests for divorce and sharing, maintenance, custody and cohabitation of children. The rules are identical for heterosexual and same-sex marriages and also apply to the procedures for the dissolution of a stable union.

Domicile and Residence

The concepts of domicile and residence are relevant to the definition of jurisdiction.

The residence is where the person regularly stays and, therefore, there may be several residences. The domicile is the place where the person establishes their permanent residence, so the residence and domicile can be the same place. The domicile is unique and can be considered to be where the person regularly carries out their professional activities. The domicile, regardless of residence, may be expressly established in contracts, pacts and/or terms.

If a person lives in several residences, and has not formally fixed their domicile, any one of the residences may be considered as the domicile. In the event of not having a habitual residence, the domicile will be considered as the place where the person can be found.

Determination of Jurisdiction

Pursuant to Brazilian civil procedural law, actions in the consensual or litigious modality will be proposed:

- at the domicile of the guardian (even factual) of an incapacitated child;
- in the last domicile of the couple, in the absence of an incapacitated child;
- at the defendant's domicile, if neither party resides at the couple's former domicile; or
- at the victim's home in the case of domestic and family violence.

These are hypotheses of internal territorial jurisdiction, and the interested party will be able to contest them, because they are not alleged ex officio by the judge.

Regarding the sharing of assets located in Brazil, the Brazilian judge has absolute jurisdiction, in view of the principle of national sovereignty.

Nationality

As for nationality, the Brazilian judicial authority may prosecute and judge actions in which the party, whatever their nationality, is domiciled in Brazil. Therefore, once the interested party is established in Brazil, the divorce will follow the rites of Brazilian procedural law.

As for jurisdiction, an action filed before a foreign court does not lead to lis pendens – that is, it does not prevent the Brazilian judicial authority from hearing the same case and related ones, even if already initiated in some other international jurisdiction. There is, therefore, concurrent competence for the discussion of divorce, except for actions related to the sharing of assets located in Brazil, which are the absolute competence of the Brazilian judge, even if the holder is of foreign nationality or is domiciled outside Brazil.

The lis pendens of the case before the Brazilian jurisdiction does not prevent the ratification of a foreign court decision when required to produce effects in Brazil.

Contest of Jurisdiction

The jurisdiction for the divorce may be contested if it is proved that neither of the parties resides or is domiciled in Brazil, even if the marriage took place in Brazil and/or if one of the parties is Brazilian. In the matter of division, jurisdiction may be contested if it can be proved that there are no assets located in Brazil. As for judicial custody and maintenance, Brazilian jurisdiction may be contested if it can be proved that the child is not resident or domiciled in Brazil and is living abroad. In this case, even if they are nationals, the Brazilian judge will not be able to analyse the actions and the jurisdiction may be contested. Therefore, for the purposes of Brazilian law, it is residence and domicile that determine jurisdiction, not nationality.

2. Financial Proceedings

2.1 Choice of Jurisdiction

According to Article 23 of the Brazilian Civil Procedure Code, it is incumbent upon the Brazilian judicial authority – to the exclusion of any other – to proceed with the sharing of assets located in Brazil, even if the holder is of foreign nationality or is domiciled outside the national territory.

Regarding this rule, there is no prior requirement to initiate the action involving the discussion of assets arising from the marriage or common law marriage. It is sufficient to enter the measure that may be accompanied by injunctions.

Thus, for the discussion of assets located in Brazil, the jurisdiction cannot be contested.

Even if a divorce or property-sharing process is begun in Brazil, the party will have to propose the action abroad for the property located outside Brazil. The Brazilian judge has no jurisdiction over assets located abroad, even if these assets are known and/or formally declared before the Brazilian tax authorities.

According to Articles 22 and 23 of the Brazilian Civil Procedure Code, Brazilian courts can hear financial claims after a foreign divorce if:

- they relate to common property located in Brazil;
- they relate to maintenance when the creditor has domicile or residence in Brazil; or
- the debtor maintains ties in Brazil, such as possession or ownership of assets, receipt of income, or obtaining of economic benefits.

2.2 Service and Process

Proceedings involving financial assets may be prior judicial measures, with the granting of injunctions, or even incidental to proceedings involving the sharing of assets located in Brazil. These preparatory or incidental measures may require the search for or survey of assets, with the determination of orders to banks, brokerages, stock exchanges or companies, and may involve the breaching of tax and bank secrecy.

The process begins with a preliminary injunction and, in view of the risk of asset loss, may involve the blocking and seizure of assets known to the judge, as well as measures to raise and give full knowledge of the financial assets to the other party. These measures begin with the assessment of the preliminary injunction by the judge – after which, the subpoena and citation of the other party that will contest the action occurs. The issue will then be decided definitively within the scope of the sharing of assets.

2.3 Division of Assets

The Legal Rules of the Property Regime

The division of property in the divorce is subject to the rules of the property regime chosen at the time of the marriage. When the parties do not choose according to their will, the legal regime of property provided for in Brazil is that of partial community of property, which does not require a prenuptial agreement. That is, this is the property regime applied to all marriages and stable unions in which no other regime has previously been established or imposed by law.

This property regime presupposes the common effort and communication of the assets acquired at a cost by either party during the term of the marriage or stable relationship. Assets received by donation or inheritance remain incommunicable regardless of the acquisition date. Assets subrogated to individuals are also incommunicable. The sharing will take place in the proportion of 50% of the collection considered common, regardless of who acquired it.

New legislation pending

As mentioned in **1.1 Grounds, Timeline, Service and Process**, Bill No 4/2025 is currently being processed in the Brazilian Senate. This reform bill addresses the updating of the 2002 Brazilian Civil Code and suggests changes to various topics, such as inheritance, division of assets, divorce, assisted reproduction, animal rights, digital law and civil liability, among others.

Although the current Civil Code is relatively recent (23 years in existence), the impact of new technologies, changes in the dynamics of social

relations, and the "world without borders" have led to the suggested changes.

Specifically in the area of inheritance law, according to the proposal, spouses will no longer be necessary heirs, which means they will be excluded from the group of people to whom half of the inheritance is mandatorily allocated. The appreciation of shares or interests in business corporations is also expected to be included in the division of the couple's assets, when it occurs during marriage or stable union, even if the acquisition of the shares is prior to marriage or cohabitation.

Debate over the bill must still proceed in both legislative houses, the Senate and the House of Representatives, and this is expected to occur during 2025.

Types of Matrimonial Regimes

According to Brazilian law, the following property regimes can be applied to marriages and stable unions.

Partial community of property regime

As stated earlier, partial community of property is the legal property regime provided when the parties are silent about the regime under which the marriage or stable union is established. Partial community of property does not require a prenuptial agreement. This regime presupposes the common effort and communication of the property acquired at a cost by either party during the term of the marriage or stable union and so the sharing will take place in the proportion of 50% of the collection considered common, regardless of who acquired it, with the exception of the property acquired through inheritance or donation.

Universal community of property regime

This regime requires a prenuptial agreement signed by public deed before a notary public before the marriage takes place and which is registered in the couple's home registry after the marriage is celebrated. In the prenuptial agreement, specific rules of incommunicability can be established. As a rule, there is the communication of all assets, even those belonging to each spouse, acquired before or after marriage, free of charge or for a fee. Liabilities are also communicated. The sharing will obey the rules of the regime of partial community of property and will take place in the proportion of 50% of all assets and liabilities, for each of the spouses or partners. This requires a grant for the sale and encumbrance of the assets.

It is important to mention that the parties have the right to agree on a sharing of property in a different proportion than the one established by law, which may happen through donation or through onerous acquisition. The sharing of assets under these terms will imply the incidence of the causa mortis and donation tax on the part that exceeds the 50/50 sharing of the property and may, therefore, occur in cases of universal and partial sharing of assets.

Moreover, it must be observed that the rate of the tax is set freely by each Brazilian state, with a maximum rate of 8%. However, the text of Constitutional Amendment No 132 provides that the causa mortis and donation tax will be levied progressively in relation to the portion shared, and the 8% limit must be respected. As a result, the higher the value of the portion shared disproportionately, the higher the incidence of such tax will be.

Separate property regime

This is established by means of a prenuptial agreement drawn up by public deed with a notary public before the marriage, which is then registered with the competent real estate registry after the marriage. In it, there is no communication of assets and liabilities: the titleholders will always be the acquirers and there is no need to speak of a presumption of common effort, much less of sharing in the event of a divorce. It is possible for a spouse or partner to donate to the other, unless this practice is prohibited in the prenuptial agreement. It does not require the granting of rights over private property.

Mandatory separate property regime

This is the regime imposed by law in certain situations, namely:

- people who contract marriage in breach of the suspensive causes of marriage; and
- a person over 70 years old, if another regime through a public deed issued by a notary public has not been chosen.

This regime used to be mandatory for persons over 70 years old. However, on 1 February 2024, the Supreme Court of Brazil issued a decision unanimously determining that such regime will be optional – that is, it may be removed by express will of the parties, through a public deed. This means that when one or both of the parties over 70 years old does not choose a different regime according to their will, the legal regime of property applicable in Brazil is that of mandatory separate property regime. The reason for such decision was that the restriction on the choice of regime violated the dignity and autonomy of the elderly.

This regime is also imposed for all those who depend on judicial supply to marry.

In this regime, there is no communication of assets, except if the common effort of the claims is duly proven, as provided for in Precedent 377 of the Supreme Court of Brazil (*Supremo Tribunal Federal*, or STF) – in which case, the sharing will take place in the proportion of 50% to each party. By means of a prenuptial agreement, which is mandatory in this regime, the incidence of Precedent 377 of the STF may be ruled out. This regime prohibits donations between spouses or partners. Further, there is no sharing and it does not require the granting of rights by the spouse.

Final participation in the quests regime

This regime is rarely practised in Brazil. In this regime, each spouse or cohabitant will own and manage their own assets, which will always remain incommunicable. At the end of the relationship, the claims for the time of the marriage or stable union will be determined – even if arising from private or common property – and divided in the proportion of 50% respectively. This requires the granting of rights over assets, even if the assets are private.

Patrimonial Search

If there is a lack of knowledge of assets, especially financial assets that make up the assets accumulated by one of the parties in the matrimony or stable union, the aggrieved party may request – prior to or incidentally to the sharing process – the search and/or blocking of assets and financial assets. The judiciary can determine the breach of banking and tax secrecy, carry out research with the Federal Revenue Service, the Central Bank, state traffic departments, real estate registry offices, etc. Once the assets are known, the blocking and attachment can be determined. These measures can be enacted at the outset and are processed under the secrecy

of justice, as they deal with financial and tax data.

Strictly speaking, it is not possible to require orders against third parties, unless fraud in the property regime has previously been proven.

No Trusts Under Brazilian Law

As for a trust, which is a company created for the specific purpose of asset management and protection, there is a regulatory gap in Brazil, as there is no specific provision in this regard, either as a legal transaction or tax regulation. Bill of Law No 4.758/2020, which provides for an institute similar to a trust (called a "contract of trust"), is still awaiting processing by the Brazilian Senate, with no clear indication of when it will be finalised. Bill of Law No 145/2022, which deals with the law applicable to the trust, its effectiveness and its tax treatment in the country, is also pending in the Brazilian Congress with no certainty of when this will be finalised. Bill of Law No 14754, approved in December 2023 by the Brazilian Congress, came into force as of January 2024. This bill establishes, among other things, the taxation of offshore companies and trusts based on 15% of income earned from 2024 onwards, even if the investment remains abroad. The bill provides: "Income and capital gains relating to the assets and rights of the trust will be considered obtained by the holder on the date of the event (creation of the trust, distribution of assets or death of the owner) and subject to income tax. Modification of ownership of the trust's assets will be considered a donation, if [this] occurred during the owner's lifetime, or an inheritance, after their death; in either case, the tax on transmission causa mortis and donation of any assets or rights (ITCMD) is a state tax."

It is important to mention that the tax provided for by Bill of Law No 14754, issued in December 2023, also applies to exclusive funds, equating them to the non-exclusive investment funds. Therefore, tax is now levied beyond the time of redemption of the amount invested, unlike it was before 2024.

2.4 Spousal Maintenance

Spouses or partners can ask each other for the maintenance they need to live in a manner compatible with their social status, so that the benefiting party can reorganise or find themselves a place in the labour market and seek other means of supporting themselves. In general, it is an exceptional obligation – although if one comes to need maintenance, the other will be obliged to provide this through a pension to be fixed by a judge, for a certain period, in most cases. This is determined, in general, on a transitory basis, based on the binomial represented by the financial capacity of the maintenance provider and the needs of the maintenance beneficiary, according to criteria of proportionality and reasonableness.

With the dissolution of the relationship, the party that feels in need can request the arbitration of provisional maintenance, proving its need, while awaiting the final decision regarding the amount and period to be defined for the payment of the maintenance. The so-called transitional alimony can also remain in force until the sharing of assets is effective, when a spouse/partner in need can live off the income and/or fruits of these assets.

Long-Term Maintenance

However, there is also the possibility that the instalment could be for life, depending on the circumstances proven on a case-by-case basis, which will also be analysed for the definition of the value, which is subject to revision, depending on the change in needs of those who receive

it and/or the possibilities of those who pay. In order to define the value of the maintenance, the party in need must prove all their expenses and the amount must also comply with the financial capacity of the person who must pay the pension.

The judge can break the maintenance debtor's tax and asset secrecy, request information from the financial and asset control bodies and credit card administrators and contact employers and third parties to find out the maintenance debtor's assets and financial situation. The judge can also determine that the payment of maintenance be directly deducted from the debtor's wages or other financial assets (eg, receipt of rent or other credits).

Compensatory Maintenance

In addition, so-called compensatory maintenance has been gaining ground in doctrine and jurisprudence, despite not having a legal provision, with the purpose of compensating the economic-financial imbalance between divorced parties and respecting the standard of family life, especially when there is no sharing of assets under the chosen regime.

Unlike transitional maintenance, in this case the beneficiary has the financial resources to ensure their subsistence, but the divorce drastically changes their standard of living. Therefore, the financial assistance will be of a compensatory nature.

2.5 Prenuptial and Postnuptial Agreements

Prenuptial Agreement

In the Brazilian legal system, the prenuptial pact is recognised, but there is no postnuptial pact or agreement. In this context, there is only the possibility of judicial amendment of the property regime, and this is subject to certain legal requirements.

The prenuptial agreement is the document through which the parties establish the economic, financial and/or personal conditions that will govern the marriage relationship. In it, they decide on the property regime or freely adapt the rules, while simultaneously respecting the legal prohibitions.

A prenuptial agreement is void if it is not made by public deed, and ineffective if the marriage does not take place. In addition, it will only be effective vis-à-vis third parties after it is registered with a competent real estate notary.

Amendment to the Property Regime

The only possibility of changing the property regime after marriage is through a judicial process, which must be consensual, with proof of the reasons for the request and safeguarding the rights of third parties.

According to the Superior Court of Justice, in the judgment of Special Appeal No 1.904.498-SP of the Third Panel on 5 April 2021, the assets acquired before the judicial decision authorising the change of regime must remain under the rules of the previous regime – that is, the judicial review should only cover legal acts performed after the sentence (ex nunc effects). In addition, spouses are not required to provide exaggerated justifications or evidence, disconnected from reality, especially in view of the fact that the decision granting the modification of the property regime has ex nunc effects.

2.6 Cohabitation

The division of assets for unmarried couples (heterosexual or same-sex) presupposes the proof of existence of a cohabitation or so-called

stable union in Brazil maintained between them – that is, of a relationship lived with the purpose of establishing a married life in common.

A stable union is mainly characterised by continuous co-existence, with affection, durability, publicity, mutual assistance and the intention to form a family. A stable union does not require a minimum period for its configuration. Cohabitation, financial dependence and children are not essential requirements for a relationship to be considered stable but, when they exist, the finding of a stable union relationship is practically unequivocal.

Thus, when there is a break-up, the existence of a stable union must be demonstrated and recognised in court, if it has not been previously declared by the parties by means of a public deed or a private instrument. Only then can the union be dissolved, producing patrimonial effects (sharing of assets and/or fixing of alimony) and arrangements regarding the children (assignment of custody, alimony, and regulation of visits).

When there is a document formalising the stable union and establishing a property regime, the property will be shared according to the rules established by the couple, as long as they do not contradict public rules. That is, the property regime established in a public deed or private instrument of recognition of the stable union must be valid to be judicially enforced. If there is a document establishing the stable union, but the property regime has not been elected, the division of property will take place according to the regime of partial community of property – that is, with the equal division of property. The same will happen if the recognition of the stable union is made in court by means of a declaratory action, with subsequent dissolution and sharing of assets, which will provide for a 50% split between each of the cohabitants of the assets acquired onerously in the course of cohabitation.

2.7 Enforcement

Compliance Enforcement

Failure to comply with a court decision or the terms agreed in a public deed of divorce or dissolution of a stable union leads to its judicial execution, by filing a request for compliance with the judgment or filing an enforcement action.

In the same way, an agreement made in a private mediation hearing, ratified by a court or an arbitral decision, is enforceable before a judiciary. Following the rite proper to each execution, the judiciary can determine the arrest, seizure and blocking of assets, provided they are located in Brazil, to enforce what has been agreed or decided. All coercive measures may be used on the defaulter's assets to comply with the order, such as breach of tax secrecy, blocking of assets, and seizure of movable and real estate. The party can also make use of financial orders, which require the inclusion of the name of the defaulting party in the list of debtors with the banking and financial system.

Concerning maintenance (child or spousal maintenance), sanctions for non-compliance can be financial – from confiscation of funds in bank accounts, investments, social security contributions for profit sharing, or rental income, to the seizure of assets such as vehicles or real estate. Suspension of credit cards can also be requested in court. The most radical sanction is a prison sentence – civil imprisonment, provided for in the Brazilian Constitution as a coercive punishment. The Brazilian Civil Procedural Code foresees from one to three months of civil imprisonment for failure to comply with an alimony obligation – this is the sole cause of

civil imprisonment in Brazil. There are also other options to seek to persuade debtors to comply with their obligations, such as the suspension of their driving licence and the retention of the debtor's passport.

International Enforcement

The recognition and, therefore, the execution of a foreign judgment in Brazilian is permitted, if it is not incompatible with the national legal system.

A foreign decision deliberating on a subject where competence is exclusive to the Brazilian judicial authority, such as the definition and distribution of assets located in the national territory, will not be ratified. Once ratified by the Superior Court of Justice and thus fulfilling the requirements, the foreign judgment has the condition of judicially enforceable title and can be fully executed on national soil.

2.8 Media Access and Transparency

The Brazilian Constitution provides that the intimacy, private life, honour and image of people are inviolable, thereby limiting freedom of expression of thought and freedom of the press.

The Brazilian Civil Code provides that proceedings dealing with marriage, divorce, stable union, filiation, alimony and custody of children and adolescents are processed in accordance with the secrecy of justice. Therefore, the processes that deal with these matters are not public, being accessible only to the parties, their attorneys, the magistrate and members of the public prosecutor's office, and servants of the judicial system.

The Secrecy of Justice

The secrecy of justice is the right to preserve the privacy of the parties and the process itself, protecting it from possible external interference. When a case will not necessarily proceed in the secrecy of justice, the parties may request secrecy and justify it and, depending on the magistrate's assessment, a decree may be issued. In any case, data protected by the constitutional right to privacy must be processed in secrecy of justice.

The Code of Ethics for Brazilian journalists prohibits the disclosure of information that violates the right to privacy of the citizen, which must mainly be considered with regard to matters dealt with in judicial proceedings that are processed in secrecy of justice.

Anyone who disrespects procedural secrecy may be regarded as committing an unlawful act and be liable for losses and damages.

2.9 Alternative Dispute Resolution (ADR)

ADR methods involve conciliation and mediation, which are carried out privately in this context. Experts in finance can assist parties if they wish; however, in Brazil, there are no specific ADR methods for actions involving financial assets.

The use of ADR is not mandatory but may be advised by a magistrate. The process can be suspended for the parties to take part in mediation sessions. In the same way, when dealing with available rights, the parties can use an arbitral court – although this is still very rare in Brazil.

3. Child Law

3.1 Choice of Jurisdiction

In order to establish competence to prosecute maintenance actions, Brazilian law considers the domicile or residence of the child. The child's residence is fixed according to the residence of their guardian. If the child's domicile is fixed

according to the domicile of the child's legal representatives, and this place does not match the child's residence, discussion may arise about the place of jurisdiction. In most cases, Brazilian law considers the place where the child is located and lives.

Brazilian jurisdiction welcomes the request for maintenance, with the establishment of provisional maintenance even in the case of foreign children, provided that they are resident and/or domiciled on Brazilian soil. There are no prior rites to be fulfilled and the request can even be formulated without lawyers being present, based on the special alimony law. If the child is not domiciled or resident in Brazil, a local judge does not, strictly speaking, have competence in this matter.

3.2 Living/Contact Arrangements and Child Maintenance

With the end of a relationship in which the parties had children, there is a need to judicially establish, for minors and incapacitated persons:

- the place of residence;
- the custody arrangement (unilateral or shared);
- regulation of contact with the non-custodial parent; and
- alimony.

Custody Arrangements

Currently in Brazil, the general approach is that of shared custody, in which there is the sharing of responsibility and greater balance in the time the child spends with both parents, with a view to preventing parental alienation or any other psychological harm. Custody may be unilateral, however, depending on the circumstances of the case or the parents' situation.

Where the parents do not agree, the court makes a decision based on the best interests of the children. Thus, the financial conditions of one of the parents is not a determining factor for custody and visits, but, rather, where the affective interests and physical and intellectual development of the child will be better served.

The judge may rely on psychosocial analyses – supported by meetings of the parties with psychologists and social workers – in order to be able to make a better analysis of the situation, always prioritising the best interests of the child.

The public prosecutor is also involved in supervising matters involving minors and persons lacking capacity and may even limit or require changes to the agreements entered into by the parties if the public prosecutor believes that the interests of the children or incapacitated persons are not being properly served.

Alimony and Maintenance

Child maintenance is understood to be everything that is indispensable for the subsistence and proper development of the child or person lacking capacity, including all expenses with regard to housing, health, food, education, clothing, transportation and leisure.

Alimony is not fixed or defined in Brazil. The value is defined, through consensus or court order, based on meeting the needs of those who ask for it within the possibilities of those who pay. Both parents are called upon to contribute to the maintenance of their children, within their respective financial capacities and also considering the social standard of family life, depending on the particular case. The parties can reach an agreement on child support without having to file a lawsuit in advance. However, for the agreement to be enforceable, it will need to be

submitted to the public prosecutor's office and subsequently approved by the court.

The maintenance process starts with the request for and establishment of provisional maintenance. The respondent is summoned to pay provisional maintenance, take part in a hearing in an attempt at conciliation, instruction and judgment, and summoned to present their defence and evidence at that same hearing. Following the decision of the judge, the interested party can appeal, and the provisional maintenance will be in force until the decision becomes final.

A child cannot apply for financial support on their own, but must be represented, in general, by one of their parents or by another legal representative (guardian, curator, etc) or by the public prosecutor, who has legitimacy in these situations.

3.3 Other Matters

Power of the Court

In the event of disagreements, the parties may refer the case to the judiciary. Litigious lawsuits involving issues related to custody and family life will be submitted to the judge, who may use the findings of a multidisciplinary team to resolve the conflict. The judge may rely on psychosocial studies – supported by meetings of the parties with psychologists and social workers – and be in a position to make a better analysis of the situation, always prioritising the best interests of the child.

As for religion, it is important to remember that children and adolescents have the right to religious freedom. Logically, it is up to the parents to raise and educate their children in accordance with their own convictions, given that the State will be responsible for intervening when the best interests of minors are compromised or at risk.

Parental Alienation

Parental alienation is dealt with in Law No 12.318/2010 (amended by Law No 14.340/2022), which considers an act of parental alienation to be interference in the psychological formation of the child or adolescent promoted or induced by one of the parents, by the grandparents or by those who have the child or adolescent under their authority, and who campaign negatively or prevent or hinder contact, destroying or harming the child's bonds with the other parent so that the child or adolescent repudiates and rejects the other parent.

Evidence of Children in Court

If the magistrate deems it essential for the judgment of the case, children will be heard indirectly and through a specialised listening service, in an appropriate and welcoming place, with the infrastructure and physical space to guarantee their privacy.

The testimony of children and adolescents, under these conditions, has the force of judicial evidence. It is not taken in isolation but is considered with the other evidence produced in the process.

3.4 ADR

In the extrajudicial scope, the parties can use mediation for all matters related to family issues, including financial and property disputes. Mediation can be carried out at the pre-procedural stage or even after the litigation has started. Sessions are held in private chambers and, in addition to private mediators and their lawyers, the parties can seek professionals with expertise in finance, accounting, valuation of assets, shareholdings, etc. Costs are at the expense of the interested parties.

The law that introduced arbitration in Brazil does not prohibit its use for family property and financial matters, as long as they are available rights. It is still little used in this area – although the doctrine is increasingly defending this option.

Brazilian legislation establishes that conciliation, mediation and other alternative methods of consensual dispute resolution are not mandatory. However, the judge may determine the attempt at conciliation and/or mediation at the beginning or during the judicial proceedings, and unjustified absence may be interpreted as an act that violates the dignity of justice. This can be penalised with a fine of up to 2% of the intended economic advantage or the value of the claim, reversed in favour of the union or the State. If both parties show a lack of interest in the consensual agreement, there will be no penalty.

The agreement reached via conciliation or mediation must be taken for judicial approval and will thus have the force of a court decision. The arbitral award, in turn, does not need ratification and can be enforced in court.

3.5 Media Access and Transparency

Cases involving children, adolescents and people who are vulnerable owing to a physical or mental condition have the right to the confidentiality of their identity and the facts dealt with in the proceedings. Cases must proceed under secrecy of justice because they involve the constitutional right to intimacy, private life and identity.

Parents cannot authorise the disclosure of facts and circumstances relating to their children. All such proceedings are treated under the principle of secrecy of justice and are not accessible to third parties.

Article 6 of the Code of Ethics for Brazilian journalists prohibits the disclosure of information that violates citizens' right to privacy, which must be considered with regard to matters dealt with in judicial proceedings that are processed in accordance with the secrecy of justice.

Anyone who disrespects procedural secrecy is committing an unlawful act and may be liable for losses and damages.

The law provides that whenever cases are reported, the child must always remain anonymous.

CANADA

Law and Practice

Contributed by:
Heather Hansen, Shannon Beddoe, Maureen Edwards and Victoria Lunetta
McCarthy Hansen & Company LLP

Contents

Contributed by: Heather Hansen, Shannon Beddoe, Maureen Edwards and Victoria Lunetta,
McCarthy Hansen & Company LLP

McCarthy Hansen & Company LLP represents and advises clients on all areas of family law, including issues related to divorce, custody and access, spousal and child support, mobility matters, division of property, separation agreements, domestic contracts, religious marriage contracts, adoption, and cross-border family law issues. McCarthy Hansen & Company LLP frequently work on matters that involve the highly complex intersection of family law and other areas of law, including business, tax, trust and estate matters and criminal proceedings. The firm's lawyers also represent children and parents in domestic and child protection matters. In addition to its deep bench strength and litigation expertise, McCarthy Hansen & Company LLP is regularly called on to provide advisory and planning assistance to other family offices to employ practical strategies for risk mitigation and long-term planning. The firm is also frequently called on by family law counsel in other jurisdictions to provide opinions as to the impact of Canadian law in international proceedings.

Authors

Heather Hansen is a partner at McCarthy Hansen & Company LLP, where a significant portion of her work involves advising high net worth individuals. She is recognised and ranked by Chambers & Partners (Band 2) and is also a fellow both of the International Academy of Family Lawyers and the American College of Trial Lawyers. Heather is an elected bencher (board of directors) at the Law Society of Ontario, where she qualified as a certified specialist in family law. Heather also serves on the board of directors of LawPro.

Shannon Beddoe is a partner at McCarthy Hansen & Company LLP, where she practises in all areas of family law. She has appeared before all levels of court in Ontario, including the Ontario Securities Commission and the Ontario Court of Appeal. Shannon was called to the Bar in Ontario in 2011. Prior to joining McCarthy Hansen & Company in 2014, she practised complex commercial litigation. Shannon is recognised as one of the best lawyers in Canada for family law. She is a 2024 recipient of the Lexpert Rising Stars Award, honouring leading lawyers under 40 from across Canada.

Contributed by: Heather Hansen, Shannon Beddoe, Maureen Edwards and Victoria Lunetta,
McCarthy Hansen & Company LLP

Maureen Edwards is a partner at McCarthy Hansen & Company LLP, where she practises in all areas of family law. She was called to the Bar in Ontario in 2011. Prior to joining McCarthy Hansen & Company she practiced complex civil and commercial litigation. Maureen has appeared as counsel before various tribunals and courts, including arbitral tribunals, and has made written submissions to the Supreme Court of Canada. Maureen is recognised as one of the best lawyers in Canada for family law.

Victoria Lunetta is an articling student with McCarthy Hansen & Company LLP.

McCarthy Hansen & Company LLP

601-1133 Yonge Street
Toronto
ON M4T 2Y7
Canada

Tel: +1 416 862 6226
Fax: +1 416 855 9001
Email: martha@mccarthyco.ca
Web: www.mccarthyco.ca

Contributed by: Heather Hansen, Shannon Beddoe, Maureen Edwards and Victoria Lunetta,
McCarthy Hansen & Company LLP

1. Divorce

1.1 Grounds, Timeline, Service and Process

The most common ground for divorce is a separation that lasts for a period of 12 months with no prospect of reconciliation. Canada still has two "fault" grounds (cruelty and adultery) but they are rarely – if ever – used. The same grounds apply to same-sex spouses.

A divorce may be granted by the court after the parties have lived separately and apart with no reasonable prospect of reconciliation for a period of no less than 12 months. The 12-month period starts on the date of separation, which is a finding of fact. There is no requirement that the parties obtain a court order or court finding of the date of separation – although, in some cases, a finding may be required if the parties cannot agree on the date of separation.

Consent is not required to apply for a divorce. One or both parties can apply to the court for a divorce. The unwinding of the parties' financial affairs and any child-related issues are corollary relief to the application for divorce. Service is personal on the responding party even if the divorce is uncontested.

Canadian courts deal only with the severing of the legal marriage and the corollary issues of separation and divorce. Ontario courts may remove a religious barrier to marriage if certain criteria are met.

Annulment

Annulment is available in Canada in limited circumstances related to a defect in the formality of the marriage. In practice, it is rare. An annulment can be ordered if a marriage lacks the formal validity requirements, such as proper registration for the marriage. An annulment can also be ordered if a marriage lacks essential validity requirements. By way of example, a marriage wherein one party did not understand the nature of the duties or responsibilities that flowed from a contract may be annulled on that basis.

1.2 Choice of Jurisdiction

A spouse may only obtain a divorce in Canada if they, as the moving party, have lived in the jurisdiction for a period of no less than 12 months. The divorce is the severing of the legal marriage only. There are four primary areas of corollary relief that have different jurisdiction requirements, as follows.

- Division of property – only married parties are able to make claims for statutory division of property. The court will take jurisdiction over division of property if the jurisdiction is the last common habitual residence of the parties as married spouses. Unmarried parties have equitable claims available to them that also require them to be habitually resident in the jurisdiction in order to make a claim to the courts.
- Children's issues – jurisdiction lies with the court where the child habitually resides at the time the application is commenced. In some circumstances, there may be concurrent jurisdiction; in which case, the court will consider the question of preferred forum in determining the appropriate jurisdiction.
- Child support – a parent can move for child support in the province where the child habitually resides, regardless of whether that jurisdiction was ever a common habitual residence for the parents.
- Spousal support – a spouse (married or common law) may move for spousal support in the jurisdiction where the spouses last shared a common habitual residence. There

is some ambiguity about whether provinces will assume jurisdiction for spousal support claims if the parties did not commonly reside in the jurisdiction prior to the commencement of the application.

In cases where both spouses reside in a foreign jurisdiction for at least one year prior to the time of the divorce application, and that jurisdiction does not recognise the validity of their marriage, the court in the province where the spouses were married may grant a divorce in accordance with Section 4-13 of the Civil Marriage Act. However, given that the Divorce Act does not apply in circumstances where a Canadian court grants a divorce for foreign spouses, the court does not have jurisdiction to adjudicate any support or custody claims.

Any person may make a claim for a divorce and/or corollary relief regardless of their nationality and/or religion. Where the parties reside (ie, their domicile) impacts where they are able to commence a court application.

Contesting Jurisdiction and Staying Proceedings

A party can contest jurisdiction based on the following factors:

- the commencement of a concurrent and/or earlier proceeding in another jurisdiction;
- the absence of habitual residence in the case of divorce and division of property;
- whether the parties have previously contracted into another jurisdiction and/or private dispute resolution (arbitration); and/or
- where there is a child under the Divorce Act, there is an opposed parenting/decision-making application and the child is "most substantially connected" to another jurisdiction.

The court may decline jurisdiction and/or stay the Canadian proceeding if a foreign jurisdiction has already taken jurisdiction. In declining or staying the Canadian proceeding, the court will consider whether the foreign court has jurisdiction over the proceeding. A province will have jurisdiction over a divorce if either spouse has been habitually resident in the province for at least one year immediately prior to the commencement of the divorce proceeding.

If a party wants to pursue divorce in a foreign jurisdiction, they must demonstrate that the foreign jurisdiction is the more convenient forum. Among the factors that a court will look to in determining if a foreign jurisdiction is more convenient are the geographical location of the parties and/or whether one spouse would be deprived of a juridical advantage in the foreign jurisdiction.

2. Financial Proceedings

2.1 Choice of Jurisdiction

As regards the grounds for jurisdiction and the possibility of contesting jurisdiction and/or staying proceedings in financial proceedings, please refer to **1.2 Choice of Jurisdiction**.

Pursuant to the Federal Divorce Act, Canadian courts do not have jurisdiction to hear and determine a corollary relief proceeding following a valid foreign divorce. Provincial courts may have jurisdiction to determine child support and property claims that have not been dealt with in the foreign proceeding.

2.2 Service and Process

Financial claims are commenced under provincial jurisdiction, most commonly by way of application to the relevant provincial Superior Court

of Justice. Most financial claims are corollary to the divorce proceeding and, as such, service is personal or admitted through counsel in the case that the party has representation.

There are no statutory timelines for parties dealing with financial proceedings. Regardless of whether the matter is negotiated or litigated, all cases start with the exchange of financial disclosure – a process that almost always informs the pace of the negotiation and/or the litigation. The case law requires the asset-holding party to provide a value and supporting documentation for the asset(s) in question. The form and extent of disclosure depends on the nature and complexity of the assets. In some cases, particularly in high net worth matters, one or both parties may need to obtain the assistance of an arm's length expert to provide an opinion of value with regard to various assets – a process that can be time-consuming and expensive.

2.3 Division of Assets

Division of property is governed by provincial legislation and is individual to each province. Generally speaking, the statutory right to division of assets (which is available only to married couples) is intended to provide an equal division of the value of all assets acquired during the course of the marriage, not a redistribution of title and/or ownership.

The question of value is a determination based on fact, rather than statutory definition. Value is calculated on a net basis, which can include actual liabilities and/or disposition costs and potential notional disposition costs or discounts. An example of this is when a minority discount is applied (in some circumstances) when a shareholder is in a non-control, minority position in the corporation and the value of their interest should be discounted based on liquidity and/or ability to dispose of the interest.

Financial Orders

In all Canadian provinces, the statutory scheme focuses on title, meaning that marriage does not create an ownership interest in the other spouse's assets (equitable or otherwise) and only in the case of equitable relief can a spouse obtain an equitable ownership interest in an asset. In some extreme cases, a party may obtain relief to have an asset transferred to them or to compel the sale of an asset to satisfy a payment – although this is the exception, not the rule.

The courts have jurisdiction in exceptional cases to transfer assets from one spouse to the other either:

- in order to secure a present or future support obligation (security for support); or
- as a remedy for oppressive conduct in cases where a spouse is also a shareholder to a corporation.

As in non-matrimonial cases, in exceptional circumstances the court can also seize and/or freeze assets to protect against depletion and potentially to enforce an outstanding order.

Disclosure Process

Canadian courts have described the failure to provide proper disclosure as the "cancer of matrimonial litigation". Canadian jurisprudence dealing with the positive duty of a spouse to provide full and frank disclosure is robust and far-reaching. If a party resists disclosure that is relevant and ought to be produced, the court can restrict the party's ability to participate in the proceeding and make orders in their absence, impose monetary and/or non-monetary penalties until

compliance, and – in extreme cases – make a finding of contempt.

An asset-holding party has the positive obligation to disclose all worldwide assets and provide a value for the disclosed assets. In the case of complex assets, this may include an obligation to provide an expert opinion on the question of value. Once disclosure (including the value) is provided, it is open to the responding spouse to request further disclosure and/or obtain their own expert opinion with regard to the value.

Sometimes the required information to value a spouse's asset (or interest in an asset) requires production from third parties. The burden on who moves against the third party depends on the nature of the requested disclosure.

If an asset-holding party is not able to obtain the required supporting documentation to value the asset, they may have an obligation to obtain a court order requiring third parties to release the necessary information to determine value. An example of this would be if the asset holder is a minority shareholder in a privately held corporation and does not have a right of access to the working papers of the corporation. In this case, the spouse would have a positive obligation to move before the court as against the corporation to obtain the disclosure.

If a responding spouse is not satisfied with the disclosure provided and wishes to pursue further or other disclosure, they are also free to ask the court to compel the asset-holding spouse (or third parties) to produce additional information.

Trusts

A spouse's interest in a trust may be an asset that is valued and then equalised by the courts. Determining value of an interest in a trust is a fact-finding exercise. The court will examine the following questions.

- What position does the spouse have in relation to the trust? Are they the settlor, a trustee or a beneficiary?
- If the spouse is a trustee, do they have the power to remove other trustees at their discretion?
- Is the spouse a trustee and a beneficiary?
- If the spouse or a related entity owned by the spouse is a beneficiary, have there been distributions to beneficiaries over the lifespan of the trust?
- How did the spouse obtain their interest in the trust? In many jurisdictions in Canada, if the spouse obtained their interest by way of gift or inheritance, it may be excluded from the calculation of their net family property – regardless of the nature of their interest.

Equitable trusts arising from unjust enrichment are remedies available both as a matter of common law and, in some jurisdictions, by statute. In addition to the traditional equitable remedies of resulting and constructive trust, the Supreme Court of Canada has expanded the reach of equitable claims and created a common-law finding of Joint Family Venture (JFV). A JFV finding allows the court to expand the reach of traditional trust remedies when the nature and dynamic of the spouse's contribution is not specifically tied to an identified asset. A finding of JFV requires the parties to have engaged in a joint economic enterprise. The determination involves many of the traditional considerations for a constructive trust remedy but, again, relieves the trier of fact of the obligation to attach those contributions to a specific asset. This has been an important development for non-married spouses.

Generally, trust claims (including a JFV finding) are available only to non-married spouses. However, the case law has not closed off certain circumstances whereby a married spouse may also have a trust claim, including a JFV.

2.4 Spousal Maintenance

Canada has a robust and well-developed body of jurisprudence related to spousal support. In addition to extensive case law, the courts rely on the Spousal Support Advisory Guidelines (SSAGs), which is a set of rules and guidelines for how to fashion an appropriate support order.

Spousal support is available to spouses on an interim and final basis. On an interim basis, the court is not required to determine a precise amount and will, in most circumstances, fashion an interim order that is intended as a holding pattern until final resolution. The court also has jurisdiction to order partial lump or uncharacterised advances on an interim basis.

Grounds for Spousal Support

Entitlement to spousal support is based on compensatory and non-compensatory grounds.

Compensatory support is payable when a spouse has made direct or indirect contributions to the marriage and/or the economic success of the other spouse and suffered an economic loss as a result of those contributions. A spouse will have a strong compensatory claim if they have sacrificed a job or career trajectory for the family, most commonly for childcare or for the advancement of the other spouse's career. Strong compensatory claims also exist in traditional marriages where one spouse works outside the home and the non-income-earning spouse works inside the home.

Non-compensatory support is payable when a spouse has suffered economic disadvantage arising from the marriage breakdown. This most commonly occurs in shorter-term marriages where a lower-income-earning spouse will suffer economic loss or hardship arising from the physical separation. By way of example, the lower-income-earning spouse may experience job disruption or relocation costs arising from the marriage breakdown.

Most spousal support claims have blended entitlement, meaning they are a combination of compensatory and non-compensatory support.

Determination of Duration and Quantum of Support

The nature of a compensatory claim can inform both the duration and quantum of support. The stronger the compensatory claim, the more likely that duration will be longer and the amount will be higher.

The court can order spousal support on a monthly or lump sum basis. Although lump sum spousal support is exceptional, it may be appropriate in cases where income is uncertain and/or a lump sum more appropriately compensates a recipient spouse. Lump sum spousal support may also be appropriate if there are concerns about the payor's ability to service monthly support in a reliable way. If spousal support is ordered on a monthly (sometimes called "periodic") basis, the payments can be ordered with or without a termination date or with a structured review.

Aside from the nature of the compensatory claim, the quantum of spousal support is determined based on:

- the ages of the parties at the time of separation;

- the length of the marriage;
- the parties' respective incomes (actual or imputed);
- the means, needs and circumstances of the parties – this basket consideration may include the capital base of either party, other financial obligations, and the budget of recipient spouse.

Duration of support is largely governed by the length of the marriage and the ages of the parties at the time of separation. Generally, a support obligation will not be less in duration than the length of the relationship. Importantly, duration for spousal support is determined by the length of the relationship, which can include cohabitation prior to the date of marriage if the parties are married.

Cohabitation does not require physical residence. There are cases in Canada where a party has established a sufficient level of economic integration and dependency during the course of a relationship for a support obligation to be imposed even though the parties did not physically live together during the relationship.

2.5 Prenuptial and Postnuptial Agreements

Domestic contracts can be entered into between married and unmarried spouses alike. In most provinces and territories, the validity and enforceability of domestic contracts are governed by both statute and case law. Domestic contracts can take the following forms.

- Cohabitation agreements – entered into between unmarried parties most commonly to restrict or modify spousal support entitlements and/or restrict equitable claims related to property. Cohabitation agreements can become marriage contracts in the event of marriage if the parties contract as such.
- Marriage contracts – entered into either during or in contemplation of marriage. Marriage contracts most commonly restrict or modify a married spouse's right to the statutory framework for equalisation of property between spouses and/or restrict or modify spousal support entitlements.
- Separation agreements – entered into between married and unmarried spouses to resolve the issues arising from the breakdown of their marriage or relationship.

Generally, courts will enforce valid and enforceable domestic contracts that do not give rise to unconscionable circumstances.

Validity of Domestic Contracts

Validity is governed primarily by statute in the relevant province. Validity is concerned primarily with the formal requirements of establishing the existence of the contract. In Ontario, for example, validity requires that the domestic contract be in writing, signed by both parties, witnessed, and dated.

Enforceability of Domestic Contracts

Enforceability, by contrast, concerns itself with whether the circumstances of entering into the contract were appropriate and with the fairness of the contract. The threshold requirements for the enforceability of all domestic contracts are threefold, as follows.

Duress

Duress is addressed extensively in the case law. Broadly understood, duress will be found when a spouse felt – at the time of execution or in the time leading up to the execution – that they had no choice but to enter into the contract and that the duress was impressed on them by the acts

or words of the other contracting spouse. External stress, discomfort or stressful circumstances do not rise to the level of duress necessary to set aside a domestic contract that was otherwise validly entered into.

Financial disclosure

The complete absence of disclosure leading up to the execution of a domestic contract is almost always a basis for setting aside a domestic contract. More often, however, there is a question about the sufficiency of the disclosure provided. A material misrepresentation or omission, whether intentional or inadvertent, will likely be considered a basis for setting aside an agreement. For a misrepresentation or omission to be material, it must directly connect to the substantive content of the contract and will depend on the facts of the case.

Independent legal advice

The absence of independent legal advice does not automatically result in a contract being unenforceable, but the presence of independent legal advice is a powerful indicator that the contract should be enforced. A certificate confirming independent legal advice was given is commonly attached as a schedule to domestic contracts to confirm the nature and extent of the legal advice given. The presence of independent legal advice leading up to and during the execution of the agreement is often, but not always, a mitigating factor against a duress allegation. Independent legal advice may not be sufficient if there was an absence of full financial disclosure. Put another way, the presence of independent legal advice may be useless if the lawyer did not have appropriate disclosure in order to administer the appropriate advice.

Unconscionable Circumstances

In addition to the above-mentioned criteria, the court has jurisdiction to set aside all or part of a domestic contract if the contract results in an unconscionable circumstances. The lead case in respect of this analysis comes from the Supreme Court of Canada in Miglin v Miglin (2003).

One example of unconscionable circumstances would be if the parties entered into a domestic contract containing a full spousal support release and then were subsequently married for 45 years in a traditional marriage. In this case, the court may set aside the spousal support release because the outcome of the contract is inconsistent with the terms and entitlement that the spouse would have otherwise received without the contract. Given the severity of the circumstances in this case, a court would likely set the spousal support release aside because its results would be unconscionable and/or inconsistent with the intentions of the parties at the time that the contract was signed.

2.6 Cohabitation

In Ontario, Alberta, New Brunswick, Nova Scotia, and Quebec, unmarried spouses have no automatic right or statutory right to share in their partner's property unless they hold legal title to the property. In these jurisdictions, unmarried spouses' property rights are limited to common law rights and equitable claims (ie, claims that anyone may advance). The Supreme Court of Canada in Walsh v Bona (2002) confirmed that the different treatment of married and unmarried spouses when it came to property rights arising from their relationships was not discriminatory under the Canadian Charter of Rights and Freedoms. Conversely, in Saskatchewan, Manitoba, and British Columbia, unmarried couples who are living together in a conjugal relationship have statutory property rights and are entitled to

equally share in property acquired during their relationship.

The contributions of the spouse to the home (including contributions to childcare) and the length of the relationship are factors that the court will considering when assessing both the finding of unjust enrichment and in fashioning a monetary or non-monetary remedy.

2.7 Enforcement

Enforcement falls under provincial jurisdiction and varies from province to province. A spouse has a combination of institutional enforcement and enforcement through the courts. An example of institutional enforcement can be found in the province of Ontario. There, the Family Responsibility Office enforces support obligations using tools such as garnishment, seizing of driver's licence and/or passports, and – in some cases – incarceration.

Court-ordered enforcement can include penalties for non-compliance, contempt findings, and writs of seizure and sale. A party that fails to comply with a financial order may also be responsible for the moving party's costs.

Enforcement of International Orders

Enforcement of international orders is governed either by treaty or common law. All provinces and territories except Quebec have reciprocal support arrangements with some countries and territories, such as the USA. However, Quebec has arrangements with a number of states, including California, Maine and Florida.

Canada also has reciprocal support arrangements with Africa, Asia, Caribbean, Europe and the South Pacific. By way of example, Canada is a signatory to the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (the "2007 Hague Convention"). The 2007 Hague Convention is an international system for the cross-border recovery of child support and other forms of family maintenance. Some provinces, including Ontario and Manitoba, have implemented the 2007 Hague Convention into a provincial law that provides the applicable procedures to enforce foreign child support orders. For the Ontario legislation, see Chapter 13 of the Interjurisdictional Support Orders Act 2002.

2.8 Media Access and Transparency

Canada enjoys freedom of expression protected by the Canadian Charter of Rights and Freedoms. This includes freedom of the press. In addition to freedom of expression, the Canadian Charter of Rights and Freedoms protects court openness as a procedural and substantive protection. In the absence of a sealing order, there is no restriction on the media's ability to access court proceedings and report on the proceeding.

Canadian court proceedings are rarely televised except at the appellate level as a matter of custom. However, there is no constitutional prohibition.

Anonymising of proceedings is required by statute in child protection proceedings. Anonymisation is available by way of application in domestic child-related proceedings based on both statute and common law and, rarely, may be ordered in financial proceedings based on common law.

2.9 Alternative Dispute Resolution (ADR)

Parties are permitted by way of agreement to resolve their financial dispute outside of the court system. Parties must enter into a contract specifically agreeing to the form of dispute resolution and the terms of the process. In some

provinces, there are statutory requirements to screen for domestic violence and to apply the law of the province in the private ADR process. Parties may contract into mediation only, mediation with focused arbitration on specific issues, or full arbitration on all issues.

There are no universal statutory obligations for parties to explore ADR methods. However, the case law in most provinces speaks to the positive obligation of parties to divert their dispute from the litigation process and attempt ADR in advance of litigation. That being said, many cases are not appropriate for ADR and counsel must consider the appropriate screening requirements before referring matters to private dispute resolution.

In the case of a settlement reached through negotiation and memorialised in a final agreement, the courts will generally enforce the agreement in the absence of a material defect. In cases where the parties properly enter into an arbitral process and a decision is made by the arbitrator, the court will treat such an award as valid and enforceable, provided that the award has not been successfully appealed, varied or set aside.

3. Child Law

3.1 Choice of Jurisdiction

As regards the grounds for jurisdiction and the possibility of contesting jurisdiction and/or staying proceedings in domestic child-related proceedings, please refer to **2.1 Choice of Jurisdiction**.

3.2 Living/Contact Arrangements and Child Maintenance

Living/Contact Arrangements

In Canada, children have the right to have contact with their parents. As a result, either parent can apply to the court to request that a parenting schedule be ordered. This can be done as part of a divorce application, an application that considers support issues, or as a standalone application. Several factors must be considered when determining what the appropriate parenting schedule should be, but the court's primary consideration is always what is in the best interests of that child.

Following the breakdown of a relationship or a marriage, the legal approach to determining questions of custody and parental responsibility is one that focuses on the best interests of the child. The court will give primary consideration to the child's physical, emotional and psychological safety, security and well-being. The status quo is not the default position in determining what is in the best interests of the child and by the same token, there is no presumption in favour of shared or equal parenting arrangements and/or decision-making responsibility regimes. The sole focus of the court is the best interests of the child in the specific factual context before it.

Child Maintenance

In Canada, child support is defined as the amount of financial support one parent must pay to the other parent to help support their child or children while in the care of the other parent.

Canada's Federal Child Support Guidelines are rules and tables for calculating the quantum of child support one parent must pay to the other parent. The quantum of child support that one (or each) parent is responsible for depends on several factors – among which are the division

of parenting time, each parent's yearly salary, and the needs of the child. The Federal Child Support Guidelines are designed to advance the best interests of children and to ensure that child support orders are fair, objective, and consistent across Canada, as well as straightforward and inexpensive to review on an annual basis. To calculate the support owing in any given year, the Federal Child Support Guidelines mandate that parents provide certain financial information to one other on request. Child support orders based on the Federal Child Support Guidelines are enforceable across Canada.

In cases where the parties can reach an agreement on child support issues, there is no requirement that the agreement be presented to the court. In these circumstances (ie, where there is no court involvement), the parties can reach agreements that do not necessarily follow the Federal Child Support Guidelines. However, if the parties were married and seek a divorce order, then the child support arrangements will be scrutinised by the court and the court will not grant the divorce until it is satisfied that the children have been appropriately provided for. Usually this requires compliance with the Federal Child Support Guidelines – although there are exceptions where special arrangements have been made that benefit the children.

In Canada, courts routinely make orders in relation to child support. Typically, there is no time limit or fixed duration set with regard to such orders at first instance. Rather, child support will end for a child when that child ceases to be a child entitled to support, as that term is defined by the common law in the relevant jurisdiction. This can happen as a result of various circumstances, which include but are not limited to:

- a child no longer lives with the parents;
- a child becomes self-supporting;
- a child turns 18 years of age, unless unable to become self-supporting owing to illness, disability, or other reasons;
- a child obtains one post-secondary degree or diploma;
- a child marries;
- a child dies; or
- a party dies, provided appropriate security is in place at the time of death.

Under the Federal Divorce Act, only spouses are able to bring an application for child support. However, under provincial legislation there are limited circumstances in which a child may bring their own child support application. Typically, this requires a child who is under the age of 18 (or who has not yet completed high school) to demonstrate that they have not voluntarily withdrawn from parental control – see, for example, Letourneau v Haskell (1979) and G(O) v G(R) (2017).

3.3 Other Matters

With limited exceptions, courts do not have the power to make orders that dictate the upbringing of a child. Decision-making responsibility is the right of a person to make decisions about the child. In a situation where parents have diverging views on a specific issue relating to the child, it is the court's role to determine which parent is best equipped to make the determination of what is in the child's best interests. Thereafter, it is up to the parent who has been granted decision-making responsibility to exercise that responsibility in a manner that is consistent with the best interests of the child.

Parental Alienation

Parental alienation is a serious issue, which first started to be identified by Ontario courts in the 1990s and has become an increasingly preva-

lent concept in Canadian family law cases. It is premised on one parent choosing to damage the character of their spouse and this, in turn, damaging the child's relationship with the "rejected" parent. Although there is no one approach taken by courts in evaluating alienation, courts tend to focus on the harmful impact alienation has on the alienated children.

The courts have generally relied on the wide plethora of social science literature to guide their analysis of whether one party is exemplifying alienating behaviour and whether children are exhibiting indicia of exposure to alienating conduct by a parent. The court will look to a variety of behavioural cues from both the alienating parent and the alienated child as indicators of the presence of parental alienation, serving as predictors of future conflict and relationship dysfunction. Some factors that the court will consider include (but are not limited to):

- a parent making derogatory statements about the other parent;
- a parent including the children in the litigation;
- a parent making the child feel guilty about spending time with the other parent; and
- a parent falsifying allegations about emotional, physical and sexual abuse.

The court will then look for a corresponding irrational and unfounded rejection of the alienated parent.

The remedies order in a finding of alienation have included parental educational programmes, reconciliation therapy, and changes to custody arrangements. See MM(V) v CMV (2017) for an overview of alienation literature.

Views of the Child

The child's perspective, views and preferences are important factors for the court to consider in parenting cases. Although children are able to testify, it is widely accepted that it is harmful and not in the best interests of children to be brought into the courtroom. This reality must be balanced by the principle that children have a right to have their views heard on matters that concern them, as articulated under Article 12 of the United Nations Conventions on the Rights of the Child 1989 (to which Canada is a signatory).

In order to protect children from the conflict between the parties, some provinces will order that judicial interviews take place. Frequently, provincial statute mandates that the interview be recorded and that the child be entitled to have counsel present during the interview. Depending on the province, courts may appoint a children's lawyer representative to evaluate and represent the child's wishes or interests within the litigation. Generally, the court is obliged to – if possible – take into consideration the views and preference of the child to the extent that the child is able to express them and the views are deemed sufficiently independent and reliable. Where applicable, the child's views will be given weight proportionate to the child's age and maturity, among other factors.

3.4 ADR

Parties can decide to use ADR at any point in their separation, including before starting any proceedings in court. The ADR process can be used to resolve all issues, no matter how big or how small. The parties can even choose to have all interim issues dealt with by ADR yet have the final issues resolved in the courtroom. The most common forms of ADR for family law disputes are mediation, arbitration, mediation-arbitration,

and collaborative family law. Parties must voluntarily enter into such processes.

No ADR processes are mandated by the court in family law proceedings – although discussions and mediated resolutions are encouraged. The court does frequently refer family law litigants to publicly funded mediation services where the dispute is deemed appropriate for such a form of dispute resolution.

In order for agreements reached outside of court to be enforceable, they must be made in writing, signed by the parties, dated, and witnessed. A court may, on application, set aside a domestic contract or a provision in it if:

- a party failed to disclose to the other significant assets (or significant debts or other liabilities) existing when the domestic contract was made;
- a party did not understand the nature or consequences of the domestic contract; or
- otherwise in accordance with the law of contract.

Currently, there are no requirements imposed by statute for parties to engage in ADR. However, in the recent amendments to the Divorce Act that came into effect on 1 March 2021, Parliament mandated that – to the extent that it is appropriate to do so – the parties to a proceeding must try to resolve matters that may be the subject of an order under the Divorce Act through a family dispute resolution process. These new changes have imposed a duty on legal advisers to encourage clients to try to resolve issues through a family dispute resolution process unless it would be clearly inappropriate to do so.

3.5 Media Access and Transparency

In Ontario, the media and press are generally permitted to report on cases involving children (including family law matters), unless there are specific court orders or legal restrictions in place. In order to safeguard the confidentiality and well-being of minors involved in legal proceedings, courts may impose publication bans or other restrictions to limit the extent to which media can report on child-related cases.

When reporting on child protection hearings, it is prohibited to publish or publicly disclose information that reveals the identity of a child who is either a witness or involved in a hearing or is the focus of a legal proceeding, pursuant to Section 87(8) of the Child, Youth and Family Services Act 2017. This includes the child's parent, foster parent, or family member.

Child Anonymity

As a result of Canada's open court principle, children are not automatically anonymised in court proceedings in most Canadian provinces. Quebec is the only Canadian province that automatically anonymises the parties' names with letters and a catalogue number.

In provinces other than Quebec, if a party to a proceeding wishes to anonymise any names within the proceeding, they are generally required to obtain a court order. Typically, the order is obtained by motion in a scheduling court or in writing before commencement of the proceedings.

Trends and Developments

Contributed by:
Heather Hansen, Shannon Beddoe, Maureen Edwards and Victoria Lunetta
McCarthy Hansen & Company LLP

McCarthy Hansen & Company LLP represents and advises clients on all areas of family law, including issues related to divorce, custody and access, spousal and child support, mobility matters, division of property, separation agreements, domestic contracts, religious marriage contracts, adoption, and cross-border family law issues. McCarthy Hansen & Company LLP frequently work on matters that involve the highly complex intersection of family law and other areas of law, including business, tax, trust and estate matters and criminal proceedings. The firm's lawyers also represent children and parents in domestic and child protection matters. In addition to its deep bench strength and litigation expertise, McCarthy Hansen & Company LLP is regularly called on to provide advisory and planning assistance to other family offices to employ practical strategies for risk mitigation and long-term planning. The firm is also frequently called on by family law counsel in other jurisdictions to provide opinions as to the impact of Canadian law in international proceedings.

Authors

Heather Hansen is a partner at McCarthy Hansen & Company LLP, where a significant portion of her work involves advising high net worth individuals. She is recognised and ranked by Chambers & Partners (Band 2) and is also a fellow both of the International Academy of Family Lawyers and the American College of Trial Lawyers. Heather is an elected bencher (board of directors) at the Law Society of Ontario, where she qualified as a certified specialist in family law. Heather also serves on the board of directors of LawPro.

Shannon Beddoe is a partner at McCarthy Hansen & Company LLP, where she practises in all areas of family law. She has appeared before all levels of court in Ontario, including the Ontario Securities Commission and the Ontario Court of Appeal. Shannon was called to the Bar in Ontario in 2011. Prior to joining McCarthy Hansen & Company in 2014, she practised complex commercial litigation. Shannon is recognised as one of the best lawyers in Canada for family law. She is a 2024 recipient of the Lexpert Rising Stars Award, honouring leading lawyers under 40 from across Canada.

Contributed by: Heather Hansen, Shannon Beddoe, Maureen Edwards and Victoria Lunetta,
McCarthy Hansen & Company LLP

Maureen Edwards is a partner at McCarthy Hansen & Company LLP, where she practises in all areas of family law. She was called to the Bar in Ontario in 2011. Prior to joining McCarthy Hansen & Company, she practiced complex civil and commercial litigation. Maureen has appeared as counsel before various tribunals and courts, including arbitral tribunals, and has made written submissions to the Supreme Court of Canada. Maureen is recognised as one of the best lawyers in Canada for family law.

Victoria Lunetta is an articling student with McCarthy Hansen & Company LLP.

McCarthy Hansen & Company LLP

601-1133 Yonge Street
Toronto
ON M4T 2Y7
Canada

Tel: +1 416 862 6226
Fax: +1 416 855 9001
Email: martha@mccarthyco.ca
Web: www.mccarthyco.ca

Contributed by: Heather Hansen, Shannon Beddoe, Maureen Edwards and Victoria Lunetta,
McCarthy Hansen & Company LLP

Introduction

In June 2019, Bill C-78 was passed in Canada, an act that amended (among other legislation) the federal Divorce Act, R.S.C. 1985, c.3 (2nd Supp) (the "Divorce Act"). The bill received Royal Assent on 21 June 2019. Most changes, and particularly those affecting the Divorce Act, came into force on 1 March 2021 (the "2021 Amendments").

The changes to the Divorce Act modified not only long-standing language but also concepts and paradigms used for decades by family lawyers, family law judges, and, to some extent, the Canadian public. The 2021 Amendments, while varied and sometimes quite specific, are collectively understood to have initiated a reshaping of how family law issues – particularly child-related family law issues – are practised and adjudicated in Canada. The 2021 Amendments triggered this change by renaming, and thus reframing, some of the central language and concepts in the Act. Generally, the changes can be summarised as shifting focus away from parents and adult litigants' experience of the issues in question, and towards children, relationships with children, children's best interests, and children's experiences of those issues.

These changes have been widely applauded insofar as they encourage a less contentious approach to family litigation. However, the application of the 2021 Amendments, and their impact on some of the older common law principles that pre-date the amendments, have made the changes less linear, and more of a gradual evolution – and one that might be closer to the beginning than the end.

This paper first sets out to explain the most significant parenting-related amendments to the Divorce Act, and summarises the reasons why some of the changes were made. Second, it considers how the amendments have affected certain pre-amendment principles used in the court's analyses in family law cases, specifically, the "maximum contact" principle, which is used as a case study to exemplify how the changes have played out in the jurisprudence.

Introduction to the Child-Related Amendments

To emphasise the child-focused nature of all parenting and decision-related inquiries – and, specifically, the importance and primacy of children's best interests – the Divorce Act now features concepts and words that focus on relationships with children, such as "parenting time", "decision-making responsibility" and "contact", rather than on parental responsibility and authority, which the pre-amendment language tended towards, with words and concepts such as "primary caregiver", "access time", "custody" and "custodial responsibility".

Details of the Child-Related Amendments

The term "parenting order" replaces "custody order" throughout the Divorce Act. The term "contact order" describes an order that sets out time for children to spend with important people who are not in a parental role, such as grandparents. These changes in language reflect an increasing recognition of diverse family structures. The amendments capture the realities of blended families, families with same-sex couples, and family structures involving more than two adults with whom children spend time consistent with their best interests. This understanding allows for a more inclusive approach to parenting arrangements, and reflects a modern view of family. This inclusivity also ensures that children maintain connections with all important adults in their lives.

The term "access" is no longer used in the Divorce Act. Instead, to emphasise the best interests of the child, the Divorce Act features concepts that emphasise children and relationships with children, such as "parenting", "parenting time" and "contact". The old concepts of "primary caregiver", "custodial parent" and "access parent" implied control or ownership of a child (or the lack thereof), and consequently left parents with more interpersonal conflict and controversy on account of a "win-loss" paradigm. The new terms are intended to promote respect between all adults involved with the child and are intended to be child-centred rather than parent-centred. Indeed, the language is deliberately neutral rather than loaded with implications.

Similarly, a new section was added to the Divorce Act to deal with "decision-making responsibility". Decision-making responsibility means the responsibility for making significant decisions about a child's well-being, including in respect of health, education, culture, language, religion and spirituality, and significant extracurricular activities. Prior to the amendments to the Divorce Act, "custody" was the term used to describe decision-making responsibility, with the specific categories of major decision-making often referred to in the jurisprudence as "heads of custody". Whereas the old language was once again laden with "win-loss" dynamics and false assumptions, the new language captures more clearly the purpose of the responsibilities at issue and authorises a court to assign responsibility for making significant decisions about a child's life.

The Divorce Act has also been amended to include an explicit clause providing that any person to whom parenting time or decision-making responsibility has been allocated in respect of a child or who has contact with that child under a contact order shall exercise that time, responsibility or contact in a manner that is consistent with the best interests of the child. This amendment reminds parties of their obligations and the purpose of the determinations governed by the Divorce Act. By way of example, when a parent exercises decision-making responsibility about a child's education, the emphasis is not on the parent's right to decide, but rather on making the decision that is in the best interests of the child.

Similarly, the Divorce Act also includes new language providing that any party to a proceeding under the Divorce Act shall, to the best of their ability, protect any child of the marriage from conflict arising from the proceeding. This amendment requires parties – to the extent possible – to shield children from conflict related to issues being decided under the Divorce Act. This amendment was made on account of research that indicates that children's well-being suffers if they are exposed to conflict between parents during and after a separation or divorce. In the best interests of children, parents must try to shield children from conflict as much as possible.

A new section, titled "Best Interests of the Child", was added to the Divorce Act. This new section specifically requires courts to consider only the best interests of the child in decisions about parenting and contact orders. This is not to say that courts did not previously consider the best interests when arriving at decisions. Courts have long focused on the best interests of the child in decisions about parenting, and this test is also found in provincial and territorial family law legislation, and in the United Nations Convention on the Rights of the Child. However, the amendments included more detailed and, in some cases, new criteria to be considered when

undertaking the "best interests" analysis, specifically when it comes to deciding the appropriate parenting time and/or contact arrangements for a given child.

In some cases, there may be conflicts between two or more of these criteria. When considering the criteria, and when necessary to resolve conflicts between two or more of these criteria, the amendments to the Divorce Act clarify that courts shall prioritise the child's safety, security and well-being: "When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being."

At subsection (3) of the new Section 16 of the Divorce Act, the factors to be considered are set out, and include:

- the child's needs, given the child's age and stage of development, such as the child's need for stability;
- the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
- each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
- the history of care of the child;
- the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
- the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
- any plans for the child's care;
- the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
- the ability and willingness of each person in respect of whom the order would apply to communicate and co-operate, particularly with one another, on matters affecting the child;
- any family violence and its impact on, among other things:
  (a) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child; and
  (b) the appropriateness of making an order that would require persons in respect of whom the order would apply to co-operate on issues affecting the child; and
- any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

The Maximum Contact Principle as Case Study for the Paradigm Shift

In this section, the "maximum contact principle" that was set out in the Divorce Act prior to the 2021 Amendments is analysed as an example of how the 2021 Amendments have led courts to re-examine and reinterpret long-standing principles that had been the subject of detailed development in the common law prior to 2021.

Interpretation and application of the maximum contact principle (pre-2021 amendments)

Prior to the 2021 Amendments, Section 16(10) of the Divorce Act provided as follows:

"In making an order for custody, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests

of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact."

While the origin of the maximum contact principle comes from legislation, and not jurisprudence, it was jurisprudence that contributed to the rather conflicting interpretation of the principle prior to the 2021 Amendments.

Young v Young (1993) 4 SCR 3, 108 DLR (4th) 193 (SCC)

The Supreme Court of Canada caseYoung v Young is recognised for its substantial initial discussion on the nature of custody and access and, specifically, the maximum contact principle. In Young v Young, the father had access to the parties' three daughters and the mother had custody. The custodial mother was raised in the Anglican faith and sought to limit the access rights of the father who was a member of the Jehovah's Witness faith. The trial judge imposed limits on the father exposing the children to his faith and this was reversed by the Ontario Court of Appeal. On appeal at the Supreme Court of Canada, the mother sought affirmation that the father was not permitted to expose the children to his faith during his access time. The exposure to the father's faith was ultimately allowed. The case emphasised that the maximum contact principle reflects the importance of the continued involvement of non-custodial parents in the course of their children's lives.

Justice McLachlin set out the historical framework under which matters of custody and access had previously been resolved, from near absolute paternal preference in the 18th and 19th centuries, which was displaced to establish that mothers had the primary right to custody of a child of "tender years", then expanded in many jurisdictions to maternal preference, and finally settling on a "best interests" or "welfare of the child" test by the 1970s (paragraphs 205–206). Justice McLachlin confirmed that the best interests test (referring to the child's condition, means, needs and other circumstances) is the only test that is relevant, and that the preferences of the parents and their rights have no role at all (paragraphs 210–211).

Her Honour found that the fact that the court enshrined the principle that "a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child" was significant, as it was the only specific factor that Parliament had singled out (paragraph 212). Her Honour specifically held that the custodial parent did not have the right to forbid certain types of contact between the access parent and the child, as "the custodial parent's wishes are not the ultimate criterion for limitations on access" (paragraph 216).

Gordon v Goertz, 1996 CanLII 191 (SCC) (1996) 2 SCR 27

The 1996 case of Gordon v Goertz required the courts to consider "the desirability of maximising contact between the child and both parents" (paragraph 49). While the case confirmed that the maximum contact principle is mandatory, it notes that it is not absolute "and the judge is only obliged to respect it to the extent that such contact is consistent with the child's best interests; if other factors show that it would not be in the child's best interests, the court can and should restrict contact" (paragraph 24).

Slade v Slade, 2002 YKSC 40

This 2002 case demonstrates how, in the years following Young v Young and Gordon v Goertz, the courts made sense of Section 16(10) as an

authority for the presumption of equal parenting time. Paragraph 10 states:

"Counsel for Ms Slade suggests that a determination must be made as to which parent is the primary caregiver. The corollary relief order is silent in that respect and states that there has been a joint and shared custody since November 1997. I do not find it helpful to go behind that order and review the evidence before the date of separation. What is clear to me is that there is a true shared custody arrangement where it would be difficult to say one parent or the other is the primary caregiver. Rhea has a good relationship with both her parents and the present arrangement achieves the desired goal of maximising contact between Rhea and both her parents. It is my view that the move of Ms Slade is not relevant to meeting the needs of Rhea, who will clearly be better off with both parents remaining in Whitehorse where she has friends, her school and is involved in a developmental gymnastics program for the past two years. The move to Prince George would be a disruption of her life at this time."

Folahan v Folahan, 2013 ONSC 2966

Similar to Slade, this 2013 case demonstrates how, in the years following Young v Young and Gordon v Goertz, courts made sense of Section 16(10) as an authority for the presumption of equal parenting time. Paragraph 14 states:

"The principle of maximum contact is an important consideration under either legislative regimen when determining the best interests of children. Contact with both parents is the children's, not the parents', right. Where, as in this case, a parent argues for unequal contact between the children and each of their parents, the onus is on that parent to rebut the presumption."

Rigillo v Rigillo, 2019 ONCA 548 and Rigillo v Rigillo, 2019 ONCA 647

In the trial decision in this matter, the trial judge ordered that the child would primarily reside with the mother, and reside with the father one overnight each week and alternating weekends. The court of appeal found that the trial judge had not adequately considered the maximum contact principle and required submissions from both parties as to the appropriate schedule for the child.

In ordering an expanded but unequal parenting schedule, the court of appeal at paragraph 23 stated that that the maximum contact principle does not necessarily require equal parenting time.

Reconciling the jurisprudence

The differentiating stances on the maximum contact principle between the above-mentioned decisions reflected the tension and uncertainty associated with the principle, being subject to unpredictable and often conflicting judicial interpretation and in fact ultimately only serving to create confusion as to whether the maximum contact principle constituted a sword or a shield for the court when battling parents embroiled in high-conflict parenting litigation and setting up equal-time orders.

While many decisions pre-2021 seemed to accept that Section 16(10) instructs the presumption of equal parenting time, there was inconsistency and confusion about where the "child's best interests" inquiry fit within the defaulting presumption. Ultimately, in the intervening 36 years from 1986 to the 2021 Amendments, the notion of whether Section 16(10) of the Divorce Act meant a standalone presumption of equal parenting time remained the subject of fierce debate.

Contributed by: Heather Hansen, Shannon Beddoe, Maureen Edwards and Victoria Lunetta,
McCarthy Hansen & Company LLP

Interpretation and application of the maximum contact principle (post-2021 Amendments)

As outlined earlier, the intention of the 2021 Amendments to the Divorce Act was to move towards focusing on the interests of children and not on the rights of parents. The aim of changes in terminology and language was to move away from "win-loss" dichotomies in child-related disputes. Importantly, the amendment to Section 16(10) has helped to create new conversations, and thus more clarity, around the interpretation (and relevance) of the prior "maximum contact" principle.

Subsection 16(10) of the Divorce Act was replaced with Section 16(6), which provides for the following: "In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child."

The concept of "maximum contact" no longer exists under the new provision and is replaced with "parenting time consistent with best interests of child". Under the new provision, the courts are directed to only consider the best interests of the child (by considering the criteria in Section 16(3)) when determining parenting time. There is no longer any basis for a common law presumption of equal parenting time, however inconsistently such a presumption was or was not applied prior to 2021. While courts do still, in some cases, seek to maximise a child's parenting time with each parent, they now do so only subject to the best interests of the child.

Some of the jurisprudence on Section 16(6) since the 2021 Amendments includes the following.

Barendregt v Grebliunas, 2022 SCC 22

This case is paramount in asserting the new version of the maximum contact principle following the 2021 Amendments. In Barendregt, the Supreme Court of Canada provided a definitive direction on interpreting the new provision. There, the court clarified – and in so doing settled a long-standing debate and subject of conflict in the jurisprudence – that previous judicial interpretation of the maximum contact principle as meaning a presumption of equal parenting time was a judicial overreach. The court further confirmed that the old "maximum contact principle" is better referred to as the "parenting time factor" and that the principle must "not be used to detract" from the "child's best interests" inquiry (Section 16(3)).

At paragraph 9, the decision reads:

"The law relating to the best interests of the child has long emphasised the need for individualised and discretionary decision-making. But children also need predictability and certainty. To balance these competing interests, the law provides a framework and factors to structure a judge's discretion. This case calls on the court to examine how some of those considerations apply in mobility cases. In particular, I clarify that a moving parent's reasons for relocation and the "maximum contact factor" are relevant only to the extent they bear upon the best interests of the child; a parent's testimony about whether they will move regardless of the outcome of the relocation application should not be considered; and family violence is a significant factor impacting the best interests of the child."

Paragraph 164 provides: "The question before the trial judge was not how to best promote the parenting time factor; it was how to best promote the best interests of the children. These

considerations are not synonymous. Nor are they necessarily mutually reinforcing. Courts should only give effect to the parenting time factor to the extent that it is in the best interests of the child."

Den Duyf v Den Duyf, 2024 BCSC 2151

In this matter, the parties separated after a four-year relationship. The father moved to Pemberton, British Columbia, while the mother lived with the child on the mainland. The parties entered a consent order providing the father with parenting time. The mother sought to relocate with the child to Salt Spring Island (a substantial distance away) on a final basis or, alternatively, on an interim basis. The mother argued that relocation would assist the mother's work experience and skill.

The mother's application for interim and temporary relocation was dismissed. The judge also elected not to implement a 50/50 parenting time schedule. Although the mother was the child's primary caregiver, the child has close relationships with his father and grandparents, and the judge considered that the disadvantages of a relocation outweighed the advantages. The judge also reasoned that moving directly to a shared parenting schedule would be too much of a change for the child. However, the judge found that an increase in the father's parenting time would be in the best interests of the child. The judge considered and applied Barendregt in ordering parenting time consistent with best interests of the child.

At paragraph 122, the court held that remaining in place "would help foster and maintain his relationship with his father as he develops, which happens quickly at this age".

CK v MK, 2024 ABKB 626

In this case, the parties were married and separated after 17 years. During their marriage, they had two children together. The mother struggled with substance abuse, and it had affected the family and the children. The father sought sole parenting and decision-making for the children.

The court considered what was an appropriate order for parenting and decision-making. At paragraphs 194-196, the court held: "CK [the father] shall have primary parenting and sole decision-making responsibility for the children. MK [the mother] shall be entitled to information from CK regarding the children's education, health and extracurricular activities and interests at her request. […]. Any parenting time for MK, whether by phone, video or in person, shall be at CK's discretion, having considered the express preferences and wishes of the children."

In making the parenting order, the judged considered that, based on Section 16(6) of the Divorce Act, the children should have as much time with each parent as is consistent with their best interests. The court held that, as a result of MK's limited ability to care for the children, and as a result of the impact of the family violence upon the children (caused by MK), it was not in the best interests of the children to have a specified parenting schedule with MK. The court also found that was potentially not possible for the mother to have any parenting time with one of the children depending on the outcome of the mother's sentencing regarding her assault charge.

Conclusion

Today, greater clarity and certainty exists in both the common law and legislation around the need for individualised best-interests analyses and the absence of any presumption with respect

to parenting time arrangements. There is little dispute over the fact that, when considering parenting time arrangements, the only analysis applicable is that of the best interests of children in all cases. Indeed, both the Divorce Act and the cases decided since the 2021 Amendments make clear that a presumption of any kind would be in direct conflict with the court's requirement to consider and only consider children's best interests pursuant to Section 16.

The adjustments to our understanding of the former maximum contact principle are emblematic of how the legislation and common law have been required to evolve in recent years. As the focus in the legislation has shifted towards children, so too have the courts reframed older principles, particularly those that had been applied inconsistently prior to 2021. The result has been to start to create healthier environments for children during family separations and divorce.

It is essential for family lawyers and the courts to embrace these developments in the law and in jurisprudence, and advocate for outcomes that prioritise children and help to foster a brighter future for families navigating the challenges of separation.

ENGLAND & WALES

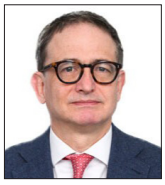
Law and Practice

Contributed by:
Alex Carruthers, Oliver Heeks and Sian Brooks
Hughes Fowler Carruthers

Contents

Hughes Fowler Carruthers has been based on Chancery Lane at the heart of legal London since 2001 and is widely regarded as one of London's leading divorce and family law practices. All partners are internationally acclaimed for the exceptional standard of their work and share a considerable breadth of experience, which enables them to offer the full gamut of skills needed to navigate complex litigation, expert and discreet negotiation, and alternative forms of dispute resolution to suit the individual demands of each client. Work is conducted with a high degree of professionalism and dedication. All solicitors in the practice are members of Resolution. The firm is part of an extensive international family law network through membership of the International Academy of Family Lawyers and the International Bar Association. This means Hughes Fowler Carruthers can provide a full international service through the partners' close connections worldwide.

Authors



Alex Carruthers is a founding partner at Hughes Fowler Carruthers and specialises in complex divorce and financial work and children's work – in particular, in international cases. His clients are high net worth individuals with complex legal issues, including trusts and jurisdictional disputes. In Chambers UK 2023, a source commented that Alex has "really good judgement on cases and he is also very intelligent".

Sian Brooks joined Hughes Fowler Carruthers in December 2024 as a paralegal. Sian assists the associates and partners on a broad range of cases – ranging from high net worth financial remedy matters to divorce and children matters, often with multi-jurisdictional elements.

Oliver Heeks joined Hughes Fowler Carruthers in January 2024 after qualifying as a family solicitor at a leading firm in 2022. He is an associate solicitor and advises on a wide range of family law matters, including divorce, financial relief, emergency injunctions, and private law children matters. Oliver is adept at working with international and domestic clients from a wide range of backgrounds, including high net worth individuals. He deals regularly with complex financial disputes often involving high-value business assets, offshore assets, trusts and inherited wealth.

Hughes Fowler Carruthers

Academy Court
94 Chancery Lane
London
WC2A 1DT
UK

Tel: +44 (0) 20 7421 8383
Email: a.carruthers@hfclaw.com
Web: www.hfclaw.com

Hughes Fowler Carruthers
HUGHES FOWLER CARRUTHERS HARPER LABI
SOLICITORS

1. Divorce

1.1 Grounds, Timeline, Service and Process

Grounds for Divorce

The grounds for divorce in England and Wales have recently been changed and are contained in Section 1 of the Divorce, Dissolution and Separation Act 2020 (the "DDSA 2020"), which replaced Section 1(3) of the Matrimonial Causes Act 1973 (the "MCA 1973").

Under the new law, there is now one ground for divorce, which is that the marriage has irretrievably broken down. Further, a statement that a marriage has irretrievably broken down is treated as conclusive evidence of that fact. This is in contrast to the law under the MCA 1973, whereby parties were required to give evidence of one or more of five "fault-based" facts to establish the irretrievable breakdown of the marriage.

Further, under the DDSA 2020, it is possible for applications to be made on a joint basis – meaning there can be an "Applicant 1" and an "Applicant 2". Under the old law, this was not possible.

The law for civil partners is contained in Section 44(4) of the Civil Partnership Act 2004 as amended by Section 3(5) of the DDSA 2020. It also holds that a statement that a civil partnership has irretrievably broken down is conclusive evidence of that fact.

Process and Timeline for Divorce

Broadly speaking, there are three stages to obtaining a divorce, and the process takes a minimum of 26 weeks. There is no separation requirement.

- Stage 1 – divorce application is issued. Twenty weeks after the divorce application is issued, the applicant(s) can apply for a conditional order.
- Stage 2 – the conditional order is pronounced. The applicant(s) may apply for a final order 43 days after the conditional order is pronounced. If the applicant does not apply for a final order, the respondent can do so after a further three months from the day on which the applicant could first have applied.
- Stage 3 – the final order is pronounced. At this stage, the marriage is dissolved.

Rules for Service of Divorce Proceedings

The rules for service are contained in Part 6 of the Family Procedure Rules 2010 as amended by Statutory Instrument 2022/44 (FPR) and have been updated. Generally, the application will be served within the jurisdiction by the court by email, which has become one of the primary methods of service. Service within the jurisdiction or outside the jurisdiction must be effected within 28 days according to the method of service chosen, unless this time limit is extended.

Religious Marriages

To be legally valid, a religious marriage (other than marriage according to the rites and ceremonies of the Church of England and the Church in Wales, as well as Jewish and Quaker marriage) must generally take place in a registered building. If a couple celebrate their marriage at a place of worship – or a venue – that has not been registered for marriage, then the couple are required to go through an additional civil ceremony in order for their marriage to be valid under English law.

Annulment and Judicial Separation

Annulment is a different way to end a marriage. It is possible to annul a marriage in the first year of a marriage (unlike divorce). A marriage can be annulled if it was never legally valid and therefore "void" or if it was legally valid but meets one of the conditions that makes it "voidable".

Examples of void marriages include those where the parties are too closely related, or one or both of the parties was underage when they married, or one of the parties was already married. Although a void marriage never existed, parties may require a decree of nullity to prove this – for example, if they want to get married again.

A marriage may be voidable for a number of reasons, including that:

- the marriage was never consummated;
- a party did not properly consent to the marriage; and
- the other person had a sexually transmitted disease.

Parties may wish to separate legally but not divorce. This may be for many reasons (eg, religious convictions). Parties can apply to court for a legal separation in these circumstances. This application can be made on a joint basis or via a sole application. The application form is called a "judicial separation application form" and is on Form D8S.

1.2 Choice of Jurisdiction

Jurisdictional Grounds to Commence Divorce Proceedings

As of 1 January 2021, the courts in England and Wales have jurisdiction to entertain proceedings for divorce, judicial separation, or nullity if the court has jurisdiction under Section 5(2) of the Domicile and Matrimonial Proceedings Act 1973 (the "DMPA 1973") (as amended). Under the DMPA 1973, the English court will only have jurisdiction if on the date of the application at least one of the following conditions is satisfied:

- both parties are habitual residents of England and Wales;
- both parties were habitual residents as a couple in England and Wales and one of them still lives here;
- one party wants to start a divorce and their spouse is habitually resident in England and Wales;
- one party wants to start a divorce and has lived in England and Wales for at least 12 months;

- one party wants to start a divorce, has lived in England and Wales for six months, and is also domiciled here;
- both parties are domiciled in England and Wales; and
- one of the parties is domiciled in England and Wales.

Jurisdiction in relation to the marriage of same-sex couples is regulated by:

- the DMPA 1973, Section 5(5A) and Sch A1;
- the Marriage (Same Sex Couples) (Jurisdiction and Recognition of Judgments) Regulations 2014, SI 2014/543 (as amended by the Civil Partnership and Marriage (Same Sex Couples) (Jurisdiction and Judgments) (Amendment etc) (EU Exit) Regulations 2019, SI 2019/495; and
- the Divorce, Dissolution and Separation Act 2020 (Consequential Amendments) Regulations 2022, SI 2022/237).

These laws import the same jurisdictional requirements for the dissolution of the partnership/marriage, albeit with one important addition. Same-sex couples who marry in England or Wales, but remain or become habitually resident/domiciled in another country, may not be able to end their marriage in that country if it does not recognise the existence of the relationship. England and Wales is therefore a "jurisdiction of last resort" so that same-sex couples may have their case heard. The courts in England and Wales will be able to assume jurisdiction if the couple was married in England or Wales and where it is in the interests of justice to do so.

Domicile, Residence and Nationality

Domicile is a relevant factor in determining jurisdiction as set out in the DMPA 1973. A person can only ever have one domicile at one time. A person's country of domicile is the country they consider home; however, their domicile can change with time. By way of example, a person's "domicile of origin" is normally the domicile of their father when said person was born and is commonly the country where the person was born. This may change, owing to a "domicile of dependence", if the person moves countries when they are under the age of 18 with their parents. A "domicile of choice" can be obtained through physical presence in a country in combination with an intention to permanently remain there.

Residence – and, in particular, habitual residence – is a relevant factor in determining jurisdiction as set out in the DMPA 1973. England and Wales (as part of the UK) have recently left the EU but it is considered likely that they will continue to use the same definition of habitual residence as was used in the EU when they departed. If a person is habitually resident in a country, this means that their day-to-day life happens in that country.

Nationality is often used interchangeably with citizenship, but its definition is actually a little bit wider. A British citizen is a passport holder, but a British national would include various classes of British (overseas) citizens. If a person changes nationality, this may be one of the factors in determining whether they have an intention to permanently remain in that country, so – even though nationality is a completely distinct concept from domicile – there is a link between them. Apart from this link, it has no relevance to jurisdiction.

Contesting Jurisdiction

An application may only be disputed on limited grounds now that there is no-fault divorce. One of these is jurisdiction. Others include the validity

of the marriage or civil partnership, fraud, and procedural non-compliance.

For international and mobile clients, it is therefore important to take legal advice and check that the jurisdictional requirements for divorcing in England and Wales are met.

Stay of Proceedings

One spouse may dispute divorce on the ground of jurisdiction and issue divorce proceedings in another country. This will result in what are known as "parallel proceedings". The court can exercise discretion to stay proceedings until the forum dispute has been determined.

The test the English court will use when deciding the appropriate forum for the divorce is the doctrine of forum non conveniens. The court will consider the links the parties have to both countries, including habitual residence, domicile, nationality, where any children attend school and in which country the parties hold assets.

In addition to a stay, the court has the power – in limited circumstances – to make a personal injunction called a "Hemain injunction". A Hemain injunction is a temporary measure to prevent the other party from pursuing divorce proceedings in a foreign jurisdiction and is an option parties may pursue at an early stage of divorce proceedings where there are competing proceedings and steps have been taken by one party that make it iniquitous for the proceedings in the other country to proceed.

2. Financial Proceedings

2.1 Choice of Jurisdiction

Grounds for Jurisdiction

The grounds for jurisdiction for financial remedy proceedings are the same as for divorce. As the jurisdiction for financial orders is linked to that for divorce proceedings, a party wishing to contest jurisdiction does so by contesting the jurisdiction for the divorce.

Financial Claims After Foreign Divorce

Courts can hear financial claims after a foreign divorce in limited circumstances. Part III of the Matrimonial and Family Proceedings Act 1984 (the "MFPA 1984") governs the bringing of financial claims after a foreign divorce; hence, they are often known as "Part III" claims. There are various requirements before such relief can be offered:

- the foreign divorce must be recognised as legally valid;
- the party applying for relief must not have remarried; and
- there must be a sufficient connection to England and Wales.

The sufficient connection to England and Wales can be established via one of three ways, as set out at Section 15 of the MFPA 1984:

- either the party or their former spouse must have been domiciled in England and Wales (ie, they consider it their true home) at the time of the foreign divorce or at the time of the application;
- one of the parties must have been habitually resident in England and Wales (ie, their life has been mainly based here) for 12 months before the date on which the foreign divorce

took effect or for 12 months before the date of the application; or
- one of the parties must have an interest in a property in England and Wales that had been a matrimonial home – albeit, in this case, their claim is limited to the value of the property – and the interest can be a beneficial interest, so their name does not necessarily need to be on the legal title.

Once the jurisdictional requirements are met, there are two stages to Part III claims:

- permission to apply; and
- the substantive application.

Permission to apply

Application is made pursuant to the FPR, Pt 18 and must be made without notice. The test for permission to apply is set out in Section 13 of the MFPA 1984: "The court shall not grant leave unless it considers that there is substantial ground for the making of an application for such an order."

In determining whether to grant leave, the court will have regard to a number of factors, including the connection the parties have with England and Wales, the connection the parties have with the country where they got divorced, and any financial benefit that the parties or a child of the family has received (or are likely to receive) in a different country. The full list of factors is set out at Section 16 of the MFPA 1984 and, therefore, Sections 13 and 16 of the MFPA 1984 should be read in conjunction with each other.

Granting of leave

If leave is granted, the respondent to a leave application can apply to "set aside" the granting of leave. The procedure for this has recently changed following the UK Supreme Court case of Potanina v Potanin (2024) UKSC 3. The test is now that the without notice order should be set aside because the test for granting leave under Section 13 is not met. Previously, the threshold was much higher, and respondents would have to show a "knockout blow" to the application for leave.

If leave is granted, then the relief available is the same as if the divorce had been conducted under English law.

2.2 Service and Process

Service of the financial application is generally done by email. There is no requirement for personal service within the jurisdiction.

Once proceedings are issued, a first hearing (called a "first appointment") is fixed, as well as the timetabling for the exchange of various documents including – most importantly – financial disclosure by way of a standard form called Form E. At the first appointment, the court sets out the timetabling for provision of further documents and reports particular to the case, including replies to questions raised and expert reports. A second hearing, called a finance dispute resolution (FDR) hearing, is fixed.

The FDR hearing is a court-based mediation whereby the parties try to settle the issues in question. If the matter is not resolved, then another short directions hearing is listed where the matter is set down for a final hearing and further directions are given for the provision of, for example, witness statements.

2.3 Division of Assets

The court will consider a number of factors when deciding how to exercise its discretion when dividing assets on divorce. These factors

are contained in Section 25(2) of the MCA 1973 and are:

- the income, earning capacity, property and other financial resources that each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity – this includes any increase in such capacity that it would, in the opinion of the court, be reasonable to expect a party to the marriage to take steps to acquire;
- the financial needs, obligations and responsibilities that each of the parties to the marriage has or is likely to have in the foreseeable future;
- the standard of living enjoyed by the family before the breakdown of the marriage;
- the age of each party to the marriage and the duration of the marriage;
- any physical or mental disability of either of the parties to the marriage;
- the contributions that each of the parties has made or is likely to make in the foreseeable future to the welfare of the family, including any contribution by looking after the home or caring for the family; and
- the conduct of each of the parties, if that conduct is such that it would – in the opinion of the court – be inequitable to disregard it.

The court will consider these factors in concert with case law from the Family Court. Although the court has an extremely broad discretion, there are guiding principles from the case law. The central ones are set out as follows.

- The court's objective in applying Part II of the MCA 1973 is to achieve a fair outcome. To this end, there shall be no discrimination between the breadwinner and homemaker (White (2000) UKHL 54).
- There is no hierarchy in the Section 25 factors – which of them will carry most weight depends upon the facts of the particular case (Piglowska (1999) 3 All ER 632).
- In addition to the welfare of minor children, the court is guided by the three "strands" of needs, sharing and compensation (Miller; McFarlane (2006) UKHL 24).

Financial Orders

The court can make a number of orders to regulate or reallocate assets on divorce. These are contained in the MCA 1973. These include:

- maintenance pending suit (Section 22);
- orders for payment in respect of legal services (Section 22ZA);
- periodical payments and/or lump sum for a party to the marriage and the children (Section 23);
- property adjustment orders (Section 24); and
- various pension orders, including pension sharing orders (Section 24B).

The court also has the power to vary a trust if the court is satisfied that it is a resource of the marriage. The Family Court can vary a trust in a divorce under Section 24(1)(c) of the MCA 1973 if it can be demonstrated that the trust is a "nuptial settlement". When using these powers, the court takes into account the above-mentioned issues and, in particular, the parties' need and the amount of matrimonial assets to be shared between the parties.

Identification and Disclosure of Assets

There is an ongoing duty to provide full and frank financial disclosure in financial proceedings. This duty includes all material facts, documents and other information relevant to the issues. As the duty of disclosure is ongoing, the court must be

informed of any material change after initial disclosure was given.

Disclosure is evidenced through a document called Form E. In Form E, parties state their assets and income and append documentary evidence to the form. Foreign assets and income must still be declared on Form E.

The procedure for financial disclosure is set out in the "Statement on the Efficient Conduct of Financial Remedy Hearings Proceeding in the Financial Remedies Court Below High Court Judge Level". This streamlined process is designed to improve efficiency in financial proceedings.

Once Form A – which is the form used to start a request for a financial order in proceedings for divorce or ending a civil partnership – is filed, the first appointment will be listed 12—16 weeks after Form A is issued. Parties are required to file Form E 35 days before the first appointment.

Not less than 14 days before the first appointment, each party must file with the court and serve on the other party:

- a concise statement of issues;
- a chronology;
- a questionnaire on the other party's disclosure; and
- a notice stating whether the party is in a position to use the first appointment as an FDR hearing.

At this point, the parties must also file a joint market appraisal in respect of each property currently used as a family home. If obtaining such evidence jointly has proved impossible, the parties should each file a market appraisal for each property and must be prepared to explain the reason for the impossibility to the court. Parties are also required to file brief indicative material as to their respective borrowing capacities and to file no more than three sets of property particulars as to what their case for themselves and the other party is likely to be on housing.

The purpose of the questionnaire is to flush out any issues of non-disclosure in the other party's Form E. The questionnaire should not exceed four pages of A4 in length (using not smaller than a 12-point font with 1.5 spacing). This is to ensure questions asked are proportionate.

These processes allow the identification of matrimonial assets and information on the parties' income.

The day before the first appointment, the applicant must file with the court:

- a composite case summary using the Case Summary Template ES1; and
- a composite schedule of assets and income, based on the figures in the parties' Forms E, using – unless wholly impractical – the Assets and Income Template ES2, on which any unagreed items must be clearly denoted.

Therefore, by the time of the first appointment, the court will have an asset schedule and be able to identify the key assets in the case. At the first appointment, the court will make numerous directions, including for formal valuations to be provided where appropriate and for replies to questionnaires to be filed. Through this ongoing process, the court is able to ultimately produce an asset schedule for the final hearing, which – owing to the disclosure directions given by the court – will be more accurate than the one at the first appointment.

Disclosure orders against third parties

It is possible for the court to order disclosure against third parties. Under FPR 21.2(3), the court may make an order only where disclosure is necessary in order to dispose fairly of the proceedings or to save costs.

Under FPR 21.2(4), the order must:

- specify the documents or the classes of documents that the respondent must disclose; and
- require the respondent, when making disclosure, to specify any of those documents:
  (a) that are no longer in the respondent's control; or
  (b) in respect of which the respondent claims a right or duty to withhold inspection.

Under FPR 21.3(1), a person may apply – without notice – for an order permitting that person to withhold disclosure of a document on the ground that disclosure would damage the public interest.

There is a distinction between orders for disclosure and orders for inspection. A party discloses a document by providing it, whereas inspection occurs when a disclosed document is inspected.

There are alternative procedures that the court may use when third parties are central to a proceeding, including:

- joining individuals to the proceedings (FPR 9.26B) – this is done where it is desirable in order for the court to resolve the issue in dispute; and
- an order requiring the production of documents.

Trusts

The court recognises trusts. The court has a sophisticated set of tools to deal with them.

The court will first establish whether the trust is a "resource" available to either party. It is a resource if that party can ask the trustees for financial support and it is, on the balance of probabilities, likely to be provided. Once this hurdle has been passed, the court can make orders against the parties in the proceedings on the basis that the trustees will make a suitable distribution.

The court also has vast powers that it can use against the trust itself – namely, the court can:

- in certain limited circumstances, set the trust aside for being a sham; or
- vary its terms on the basis that the trust is a prenuptial or postnuptial settlement.

2.4 Spousal Maintenance

The court's attitude to spousal maintenance is that awards for spousal maintenance should be made with reference to needs. The exception is in the most extreme cases where it can be said that the sharing or compensation principle applies, per SS v NS (2014) EWHC 4183 (Fam).

Traditionally, the court has been relatively generous when assessing those needs compared to many other jurisdictions. However, in recent years, the length of time such orders should continue has come under scrutiny and has become shorter – with an expectation that the economically weaker party should be able to become financially independent sooner rather than later.

A party can apply for maintenance pending suit under Section 22 of the MCA 1973, before the final outcome of the division of finances on

divorce. The court will need to assess firstly whether interim maintenance is appropriate and secondly what level of maintenance should be provided. This is done by an analysis of the parties' respective income and income needs.

The court's power to award spousal maintenance is set out in Section 23(1)(a) of the MCA 1973 and, for secured periodical payments, in Section 23(1)(b). The court will determine quantum by looking at the parties' respective income needs and will make an award that takes these into account as well as the resources of the parties. The court will expect both parties to maximise their earning potential as much as they reasonably can.

2.5 Prenuptial and Postnuptial Agreements

Nuptial agreements are not legally binding under English law; however, following the seminal case of Radmacher v Granatino (2010) UKSC 42 ("Radmacher"), they carry significant influence with the courts. Provided that certain procedural safeguards have been put in place, parties should assume that the court will hold them to the terms of the nuptial agreement. The court, however, retains its discretion to make a financial award that is contrary to the terms of a nuptial agreement if the latter would not produce a fair outcome.

The seminal case of Radmacher marked a shift in the court's approach to the implementation of nuptial agreements. In this case, the prenuptial agreement was to protect the wife's substantial wealth. The husband sought to disregard the prenuptial agreement, but the UK Supreme Court held that the agreement should be largely upheld. In doing so, the UK Supreme Court put forward the following test: "The court should give effect to a nuptial agreement that is freely entered into by each party with full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."

The case has been interpreted by lower courts since the judgment was delivered and, at present, there are two major grounds on which the agreements can be challenged:

- the circumstances under which it was entered into were flawed – ie, there must be financial disclosure, independent legal representation and no undue pressure; or
- the outcome is unfair (which the courts seem to interpret as not meeting the parties' needs).

2.6 Cohabitation

The law has always recognised differences between its treatment of cohabitants and its treatment of married couples (and civil partners since 2005 and same-sex married couples since 13 March 2014). There is no equitable distribution of assets in cases where the parties are not married.

Unmarried couples who are not engaged must rely on civil law to establish any property rights that they may have. The key laws that affect the division of assets for unmarried couples include:

- express declarations of trust as to the division of property;
- constructive trusts;
- resulting trusts; and
- proprietary estoppel.

An unmarried partner is therefore exposed if they cannot engage any of these principles and will usually have no direct claim to assets of their

partner following a breakdown of their relationship.

If the parties have children, however, then a party may apply for provision under Schedule 1 to the Children Act 1989 (the "CA 1989") in circumstances where provision courtesy of the Child Maintenance Service (CMS) is inadequate. Any order under Schedule 1 must be for the benefit of the child; however, periodical payments, lump sum orders, and transfers and settlements of property are possible.

An engaged party or formerly engaged party may seek to have their property rights determined under the Married Women's Property Act 1882. However, they do not have the protection provided by the MCA 1973.

Cohabitants do not obtain additional rights by virtue of the length of cohabitation. The fact that parties who have been together for many years do not obtain legal protections is a source of controversy in the Family Court.

2.7 Enforcement

Methods of Ensuring Compliance

There are a number of tools at the court's disposal to ensure compliance with a financial order – principally, the following.

- Attachment of earnings – this method is typically used to ensure compliance with maintenance obligations by the deduction of money directly from the debtor's earnings.
- Warrant of control – a warrant of control authorises a county court bailiff to try to take control of the possessions of the debtor, provided they are given seven clear days' notice. This method can be useful where the debtor has possessions of sufficient value to meet the debts.
- Third-party debt order – this is an order of the court that freezes money that might otherwise be paid to the debtor.
- Charging order – if a charging order is granted to a creditor, the debtor cannot sell their property without discharging the debt through the net proceeds of sale.
- Judgment summons – this is an application for a committal order.
- Order for sale – where the judge is concerned that a party will not pay the other party a lump sum owing to historic non-compliance with court orders, the judge's final order may be for a property to be sold to prohibit the paying party from being able to delay paying the receiving party monies awarded.

International Enforcement of Financial Orders

The enforcement of a foreign financial order in England and Wales is permitted if the order was made by a country that is party to a convention to which the UK is a signatory and the order is one covered by the treaty.

Furthermore, a party may be able to use the Part III jurisdiction described in **2.1 Choice of Jurisdiction** (Financial Claims After Foreign Divorce) to enforce orders if that is applicable.

2.8 Media Access and Transparency

Transparency is an issue in the Family Court owing to the inherent conflict in many cases between Article 8 of the Human Rights Act, which protects the right to respect for parties' private life, and Article 10 of the Human Rights Act, which protects freedom of expression and the principles of open justice. Accordingly, there is a lack of consensus among judges about the best approach to this issue, as well as a lack of uniformity as to the extent that the press should report on cases.

There have been recent developments in this area. The Transparency Implementation Group published a report in April 2023 titled "Transparency in the Financial Remedies Court", which gave a number of recommendations to increase transparency in the Family Court. This report has led to a number of recent updates, as follows.

- From 27 January 2025, journalists and legal bloggers are able to report on what they see and hear in all family courts in England and Wales if a transparency order is granted. The open reporting provisions mean that there is a presumption that a transparency order is granted, unless there is a legitimate reason not to.
- This recent change follows the success of Family Court Reporting Pilot, which started in January 2023 and was progressively rolled out thereafter.

Parties are not able to anonymise proceedings. Anonymisation is controlled by the court, not by the parties. There is a presumption that any transparency order protects the anonymity of the children and their families.

2.9 Alternative Dispute Resolution (ADR)

Mediation is a frequently used method that parties use to resolve financial matters. In fact, before issuing financial remedy proceedings, parties must attend a Mediation Information and Assessment Meeting (MIAM) to see whether their case is suitable for mediation. During mediation, an independent mediator will meet with the parties (either together or separately) and attempt to facilitate the resolution of financial matters. The mediator is impartial and cannot give legal advice. This method is particularly popular in low-conflict cases; however, it may not be appropriate where there is a power imbalance in the relationship.

Early neutral evaluation and private FDR hearings involve both parties appointing a neutral evaluator (typically an experienced judge or barrister) to provide an indication as to what they think a fair outcome would be, following disclosure and submissions from the parties. This can facilitate settlement and prevent the unnecessary incurrence of legal fees associated with going to a final hearing at court. The indication is not binding, however. Therefore, if the parties ignore the indications and do not negotiate reasonably thereafter, the legal fees associated with the FDR hearing are effectively wasted.

Arbitration is becoming increasingly popular as a method for parties to deal with financial disputes upon divorce. Arbitrators must be members of the Institute of Family Law Arbitrators, governed by the Arbitration Scheme. The decision of the arbitrator is binding; however, their decision will need to be drafted as a court order and sealed by the court after the arbitral award is given. The key advantage of arbitration is that parties have more control over the process, as they can pick the arbitrator and the venue. Further, the process circumvents court time delays and therefore is quicker and can save costs.

From 29 April 2024, the Family Procedure (Amendment No 2) Rules 2023 (SI 2023/1324) came into effect, instituting a number of changes that are designed to increase the use of ADR.

- The definition of "non-court dispute resolution" at FPR 2.3(1)(b) has been widened to mean "methods of resolving a dispute other than through the court process, including but not limited to mediation, arbitration, evaluation by a neutral third party (such as a private FDR process), and collaborative law".
- A change to the conduct of MIAMs – FPR 3.9(2) has been amended to impose a

requirement for MIAM providers to "indicate to those attending the MIAM which form, or forms, of non-court dispute resolution may be most suitable as a means of resolving the dispute and why" and "provide information to those attending the MIAM about how to proceed with the form, or forms, of non-court dispute resolution in question".
- Parties are now required to file an FM5 standard form setting out how they have engaged with ADR. Failure to engage in ADR without good reason may result in a costs order for the party not engaging. The court may also adjourn proceedings if they feel ADR has not been attempted.

Exemptions From Requirement for MIAM

Proceedings to which the MIAM requirements apply are set out in FPR 2010, Practice Direction 3A, paragraphs 12—13. For the vast majority of financial remedy proceedings and private Children Act proceedings, a MIAM is required prior to proceedings being issued. For the vast majority of financial remedy proceedings and private Children Act proceedings, a MIAM is required.

For financial remedy proceedings, a MIAM is not required where a consent order is being lodged or for enforcement of any order made in proceedings for a financial remedy or of any agreement made in or in contemplation of proceedings for a financial remedy.

In Children Act proceedings, a MIAM is not required for:

- a consent order;
- an order relating to a child or children in respect of whom there are ongoing emergency proceedings, care proceedings or supervision proceedings; or
- an order relating to a child or children who are the subject of an emergency protection order, a care order or a supervision order.

There are various exemptions from the requirement for a MIAM. FPR 3.8(1) sets out the circumstances in which the MIAM requirement does not apply. The most commonly used exemption is for cases of domestic abuse.

Judges have a range of powers for non-compliance with the MIAM requirement, including directing that a party must attend a MIAM and for proceedings to be adjourned to allow mediation to take place. Further, at the conclusion of proceedings, a judge can impose costs orders against the party that has not complied with the MIAM requirement.

A judge may also make a direction order for parties to attend arbitration. If such a direction is breached because one party does not attend the arbitration or refuses to engage with the arbitration process, that party can be ordered to meet the other's legal costs.

Legal Status of Out-of-Court Agreements

Parties' financial claims against each other upon divorce are only extinguished by a sealed financial order of the court. If parties reach an agreement through mediation, arbitration or any other ADR method, it is important that a court order is drafted and sent to the court to be sealed. Otherwise, an ex-spouse may issue financial remedy proceedings in the future.

3. Child Law

3.1 Choice of Jurisdiction

Jurisdictional Grounds

Commonly, Children Act proceedings are brought on the ground that a child is habitually resident in England and Wales. This is a complex area of law, however, and the case of Re: S (A Child) (Jurisdiction) (2022) EWHC 1720 (Fam) provides a useful analysis of the jurisdictional framework in Children Act proceedings, now that the UK is not in the EU.

The provisions of Brussels II Regulation No 1347/2000 ("Brussels II") no longer apply to England and Wales. The 1996 Hague Convention and the Family Law Act 1986 set out the law of jurisdiction in Children Act proceedings.

Under the Hague Convention, the country in which the child is habitually resident will have jurisdiction – although there are exceptions to this rule. The rules relating to jurisdiction are found in Articles 5—14 of the Hague Convention. If the Hague Convention does not apply because one of the relevant countries is not a signatory, then the provisions of the Family Law Act 1986 will be used by the courts.

Section 2(1) of the Family Law Act 1986 states that welfare orders (which would include Section 8 child arrangements orders) can only be made if one of the following four conditions is satisfied:

- the court has jurisdiction under the Hague Convention (as above);
- the Hague Convention does not apply but the order sought arises in connection with divorce proceedings;
- the child is habitually resident in England and Wales; or
- the child is present in England and Wales and not habitually resident in any other country of the UK.

The court can also make orders under its "inherent jurisdiction", which is a broad power that the court has to protect children in areas where statutory remedies are inadequate.

Domicile, Residence and Nationality

The concepts of domicile, residence and nationality are relevant considerations when determining jurisdiction upon a reading of the articles contained in the Hague Convention.

Article 5(1) of the Hague Convention provides that the judicial or administrative authorities of the contracting state of the habitual residence of the child have jurisdiction to take measures directed at the protection of the child's person or property.

Article 8(1) provides that the authority of a contracting state having jurisdiction under Article 5 or Article 6 of the Hague Convention, if it considers that the authority of another contracting state would be better placed in the particular case to assess the best interests of the child, may either:

- request that other authority, directly or with the assistance of the central authority of its state, to assume jurisdiction to take such measures of protection as it considers to be necessary; or
- suspend consideration of the case and invite the parties to introduce such a request before the authority of that other state.

Article 8(2) of the Hague Convention provides that the contracting states whose authorities may be addressed as provided in the preceding paragraph are:

- a state of which the child is a national;
- a state in which property of the child is located;
- a state whose authorities are seised of an application for divorce or legal separation of the child's parents or for annulment of their marriage; or
- a state with which the child has a substantial connection.

The nationality of a child will therefore be a relevant factor in determining which jurisdiction is suitable to hear an application, as will factors establishing a substantial connection of a child to a country (including domicile). Habitual residence, however, is the primary factor that will decide the issue of jurisdiction in most international cases.

3.2 Living/Contact Arrangements and Child Maintenance

If the parents do not agree on a child's living arrangements and the time/contact the child will have with each parent, either parent can apply to the court under Section 8 of the CA 1989 for a child arrangements order (note the MIAM requirement for most cases). The court will make a determination of future child arrangements on an analysis of the best interests of the child. The factors relevant to the court's determination are set out in Section 1(3) of the CA 1989 and are:

- the ascertainable wishes and feelings of the child concerned (considered in light of their age and understanding);
- their physical, emotional and educational needs;
- the likely effect on them of any change in their circumstances;
- their age, sex, background and any characteristics of theirs that the court considers relevant;
- any harm that they have suffered or are at risk of suffering;
- how capable each of their parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting their needs; and
- the range of powers available to the court under the CA 1989 in the proceedings in question.

This is not an exhaustive list and the court will take a holistic approach and make a decision based on the child's best interests.

Custody and Parental Responsibility

In England and Wales, a parent's decision-making power is defined as "all the rights, duties, powers, responsibilities and authority [that] by law a parent of a child has in relation to the child and his property" (Section 3(1) of the CA 1989). This authority is known as "parental responsibility" and empowers a person to make decisions in relation to, among other things, a child's education and healthcare.

Parental responsibility is acquired automatically by a child's father if they are:

- married to the child's mother; or
- as of 2 December 2019, a civil partner of the child's mother at the time of birth.

Alternatively, parental responsibility can be acquired by unmarried fathers in the following ways:

- by subsequently marrying – or, as of 2 December 2019, becoming a civil partner of – the child's mother;
- by being registered as the child's father on the child's birth certificate on or after 1 December 2003;

- by entering into a parental responsibility agreement with the child's mother;
- by obtaining a parental responsibility order from the court, so long as the child is under 18; or
- by being formally appointed as the child's guardian by the mother or by the court.

If the father is named as the parent with whom the child is to live, a parental responsibility order must be made. Such an order need only be considered if the father is named as someone with whom the child is to spend time.

Therefore, following the breakdown of a marriage or relationship, the parties will retain their parental responsibility (save if there is an order from the court to remove a party's parental responsibility). Important decisions relating to a child must have the consent of all persons with parental responsibility. This would include matters such as schooling and medical decisions. If parties cannot agree, then they must make an application to court.

If, however, one parent obtains a "lives with" child arrangements order during Children Act proceedings, they may take the child out of the jurisdiction for up to 28 days without the other parent's consent. The court order in the Children Act proceedings can curtail the exercise of a parent's parental responsibility by placing limits on what a parent can do with a child.

Restrictions on the Court's Ability

A "lives with"order will be legally binding until the child reaches the age of 18. Any contact arrangements laid out in a child arrangements order are usually legally binding until the child reaches the age of 16 (Section 91(10) of the CA 1989). Between the ages of 16 and 18, it will be up to the child to decide how much contact they would like to have with the parent they do not live with, and the court will be reluctant to interfere. This reflects the criteria in Section 1(3) of the CA 1989, as the ascertainable wishes and feelings of a child aged 16 carry more weight than they do for a young child.

Child Maintenance

Child maintenance is governed by the Child Support Act 1991 (the "CSA 1991"). The CSA 1991 has been extensively amended by four later substantial sets of legislation: the Child Support Act 1995, the Social Security Act 1998, the Child Support, Pensions and Social Security Act 2000, and the Child Maintenance and Other Payments Act 2008.

The CSA 1991 stipulates in Section 1 that each parent of a "qualifying child" is responsible for maintaining them.

A child is a "qualifying child" if:

- one of their parents is, in relation to them, an absent parent; or
- both of their parents are, in relation to them, absent parents.

There is thus a legal obligation on a non-resident parent to pay money to the resident parent. This can be arranged privately between the parents (if the amount is agreed) or through the CMS, which is a government body that calculates the payments due under the legislation.

Under certain circumstances, mostly those that involve very high earners and where one party lives outside of the country, applications for child support can be make to the court.

Child maintenance is normally calculated by the CMS, which utilises a six-step process to cal-

culate child maintenance due. The formula used to calculate child maintenance is contained in Schedule 1 of the CSA 1991 (see, in particular, paragraphs 2, 5A, 6 and 7). CS3 now applies, which is the third version of the formula.

The Child Support (Enforcement) Act 2023 allows the CMS to impose tougher sanctions on non-paying parents – including the making of "liability orders" for non-paying parents – without having to apply to the courts. Previously, the CMS needed to apply to the court to obtain a liability order before they could use their powers of enforcement under "enforcement orders". This change will reduce delays for the receiving parent. Enforcement orders can include a sheriff officer going to the liable parent's home to value their belongings that could then be sold to meet arrears, or disqualification from holding a driving licence or UK passport for the non-paying parent.

The CMS' approach to calculating child maintenance is as follows.

- Gross income of the paying parent is worked out.
- The CMS will then check for things that will affect this gross figure (eg, pension contributions).
- The CMS will apply one of five rates for the paying parent (for all incomes above GBP200 gross per week the basic rate will be used).
- The CMS will factor in any other children that the paying parent is supporting.
- Using the first four steps, the CMS will calculate the weekly amount due.
- A deduction will then take place where the child stays overnight with the paying parent.

Where the paying parent earns over GBP156,000 or either party lives abroad, the jurisdiction to make awards lies with the Family Court. Judges at the Family Court retain a broad discretion when adjudicating on the amount of maintenance due. The level of such child support has been growing throughout the years and the court has recently delivered slightly conflicting judgments about the basis on which such maintenance should be calculated – ie, whether on the basis of a fixed formula, on the basis of a consideration of the lifestyle of the child, or on a more general basis.

Child Maintenance Agreements Without Court Involvement

Parties are at liberty to agree child maintenance arrangements without any involvement of the court or the CMS. Only where there is a dispute will the court or the CMS get involved.

Child Maintenance Orders

The Family Court retains jurisdiction to make orders on child maintenance where the paying parent earns more than GBP156,000 or a parent lives abroad. Further, the Family Court is able to make orders by consent where parties agree on the amount of child maintenance due as part of the overall financial negotiations. Importantly, however, the Family Court's jurisdiction can only be excluded for 12 months – at which point, either party will be at liberty to apply to the CMS for an assessment of the amount of child maintenance due. The maintenance can be ordered to be paid until the end of the child's education or until their 18th birthday.

Under limited circumstances, a child can apply for financial provision under Schedule 1 of the CA 1989 when they are over 18 – for example, to assist with educational or vocational training.

3.3 Other Matters

Decisions on Upbringing

Decisions on schooling, medical treatment, religion and holidays require the consent of both parents as they involve the exercise of parental responsibility. In circumstances where there is a disagreement, the involvement of the court is necessary.

Where parties apply for the court to adjudicate on such disputes, the application is called a "specific issue" application and is made on Form C100. Where a parent is concerned that the other parent is going to make a decision without their consent that involves the exercise of parental responsibility (eg, changing the child's school), an application to court can be made to prohibit this from happening. This is called a "prohibited steps" application and is also made on Form C100.

Parental Alienation

"Parental alienation" is not a term that is defined in law. The Family Court focuses on the behaviour of the parents and the impact of that behaviour on the children involved. Parental alienation is becoming an increasingly contentious topic in the Family Court.

In the case of Re S (Parental Alienation: Cult) (2020) EWCA 568, Peter Jackson LJ stated that there is an obligation on the court to respond with "exceptional diligence and take whatever effective measures are available". Any decision the court will take will be guided by Section 1(3) of the CA 1989. The court has significant case management powers, including:

- directing the Cafcass officer (a registered social worker who makes welfare recommendations to the court during children proceedings) to consider the issue of parental alienation when they make "welfare recommendations" during their Section 7 report;
- ordering a "fact-finding hearing" so that findings of fact can be made on the issue;
- powers under FPR 16.4 to make a child a party to proceedings – when this happens, a guardian is appointed who will give the court an independent view of proceedings from the child's perspective and will instruct a solicitor to represent the child.

If, at a final hearing, the court makes serious findings of parental alienation, it can – in extreme cases – order a transfer of residence so that a child is removed from the alienating parent.

Children's Evidence

Section 96(2) of the CA 1989 provides that the unsworn evidence of a child may be heard by a court in civil proceedings if, in the court's opinion, the child understands that it is their duty to speak the truth and they have sufficient understanding to justify their evidence being heard – even though, in the court's opinion, they cannot understand the nature of an oath.

The CA 1989 does not, therefore, impose a minimum age for children to give evidence. Further, the case of Re W (2010) UKSC 12 held that there is no presumption against a child giving evidence in court. Whether a child should give evidence will depend on the circumstances of the case and, in particular, whether the giving of evidence will be contrary to the child's welfare.

The Family Court may order that the child's wishes and feelings are in written form, where oral evidence is deemed inappropriate.

3.4 ADR

See **2.9 Alternative Dispute Resolution (ADR)**.

3.5 Media Access and Transparency

On 30 January 2023, a 12-month pilot (called the "Reporting Pilot") was launched in respect of children cases in Cardiff, Leeds and Carlisle, and this pilot was extended in 2024. Accredited journalists and bloggers can report from court. This is known as the "transparency principle". Any reporting will be subject to protecting the anonymity of children, which is known as the "anonymity principle".

The judge has discretion as to any transparency order made in Children Act proceedings. Under the standard template transparency order, which remains in place until any relevant child turns 18, there are restrictions on identifying details, including the anonymisation of the parties and the relevant children and other identifying information. Local authorities, NHS trusts and legal representatives can be identified.

In broad terms, then, the media are able to report on children cases – although the anonymisation of children is a major concern of the Family Court. The Family Court are concerned with "jigsaw identification" and, as such, other identifying materials about a child may be anonymised.

Anonymisation matters fall within the exercise of a judge's discretion and are not decided upon by the parents. As explained earlier, all children are anonymous in Children Act proceedings, unless the Family Court orders otherwise.

As mentioned in **2.8 Media Access and Transparency**, from 27 January 2025, journalists and legal bloggers are able to report on what they see and hear in all family courts in England and Wales if a transparency order is granted. The open reporting provisions mean that there is a presumption that a transparency order is granted, unless there is a legitimate reason not to. This recent change follows the success of Family Court Reporting Pilot, which started in January 2023 and was progressively rolled out thereafter.

Trends and Developments

Contributed by:
Alex Carruthers, Oliver Heeks and Sian Brooks
Hughes Fowler Carruthers

Hughes Fowler Carruthers has been based on Chancery Lane at the heart of legal London since 2001 and is widely regarded as one of London's leading divorce and family law practices. All partners are internationally acclaimed for the exceptional standard of their work and share a considerable breadth of experience, which enables them to offer the full gamut of skills needed to navigate complex litigation, expert and discreet negotiation, and alternative forms of dispute resolution to suit the individual demands of each client. Work is conducted with a high degree of professionalism and dedication. All solicitors in the practice are members of Resolution. The firm is part of an extensive international family law network through membership of the International Academy of Family Lawyers and the International Bar Association. This means Hughes Fowler Carruthers can provide a full international service through the partners' close connections worldwide.

Authors

Alex Carruthers is a founding partner at Hughes Fowler Carruthers and specialises in complex divorce and financial work and children's work – in particular, in international cases. His clients are high net worth individuals with complex legal issues, including trusts and jurisdictional disputes. In Chambers UK 2023, a source commented that Alex has "really good judgement on cases and he is also very intelligent".

Oliver Heeks joined Hughes Fowler Carruthers in January 2024 after qualifying as a family solicitor at a leading firm in 2022. He is an associate solicitor and advises on a wide range of family law matters, including divorce, financial relief, emergency injunctions, and private law children matters. Oliver is adept at working with international and domestic clients from a wide range of backgrounds, including high net worth individuals. He deals regularly with complex financial disputes often involving high-value business assets, offshore assets, trusts and inherited wealth.

Contributed by: Alex Carruthers, Oliver Heeks and Sian Brooks, **Hughes Fowler Carruthers**

Sian Brooks joined Hughes Fowler Carruthers in December 2024 as a paralegal. Sian assists the associates and partners on a broad range of cases – ranging from high net worth financial remedy matters to divorce and children matters, often with multi-jurisdictional elements.

Hughes Fowler Carruthers

Academy Court
94 Chancery Lane
London
WC2A 1DT
UK

Tel: +44 (0) 20 7421 8383
Email: a.carruthers@hfclaw.com
Web: www.hfclaw.com

Hughes Fowler Carruthers
HUGHES FOWLER CARRUTHERS HARPER LABI
SOLICITORS

Contributed by: Alex Carruthers, Oliver Heeks and Sian Brooks, **Hughes Fowler Carruthers**

The Significance of Matrimonalisation and Conduct in the Division of Assets During Divorce Proceedings in England and Wales

One of the key issues in many financial remedy cases is the sharing of matrimonial assets. Of the factors that inform the division of matrimonial assets in a fair manner, perhaps the most debated at the present time are:

- the role of "matrimonalisation" – ie, the process whereby assets that were once non-matrimonial (eg, separate) come to be considered matrimonial property; and
- the extent to which conduct (including, most notably, domestic abuse) should be considered in financial remedy awards.

Here, the authors provide an outline of these two concepts (including concomitant controversies, relevant and recent case law, and constructive advice for family practitioners), as well as their impact on the equitable determination of financial remedies in divorce proceedings.

The seminal case of White v White (2000) UKHL 54 ("White") in 2000 made fairness the overriding objective in financial remedy proceedings and clarified that any decision should be cross-checked against a "yardstick of equality" (an equal split of divorcing parties' assets). Judges in the Family Court have wide discretionary powers and will depart from an equal division of assets when it is considered fair. The combined cases of Miller and McFarlane identified three strands to fairness:

- equal sharing (per White);
- meeting needs; and
- compensation for relationship-generated disadvantage.

In the intervening years, further cases have provided detail on the operation of these strands.

Compensation relates to prospective financial disadvantage that parties may face upon divorce, where such disadvantage is a result of decisions they took during the marriage (eg, sacrificing their career) or – potentially – as a result of forms of conduct (eg, domestic abuse). It is extremely rare.

Needs are an elastic concept. The Family Justice Council has stated that the standard of living parties enjoy during the marriage "should be reflected, as far as possible, in the sort of level of income and housing each should have as a single person afterwards" and that "it is not appropriate for the divorce to entail a sudden and dramatic disparity in the parties' lifestyle".

In most cases, there are not sufficient financial resources for a judge's enquiry to go beyond meeting the needs of both parties. It is only in those cases where there is a surplus of assets over needs that the sharing principle is engaged (WC v HC (Financial Remedies Agreements) (2022) EWFC 22).

Matrimonalisation in the division of assets

Under the sharing principle, parties are ordinarily entitled to an equal division of matrimonial assets. Non-matrimonial assets are ordinarily retained by the party to whom they belong, unless there are good reasons to the contrary.

Matrimonial assets are assets that are generated from the joint endeavour of marriage, such as the family home and pensions/investments built up during the marriage or assets that have been treated as matrimonial (eg, the family home). Non-matrimonial assets are assets that have been brought into the marriage by one spouse

only, such as assets acquired prior to the marriage or by inheritance or gift.

The matrimonalisation of assets refers to the process whereby assets that were once non-matrimonial "become part of the economic life of [the] marriage" (Mostyn J, JL v SL (No 2) ECHC 555 (Fam) (2015)) and thereby become matrimonial property. The concept is a nebulous one and a source of debate among family practitioners.

Standish v Standish

In 2024, the court of appeal's decision in Standish v Standish (2024) EWCA Civ 567 became the new leading authority on the sharing principle and how to deal with the matrimonalisation of assets. The case also clarifies that it is the source of an asset – and not the legal title – that will be the critical factor in determining the status of matrimonial property.

The judgment deals with the following two issues identified in both parties' cross-appeals:

- how the financial remedy court identifies assets that are subject to the sharing principle; and
- once these assets have been identified, how the sharing principle is applied.

i) Facts of the case

The parties began their relationship in 2003, married in Australia in 2005 and relocated to the UK in 2010 – whereupon they moved into their recently acquired property (the "family home"), which was purchased for approximately GBP9.6 million in 2008. The parties separated in 2020.

Clive Standish, a former chief financial officer at global investment bank UBS, had obtained significant wealth. He owned a successful farming business (Ardenside Angus), which he purchased in 2002.

In 2017, two key events happened. These decisions were made as part of Clive Standish's tax planning.

- Clive Standish transferred GBP77 million worth of investment funds ("the 2017 assets") into his wife (Anna Standish)'s name. It was intended that these funds would be then transferred into vehicles for the benefit of Clive Standish's children. Unfortunately for him, the divorce proceedings intervened before this step took place.
- Anna Standish was issued shares in Ardenside Angus.

Total assets between the parties were found to be GBP132 million.

ii) First-instance decision – ARQ v YAQ (2022) EWFC 128

The final hearing took place in May 2022 at the High Court before Mr Justice Moor. In summary, Mr Justice Moor's findings were as follows.

- Ardenside Angus was not matrimonalised, as it was premarital and had remained the same throughout the marriage.
- The family home was matrimonial property, owing to the central role it occupied in the marriage.
- Mr Justice Moor rejected Anna Standish's argument that the investment funds became her separate property and found that they were matrimonial property.
- The shares in the farming business also became matrimonial property as a result of placing them into Anna Standish's name.

- The matrimonial assets were assessed to be GBP112,631,062, comprising assets that formed part of the matrimonial acquest and those that were matrimonalised by the tax-planning exercise. Owing to the "magnetic" factor of the case, which was the premarital origin of most of this sum, Mr Justice Moor decided that an appropriate division of matrimonial assets was 40% to Anna Standish (equating to an overall share of 34%).

iii) Grounds of appeal

Anna Standish appealed on two grounds, as follows.

- Mr Justice Moor had been incorrect in labelling the 2017 assets as matrimonial and they should be Anna Standish's separate property. Anna Standish's overarching case was that "title or ownership is the critical factor in the exercise of the court's powers under Part II of the Matrimonal Causes Act 1973 in the application of the sharing principle".
- The property at Ardenside should be declared a matrimonial asset and shared equally, as the parties had holidayed there and improved the property during the marriage.

Anna Standish submitted that, notwithstanding the non-matrimonial nature of the 2017 assets, they should be shared equally to reflect the nature of the marriage. Accordingly, Anna Standish argued that her award should be increased from GBP45 million to GBP66 million.

Clive Standish cross-appealed on two grounds, as follows.

- The judge was wrong to find Ardenside Angus and the 2017 assets as matrimonial property. Clive Standish argued that the source of the asset was the critical factor in identifying assets subject to the sharing principle. Regarding matrimonalisation, Clive Standish argued that the concept should be applied cautiously and conservatively.
- Clive Standish's second ground was that – even if the 2017 assets were deemed to be matrimonial property – Mr Justice Moor's distribution was wrong, as it did not factor in the scale of Clive Standish's unmatched contribution of premarital wealth.

Clive Standish submitted that Anna Standish should receive GBP25 million to meet her reasonable needs, with the balance transferred to him.

iv) Court of appeal decision

The court of appeal held the following.

- The source of the asset is the critical factor in the application of the sharing principle.
- The concept of matrimonalisation should be applied narrowly. Moylan LJ reformulated the categories listed by Wilson LJ in K v L (2011) EWCA Civ 550, where the source of an asset may diminish over time, to the following:
  - (a) the percentage of the parties' assets (or of an asset), which were or which might be said to comprise or reflect the product of non-marital endeavour, is not sufficiently significant to justify an evidential investigation and/or an other than equal division of the wealth;
  - (b) the extent to which and the manner in which non-matrimonial property has been mixed with matrimonial property mean that, in fairness, it should be included within the sharing principle; and
  - (c) non-marital property has been used in the purchase of the former matrimonial

home, an asset that typically stands in a category of its own.
- When the evidence does not establish a clear dividing line between matrimonial and non-matrimonial property, the court is required to take a nuanced approach and must consider whether the asset should have the same character as the assets built up during the parties' joint endeavour of marriage, such that it should attract the sharing principle.
- If an asset does fall within the matrimonalised category, it does not follow that it should be shared equally between the parties.

Anna Standish's appeal was dismissed and Clive Standish's appeal was allowed.

The court of appeal remitted the case back down to the High Court to undertake an assessment of Anna Standish's needs (as Mr Justice Moor did not undertake a needs assessment) in order to decide whether GBP25 million would meet her needs.

Points to note for practitioners

The Standish decision demonstrates clearly that the source of an asset – rather than the legal title – is the critical factor in categorising assets in financial remedy proceedings and that the concept of matrimonalisation is to be used narrowly. It is being appealed to the Supreme Court, as it obviously has very widespread application. In the meantime, it is therefore important for practitioners to:

- ask the client for specific details on the source of assets in the case at the initial client meeting, so that the parameters of settlement are known as quickly as possible;
- understand the "journey" an asset has taken during a marriage; and
- ensure that there is a "joined-up" approach between lawyers and other professionals, such as tax advisers or wealth planners.

Role of conduct in financial remedy proceedings

Section 25 of the above-mentioned Matrimonial Causes Act 1973 specifies the factors that the Family Court must have regard to when dividing assets upon divorce. One of these factors is "the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it" (Section 25(2)(g)). There is no statutory definition of conduct; however, it refers to bad behaviour of one or both spouses.

The Family Court has historically been reluctant to consider conduct in financial remedy proceedings, reserving it only for the most severe cases. Judges have been cautious not to conduct a "rummage through the attic of the marriage" (G v G (2002) EWHC 1339 (Fam), (2002) 2 FLR 1143). Conduct has therefore been reserved for only the most serious cases – ie, those with a "gasp" factor, not just a "gulp" factor (S v S (Non-Matrimonial Property: Conduct) (2006) EWHC 2793 (Fam), (2007) 1 FLR 1496).

This is now being revisited. There is debate among practitioners over the role conduct should play in financial remedy proceedings. This tension was identified in the Law Commission's recent scoping paper, "Financial Remedies on Divorce and Dissolution". Cultural shifts that have shone a light on the devastating impact of domestic abuse and the various, sometimes subtle, forms that domestic abuse can take. This has led to legislative reform – most notably, the Domestic Abuse Act 2021, which created a statutory definition of domestic abuse (including economic abuse) in Section 1 thereof. Some

practitioners propose that there should be greater recognition of domestic abuse as conduct.

Other practitioners argue that domestic abuse is already factored into financial remedy awards, through the court's determination of a party's needs, and that to include domestic abuse as an example of conduct would increase litigation and costs and undermine the shift to no-fault divorce that occurred in 2022 following the Divorce, Dissolution and Separation Act 2020.

The importance of this issue has only increased following research into the scale of domestic abuse among divorcing parties. It was recently found that 29% of divorcing spouses reported that the abusive or controlling behaviour of their spouse was a reason for the breakdown of their relationship.

What is meant by "conduct" and how is it managed in court proceedings?

Under current case law, set by Mr Justice Mostyn in OG v AG (2020) EWFC 52, there are four categories of conduct that behaviour can fall into:

- gross and obvious personal misconduct – the conduct must have a financial impact for it to be considered relevant to proceedings;
- wanton and reckless dissipation of assets;
- litigation misconduct – this is usually penalised in costs; and
- failure to provide full and frank financial disclosure about finances.

Case law has held that the threshold for the first category is extremely high. Notable examples of conduct under this category include H v H (2005) EWHC 2911 (Fam), (2006) 1FLR 990, where a husband's attempted murder of his wife – resulting in him being sentenced to 12 years' imprisonment – was held to be relevant conduct

This approach has been upheld in subsequent case law, with the current iteration of the law set out in the case of N v J (2024) EWFC 184, in which Mr Justice Peel stated that he "struggle[d] to envisage many situations where personal misconduct will have a material impact on the ultimate evaluation" – thereby further clarifying that, in the vast majority of financial remedy cases, domestic abuse will not impact on awards in the financial remedy courts. After an analysis of recent case law, Mr Justice Peel noted that "the high bar to conduct claims established in the jurisprudence… is undisturbed by the recent focus on domestic abuse in society and [in] the family justice system".

This case also endorsed the procedure to be followed in conduct cases, as set out in Tsvetkov v Khayrova (2023) EWFC 130. Where a party relies on conduct, there is a two-stage process. At the first stage, the party asserting conduct must prove the facts relied upon, that those facts meet the high threshold for conduct, and that there is a negative financial impact on the other party. At the second stage, the court will consider how the conduct should impact on the outcome of the financial remedy proceedings, bearing in mind the Section 25 factors.

Conduct allegations should be introduced as early as possible in proceedings and should be set out clearly at Section 4.4 of the party's Form E, so that the court can provide case management directions at the first appointment.

Recent discussion on conduct in financial remedy proceedings

Practitioners who believe that there should be greater recognition of domestic abuse as conduct cite a multitude of reasons, including:

- the failure of the so-called gasp factor to reflect modern understanding of domestic abuse, including the subtle, pernicious effects of financial abuse and psychological abuse;
- the difficulty in proving a link between domestic abuse and the financial impact this has on the other spouse; and
- the position in other jurisdictions – Australia's Family Law Amendments Bill 2024, which amended the Family Law Act 1975, explicitly provides for consideration of "family violence" in financial remedy proceedings and Schedule 1 to the bill contains examples of what conduct could constitute economic or financial abuse.

The majority of stakeholders in the Law Commission's recent scoping paper were opposed to greater recognition of domestic abuse as conduct. The chief concern was the impact on already stretched court resources and the resulting delays and increase in costs this would cause. However, other points were raised, including the following.

- Section 25(2)(a) of the Matrimonial Causes Act 1973 already provides that one of the factors the court must consider is the income, earning capacity, property and financial resources of the parties. Therefore, if a victim's earning capacity was limited owing to domestic abuse, they could rely on this factor in their submissions.
- Allegations of domestic abuse advanced as conduct will likely increase acrimony, thereby reducing the chances of early settlement. Introducing such allegations into proceedings could even result in provoking more serious violence by the perpetrating spouse.

The scoping paper suggests that the law would benefit from greater clarity on the following issues:

- what forms of behaviour will be considered conduct (whether that be personal misconduct or litigation misconduct);
- the impact that conduct will have on a claim for financial remedies; and
- the process to be adopted when making an allegation of conduct.

It will be up to the UK government to decide if they want the Law Commission to make any formal recommendations for reform.

Advice for practitioners

Recent case law highlights that, although there is a greater understanding of domestic abuse in financial remedy proceedings (including economic abuse and controlling and coercive behaviour), the threshold remains extremely high for this to affect the division of assets. It is therefore important for practitioners to advise their clients of the potential consequences of running an ill-advised conduct argument. If it is indeed advisable to run a conduct argument, the conduct to which it relates should be clearly set out at Section 4.4 of Form E at the onset of proceedings.

FINLAND

Law and Practice

Contributed by:
Pekka Tuunainen
Pekka Tuunainen Attorneys Ltd

Contents

Pekka Tuunainen Attorneys Ltd is a Helsinki-based private client boutique law firm focusing on family law and estate advisory and litigation. Firm owner, Dr Tuunainen, is one of the leading attorneys in the field of family and inheritance law. The firm has a strong international dimension, in respect of both clients and cases. Its expertise includes international enforcement of foreign judgments and tax advisory of individuals. The firm has recently advised foreign ultra-high net worth clients on Finnish prenuptial agreements and child-related matters. Dr Tuunainen presently frequently assists foreign residents in marital financial agreements and proceedings, and he acts as distributor in several marital property divisions.

Author

Pekka Tuunainen is admitted to the Finnish Bar and holds a Doctor of Laws and a Master's degree. He is a leading Finnish private client adviser for individuals and families, and he represents his clients in all courts in Finland. Pekka is a frequent speaker at legal training events and conferences, and also acts as an expert witness in foreign courts on Finnish legislation. He has clients with an international focus and he is well connected around the world. Before becoming a full-time attorney, Pekka was a member of the Faculty at the University of Helsinki Faculty of Law and lectured on family and inheritance law.

Pekka Tuunainen Attorneys Ltd

Urho Kekkosen katu 2 C
00100 Helsinki
Finland

PEKKA TUUNAINEN ATTORNEYS LTD

Tel: +358 40 553 8874
Email: pekka.tuunainen@ptlaki.fi
Web: www.ptlaki.fi

1. Divorce

1.1 Grounds, Timeline, Service and Process

There are no grounds needed for divorce. Divorce is simply granted upon application of one of the spouses or application made by both spouses. This applies also to same-sex spouses. A written application must be submitted to a district court in the municipality of either spouse.

If only one of the spouses applies for divorce, the district court ex officio serves the application (also to foreign nations) on the other spouse and reserves for the other spouse the possibility to issue a written statement on the application. In practice this possibility to issue a statement is a formality, as there is no legal means to object to divorce. Therefore, divorce is not handled in oral court proceeding and it is solely a written process.

Although religious marriages are common practice for churches and other religious entities, if they are licensed for marriage, only courts can legally dissolve marriage.

There are two ways to get a divorce, depending on whether or not the spouses have lived separated and for how long.

- Most commonly, divorce is granted after a reconsideration period of six months.
  - (a) If the spouses file a joint application, the reconsideration period begins when the application is filed at the district court. If the application is filed by one of the spouses, the reconsideration period begins when it is served by the court on the other spouse.
  - (b) Once the reconsideration period has ended, the spouses jointly, or one of the spouses, can file an application for final divorce judgment. Once again, there is no grounds needed at this point. The application must be filed within one year from the start of the reconsideration period. After this one-year term, divorce proceedings must start, if a second application has not been placed within that time.
- The spouses may have a divorce without a reconsideration period, if they have lived separated for at least the past two years without interruptions. The separation must be proved. Commonly, this is proved by entries from the population register or the fact that spouses have lived in different countries for at least two years.

Divorce matters are handled at the court usually quite fast, within weeks rather than months.

When divorce is applied for, it is possible to claim at the same time an order for the end of common life in the same household. In such a matter, the court will determine which of the spouses may continue to live in the common home and use it regardless of which of the spouses owns the home. The other spouse will be ordered to move out of the common household. If this matter is argued, oral hearing will follow and it is decided separately from the divorce itself. Such a matter should be handled in an expedited process, which the courts do follow well. In practice, this claim is used quite seldom; most commonly in cases where there are significant differences in the spouses' wealth and ability to accumulate income. The spouse with a lower income-generating ability usually has the right to stay in the common home.

When divorce is applied for, the court may, based on the application, also order a spouse to pay maintenance to the other spouse. As will be

explained, spousal maintenance is a rare institution in Finland.

1.2 Choice of Jurisdiction

Jurisdiction of Finnish courts in divorce matters is based on the residency of either spouse. If both spouses are habitually resident in Finland, there are no other requirements.

Nationality has relevance only in cases when both of the spouses are Finnish citizens. In such cases, Finnish courts always have jurisdiction, even when the spouses have never lived in, or even visited Finland. In all other cases, nationality has no relevance.

There are some limitations on the residency concept when only one of the spouses is resident in Finland. In these cases, Finnish courts have jurisdiction only when one (or more) of the following criteria is met:

- joint application is made;
- the spouses were last habitually resident in Finland and one of them still resides in Finland;
- if the respondent spouse is habitually resident in Finland;
- the applicant is habitually resident in Finland and resided there for at least a year immediately before the application was filed; or
- the applicant is habitually resident in Finland and resided there for at least six months immediately before the application was made and they are a Finnish citizen.

This means that a Finnish resident cannot apply for divorce immediately when they move back to Finland from a foreign country. There is at least a six or 12-month period before application can be made.

In national legislation, there is also a back-up clause for jurisdiction. If the applicant is resident in Finland or has other close links to Finland and they cannot successfully start divorce proceedings in the foreign state where either spouse is domiciled, or this would cause unreasonable inconvenience, and the admissibility of the matter in Finland is justified in view of the circumstances, Finnish courts may rule they have jurisdiction on the matter. This usually requires extraordinary situations – eg, war or legal impossibility to file divorce in the other state.

Jurisdiction can be contested if the above-mentioned requirement for jurisdiction is not met. Courts are required to determine jurisdiction ex officio, but sometimes an applicant can give false information, or the registers determining residency are not accurate. In such cases, a party to a divorce proceeding must oppose jurisdiction when responding for the first time to court.

If a divorce proceeding is already filed in some other jurisdiction before being filed in Finland, it is possible to apply to stay proceedings in Finland and the Finnish divorce procedure is definitively ended. If one of the parties can prove that the other divorce proceeding is not real or they will not get a fair trial, the procedure in Finland may continue.

2. Financial Proceedings

2.1 Choice of Jurisdiction

A Finnish court has jurisdiction for financial proceedings if divorce is filed successfully in a Finnish court (ie, Finland has jurisdiction in the divorce proceedings). This is of course the case when both spouses are resident in Finland and in

such cases Finnish courts have always jurisdiction on financial matters.

According to the Brussels IIa Regulation this jurisdictional connection with divorce proceeding has limitations if a spouse has applied divorce on the grounds they have been habitually resident in Finland and they resided there for at least a year immediately before the application was filed or they are habitually resident in Finland and they resided there for at least six months immediately before the application was made and they are a Finnish citizen. In these cases, jurisdiction of a Finnish court over the financial matters is subject to the spouse's agreement even though the divorce case has jurisdiction in Finland.

In other cases, Finland courts have jurisdiction if (not depending on divorce proceeding):

- the spouses were last habitually resident in Finland and one of them still resides there;
- the respondent is habitually resident in Finland; and
- both spouses are Finnish citizens.

In these cases spouses can make an agreement on jurisdiction, but agreed jurisdiction is limited to countries where marriage was concluded, or to the country of choice of law of the spouses' marital property regime.

Jurisdiction can be contested if the above-mentioned requirement for jurisdiction is not met or spouses have agreed on jurisdiction. Courts are required to determine jurisdiction ex officio, but this not always possible due to lack of information and in such cases jurisdiction must be opposed when responding for the first time to court.

If financial proceedings have already commenced in some other jurisdiction before being filed in Finland, it is possible to apply to stay proceedings in Finland. Depending on the matter, this can lead to the ultimate end of proceedings, or a temporary hold. In many international cases it is not uncommon to have separate ongoing processes in different jurisdictions if one party can prove that local financial matters will not be handled without Finnish proceedings.

2.2 Service and Process

If spouses cannot agree on the financial matters and distribution of assets, the district court will appoint a distributor upon application. Such application may be filed by either spouse or one of them. No reasons need be supplied for the request to nominate a distributor.

If only one of the spouses makes the application, the district court ex officio serves the application on the other spouse and reserves for the other spouse the possibility to issue a written statement on application. As there are no grounds needed, the only thing that can be disputed in practice is the distributor's person; who will be the distributor.

Although the law does not require it, distributors' duties are performed by attorneys or other legal professionals (law professors, former judges, etc). The distributor must be absolutely impartial with regard to all parties.

In Finland, it is not possible to have all financial matters handled in a court of first instance. Only limited and specific marital property financial matters can be taken to court, which happens very seldom. A distributor is the first instance and after one is nominated, all services are private acts between parties and the distributor. It

is up to the distributor to take care of all tasks and they can request court help for services.

A distributor's decision on financial matters can be appealed to a district court and from there it can be taken to an appeals court and even to the supreme court if leave to appeal is granted. In this way spouses' financial matters will be handled in court. A small portion of cases end up in court through appeal.

Appointment of a distributor is decided usually within weeks if the spouses agree on a person. If not, it can take up to one year to appoint a distributor, and it is possible to appeal this. After a distributor is appointed, there is no specific timeline. It all depends on the case and time required to handle the case. In international cases with significant assets, proceedings can take several years.

2.3 Division of Assets

The main rule according to the Marital Act is that all assets, after the deduction of debts, are equally divided between the spouses. By law, this division includes all global assets, all assets owned and all profits gained, even before the marriage, up to the date when divorce was filed by one of the spouses. Also, assets inherited or received as gifts are part of division if the testator or donor has not ruled this out in a will or deed of gift, which is nowadays common practice.

In the first stage, all assets and debts are valued, and division of property is made in euros. As a main rule, both parties keep their own assets and debts. The party that has more assets is liable to pay adjustment to the other party. They can always pay this in cash or with marital property they own. If this is not decided by the party that is liable to pay, payment will be determined by the distributor, or if appealed, by court. In these cases, most disputes arise from the valuation of assets. If the parties have jointly owned property, ownership can be dissolved after separation. If no other solution is found, the distributor ultimately would sell such property and the parties will be paid the sales price.

As equal division of property is a rule, it can lead to an unreasonable result or the other spouse receiving unjust financial benefit. In such a matter, the Marriage Act allows for adjustment of division of property. A distributor or court can adjust the outcome after considering the duration of the marriage, the activities of the spouses for their common household and for the accumulation and preservation of the property, and also other comparable facts regarding the finances of the spouses. Adjustment of division of property is an exception and it must be regarded as such. Most commonly, it is used when there is short-term marriage, normally one under five years, or when there is a significant difference of assets and those assets are not accumulated during the marriage.

Both spouses must disclose all their assets and debts to the distributor. The distributor has limited resources to search assets and they have no power to give orders to disclose assets. This is regarded as somewhat problematic as it can be quite easy for parties to hide assets. Courts have legal power to give orders to disclose assets, but this is in practice non-existent, as it is still only up to the party to disclose assets. Courts cannot make orders for disclosure to third parties. Not disclosing assets when asked is considered a criminal offence (fraud). Courts have quite strict practice with such frauds, and in cases where significant amounts have not been disclosed fraudulently, jail time for over two years can be sentenced. This fact prevents asset hiding in most cases.

Trusts are not recognised in Finland. However, if one is beneficiary in trust or assets have been transferred into trust to avoid division of marital property, the trust assets can be taken into consideration.

2.4 Spousal Maintenance

Spousal maintenance is recognised in legislation. In practice it is used in very few cases. During marriage it is mostly unknown although possible by law. The main approach is that spousal maintenance duties are fulfilled during the course of marriage as spouses wish, and after the breakdown of marriage, spousal maintenance responsibilities are over and it is up to each spouse take care of their own needs, and if needed, the social welfare system will support.

Spousal maintenance is used mainly in divorce cases when the other party is from a foreign, low-income country and has no social network or job in Finland and has limited financial resources. In these cases maintenance can be ordered until division of property is finalised and if that does not suffice, maintenance can continue normally for a maximum of a year or two.

The amount of maintenance is normally relatively low and not determined by the standards of living during the marriage although it can have some relevance.

2.5 Prenuptial and Postnuptial Agreements

Prenuptial and postnuptial agreements are recognised and must be followed by courts and distributors. Spouses may enter a marital property agreement either before they marry or at any time during the marriage. This is quite a popular agreement because, as described above, the Finnish marital property regime covers all assets, even all assets before the time of marriage.

Such an agreement must be made with the formalities required by law (signatures and witnesses), but it is made solely privately. It is not possible to have a notarised prenuptial agreement. To make an agreement valid, it must be registered with the local magistrate.

As said, agreements are strictly followed as a main rule. The law allows for the adjustment of a marital property agreement. Use of this legislation is very limited in practice. Only in cases when an agreement can lead to an obviously unjustifiable or unreasonable result, adjustment of agreement can be used. To some extent spouses' financial needs can result in adjustment of agreement, which minimises the use of spousal maintenance.

Courts adjust marital property agreements commonly in cases of long marriage and a spouse with no notable assets who has made a significant effort in the household or worked without decent pay in a family company and the other spouse has accumulated wealth during marriage. Even in such cases, division of property is not judged as equal division. The result of adjustment is normally a fraction of assets or a fixed amount.

2.6 Cohabitation

There is special legislation in relation to unmarried cohabitants. The main rule is that parties will have their own assets after separation and there is no possibility of division of assets.

However, a cohabitant can have a monetary claim of excessive inputs into the other cohabitant's asset. There is quite a heavy burden of proof from the claimant, but orders to pay exist in practice. Successful cases are normally quite obvious where the other cohabitant has paid all family costs and even paid partly for assets

owned by the other party. Everyday spending cannot be normally used successfully as ground for claims.

To use this cohabitation legislation there are two requirements. Cohabitation must have continued at least five consecutive years or cohabitants must have a common child. This does not guarantee any compensation. Requirements for compensation set in law must be met.

2.7 Enforcement

If a party has a court order, it is enforceable by law and a claim can be taken to the enforcement office. The enforcement system is a public service and a separate office. It is considered to be effective and cheap for the claimant.

If a financial decision is made by the distributor, as it is in most cases, this decision is not enforceable and one must have enforcement of judgment first.

Judgments and similar orders from European Union countries are enforceable. Orders from other countries are not. There are exclusions on spousal maintenance orders and those can be accepted as enforceable.

2.8 Media Access and Transparency

As most cases are handled by distributors, these are completely private proceedings, and the media does not have any access to these proceedings. This is one of the reasons why the system of distributors is widely accepted.

If a case is appealed to court, the main rule is that all material and cases are public. It is possible to request that financial information of spouses should be kept private, but courts normally do not accept such requests.

It is not possible to anonymise proceedings and names of the parties at court.

The media's ability to report is somewhat limited and it cannot disclose the names of parties unless it is a question of a public figure or publishing the names has public interest. This is quite well followed by the media. Politics, celebrities, sportsmen and well-known business figures are normally the ones whose names are published.

One important fact is that after the prenuptial or postnuptial agreement has been registered in a magistrate's court, which is mandatory, this agreement is a public document and it can be obtained from the register by anyone. A magistrate can hide some financial information in the agreement (eg, exact amounts to be paid in case of divorce).

2.9 Alternative Dispute Resolution (ADR)

Private distributors are the first instance to handle financial matters. The law states that it is the distributor's duty to encourage parties to agree their dispute and help parties to reach agreement. It depends on the case on how successful this can be. In the author's experience, about half of the cases end up in agreement with the distributor's proceedings. Such agreement is final and comparable to a court judgment. To get it enforced, exequatur must be applied for from the court, but this is not usually needed, as part of the agreement is that the agreement is enforced before it is final.

If the case is appealed to court, the court offers the possibility of mediation. Such mediation is stated in law and it is completely voluntary. Not using it does not have any negative effect on the normal court proceeding. Mediation is run by another experienced judge, that was not previ-

ously involved with case. There are no minutes drawn up and discussions are informal. A key objective is that the dispute be settled without following the legislation and parties are free to determine the terms of settlement. Mediation at court is free of charge, but if parties use counsel, parties are responsible for their own legal fees. One of the biggest advantages is speed of the process, which can be significantly less than with normal court proceedings.

If agreement is reached at court mediation, the status of agreement is equal to court judgment. Agreement is legally final and enforceable immediately.

3. Child Law

3.1 Choice of Jurisdiction

In children-related proceedings, Finnish courts have jurisdiction if the child has habitual residence in Finland at the time the matter is taken to court. This is the main rule and nationality has no relevance in this matter. Courts tend to rule that they have jurisdiction quite easily if the child is registered in Finland with a Finnish resident parent. Any other proof, if living in Finland, is also carefully considered.

Residency is considered by normal residency rules. It is stated in law that a child who has lived in Finland without interruptions for at least one year immediately before the matter was taken to the court, is considered to be habitually resident in Finland, unless otherwise shown in the case.

A Finnish court can also have jurisdiction after its consideration, even if the child is not habitually resident in Finland at the time the case is taken to court, if the child is currently residing more or less temporarily in Finland or if the consideration is deemed justified for some other reason and:

- the child has been habitually resident in Finland during the year preceding the court case; or
- the child has, all relevant things considered, another close connection to Finland.

3.2 Living/Contact Arrangements and Child Maintenance

If agreement on the child's living arrangements and visitation are not reached, either parent can take the case to the court. Courts consider cases as any dispute, and child matters must be taken into expedited handling.

Both parents are legal custodians of a child. This means that parents together decide all relevant matters relating to the child. Divorce or separation does not change this principle. The fact that the other parent lives in another country does not change this either. Parenting decisions would be made together also after separation. Living in different countries is a practical question, and the principle of common custody is clear, but courts have powers to order otherwise too.

The question about where a child would live after separation is considered from the child's point of view. If parents live close to each other, living is based more and more on a week-by-week basis with each parent. The key principle is that both parents are considered to be good parents to live with.

In cases where parents do not live close to each other or they live in different countries, a court would decide where the child should live. In international cases, especially if the child has not lived for long in Finland, the child could be

ordered to live in the other country if that is in the best interest of the child.

Visitation rights are important to parties and the child. Courts try to establish adequate visitations if parents cannot agree and one parent is opposing visitations.

If parents agree on a child's living and visitations/contact, courts must verify such agreement if it is not obviously contrary to the child's interest. In practice, agreements are always verified.

Maintenance is determined on three factors.

- Net income of primary caregiver (parent living with children) after housing costs and other necessary living costs.
- Net income of other parent after housing costs and other necessary living costs.
- Needs and spending of children, which is decisive.

Both parents must take part in payments. When one parent has more income, they are responsible for the majority of payments. When doing calculations, both parents are expected to work and have income, if there is not adequate reason not to work.

Child support is not meant to cover 100% the previous standard of living, but more likely an average Finnish standard of living. Child support payments are relatively low compared to some jurisdictions. It is meant to cover basic needs. Healthcare is free as it is state covered. If the child has activities and hobbies that are reasonable, those must be covered.

Parents can agree maintenance payments freely without court involvement and this happens most of the time. Parents are also encouraged to use a local social welfare office which offers guidance on child maintenance and visitation agreements.

If not agreed, a court will order one parent to pay maintenance, and such order is enforceable. Court orders are normally monthly payments until the child is 18 years of age. Increases in payment are determined by law reflecting the cost-of-living index. If child maintenance needs to change or parents' ability to pay changes significantly, a new court order must be applied for, or parents must make new agreements.

A child must be represented by a parent or other legal guardian when claiming maintenance.

3.3 Other Matters

Courts have powers to make orders on all parental responsibilities and powers – eg, schooling, medical treatment, religion, holidays, language taught to child, etc, if parents have significant disagreements on these matters. In practice this is applied rarely and such matters should be decided by parents.

If parental alienation is obvious, courts take this into account when deciding child matters and especially parents' access to the child. All things are considered and courts tend to promote the establishment of the alienated parent's contact with children. This can include proactive enforcement orders so the alienated parent can act swiftly to enforce orders.

A child may be heard in court in person, if this is necessary for resolving the case and the child requests it or consents to it. Children under 12 years of age may, however, be heard in person only if the hearing is absolutely necessary and it must be considered that the hearing will not cause the child any significant harm. A child

can be heard with nobody else but one or more members of the court present, if this is necessary to protect the child or to find out the child's independent opinion. If the child is considered mature enough to give their opinion on the case, it will be taken into account, all things being considered. The older the child is, the more decisive the child's opinion can be. If a child is, for example 16 or older, and the child's opinion is genuine, it has great significance. In practice, children are not very often heard at court. A child's opinion is normally reported in a status evaluation made by a local social office at the request of the court.

3.4 ADR

Parents have the option to use a local social welfare office's services on child matters. These offices are required to offer help to parents to reach an agreement on all child-related matters.

If parents are willing to agree, this is the most common way to take care of an agreement outside court and the majority of agreements are actually made at the social welfare offices. If agreement is reached, the social welfare office has powers to verify such agreement and after this, the parents' agreement is equivalent to a court order and it is also instantly enforceable like a court order.

Also in child-related matters, the courts offer the possibility of mediation. Such mediation is stated in law and it is completely voluntary. Not using it does not have any negative effect on the normal court proceeding. Mediation is run by another experienced judge, that was not previously involved with the case. One of the biggest advantages is the speed of the process, which can be significantly less than with normal court proceedings.

If agreement is reached at court mediation, the status of the agreement is equal to a court judgment. Agreement is legally final and enforceable immediately.

Use of these alternative mechanisms are voluntary and a case can be taken into full court handling at any time.

3.5 Media Access and Transparency

If a child-related case is at court, those are public cases. Only documents and hearings related to health issues are generally non-public information. The media is able to report on these matters, but to protect the privacy of the child, names of the parties cannot be disclosed if there is no substantial public interest in the case.

Names of the parties cannot be anonymised if the case is public, as they normally are. The media is not allowed to report names as a default to protect the privacy of the parties. The media follows this expectation well and child-related matters are rarely in the media; mainly child-abduction cases are ones that are reported.

FRANCE

Law and Practice

Contributed by:
Elodie Mulon, Emmanuelle Bonboire-Barthélémy and Louise Astruc Baciotti
Chauveau Mulon & Associés

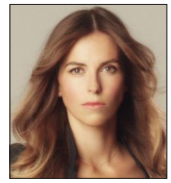
Contents

Contributed by: Elodie Mulon, Emmanuelle Bonboire-Barthélémy and Louise Astruc Baciotti,
Chauveau Mulon & Associés

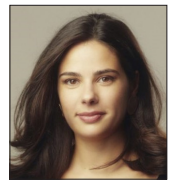
Chauveau Mulon & Associés (CM&A) is a distinguished firm dedicated to handling various facets of family law, encompassing both patrimonial and non-patrimonial aspects. With a team consisting of nine partners, 15 associates and a dedicated administrative staff, the firm is well-positioned to address a wide range of family law matters. CM&A takes pride in its acclaimed proficiency in international family law, covering areas such as international marriages and divorces, child abductions, international successions and the recognition of foreign legal decisions. Recently, the firm has expanded its global footprint by deploying one of its partners to establish a presence in Australia. This initiative is specifically designed to enhance the firm's capabilities in offering legal counsel to French expatriates.

Authors

Elodie Mulon is a founding partner of CM&A dedicating her professional practice to family law in national and international contexts, focusing on both patrimonial and non-patrimonial aspects. She serves as President of the IDFP (Institute of Family and Heritage Law), President of CALIF (Arbitration Centre for Family Disputes) and President of the CCBE Committee on Family and Succession Law. Elodie has held numerous roles in representative bodies of the legal profession and is presently a member of the board of the National Bar Council. She is also a member of international associations such as the UIA (International Association of Lawyers) and the IAFL (International Academy of Family Law).



Emmanuelle Bonboire-Barthélémy is a partner at CM&A specialising in international family and patrimonial law. Based in Sydney since 2024, Emmanuelle drives the firm's international development and contributes to Expats by CM&A, a service dedicated to expatriates. With expertise in complex international cases, she advises French nationals abroad and foreign clients in France on matters such as marriage contracts, wills, donations, filiation and cross-border disputes. Her dual qualifications in law and wealth management allow her to provide tailored support in divorce, family law and inheritance issues.



Louise Astruc Baciotti is a junior associate at CM&A. She specialises in international family law, assisting an international clientele on the extrapatrimonial aspects of their divorce and separation. She regularly publishes articles in the Gazette du Palais, a trade magazine specialising in family law.

Contributed by: Elodie Mulon, Emmanuelle Bonboire-Barthélémy and Louise Astruc Baciotti,
Chauveau Mulon & Associés

Chauveau Mulon & Associés

27, rue Duret
75116
Paris
France

Tel: +33 1 42 68 24 24
Email: cabinet@cm-associes.com
Web: www.cm-associes.com

1. Divorce

1.1 Grounds, Timeline, Service and Process

Grounds for Divorce

In France, there are four grounds for divorce, applicable to both same-sex and opposite-sex couples.

- *Alteration définitive du lien conjugal* – when filing for divorce, the spouses must have ceased cohabitation for one year (Article 237/238 of the Civil Code).
- *Acceptation du principe de la rupture du mariage sans considération des faits à l'origine de celle-ci* – either or both spouses can request divorce without contesting the grounds. Once accepted, divorce cannot be retracted, even through an appeal (Article 233 of the Civil Code).
- *Divorce pour faute* – this can be requested by one spouse when there is a serious and repeated violation of marital duties by the other spouse, making continued cohabitation intolerable (Article 242 of the Civil Code).
- *Divorce par consentement mutuel par acte sous signature privée contresigné par avocat déposé au rang des minutes du notaire* – mutual consent divorce by private agreement, countersigned by lawyers and deposited with a notary (Article 229-1 of the Civil Code).

Grounds for Civil Partnership Dissolution

A civil solidarity pact can be dissolved through the death of one partner, the marriage of one or both of the partners or by joint declaration or the unilateral decision of one partner (Article 515 of the Civil Code). Unlike divorce, there is no specific foundation for dissolution similar to divorce grounds.

Partners can dissolve the pact by jointly declaring it to the civil registry or the notary who recorded it. If only one partner decides to dissolve the pact, they must serve a unilateral declaration on the other partner and provide a copy to the civil registry or notary.

Divorce Process and Service of Proceedings

Out-of-court divorce

When spouses agree on divorce principles and consequences, they can formalise the agreement in a convention drafted by their lawyers, signed by both parties, countersigned by lawyers, and registered with a notary (Article 229-1 of the Civil Code).

Spouses cannot opt for mutual consent divorce if one of the minor children requests to be heard

by the judge or if one spouse is under a protective regime (Article 229-2 of the Civil Code).

The draft divorce agreement, along with all its annexes, must be notified to the parties at least 15 days before the convention signing date to allow for reflection. On the signing day, parties and their respective lawyers must be present, and remote signing is not allowed.

Upon registration by the notary, compliance with all formalities is verified by the notary, including ensuring that the children have been informed of their right to be heard and the 15-day reflection period has been observed. The divorce between the parties and third parties takes effect in principle from the date of registration by the notary (Article 229-1 of the Civil Code).

Judicial divorce

Spouses can jointly or unilaterally seize the family court judge for divorce, with no minimum marriage duration required. However, if one spouse seeks divorce for *altération définitive du lien conjugal*, a one-year separation period is necessary, assessed at the time of divorce pronouncement (Article 1107 of the Code of Civil Procedure).

Joint application

In the case of a joint application, spouses submit a joint petition to the court, expressing their agreement on divorce and its consequences, seeking approval from the judge. This allows spouses, particularly in an international context, to obtain a divorce judgment even if they agree on all aspects.

In a joint application, the family court clerk sends the parties a summons to an orientation and provisional measures hearing where the parties and their lawyers can express their agreement.

Unilateral application

For a unilateral application, one spouse initiates the process through a divorce summons sent to the clerk, outlining provisional measures during the divorce procedure and the divorce pronouncement consequences. The summons must include, on penalty of nullity, the date, time and location of the orientation and provisional measures hearing. This date must be requested from the clerk before serving the summons to the defendant.

The petitioner must serve the divorce summons to the opposing party through a bailiff. To validly file the case, the petitioner must provide evidence of this service at least 15 days before the orientation and provisional measures hearing.

The divorce process unfolds in two stages.

- The provisional measures hearing: The opposing party will respond in writing to the requests for provisional measures. The petitioner may then submit a reply. After this hearing, the judge issues an order on provisional measures, organising family arrangements until the divorce pronouncement. The judge also sets the date for the petitioner to conclude on the divorce's merits, initiating the discovery period during which parties exchange evidence and arguments. At the end of this period, the judge schedules the pleading hearing.
- The merits hearing: The parties will exchange written submissions regarding the final terms of the divorce. After this second hearing, the judge will rule on the principle of the divorce and its effects.

Legal representation by an attorney is mandatory throughout the judicial divorce process.

Religious marriage and divorce

Religious marriages celebrated abroad can be recognised in France if the celebration complies with the law of the state where the marriage has been celebrated and is not contrary to French international public policy (eg, in terms of the age of the spouses). In French law, a religious marriage must be preceded by a civil marriage, failing which the minister of worship who conducts the marriage could face six months of imprisonment and a fine of EUR7,500.

Religious divorces pronounced abroad can be recognised in France if their effects do not violate French international public order, particularly gender equality.

Judicial separation (Articles 296 et seq of the Civil Code)

Legal separation (*séparation de corps*) allows spouses to remain married while terminating the duty of cohabitation. Legal separation is often sought by couples who do not wish to divorce for religious or cultural reasons.

Legal separation can be established by a private agreement deposited with a notary or by a court judgment. It can be requested on the same grounds and conditions as divorce (Article 296 of the Civil Code).

In case of legal separation, the duty of support persists, and the judgment of legal separation or the mutual consent legal separation agreement may stipulate that one spouse must pay alimony (*devoir de secours*) to the other (Article 303 of the Civil Code).

Legal separation always entails the separation of the spouses' assets (Article 302 of the Civil Code).

Upon the death of one of the legally separated spouses, the surviving spouse retains the rights granted by law to the surviving spouse (Article 301 of the Civil Code), unless otherwise stipulated in the agreement.

The resumption of common life by the spouses terminates legal separation. However, to be opposable to third parties, the resumption of common life must be recorded by a notarial act or declared to the civil registry (Article 305 of the Civil Code).

When legal separation has lasted two years, one of the spouses can request the conversion of the legal separation judgment into a divorce judgment (Article 306 of the Civil Code). This also applies if legal separation has been mutually agreed upon. In this case, one spouse can request its conversion into mutual consent divorce.

Nullity

In the event of non-compliance with essential marriage conditions, the marriage can be annulled. However, to ensure the legal stability of personal status, only the most severe violations of validity conditions result in marriage nullity.

To secure the institution of marriage, not all nullities follow the same regime. Some are relative (can be raised by persons designated by law), and others are absolute nullities (can be raised by any person with an interest).

Relative nullities (Article 180 of the Civil Code) include:

- lack of free consent from both or one of the spouses;
- the exertion of coercion on both or one of the spouses; and

- error regarding the person of the other spouse or their essential qualities.

In these cases, only the spouses, the spouse whose consent was not free or the public prosecutor can seek marriage nullity. These grounds for nullity can only be invoked within five years from the marriage or from the spouse's acquisition of full freedom or acknowledgment of the error (Article 180 of the Civil Code).

Also, if the consent of the father, mother, family counsel or ancestors was necessary, the marriage nullity can only be requested by them or by the spouse who needed to consent (Article 182 of the Civil Code). This action is also subject to a five-year limitation period from the time the person whose consent was required became aware of the marriage or from the time when the spouse reached the age required to consent to marriage independently.

Finally, absolute nullities (Article 184 Civil of the Code) include:

- legal incapacity – if the marriage was contracted before the spouses reached the age of 18;
- lack of consent from one of the spouses;
- absence of one spouse during the marriage celebration in France or abroad;
- bigamy – if a second marriage was contracted before the dissolution of the first;
- incest – if the marriage was celebrated between ascendants, descendants or allied individuals in direct line, in the same line or between members of the same sibling group, or between a nephew/niece and their uncle/aunt; and
- incompetence of the civil registrar.

In these cases, the marriage can be challenged within a 30-year period from its celebration by the spouses, any person with an interest or the public prosecutor.

1.2 Choice of Jurisdiction

Jurisdictional Grounds

French courts apply the provisions of Regulation (EU) No 2019/1111 ("Brussels IIb Regulation (recast)") for proceedings initiated after 1 August 2022, and those of Regulation (EU) No 2201/2003 ("Brussels IIb") for proceedings initiated before that date.

According to Article 3 of the Brussels IIb Regulation (recast), French courts have jurisdiction over the divorce or legal separation of same-sex or opposite-sex spouses if:

- the habitual residence of the spouses is in France;
- the last habitual residence of the spouses is in France, insofar as one of them still resides there;
- the habitual residence of the defendant is in France;
- in the event of joint application, the habitual residence of either spouse is in France;
- the habitual residence of the petitioner is in France if they resided there for at least one year immediately before filing the petition;
- the habitual residence of the petitioner is in France if they resided there for at least six months immediately before filing the petition, and the petitioner is a French national; or
- French is the nationality of both spouses.

If the foregoing criteria do not establish the jurisdiction of any European court, Article 6 of the Regulation states that each member state's domestic law governs this jurisdiction. In France, Articles 14 and 15 of the Civil Code provide a

jurisdictional privilege, allowing French courts to have jurisdiction if the petitioner or the defendant is a French national.

These provisions do not apply to the dissolution of the French civil partnership (*pacte de solidarité civile*), as its dissolution occurs outside any judicial process (see **1.1 Grounds, Timeline, Service and Process** – Grounds for Civil Partnership Dissolution).

Domicile, Residence and Nationality

In France, the concepts of habitual residence and nationality are crucial for determining French court jurisdiction in divorce/legal separation matters, as these are the connecting factors favoured by European regulations.

- Habitual residence – French courts consider the concept of habitual residence as an "autonomous concept of European Union law". They apply the case law of the Court of Justice of the EU regarding the definition of a person's habitual residence under European regulations. Therefore, the Court of Cassation has defined "habitual residence" as "the place where the individual has established, with the intention of giving it a stable character, the permanent centre of their interests".
- Nationality – a person's nationality is assessed according to French law criteria.
- Domicile – French law does not recognise the notion of domicile.

Contestation of Jurisdiction

The jurisdiction of French courts can be contested by either party or by the judge. The lack of jurisdiction of the court must be raised, under penalty of inadmissibility, before any defence on the merits or an objection.

Forum and Staying Proceedings

A party can request a French court to stay proceedings pending the decision of a foreign court on its jurisdiction. The legal basis, however, differs depending on whether the states involved are two EU member states or an EU member state and a third state.

Lis pendens between EU member states

Article 20 of the Brussels IIb Regulation (recast) stipulates that if two divorce/legal separation proceedings have been initiated between the same parties, the secondly seised court automatically suspends its proceedings until the jurisdiction of the firstly seised court is established. Once the jurisdiction of the firstly seised court is established, the secondly seised court must defer to the firstly seised court.

Lis pendens between France and a third state

In the absence of bilateral agreements governing lis pendens, Article 100 of the Code of Civil Procedure will apply. The existence of a situation of lis pendens thus requires three elements:

- first, at the time the French court is seised, another process must already be pending before the foreign judge;
- second, the lis pendens situation necessitates that the courts are seised with the same dispute, which presupposes the triple identity of parties, cause and subject matter; and
- third, it is essential that both French and foreign courts have jurisdiction.

If the same dispute is pending before two equally competent courts of the same level, the court secondly seised must defer if either party requests this, or of its own accord.

The factor considered by French courts is therefore chronological. Hence, the date of seising

of the court is crucial. In France, following the new divorce procedure, the date of receipt of the summons by the process server of the requesting state marks the beginning of the divorce procedure and the seisure of the French jurisdiction.

However, it is well-established jurisprudence that French courts may refuse to stay proceedings if the decision to be made abroad is not likely to be recognised in France. The admissibility of the foreign decision in France is assessed based on the criteria set by the Cornelissen decision (indirect judicial competence of the foreign court rendering the decision, absence of fraud and absence of conflict with French international public order).

2. Financial Proceedings

2.1 Choice of Jurisdiction

Grounds for Jurisdiction in Financial Proceedings

The financial consequences of divorce in France encompass, on the one hand, financial support obligations and, on the other hand, the settlement of the matrimonial regime.

Jurisdiction for maintenance obligations

Jurisdiction over support obligations in France is determined in accordance with Regulation (EC) No 4/2009 of the Council of 18 December 2008, known as the "Maintenance Regulation".

Spouses can designate the French jurisdiction as competent to handle their dispute regarding support obligations if (Article 4):

- one of the spouses has their habitual residence in France;
- one of the spouses holds French nationality;
- the French jurisdiction is competent to grant the divorce (see **1. Divorce**); or
- the spouses' last common habitual residence was in France and lasted at least one year.

If the spouses have not designated the competent jurisdiction to decide on support obligations, the French judge has jurisdiction to address support obligations between spouses if (Article 3):

- the defendant has their habitual residence in France;
- the support creditor has their habitual residence in France; or
- the French judge also has jurisdiction to grant the divorce, except if their jurisdiction is solely based on the nationality of one of the parties (see **1. Divorce**).

As a subsidiary provision, if no judge within the EU has jurisdiction, the French judge may have jurisdiction if:

- the spouses share common French nationality (Article 6); or
- a procedure cannot reasonably be conducted or initiated in a third state, and the dispute has sufficient connection with the member state of the court seised (Article 7, forum necessitatis).

Jurisdiction for matrimonial property regime

Jurisdiction concerning the matrimonial property regime is determined in France under Regulation (EU) No 2016/1103 of the Council dated 24 June 2016, known as the "Matrimonial Property Regimes Regulation".

Prospective spouses can designate the French jurisdiction to oversee the settlement of their matrimonial property regime if French law

applies to their matrimonial regime or the marriage was celebrated in France (Article 7).

If the spouses have not designated the competent court to decide on the settlement of the matrimonial property regime, distinctions are made.

- If the settlement of the matrimonial property regime occurs simultaneously with the divorce (Article 5) – the French judge having jurisdiction to rule on the spouses' divorce will also have jurisdiction over matters related to the dissolution, settlement and distribution of the spouses' matrimonial property regime. However, this extension of jurisdiction will be subject to the spouses' agreement when the French judge's competence for divorce is based on the following criteria:
  (a) the petitioner's residence is in France for at least one year, or for six months if they are French; or
  (b) rules of residual competence and the application of French domestic law (see **1. Divorce**).
- If the settlement of the matrimonial property regime occurs after the divorce (Article 6) – the French judge will have jurisdiction over the settlement if:
  (a) the habitual residence of the spouses is in France;
  (b) the spouses' last habitual residence was in France, and one of them still resides there;
  (c) the defendant's habitual residence is in France; or
  (d) both spouses hold French nationality.

These criteria are hierarchised.

When no court of a member state has jurisdiction, French courts will have jurisdiction as long as an immovable property of one or both spouses is located in France (Article 10). The jurisdiction will be limited to this property.

Contestation of Jurisdiction

The jurisdiction of French courts can be contested by either party or by the judge. The lack of jurisdiction of the court must be raised, under penalty of inadmissibility, before any defence on the merits or an objection.

Lis Pendens

A party has the option to seek a suspension of proceedings in the French court while awaiting a decision from a foreign court regarding its jurisdiction. However, the legal foundation for this varies depending on whether the states in question are two EU member states or involve an EU member state and a third state.

Lis pendens with a member state

Under the Matrimonial Property Regimes and Maintenance Regulations, there exists lis pendens when two different courts of EU member states are seised with claims made by the same parties, with the same subject matter and cause (Regulation (EU) No 2016/1103, Article 17, Section 1, and Regulation (EC) No 4/2009, Article 12).

In this scenario, both regulations dictate a similar approach:

- initially, the court of the subsequently seised member state suspends proceedings until the jurisdiction of the first court seised is established; and
- subsequently, once the jurisdiction of the first court is established, the subsequently seised court defers to the first court.

Therefore, the crucial criterion is the date the court is seised. In France, following the new divorce procedure, the date of receipt of the summons by the process server of the requesting state marks the beginning of the divorce procedure and the seising of the French court.

Lis pendens with a non-member state

The previously outlined rules do not apply whenever the French judge is seised concurrently with courts of a non-EU state.

To address the lis pendens issue, it is necessary to determine whether there is an applicable rule of conventional origin (eg, Lugano Convention of 30 October 2007, Franco-Moroccan Convention of 10 August 1981, or Franco-Belgian Convention of 8 July 1899).

In the absence of an applicable rule of conventional origin, Article 100 of the French Code of Civil Procedure will apply (see **1.2 Choice of Jurisdiction** – Lis pendens between France and a third state). In this scenario, the same solution applies: the second seised judge acknowledging the exception must defer to the first seised court.

Financial Claims After a Foreign Divorce

Settlement of the matrimonial property regime following a foreign divorce

The matrimonial property regime can be settled either during or after the divorce proceedings. If it was not addressed during the foreign divorce, it may still be resolved in France, provided the French courts have jurisdiction (see **2.1 Choice of Jurisdiction** – Jurisdiction for matrimonial property regime).

Post-divorce spousal maintenance after a foreign divorce

Spousal maintenance (referred to in France as prestation compensatoire) cannot be awarded in France following a divorce granted in another country. The French Supreme Court recently ruled (Cass 1re civ, 7 February 2024, No 22-11.090) that such claims must be included in the original divorce judgment.

This decision has sparked criticism for conflating divorce proceedings with spousal maintenance, which are treated as separate matters under private international law. Indeed, the European Maintenance Regulation allows maintenance claims to be adjudicated by courts distinct from those handling the divorce based on criteria such as the parties' residence or jurisdiction agreement (Article 3(c), 2008 Regulation).

2.2 Service and Process

Service and Process for Spousal Support and Compensatory Allowance

Spousal support (*devoir de secours*) and compensatory allowances (*prestation compensatoire*) are determined during the divorce proceedings (see **1. Divorce**).

Regarding interim measures, spousal support for one of the spouses can be ordered at any time of the divorce proceeding (Article 212 of the Civil Code). However, it cannot extend beyond the dissolution of the marriage. Modification of spousal support, in amount or principle, can be requested throughout the procedure if new elements justify it (Article 1118 of the Civil Procedure Code).

As for substantive measures in divorce, only a compensatory allowance, often paid as a lump sum, can be determined. To assist the judge in determining the compensatory allowance,

especially when identifying and valuing personal assets or incomes of one of the parties poses challenges (Article 255 9° of the Civil Code), an expert can be appointed for an expert opinion as part of the divorce procedure.

The duration of the divorce procedure, excluding appeals, generally ranges between two and four years depending on the complexity of the case and the assets involved.

Service and Process for Liquidation and Division

The liquidation of the matrimonial regime can occur within the divorce proceedings or through a separate procedure after the divorce.

Post-divorce liquidation and division proceedings

Following the divorce, the spouses must settle their matrimonial regime. Initially attempted amicably, division becomes judicial only upon failure.

The judicial procedure for liquidation and division starts with a summons, which, to avoid dismissal (Article 1360 of the Civil Procedure Code), must contain:

- a summary of the efforts made by the parties towards an amicable division;
- a brief description of the assets to be divided; and
- the petitioner's intentions regarding the distribution of assets.

The judicial procedure then varies depending on the type of division. In a simple division ("short process"), the judge orders the division when disagreements are straightforward:

- identification of the assets and liabilities to be divided;
- agreement or judicially fixed values of assets; and
- clear understanding of each party's rights, including calculations of reimbursements and debts.

In cases where a simple division is not feasible, a complex division ("long process") involves the judge referring to a notary for the liquidation and division operations and appointing a judge to oversee these actions (Article 1364, Section 1 of the Civil Procedure Code). The notary has a year to carry out this task.

Upon the notary's designation, parties are summoned, and a provisional liquidation statement is drafted based on available information. Each party can provide their observations on this statement.

If parties disagree with the liquidation statement, judicial division proceeds, and the notary submits both the liquidation statement and a statement of observations summarising each party's stance regarding the appointed judge (Article 1373 of the Civil Procedure Code). The judge then resolves disagreements (Article 1375 of the Civil Procedure Code).

Liquidation during divorce proceedings

The divorce judge can also decide on liquidation and division of the spouses' property interests during the divorce proceedings if either party requests it (Article 267 of the Civil Code).

Parties must prove the existence of remaining disagreements. This proof can stem from the report of the notary appointed for interim measures to prepare a liquidation project for the matrimonial regime (Article 255, 10° of the Civil Code).

2.3 Division of Assets

Matrimonial Regimes

Choice of matrimonial regime at the time of marriage

Spouses have the freedom to choose their matrimonial regime. The liquidation rules for these different matrimonial regimes are determined by the Civil Code, and the court does not have the capacity to regulate or reallocate assets or resources on divorce.

Application of the legal regime does not preclude a prior contract, except to include specific adjustments. However, to establish a contractual regime, spouses must draw up a marriage contract (see **2.5 Prenuptial and Postnuptial Agreements**).

The choice of matrimonial regime does not affect the effects of spousal separation regarding support obligations (alimony and compensatory allowances).

The legal matrimonial regime

Spouses may opt not to make an explicit choice and will then be subject to the legal regime of community property (*communauté réduite aux acquêt* s) (Article 1400 to 1491 of the Civil Code). This regime comprises the following asset categories.

- Common or acquired property, which includes assets acquired by the spouses separately or together during the marriage, including their incomes and the profits from their separate assets (Article 1401 of the Civil Code). Any property acquired during the marriage is deemed to be common property (Article 1402 of the Civil Code).
- Each spouse's separate assets, including assets received through inheritance or gift during the marriage.

Upon the liquidation of the regime, claims (*récompense*) can be calculated.

- The community owes compensation to a spouse whenever it benefited from a separate property (Article 1433 of the Civil Code).
- The community is entitled to compensation whenever an expenditure was made by it for the personal benefit of a spouse (Article 1437 of the Civil Code).

The assessment modalities are determined by the Civil Code.

Conventional matrimonial regimes

Spouses can also choose one of the standard regimes organised by the law:

- separation of assets (*séparation de biens*) (Articles 1536 to 1543 of the Civil Code);
- participation in acquisitions (*participation aux acquêts*) (Articles 1569 to 1581 of the Civil Code); or
- conventional communities (*communautés conventionnelles*) (Articles 1497 to 1526 of the Civil Code).

Moreover, spouses can modify certain rules of existing regimes. In communal regimes, they can establish "matrimonial advantages" (*avantages matrimoniaux*) to alter:

- the consistency of the common mass – eg, a provision to convert separate property into common property (*clause d'ameublissement*), a clause to exclude a property or a category of property from the community (*clause de stipulation de propre*);
- rules regarding compensations in principle or their evaluation; and
- asset distribution upon death to favour the survivor – eg, a clause allowing the surviv-

ing spouse to withdraw a common property before any inheritance division (*clause de préciput*) and a clause allowing complete allocation of assets to the survivor (*clause d'attribution intégrale*).

In case of divorce, these "matrimonial advantages" are maintained if they took effect during the marriage but are automatically revoked if they were to take effect only upon marriage dissolution (Article 265 of the Civil Code).

Spouses can also modify separate regimes by changing the rules regarding claims or by creating a limited community enclave for one or more assets (*société d'acquêts*).

Foreign matrimonial regimes

Spouses may be subject to a foreign matrimonial property regime either by default or by choice.

When there is no marriage contract, the law governing the matrimonial property regime depends on the date of marriage.

- Before 1 September 1992: The applicable law is based on the spouses' common intent, determined explicitly or implicitly (eg, first common residence or other relevant connections);
- Between 1 September 1992 and 28 January 2019: The Hague Convention applies. The law of the first habitual residence after marriage governs, followed by the common nationality or closest connection. The law could change automatically due to relocation or prolonged residence abroad.
- On or after 29 January 2019: The EU Matrimonial Property Regulation governs, applying the same hierarchy – first habitual residence, common nationality, closest connection.

French marriage contracts may also permit the selection of a foreign matrimonial regime by choosing a foreign applicable law (EU Regulation No 2016/1103, Article 22). However, the choice is limited to the law of the country where at least one spouse holds nationality or resides habitually at the time of the choice. Such choices must not conflict with French international public policy.

Changing matrimonial regime during the union

Couples may change their matrimonial regime during the marriage (Article 1397, Civil Code). This change requires a notarial deed and, where necessary, the liquidation of the previous regime to ensure validity. The change must serve the family's interests and applies prospectively.

A change in the matrimonial regime may also result from applying a new applicable law during the marriage, as permitted under EU Regulation No 2016/1103. In France, such modifications must be executed via a notarial deed. While typically prospective, spouses may agree to retroactive application back to the date of their marriage.

Disclosure of Assets

Information obligation on spouses

An information obligation rests upon the spouses, who are generally required to provide the judge with "all information and documents necessary to determine benefits and pensions and to liquidate the matrimonial regime" (Article 259-3 of the Civil Code).

The spouses are obligated to substantiate their assets and financial status, as requested by the judge, not only with "income statements, tax notices, and fiscal situation documents" but also with "supporting documents related to their

assets and living conditions" (Article 1075-2 of the Civil Procedure Code).

Additionally, when a compensatory allowance is requested, they must provide a sworn statement to the judge certifying the accuracy of their resources, income, assets and living conditions (Article 272 of the Civil Code).

Judges typically draw all consequences from the failure to produce necessary information. Concealment of communal property by one of the spouses in a community regime is penalised, and the spouse is deprived of all rights over the concealed property (Article 1477 of the Civil Code).

Information collection through third parties or experts

The judge can request information, without the ability to claim professional secrecy, from third parties such as banking institutions and other fund and asset depositaries, as well as the debtors of each spouse (Article 259-3 of the Civil Code).

When the financial situation of the spouses is difficult to understand, the judge may seek help from an expert – that is:

- from a qualified professional, "to draw up an estimated inventory or make proposals regarding the settlement of the spouses' financial interests" (Article 255, 9° of the Civil Code); or
- from a notary for the purpose of "elaborating a plan for the liquidation of the matrimonial regime and, incidentally, the division of the lots to be shared" (Article 255, 10° of the Civil Code).

The designated expert enjoys the same investigatory powers as the judge in executing their mission, as per Article 259-3 of the Civil Code.

Various asset identification tools

Multiple tools for identifying assets can be used.

- FICOBA (*fichier des comptes bancaires* file of bank accounts and similar) records all bank accounts held by an individual or corporation in France or abroad. It involves account opening, modification and closure operations but does not include actual transactions or the account balance.
- FICOVIE (*fichier des contrats d'assurance vie* file of life insurance contracts and capitalisation contracts) references all life insurance and capitalisation contracts with insurance companies established in France.

A notary, authorised by a court decision, can access these files, especially within the scope of their expertise mission (based on Articles 255, 10° and 255, 9° of the Civil Code), from:

- the land registry, which centralises and publishes information regarding property ownership and cadastres – any individual can request a copy of ongoing entries by filling in a form and providing specific information (cadastral references, owner's name, etc); and
- the trade and companies register, which compiles all individuals and legal entities engaged in commercial activities.

Recognition of Foreign Trusts

France does not recognise, within its domestic law, the mechanism of trusts and has not ratified the Hague Convention of 1 July 1985 concerning the law applicable to trusts and their recognition.

However, French jurisdictions acknowledge and take foreign trusts into account when addressing the financial consequences of divorce. Case law is limited.

Regarding spousal support obligations, French courts consider trusts in two primary contexts:

- spousal maintenance – courts typically assess prior distributions from the trust to determine the spouses' standard of living; and
- compensatory payments – rather than analysing the beneficiary spouse's specific rights under the trust, courts often focus on the total value of the trust's assets to evaluate whether the divorce creates a financial imbalance justifying compensatory payments (Paris Court of Appeal, 7 July 2015, No 14/08780).

In liquidation of matrimonial property, case law addresses two key issues:

- community property transfers to a trust – when community property is placed in trust and only one spouse is designated as a beneficiary, a claim for reimbursement is created (Paris Court of Appeal, 1 October 2008, No 04/24633); and
- determining spouses' rights in liquidation – French courts generally apply a civil law perspective, disregarding the specific beneficiary rights under the trust; instead, they treat the trust as conferring direct ownership over its assets (eg, Aix-en-Provence Court of Appeal, 9 November 2016, No 15/02936).

2.4 Spousal Maintenance

Spousal maintenance obligations between spouses may result from the payment of alimony during the divorce proceedings (*devoir de secours*) or the establishment of post-divorce spousal support (*prestation compensatoire*).

Alimony (Devoir de Secours)

During divorce proceedings, the judge may establish alimony for the benefit of one of the spouses (Article 255, 6° of the Civil Code). This alimony persists until the spouses are officially divorced by an irrevocable decision. It aims not only to secure the minimum essential for the recipient spouse but also to maintain a similar standard of living between the spouses.

The determination of alimony follows specific criteria: it takes into account the recipient spouse's needs and the marital standard of living, as well as the financial resources and expenses of each spouse. French law does not provide for any specific calculation. The determination of the amount is left to the discretion of the family court judge.

Post-Divorce Spousal Support (Prestation Compensatoire)

The purpose of spousal support is to offset, as much as possible, the disparity in the spouses' living conditions resulting from the divorce (Article 270 of the Civil Code).

Spousal support is determined based on the needs of the recipient spouse and the resources of the other, taking into account their situation at the time of divorce and its foreseeable evolution.

The judge has several elements to consider in assessing this disparity (Article 271 of the Civil Code):

- duration of the marriage;
- age and health status of the spouses;
- their qualifications and professional situation;

- the consequences of professional choices made by one of the spouses during the marriage to perform child-rearing – and the time still needed therefor – or to prioritise the career of their partner at the expense of their own;
- the estimated or foreseeable assets of the spouses, both in capital and income, after the liquidation of the matrimonial regime;
- their existing and foreseeable rights; and
- their respective situations regarding retirement pensions.

As for alimony, French law does not provide for any specific calculation, and the determination of the amount is left to the discretion of the family court judge.

2.5 Prenuptial and Postnuptial Agreements

French Marriage Contract: Conditions and Purpose

Under French law, marriage contracts are subject to strict formalities. To avoid nullity, they must be executed as notarial deeds (Article 1394, al 1, Civil Code). Additionally, the contract must be finalised prior to the marriage ceremony, and both parties must provide simultaneous consent, as separate signing dates render the contract invalid.

French law does not require the parties to obtain independent legal advice or disclose financial information. The absence of such formalities can complicate the recognition of French marriage contracts in Common Law jurisdictions where these requirements are standard.

Unlike prenuptial agreements in some foreign jurisdictions, French marriage contracts cannot predefine financial or spousal support arrangements in the event of divorce. Their primary purpose is to allow spouses to choose or tailor a matrimonial property regime. Without a contract, the couple is automatically subject to the default regime of community of property.

Recognition of Foreign Prenuptial and Postnuptial Agreements in France

Marriage contracts validly executed under foreign laws are recognised in France under international public policy principles. However, not all clauses are enforceable.

Non-financial clauses that contravene French public policy, such as stipulations imposing conditions for divorce, may be invalidated.

Conversely, financial clauses – such as pre-agreed spousal support amounts or waivers – might be recognised under specific conditions, even though they are impermissible under French law.

To be enforceable, such provisions must comply with the governing law chosen by the spouses (Article 8(1), Hague Protocol). Moreover, the habitual residence of the maintenance creditor governs whether a waiver of maintenance is permissible (Article 8(4), Hague Protocol).

Courts may disregard the chosen law if its application leads to "manifestly inequitable or unreasonable consequences" (Article 8(5), Hague Protocol) or if it contravenes French international public policy (Article 13, Hague Protocol). For instance, the French Court of Cassation invalidated a German law waiver of spousal support, deeming it contrary to French public policy (Civ 1re, 8 July 2015, No 14-17.880).

2.6 Cohabitation

In France, unmarried couples have the option of cohabiting or formalising their relationship through civil partnerships.

Cohabitation

Financial responsibilities of cohabitants

During cohabitation, cohabitants can enter into a cohabitation agreement, whose content is freely determined with the main purpose of organising their shared life and establishing financial rules (contributions to common expenses). However, this agreement does not create personal obligations between the partners, leading to the absence of financial compensation or support upon separation.

Joint ownership among cohabitants

Cohabitants are subject to joint ownership rules. Consequently, assets acquired during cohabitation are either personal to the purchaser or jointly owned by both cohabitants in the case of shared acquisition, in proportion to their financial contributions.

Upon separation, exiting this joint ownership requires initiating a sharing procedure, primarily through amicable means and, if necessary, through legal proceedings as part of a liquidation and division process (see **2.2 Service and Process** – Post-divorce liquidation and division proceedings).

Civil Partnerships

Financial responsibilities between PACS partners

Partners in a civil partnership (*pacte civil de solidarité* PACS) must provide each other with "material assistance and reciprocal support" during their shared life (Article 515-4 of the Civil Code). However, upon dissolution of the PACS, partners cannot seek compensatory maintenance.

Property regimes

Partners in a PACS are generally subject to the legal regime of separate estates (Article 515-5 of the Civil Code). However, partners can opt for the joint ownership regime. In this case, the assets are shared equally, even if one partner finances them beyond their ownership share.

Upon separation, partners must come to an agreement on the division of their assets. In the absence of an agreement, the family affairs judge will have the authority to resolve their disputes (Article 515-7 of the Civil Code) through a liquidation and division procedure (see **2.2 Service and Process**, "Post-divorce liquidation and division proceedings").

2.7 Enforcement

Enforcing Financial Order in France

Non-payment of alimony

When alimony remains unpaid, the creditor spouse can resort to a direct payment procedure to obtain the owed amount from a third party (employer, bank, etc) holding funds initially intended for the debtor. This procedure can be initiated as soon as the first instalment of unpaid alimony is due and is executed by a bailiff.

The creditor spouse can also file a complaint: the non-payment of alimony constitutes a criminal offence of family abandonment punishable by two years' imprisonment and a fine of EUR15,000. If the debtor spouse's bad faith results in harm to the former creditor spouse, the latter can also request the determination of compensatory damages.

Non-payment of the compensatory allowance
In the event of non-payment of the compensatory allowance, it is possible to request the involvement of a bailiff to initiate recovery procedures. The bailiff can carry out one of the following procedures:

- direct payment (except for the compensatory allowance paid as a lump sum);
- bank account seizure;
- wage garnishment;
- attachment of assets; and
- forced sale.

The non-payment of the compensatory allowance also constitutes a criminal offence of family abandonment (see "Non-payment of alimony" in the foregoing).

Recognition and Enforcement of Foreign Financial Orders in France

The procedure for enforcing foreign court decisions in France varies depending on whether the judgment originates within the EU or from a non-EU country.

Recognition and enforcement of EU judgments
For rulings issued within the EU, the enforcement of maintenance claims is simplified. A judgment from one EU member state is automatically recognised and enforceable in another, requiring only a European Enforcement Order certificate (issued by the original court).

Exequatur for non-EU judgments
Judgments issued outside the EU require a formal exequatur process to be recognised and enforced in France. The French court will grant exequatur if the following conditions are met:

- the foreign court had appropriate jurisdiction;
- the judgment complies with international public policy; and
- no evidence of fraud exists.

2.8 Media Access and Transparency

Debates regarding the grounds and consequences of divorce and provisional measures are not public (Article 248 of the Civil Code). Thus, the media cannot attend the proceedings. If the judgment is made available to the public, the parties must be anonymised (Article L 111-13 of the Judicial Organisation Code).

2.9 Alternative Dispute Resolution (ADR)

Alternative dispute resolution methods hold an increasingly prominent role in family matters, particularly with the introduction of mutual consent divorce (*divorce par consentement mutuel*) and the advancement of mediation and arbitration.

Mutual Consent Divorce

In France, spouses can divorce by mutual consent without appearing before a judge (see **1.1 Grounds, Timeline, Service and Process** – Out-of-court divorce). In this divorce agreement, spouses agree on the principle of divorce and all its consequences, including financial ones (asset division, compensatory allowance, etc).

Mediation

Family mediation can be initiated by the parties, and the judge may also compel them to meet with a mediator for an initial information meeting. However, the judge cannot compel the parties to follow a mediation process.

Mediation unfolds in three stages.

- There is an initial information session during which the family mediator outlines the objec-

tives, content and topics to be addressed during the mediation.
- Subsequent successive family mediation sessions span a period of three to six months.
- At the end of mediation, if an agreement is reached, it is binding on the parties like any contract. It is possible to have it ratified by a judge to give it enforceability, meaning it will be applied to the parties as any court judgment. If no agreement or a partial agreement is reached, the parties must seek the intervention of a judge to settle the dispute.

Arbitration

Family arbitration is gaining traction in France, notably marked by the establishment of the Arbitration Centre for Family Disputes (*Centre d'Arbitrage des Litiges Familiaux* CALIF) in 2019. Certain rights, where parties lack full autonomy, cannot be subject to arbitration. Specifically, extrapatrimonial rights – concerning an individual's status and capacity and issues related to divorce and legal separation – are excluded from arbitration (Articles 2059 and 2060 of the Civil Procedure Code). Nevertheless, patrimonial matters are arbitrable and encompass various aspects, such as:

- the settlement of matrimonial regimes or joint ownership;
- the resolution of a *société civile immobilière* (SCI) at the time of divorce; and
- the determination of the quantum and modalities of the compensatory allowance, etc.

An arbitration clause is essential to arbitrate family law issues. Arbitration can be implemented from the outset in marriage, cohabitation or civil union contracts to address potential future disputes. The compromissory clause can outline the procedures for selecting the arbitrator or arbitration centre, specify the location of arbitration, and define the applicable procedures. In the event that parties have not initially included such a clause, they still have the option to convene, once a dispute arises, and voluntarily agree to arbitration by signing an arbitration compromise.

3. Child Law

3.1 Choice of Jurisdiction

Parental Responsibility: Residence and Visitation Rights

To determine jurisdiction in matters of parental responsibility, French courts apply the provisions of Regulation (EU) No 2019/1111 ("Brussels IIb Regulation (recast)") for proceedings initiated from 1 August 2022, and Regulation (EC) No 2201/2003 ("Brussels IIb") for proceedings initiated before that date.

Article 7 of the Brussels IIb Regulation (recast) states that the court having jurisdiction for issues related to parental responsibility for a child under 18 is the court of the member state of the habitual residence of the child at the time the court is seised.

The Brussels IIb Regulation (recast) introduced the possibility for parents of designating the courts of a member state that shall have jurisdiction over matters relating to parental responsibility (Article 10), provided that the following apply.

- The child has a close connection with that member state, including:
  - (a) at least one holder of parental responsibility has habitual residence there;
  - (b) that member state is the former habitual residence of the child; or
  - (c) the child is a national of that member state.

- The holders of parental responsibility have agreed on the jurisdiction at the time the court is seised, or have expressly accepted jurisdiction during the proceedings.
- The exercise of jurisdiction is in the best interests of the child.

In the case of a lawful relocation from one member state to another (Article 8), the courts of the former member state retain jurisdiction for three months after the move to modify a visitation rights decision in that member state if the person to whom visitation rights were granted continues to reside in the former member state.

In cases of wrongful removal or non-return of the child (Article 9), the courts of the member state where the child had habitual residence before the removal or non-return retain jurisdiction until the child acquires a new habitual residence in a member state and certain conditions are met.

If the child's habitual residence cannot be established, and there is no choice of jurisdiction under Article 10, the jurisdiction of a member state can be based on the child's presence (Article 11) or on the domestic law (Article 14)

Child Maintenance Obligations (Contribution à l'Entretien et l'Education de l'Enfant)

Under Article 3 of Regulation (EC) No 4/2009, French courts have jurisdiction over child support if France is:

- the state where the defendant has their habitual residence;
- the state where the creditor has their habitual residence (it should be noted that the court is generally that of the crediting parent, unless child support is paid directly to the child); or
- the state where the court has jurisdiction to hear an action related to parental responsibility when the claim for child support is incidental to this claim, for example in the context of divorce proceedings – this extension of jurisdiction does not apply if jurisdiction is based on the nationality of only one of the parties.

The choice of forum is expressly excluded by Article 4 in proceedings concerning a child under 18.

Habitual Residence, Nationality and Domicile

The concept of habitual residence under European law differs according to whether the residence in question is that of an adult or a child. With regard to a child's residence, the Court of Justice of the European Communities has stated that habitual residence should be interpreted as "the place that reflects a certain integration of the child into a social and family environment". It added that "[f]actors such as the duration, regularity, conditions, and reasons for the stay in a Member State, the child's nationality, place and conditions of schooling, linguistic knowledge, and family and social relationships in the state must be taken into account".

The concept of nationality is the same as in divorce proceedings (see **1.2 Choice of Jurisdiction** – Domicile, Residence and Nationality"), and French law does not recognise the concept of domicile.

3.2 Living/Contact Arrangements and Child Maintenance

Issues related to children encompass the following.

- Parental authority:
  (a) the exercise of parental authority;
  (b) the residence of the child; and
  (c) the visitation and lodging rights of the other parent.

- Contribution to the child's maintenance and education.

In the event of divorce or legal separation, the arrangements for exercising parental authority over a minor child, as well as the contribution to their maintenance and education, will be determined within the divorce or separation proceedings. Parents can also approach the family court judge outside the divorce or separation process.

In urgent cases, one parent can petition the family court judge to be authorised for expedited proceedings to obtain a quicker hearing date. The petitioner must demonstrate the urgency, such as a violation of their parental rights by the other parent, imminent school enrolment, or impending relocation.

Parental Authority

Exercise of parental authority

By default, both parents share the exercise of parental authority over the minor child (Articles 372 and 373-2 of the Civil Code). However, if justified by the child's best interest, the family court judge may decide that parental authority will be exclusively exercised by one parent (Article 373-2-1 of the Civil Code).

Parental authority ceases when the child reaches the age of majority – 18 years old in France (Article 371-1 of the Civil Code). Therefore, parents can only seise the judge or agree on the terms of its exercise for minor children.

Child's residence and visitation rights

When determining the exercise of parental authority, the family court judge must ensure the safeguarding of the child's interests (Article 373-2-11 of the Civil Code) and consider factors such as:

- past parental practices or prior agreements;
- the feelings expressed by the minor child during hearings, if applicable;
- each parent's ability to fulfil duties and respect the rights of the other;
- results of any relevant expert assessments, considering the child's age;
- information gathered from social investigations; and
- any physical or psychological pressures or violence exerted by one parent on the other.

To help their decision, the family court judge may order a psychological evaluation of the family or a social investigation of the living conditions and accommodation of the child with each parent (Article 373-2-12 of the Civil Code).

Both parties and the judge have flexibility in determining the child's residence and visitation rights. Residence can be established:

- alternating between the homes of each parent, on a weekly basis or according to other schedules; or
- solely at one parent's home, with the other parent having visitation rights, the extent of which depends on factors such as availability, geographic proximity and the children's ages.

If needed, and when the child's best interests require it, visitation rights can be exercised in a supervised setting to ensure the child's safety and allow the parent to be surrounded by professionals.

The exercise of parental authority determined by the family court judge is in the absence of a better agreement between the parents. If desired, parents can modify the arrangements and, for example, mutually agree to expand visitation rights or implement shared residence without re-

seising the family court judge. If an agreement is reached, they can, however, request the judge to approve it for enforceability (Article 373-2-7 of the Civil Code).

Child Support

In France, the contribution to the maintenance and education of a child takes the form of a monthly allowance. It can also take the form of covering certain in-kind expenses (eg, school fees, extracurricular activities, unreimbursed health expenses, psychologist fees) or be a mix of both.

The contribution is calculated based on the resources of each parent and the child's needs (Article 371-2 of the Civil Code). The residence arrangement can also impact the amount of the contribution for the child. French law does not provide for any specific calculation. The determination of the amount is left to the discretion of the family court judge.

The family court judge may temporarily grant the use of the family home to the parent with whom the child resides in exchange for an occupation fee, if applicable, and for a maximum duration of six months unless the property is jointly owned by the parents. In this case, the judge can extend this measure if either party initiates a procedure for property settlement (Article 373-9-1 of the Civil Code).

If the parents agree on the amount and terms of this contribution, they can enter into a parental agreement and request its approval by the family court judge to make it enforceable (Article 373-2-7 of the Civil Code).

The contribution to the maintenance and education of the child does not cease with the child's majority (Article 371-2 of the Civil Code) – it is customary for it to continue until the child achieves financial independence. When the child reaches adulthood, it is possible to request that the family court judge indicates that the contribution will be paid, in whole or in part, directly to the adult child, especially if they no longer reside with either parent (Article 373-2-5 of the Civil Code). An adult child can seise the family court judge to request or maintain a contribution for their maintenance and education, demonstrating their need in such cases.

3.3 Other Matters

Either parent can approach the family court judge in case of disagreement regarding the child's education, religious upbringing or medical care. The family court judge must consider the child's best interests, the elements listed in Article 373-2-11 of the Civil Code (see **3.2 Living/Contact Arrangements and Child Maintenance** – Exercise of Parental Authority) and any other information brought to their attention.

Parental alienation

There is no legal definition of "parental alienation" in French law. In cases of suspected parental alienation, where one parent attempts to estrange the child from the other parent, the family court judge can request a psychological evaluation of the family before making any substantive decisions. The judge must then draw all necessary conclusions from the expert's report to protect the children, potentially establishing residence with the other parent and arranging visitation in a supervised setting initially.

Child's audition

Minor children can be heard, by the judge or a professional appointed by the judge, in proceedings that concern them, provided they have the capacity for discernment (Article 388-1 of the Civil Code). However, the child is not a party to

the proceedings, and therefore cannot submit evidence.

3.4 ADR

Agreement

The family court judge can approve the parties' agreement regarding both living arrangements and child maintenance during or outside a divorce process (see **3.2 Living/Contact Arrangements and Child Maintenance**).

Mediation

The judge must attempt to reconcile the parties in case of disagreements regarding the exercise of parental authority (Article 373-2-10 of the Civil Code). Family mediation can be led regarding children's issues (see **2.9 Alternative Dispute Resolution (ADR)** – Mediation).

Nevertheless, it has to be noted that if one parent alleges violence against the other or the children, it is impossible for the family court judge to compel the parties to meet with a mediator (Article 373-2-10 of the Civil Code).

Arbitration

Unavailable rights cannot be arbitrated. Thus, extrapatrimonial issues involving the legal state and capacity of a person, such as filiation or child custody arrangements, are excluded from arbitration (see **2.9 Alternative Dispute Resolution (ADR)** – Arbitration). Nevertheless, financial issues concerning children, such as child maintenance, can be submitted to arbitration.

It is important to note that these principles do not extend to international arbitration. Consequently, non-financial matters can be arbitrated in cases involving "international trade interests" (Article 1504 of the Civil Procedure Code).

3.5 Media Access and Transparency

In France, civil hearings related to children (parental responsibility, child support) are held in private, without the presence of the public or media. Consequently, the media cannot attend the proceedings. If the judgment is published, the names of the parties and the child(ren) will be anonymised.

HONG KONG SAR, CHINA

Trends and Developments

Contributed by:
Stephen Peaker, Yvonne Kong, Lauren Ng and Gabriel Yuen
Oldham, Li & Nie

Oldham, Li & Nie (OLN) is a highly regarded Hong Kong-based law firm committed to professional excellence, and this has been the cornerstone of the firm since its creation in 1987. With many years of experience practising in Hong Kong, OLN's diverse expatriate and local employees – who embody the firm's East-West culture – are able to deliver an integrated suite of legal and business solutions. OLN currently has more than 40 lawyers who are admitted to one or more jurisdictions, including Hong Kong, France, the UK, the USA, Australia, Canada, and Japan. The firm also has a thriving China practice, conducted from its Hong Kong and Shanghai offices and – when necessary – with its associate firm, Watson & Band, in Mainland China.

Authors

Stephen Peaker has been the partner heading up the family law department at Oldham, Lie & Nie since 2000 and is a fellow of the International Academy of Family Lawyers (IAFL) and the former vice-chairman of the Hong Kong Family Law Association (FLA). Stephen has been instructed on many leading cases in the areas of family law and trusts law. He also advises extensively on trusts and wills, wealth protection, and tax planning. Stephen is ranked by Chambers and Partners in Family/Matrimonial (international firms) in the Chambers Greater China Region Guide 2024.

Yvonne Kong is a partner in Oldham, Lie & Nie's family law department. Yvonne has worked extensively with local and expatriate clients on applications for divorce, financial applications, and children's matters. Yvonne has a strong interest in complex children's applications, including the Hague Convention, wardship, surrogacy, adoption, relocation, custody, care and control, and access. She has been involved in a Hong Kong trial relating to enforcing a foreign judgment for child return orders by seeking leave to issue a writ of sequestration against a Hong Kong property – a landmark case in Hong Kong (Re ARR (Wardship: Sequestration) (2022) 5 HKLRD 583).

Lauren Ng is an associate in Oldham, Lie & Nie's family law department. Lauren has worked on matters including divorce, child custody, ancillary relief, and prenuptial agreements.

Gabriel Yuen is an associate in OLN's Family Law Department with experience in divorce, children and ancillary relief matters.

Oldham, Li & Nie

Suite 503
5/F
St George's Building
2 Ice House Street
Central
Hong Kong

Tel: +852 2868 0696
Fax: +852 2810 6796
Email: info@oln-law.com
Web: www.oln-law.com

Recent Family Law Developments In Hong Kong

Family law in Hong Kong is ever-evolving to meet the needs of this dynamic and multifaceted city, which – on average – handles more than 10,000 new cases every year. The Hong Kong Family Court introduced new measures, including a new Family Masters system, in late 2023. Heading into 2025, it is worth reviewing these changes in 2024 and how they impacted the way in which family law cases are handled moving forwards.

New Family Masters system

The Family Procedure Ordinance (Cap 646) ("the Ordinance") was gazetted on 30 June 2023 to legislate for a consolidated and unified set of comprehensive court procedural rules for the family justice system in Hong Kong. The objective of the Ordinance was to alleviate the ongoing problems that the family court had been facing for many years, including the hodgepodge of court rules and procedures for family law matters, which were at times difficult to comprehend and not user-friendly, especially for litigants in person. In light of the increasing number of litigants choosing to act in person in family law cases, there was an imminent need to impose clearer guidance in procedural matters in the family court.

Upon the enactment of the Ordinance, certain sections came into operation first, with the main development being the implementation of a new Family Masters system in October 2023 pursuant to section 15 of the Ordinance. To facilitate the implementation of this new system, two new General Directions were issued under section 15 of the Ordinance – namely, General Directions 1.1 and 1.2, which came into effect on 3 October 2023.

The new system has injected seven additional Masters into the Hong Kong family court system, which has been under strain for many years. Prior to the implementation of the new Master system, there was only one principal family court judge, seven district judges and four deputy district judges. The family court now has one principal family court judge, five family court judges, two family court deputy district judges, and seven Masters.

Under the Family Masters system, there is now a division of work between family judges and Masters, with the registrar and Masters empow-

ered to handle procedural work in family law proceedings. Pursuant to General Direction 1.1, Masters can handle applications to amend petitions, time extension and substituted service. In simple cases, Masters can also conduct children dispute resolution hearings and financial dispute resolution hearings where appropriate. The division of work has enhanced case management and efficiency within the family court. This has benefited court users, as there has been a shortening of the timeline for fixing substantive hearings, which had to be fixed in a judge's diary, which was often full. As a result of the new Family Masters system, the family judges can focus on hearing and adjudicating on more "substantive" matters (eg, jurisdiction, injunction, and joinder) while leaving procedural matters (such as amendments to the originating process and time extensions) to be dealt with by Masters.

Furthermore, pursuant to General Direction 1.2, all initial hearings (ie, first appointments and children appointments) are to be listed before family court Masters, with the case only being transferred to a family judge when the case is ready for a case management hearing (CMH). As part of the family court's mission to achieve better case management in family law proceedings, interlocutory applications such as expert evidence, joinder and specific discovery are now expected to be filed as early as possible and ideally dealt with before a CMH is fixed. This has had the added benefit of encouraging parties to settle earlier in order to avoid incurring further costs at a very early stage on taking out interlocutory applications, which previously would have been filed later before the pre-trial review or the trial itself.

An increasing number of clients are keen to consider mediation and other alternative forms of dispute resolution prior to the issue of the proceedings in an effort to save costs. Since the new Master system was introduced, more and more clients are keen to settle matters out of court before the proceeding, with fewer cases being contested. This is a welcome development, given the significant emotional and financial strain fully contested divorce proceedings can have on the parties.

Target timetabling has also been introduced as part of the overhaul of the family court system, with General Direction 1.2 setting out the target timetable for the conclusion of cases. In particular, in cases involving both children and financial proceedings, family judges are encouraged to exercise strict and robust case management to ensure that short cases are dealt with within 23 months from the CMH, medium cases within 27 months from the CMH, and long cases within 32 months from the CMH. This has brought clarity for legal practitioners and enabled them to manage clients' expectations better.

Overall, the new Masters system has shortened the waiting times for substantive court hearings and helped to bring clarity for court users. Thus, it gives reason to look forward to the full operation of the rest of the Ordinance, which will be put in place gradually. This will hopefully result in a more unified and efficient process and rules for family law proceedings in Hong Kong.

Deployment of electronic filing in the family court

The Hong Kong judiciary had already recognised the need to modernise its system, including the Hong Kong Family Court, which is still conventionally paper-based and manually operated with limited deployment and usage of modern technology. On 17 July 2020, the Court Proceedings (Electronic Technology) Ordinance (Chapter 638) (the "Electronic Technology Ordinance")

was enacted – the main purpose of which was to incorporate the Information Technology Strategy Plan (ITSP) into the Hong Kong court system. The objective of the ITSP was to enhance the accessibility, transparency and efficiency of case management by providing more electronic services – namely:

- electronic filing, service and storage of court documents;
- electronic payment of court fees; and
- electronic authentication of court documents that are required to be signed, sealed or certified.

Under the ITSP, an integrated case management system ("iCMS") is being developed gradually in phases to allow court users the option to file, seal and serve court documents instantly upon uploading onto the e-system, in addition to the traditional paper-based system. This not only creates immediate access to legal documents for members of the judiciary and litigators but also saves time and costs for legal practitioners by reducing the time and workforce spent in printing and photocopying court documents and the need for law clerks to attend court personally for filing and service.

There are many more benefits to implementing the e-filing system into the Hong Kong Family Court, including but not limited to:

- environmental benefits from significantly reducing the consumption of paper;
- better administration of justice by eliminating errors commonly seen in paper-based systems; and
- improving public access to justice, as this would enable court users other than judicial officers to transact court business by electronic means remotely around the clock, without restriction of the office hours and location of the judiciary.

As of January 2025, the e-filing system is only applicable and available for personal injury actions, tax claim proceedings, civil action proceedings, employees' compensation cases in the district court, and summons cases in the magistrates' courts. While the judiciary administration reported that the iCMS would be extended to the Court of Final Appeal, the High Court, the non-summons courts of the magistrates' courts and the Small Claims Tribunal commencing in the last quarter of 2024, this has not been fully rolled out to date. While there is no confirmed date as to when the iCMS will be extended to the remaining courts and tribunals (including the family court), it is hoped that further announcements will be made soon, as the expansion of the iCMS will bring welcome relief to court users – especially litigants-in-person, who make up the significant proportion of family court users – by making the family court more accessible and user-friendly.

Children Bill

In 2015, the Labour and Welfare Bureau prepared the draft Children Proceedings (Parental Responsibility) Bill (the legislative proposal) (the "Children Bill"). The Children Bill represents efforts and attempts to bring forth the important concept of parental responsibility into Hong Kong family law – a concept many other jurisdictions have adopted.

Under current family law in Hong Kong, the relationship between parents and child is based on the concept of "custody" and "care and control"; such wordings are commonly used in court documents and orders, with emphasis on parents' rights rather than the rights of their child/children. The Law Society of Hong Kong has

shared its view with the public that this concept is outdated, as it erroneously identifies children as under the control of their parents, who have rights over them that can be disposed of and possessed by a parent, and thereby fails to encourage parents to make decisions that are in the best interests of the children post-separation or divorce.

Contrary to the concept of "custody" and "care and control", the concept of "parental responsibility" emphasises the relationship between parent and child and the rights of the child to both parents, which is far more neutral and child-friendly in nature. More importantly, the concept of "parental responsibility" serves as an important reminder to all parties involved in divorce proceedings (including but not limited to parents, members of the judiciary and legal practitioners) that the focus should be on the children's best interests, not the parents'. The concept of parental responsibility represents the modern view in family law practice that children shall be deemed as individuals with their own rights, voice and wishes and that – in light of their vulnerability – they ought to be protected and given priority, especially those who are involved in divorce proceedings.

However, that is not to say that the Hong Kong Family Court does not take into account nor prioritise the wishes of children. Under Practice Direction PDSL5, which came into effect on 28 May 2012, the family court has long since recognised that – in circumstances where a child is capable of forming their own view – that child should have the right to freely express those views directly or indirectly. Pursuant to PDSL 5, the family judge has the discretion to meet with a child either upon application by the parties or on their own motion. While it is rare for a family judge to interview children, in the recent case of I, M, also known as K, M and I, SM (2023) HKFC 66, the family judge exercised her discretion to meet the children to determine their wishes in a relocation case.

Moreover, where there are disputes regarding the children's arrangements, the family court frequently calls for social investigation reports to be conducted, with the social investigation officer acting as the eyes and ears of the court to report on the wishes of the children. Thus, while there has not been significant progress since the Children's Bill in 2015 owing to objections from certain sectors as part of the consultation process, the family court does support and ensure that children's voices are heard. A legislative push to enact the Children's Bill to bring the model of parental responsibility into Hong Kong Family law will only serve to strengthen the family court's commitment to putting the best interests of children as the first and paramount consideration.

Conclusion

It is beyond doubt that various schemes, policies and draft bills have been introduced and implemented throughout the years to enhance the efficiency of the Hong Kong Family Court in light of its heavy workload. As such, family law practitioners in Hong Kong are eager to see more developments both within the court and in terms of the law.

Therefore, the continuous modernisation and development of the family justice system (including the introduction of electronic filing) would undoubtedly be welcomed, as it would enhance the effectiveness of the Hong Kong Family Court.

ITALY

Law and Practice

Contributed by:
Carlo Rimini and Rebecca Andrello
Studio dell'avv. prof. Carlo Rimini

Contents

Studio dell'avv. prof. Carlo Rimini is an esteemed Italian family law firm, which is based in Milan and operates throughout the national territory. Comprising a selected group of professionals, this tailored boutique has developed unique expertise in advising domestic and international clients in all areas of family law and succession law. It deals with both out-of-court and judicial matters, with a particular focus on cross-border cases, thanks to its strong and long-standing connections with international law firms worldwide.

Authors

Carlo Rimini of Studio dell'avv. prof. Carlo Rimini advises on family and succession law matters, with a particular focus on international aspects. He is a member of the Milan Bar Association and the International Academy of Family Lawyers. Carlo is a professor of private law (University of Milan) and a professor of family law (University of Pavia), and has authored around 100 papers and publications. He is a member of the scientific committee of the periodical Familia and the ICALI Association, and was previously a member of the Advisory Board of the PSEFS Project co-founded by the Justice Programme of the European Union (2014–20).

Rebecca Andrello joined Studio dell'avv. prof. Carlo Rimini in 2014 and advises on both domestic and international family law matters, including separations and divorces, financial disputes and children matters. She is a member of the Milan Bar Association and a fellow of the Italian Association of Family Lawyers. She previously attended the Law School – Professional Specialist Programme (Bocconi University of Milan and University of Pavia) as well as a training programme at the Court of Pavia. Rebecca also worked as a trainee in a leading London law firm.

Studio dell'avv. prof. Carlo Rimini

Corso di Porta Vittoria No 17
20122 Milano
Italy

STUDIO DELL' AVV. PROF. CARLO RIMINI

Tel: +39 02 5518 0974
Fax: +39 02 3792 8867
Email: office@carlorimini.com
Web: www.carlorimini.com

1. Divorce

1.1 Grounds, Timeline, Service and Process

Grounds for Divorce

In order for a divorce to be pronounced, the judge must be satisfied that there has been an irreparable dissolution in the spiritual and material communion of the spouses. In other words, the judge is required to ascertain the irretrievable breakdown of the marriage, which must have its cause in one of the grounds indicated in Article 3 of Law No 898/1970 (the "Italian Divorce Law"). The list is exhaustive, with the consequence that the divorce cannot be pronounced if none of them is met.

The grounds for divorce can be divided into the following two groups:

- facts that coincide with the commission of specific crimes:
  - (a) one of the spouses is convicted, with lifelong or long sentences;
  - (b) incest;
  - (c) crimes against sexual freedom;
  - (d) crimes linked to prostitution;
  - (e) murder or attempted murder of the other spouse or children; or
  - (f) abuse or injuries against the other spouse or children; and
- facts that are incompatible with the persistence of the spiritual and material communion of the spouses:
  - (a) a period of protracted legal separation;
  - (b) the foreign spouse has obtained a divorce or a declaration of annulment of the marriage abroad, or has contracted a new marriage abroad;
  - (c) failure to consummate the marriage; or
  - (d) one of the spouses undergoes gender reassignment surgery.

This list is more apparent than real, given that – in daily practice, in almost all cases – the most common ground for divorce is an uninterrupted personal legal separation lasting for six months in the case of mutual separation, or one year in the case of judicial separation.

Divorce can be obtained through a judicial process or through ADR.

Judicial Process

Recent reform in Italy

A relatively recent reform (the so-called Cartabia reform) of civil proceedings in Italy (contained within Law No 206/2021 and Legislative Decree No 149/2022) has had a significant impact on family law matters, with significant changes for legal separation and divorce proceedings started after 28 February 2023.

Divorce proceedings when both parties apply for a consent order

If the spouses have reached an agreement on all terms and conditions of their divorce (children's custody, visitation rights, maintenance, house, etc), they can submit a joint petition in court. If the agreement between the spouses is fair and does not conflict with the interest of the children, the court rules on the divorce in accordance with the parties' agreement. The parties can ask to replace the hearing in their presence with a hearing on papers, without having to go to court. Such procedure normally lasts approximately three or four months.

In Italy, it is now possible for the spouses to file a joint petition for both legal separation and divorce cumulatively; this means that the joint petition contains the spouses' agreements for both the legal separation and the divorce (Articles 473-bis.49 and 473-bis.51 of the Italian Civil Procedure Code). Nevertheless, an uninterrupt-

ed legal separation before divorce is still mandatory. This means that, when legal separation and divorce are claimed with the same petition, the court – within the same proceedings – rules on the legal separation and can only decide on the divorce after six months have elapsed (this was confirmed by Supreme Court Decision No 28727/2023). Such procedure normally takes about eight or nine months.

Divorce by litigation

If the spouses do not reach an agreement and a divorce has to be granted by the court, the procedure is as follows.

- After the submission of the petition, a hearing is scheduled within 90 days. Before the first hearing, both the petitioner and the respondent are given some deadlines within which they are supposed to lodge all their reciprocal claims, requests for investigation by the court and the relevant documents with the court.
- Following the first hearing, if the judge considers that the case is ready to be decided without any further investigation, the final decision can be immediately ruled. If, on the other hand, the judge considers that a more in-depth investigation is required, interim orders are issued (including visitation rights and maintenance for the children and eventually for the spouse). Once further investigations are closed, the judge orders the submission of final defences and the final decision is ruled.

The reform of the civil proceeding rules has led to rather pressing timeframes for proceedings. This means that, depending on the complexity of the case, such proceedings take between six months and a year.

The possibility to submit a cumulative request for both legal separation and divorce is also permitted in case of litigation between the spouses. This means that the request for divorce can be lodged with the court (by both the petitioner and the respondent, or by only one of them) together with the request for legal separation (Article 473-bis.49 of the Italian Civil Procedure Code). When legal separation and divorce are claimed with the same proceedings, the court rules on the legal separation and can only rule on the divorce once one year has elapsed.

The procedure for divorce is the same for religious marriages and civil marriages. A religious marriage has civil effects in Italy if it is celebrated according to the Catholic rite or if it is celebrated in Italy before a minister of a faith that is recognised in Italy by a bilateral agreement. The only difference between ending a religious marriage or a civil marriage by divorce lies in the name used:

- *Cessazione degli effetti civili del matrimonio* – if the marriage was celebrated in front of a Catholic priest or a minister of a faith with a bilateral agreement with the State; or
- *Scioglimento del matrimonio* – if the marriage was celebrated in the municipality or in front of a minister of a faith without a bilateral agreement with the State.

Service

According to the Italian Civil Procedure Code, service is generally dealt with by a bailiff. The recent reform of civil proceedings in Italy (contained within Law No 206/2021 and Legislative Decree No 149/2022) has provided for new rules relating to service, according to which lawyers can also deal with service (in the cases and in the way stated by the law).

When a judicial document has to be transmitted abroad and an EU member state is involved, EU Regulation 1784/2020 applies; when a judicial document has to be transmitted abroad and a non-member state is involved, the Hague Service Convention of 1965 applies. When the Hague Service Convention does not apply and there are no bilateral agreements, the Italian Civil Procedure Code states that service is made by registered mail addressed to the recipient, and a copy of the document is also delivered to the Ministry of Foreign Affairs (Article 142 of the Italian Civil Procedure Code).

ADR

Collaborative practice (convenzione di negoziazione assistita)

As provided for in Decree Law No 132/2014 converted into Law No 162/2014, this procedure offers spouses the possibility of divorcing by reaching a mutual agreement, without lodging a petition with the court but with the (mandatory) assistance of (at least) one lawyer for each of the spouses.

The procedure applies whether or not children are present.

Extensive collaboration by the parties, disclosure of their assets, and (almost) absence of conflict are necessary.

The agreement reached by the parties with the assistance of the lawyer is subject to scrutiny by the public prosecutor. An agreement will be authorised if it is in the best interest of the children. If there are no children, the public prosecutor's check is purely formal.

Once the agreement is authorised and lodged with the Italian public records, it has the same effects as a court order.

Agreement signed before the mayor

As ruled by Decree Law No 132/2014 converted into Law No 162/2014, this procedure offers the possibility for the parties to divorce by reaching a mutual agreement, without lodging a petition with the court. The assistance of a lawyer is not mandatory.

The procedure only applies if there are no children, and it cannot include any clause concerning the transfer of any assets between the spouses. The mayor's check is merely formal. Once the agreement is authorised and registered with the Italian public records, it has the same effects as a court order.

Other Processes

There are other processes for ending a marriage in Italy. By way of example, according to the Italian Civil Code, spouses can obtain the annulment or nullity of a civil marriage, which is an ordinary civil procedure, if:

- the conditions provided by Italian law for matrimonial capacity are not met (ie, being unmarried, being adults, not being relatives, not having been charged with the murder of the other spouse's previous husband/wife);
- there was a vice of consent;
- the parties did not have legal capacity; or
- the marriage was simulated.

If the marriage was celebrated according to the Catholic rite, the nullity of the marriage can also be ruled by the ecclesiastic courts. The decision of the ecclesiastic court must be recognised in Italy by proceedings for the "exequatur" of the decision, which take place in front of the court of appeal of the place where the marriage was celebrated.

Judicial separation does not end the marriage. As a matter of fact, the parties remain married – although some of the duties of marriage cease (ie, the duty of cohabitation and fidelity), some continue (ie, educating and maintaining the children) and some change (ie, maintaining the spouse). During the period of legal separation, the wife may continue to use the husband's surname that was acquired with the marriage. The community of assets regime (if applicable to the marriage) ends. Inheritance rights survive.

Legal separation proceedings are very similar to the divorce proceedings outlined earlier.

Same-Sex Couples

Same-sex couples are not permitted to marry in Italy but can constitute a civil union. The civil union ends when one of the parties declares their willingness to end the civil union in front of the registrar. After three months, a petition is lodged with the court by a lawyer. During the hearing, both parties are asked to confirm their willingness to dissolve the civil union.

The judicial phase can be replaced by the collaborative practice.

1.2 Choice of Jurisdiction

According to Article 3 of EU Regulation 1111/2019, which applies to cases lodged with the court on or after 1 August 2022 (EU Regulation 2201/2003 applies for cases initiated before that date), Italian jurisdiction is grounded if:

- the spouses are habitually resident in Italy or their last habitual residence was in Italy (insofar as one of them still resides there);
- the respondent is habitually resident in Italy;
- in the case of a joint application, either of the spouses is habitually resident in Italy;
- the applicant is habitually resident in Italy, provided that they resided there for at least a year immediately before the application was made;
- the applicant is habitually resident in Italy, provided that they resided there for at least six months immediately before the application was made and is an Italian national; or
- both the spouses are Italian nationals.

If the criteria established by EU Regulation 1111/2019 are not relevant for the determination of the competent jurisdiction, Law No 218/1995 (the "Italian International Private Law") applies, according to which Italian jurisdiction exists if (Articles 3, 9 and 32):

- one of the two spouses has Italian citizenship;
- the celebration of the marriage took place in Italy, with a formal celebration provided for by Italian law;
- the respondent is resident or domiciled in Italy; or
- domestic Italian rules ground Italian jurisdiction.

All the criteria developed by the EU Regulation and the Italian International Private Law in order to establish jurisdiction revolve around the following concepts.

- Habitual residence – this refers to the place where the party has established the habitual or permanent centre of their interests. It assumes relevance as the place of effective residence (understood as the place of the concrete and continuous development of personal and possibly working life) on the date of submission of the application, and not the place formally mentioned within the registry. The concept of habitual residence combines an objective element (stability) and a subjec-

tive element (intentionality), and has a main factual character, meaning that it has to be reconstructed based on the concrete case.
- Citizenship – this refers to the legal status of a member of a State, with the assumption of a set of rights and obligations.
- Domicile – the main centre of the business and interests of a person. This does not necessarily coincide with the place where a person de facto resides.

Each party can contest jurisdiction, as can the judge (on their own motion). The issue of jurisdiction has to be decided before the merits of the case, which can only be decided if Italian jurisdiction is correctly established.

Lis Pendens

According to Article 20 of EU Regulation 1111/2019, where two proceedings between the same parties are instituted before an Italian court and before the court of another EU member state (lis pendens), and if the foreign proceedings started first, the Italian court (second seized) shall on its own motion stay proceedings until the jurisdiction of the foreign court (first seized) is established. If the jurisdiction of the foreign court is established, the Italian court shall decline jurisdiction in favour of the foreign court. If the jurisdiction of the foreign court is declined, the Italian judge can decide the case. This rule also applies if a separation proceeding and a divorce proceeding are simultaneously pending in Italy and in another EU member state.

The factor taken into account by the Italian judge in deciding whether to issue a stay order is the chronological criterion.

On the other hand, when the court first seized is the court of a non-member state (according to the Italian International Private Law), the Italian court shall stay proceedings if the Italian judge believes that the foreign decision may produce effects and be executed in Italy. If the foreign court declines jurisdiction or if the foreign decision cannot produce effects in Italy, the Italian judge can decide the case. This rule only applies if two identical proceedings are pending in Italy and in the foreign non-member state, meaning that it does not apply if separation proceedings and a divorce proceeding are simultaneously pending.

Same-Sex Couples

Same-sex couples are not permitted to marry in Italy, but they can enter into a civil union. Italian jurisdiction for the dissolution of a civil union is governed by the Italian International Private Law, Articles 3 and 32-quater of which state that Italian jurisdiction is established if:

- the respondent is resident or domiciled in Italy;
- one of the parties is an Italian citizen; or
- the civil union was established in Italy.

2. Financial Proceedings

2.1 Choice of Jurisdiction

Finance issues include:

- maintenance obligations; and
- the matrimonial property regime.

The grounds for jurisdiction for commencing financial proceedings are ruled by two different EU Regulations.

Maintenance Obligations

According to Article 3 of EU Regulation 4/2009, Italian jurisdiction is established if:

- the defendant is habitually resident in Italy;
- the creditor is habitually resident in Italy;
- Italian courts have jurisdiction to entertain proceedings concerning the status if the matter relating to maintenance is ancillary to those proceedings (unless that jurisdiction is based solely on the nationality of one of the parties); or
- Italian courts have jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings (unless that jurisdiction is based solely on the nationality of one of the parties).

Article 4 of EU Regulation 4/2009 gives the parties the option to choose Italian courts to be competent in matters of maintenance obligations between spouses/ex-spouses (electio fori). Italian courts can be chosen if:

- they have jurisdiction to settle the dispute in matrimonial matters; or
- Italy is the member state of the spouses' last common habitual residence for a period of at least one year.

These conditions have to be met at the time the choice of court agreement is concluded, or at the time the court is seized. The choice of court agreement will have to be in writing.

Italian courts can also hear financial claims after a foreign divorce. The clauses mentioned in a foreign divorce concerning maintenance (in favour of the children or in favour of the spouses) can always be revised if:

- the divorce is recognised in Italy;
- Italian jurisdiction is established;
- new circumstances arise; or
- spousal maintenance was not determined as a lump sum.

Matrimonial Property Regime

Jurisdiction in matters of the matrimonial property regime is defined by EU Regulation 1103/2016, which applies to legal proceedings instituted on or after 29 January 2019. According to Article 5 of the Regulation, where Italian courts are seized to rule on an application for divorce pursuant to EU Regulation 1111/2019, an Italian court shall have jurisdiction to rule in matters of the matrimonial property regime arising in connection with that application. Nevertheless, Italian jurisdiction in matters relating to the matrimonial property regime shall be subject to the spouses' agreement where the Italian courts that are seized to rule on the application for divorce are:

- the courts of the state in which the applicant is habitually resident and the applicant had resided there for at least a year immediately before the application was made;
- the courts of the state of which the applicant is a national and the applicant is habitually resident there and had resided there for at least six months immediately before the application was made;
- seized in cases of the conversion of a legal separation or divorce; or
- seized in cases of residual jurisdiction.

Each party can contest jurisdiction, as can the judge (on their own motion). The issue of jurisdiction has to be decided before the merit of the case, which can only be decided if Italian jurisdiction is correctly established.

Lis Pendens

As is the case for proceedings concerning status and those relating to maintenance obligations

and the matrimonial property regime, where proceedings involving the same cause of action and between the same parties are brought in the courts of different EU member states, any court other than the court first seized shall, on its own motion, stay its proceedings until such time as the jurisdiction of the court first seized is established (Article 12 of EU Regulation 4/2009 and Article 17 of EU Regulation 1103/2016).

Where the jurisdiction of the court first seized is established, any other court shall decline jurisdiction in favour of that court.

The above-mentioned rule on lis pendens does not apply if the court first seized is that of a non-member state, in which case the lis pendens mechanism is regulated by Article 7 of Law No 218/1995.

2.2 Service and Process

Spousal Maintenance

Financial issues in terms of maintenance between spouses are dealt with in legal separation or divorce proceedings. The legal separation/divorce judge can only grant maintenance as a sum paid monthly.

The following applies to spousal maintenance.

- If the spouses reach an agreement, they can submit a joint petition in court. If the agreement is fair, the court rules on financial issues according to the parties' agreement. Such procedures normally last approximately three or four months.
- If the spouses do not come to an agreement and a judicial divorce is necessary, proceedings progress as follows.
  (a) After the submission of the petition, a hearing is scheduled within 90 days. Before the first hearing, both the petitioner and the respondent are given some deadlines within which they are supposed to lodge all their reciprocal claims, requests for investigation by the court and the relevant documents with the court.
  (b) Following the first hearing, if the judge considers that the case is ready to be decided without any further investigation, the final decision can be immediately ruled. If, on the other hand, the judge considers that a more in-depth investigation is required, interim orders are issued (including visitation rights and maintenance for the children and eventually for the spouse). Once further investigations are closed, the judge orders the submission of final defences and the final decision is ruled.

The reform of civil proceedings has led to rather pressing timeframes for proceedings. This means that such procedures normally last between approximately six months and one year, depending on the complexity of the case.

Division of Assets

In order to divide their common assets (if any), the spouses have to lodge a petition in court, separate from legal separation or divorce proceedings.

Service

According to the Italian Civil Procedure Code, service is generally dealt with by a bailiff. The recent reform of civil proceedings in Italy (contained within Law No 206/2021 and Legislative Decree No 149/2022) has provided for new rules relating to service, according to which lawyers can also deal with service (in the cases and in the way stated by the law).

When a judicial document has to be transmitted abroad and an EU member state is involved, EU Regulation 1784/2020 applies; when a judicial document has to be transmitted abroad and a non-member state is involved, the Hague Service Convention of 1965 applies. When the Hague Service Convention does not apply and there are no bilateral agreements, the Italian Civil Procedure Code states that service is made by registered mail addressed to the recipient, and a copy of the document is also delivered to the Ministry of Foreign Affairs (Article 142 of the Italian Civil Procedure Code).

2.3 Division of Assets

Matrimonial Property Regime

The matrimonial property regime governs property acquired by the spouses during the marriage. Italian law provides for two different types of matrimonial property regime:

- *comunione dei beni* (community of assets regime); and
- *separazione dei beni* (separation of assets regime).

The matrimonial property regime applicable to the marriage does not interfere with the effects of legal separation/divorce between the spouses in terms of maintenance obligations.

- The statutory matrimonial property regime is the community of assets regime (Article 159 of the Italian Civil Code), which applies if the spouses do not make a different choice. According to Article 177 of the Italian Civil Code, all property acquired by the spouses after their marriage, whether individually or together, is part of the community of property, with the exception of some personal property (such as assets received as a gift or inheritance, or personal effects or assets that are used for the exercise of the spouse's profession). The assets acquired by each spouse before the marriage remain personal property even if the community of assets regime applies.
- The separation of assets regime is entirely different from the default regime: if the separation of assets regime is elected, each spouse maintains exclusive ownership and the right to use and manage property acquired before and after the marriage without any exception (Article 215 of the Italian Civil Code). Only chattels whose exclusive ownership is not proved are considered as joint property (Article 219 of the Italian Civil Code).

At the time of the death of one of the spouses or at the time of the legal separation, the community of assets regime dissolves and the spouses are supposed to divide the common property, if any, equally (50/50). The division of the spouses' eventual common assets must be dealt with in ordinary proceedings (not within legal separation/divorce proceedings).

If the separation of assets regime applies, Italian law does not allow for an equitable distribution of the assets between the spouses upon divorce. This means that, during legal separation or divorce proceedings and if Italian law applies, the judge has no power to split or reallocate assets or resources between the spouses.

Choice of Regime

In Italy, it is possible to choose the matrimonial property regime at any time. According to Article 162 of the Italian Civil Code, the choice of the separation of property regime may be declared during the celebration of the marriage, or made before the marriage or after the marriage itself, by drawing up a specific deed called c *onvenzione di separazione dei beni*. In order to be valid,

such c *onvenzione* must be concluded as a notarised deed in the presence of two witnesses. If the agreement is not concluded as a public deed (meaning that it does not fulfil the requirements as to form contained in Article 162 of the Italian Civil Code), it is null and void.

Trusts

The Hague Convention on the law applicable to trusts and their recognition concluded on 1 July 1985 entered into force in Italy on 1 January 1992. However, trusts are not regulated by Italian law, and the courts' approach to them is quite uncertain.

2.4 Spousal Maintenance

Sum Paid Monthly

As mentioned in **2.2 Service and Process**, the only decision an Italian judge can make on financial issues is the provision of a monthly maintenance payment, in both legal separation and divorce. The weaker spouse (usually, the wife) is entitled to receive spousal maintenance from the stronger spouse if there is financial disproportion between them.

Spousal support awarded by the Italian judge during legal separation/divorce proceedings does not have the scope to share or distribute the spouses' wealth and assets.

- Spousal maintenance granted within legal separation proceedings is called *assegno di mantenimento* (Article 156 of the Italian Civil Code) and has an assistance function. It serves to provide financial support to the weaker spouse – who has no means or who is incapable of obtaining them – so that they can maintain the standard of living enjoyed during the marriage. Spousal maintenance during legal separation is not awarded if the claimant is considered "guilty" for the separation.
- Maintenance granted within divorce proceedings is called *assegno divorzile* (Article 5 of the Italian Divorce Law). In Italy, a milestone decision of the Italian Supreme Court (Decision No 18287/2018) modified the grounds of spousal maintenance in the case of divorce, with the Supreme Court stating that spousal maintenance during divorce has to be granted in favour of the weaker spouse in order to allow them to be self-sufficient. If there is a disproportion between the finances of the spouses and the weaker spouse has no adequate means and cannot obtain them for objective reasons, the judge grants spousal support, taking into consideration criteria such as the parties' contribution to the increase of the family's assets and welfare, the sacrifices that the weaker spouse has made for the benefit of the family (eg, giving up work in order to take care of the children), their work capacity and age, and the duration of the marriage. This means that divorce maintenance in Italy now has a compensative nature as well as an assistance function.

During both legal separation proceedings and divorce proceedings, the judge rules on the financial interim order after the first hearing. This order is effective during the whole proceedings until the final decision (when it can be confirmed or modified on the basis of the result of the eventual investigation into the spouses' finances made during the proceedings).

In the absence of a standard calculator/table/percentage, the quantum of the spousal support depends on the judge's discretion. There is no maximum limit on the maintenance that can be ordered.

Provision of Information

The parties must provide relevant information about their income or assets in order for spousal support to be granted. In particular, according to the recent reform of civil proceedings in Italy (contained within Law No 206/2021 and Legislative Decree No 149/2022), in legal separation and divorce cases the spouses must provide:

- evidence of their own tax returns for the past three years;
- the documents concerning their property (eg, real estate, vehicles, boats) and shares in companies; and
- the statements of their bank accounts and investments for the past three years (Articles 473-bis.12 and 473-bis.48 of the Italian Civil Procedure Code).

Many courts in Italy also require the spouses to submit a "disclosure form", in which they are each supposed to provide even more detailed information than is required by law (housekeepers, insurance policies, membership of clubs and associations, the availability of rental properties, the enrolment of children in private schools, etc).

If the evidence provided by the spouses is contested or if the judge considers it to be inaccurate, a further investigation into their income and assets can be ordered (with the help of the tax authorities if necessary).

Moreover, the judge may draw conclusions from the behaviour of the parties during the proceedings (eg, providing inaccurate or incomplete information on their own economic conditions), from the answers of the parties during formal questioning and from their unjustified refusal to allow inspections (Articles 473-bis.18 and 116 of the Italian Civil Procedure Code).

Modification

It is always possible to ask for the modification of legal separation/divorce spousal support if the circumstances of the spouses or the family change.

When making its decision on spousal support, the court is supposed to explain the reasons of the decision itself, which is effective rebus sic stantibus. At the request of each of the parties, if the reasons for the decision change on the basis of new facts that unexpectedly developed after the decision was made (eg, a worsening of the financial position of the debtor or an improvement in the financial position of the claimant), the court may revise spousal support.

Financial orders concerning spousal support issued during legal separation or divorce proceedings are never final unless the payment of a lump sum is made (Article 5, Section 8 of the Italian Divorce Law).

Lump Sum

The payment of a lump sum (known as an una tantum payment) instead of periodical maintenance can only be agreed by the parties themselves and only at the moment of the divorce (not at the moment of legal separation). The judge cannot order the payment of a lump sum on their own motion; nevertheless, so that the lump sum agreed by the parties definitively stops any financial claim between the spouses, the judge has to ascertain that its amount is fair (generally speaking, this check is only formal).

2.5 Prenuptial and Postnuptial Agreements

Prenuptial and postnuptial agreements dealing with the effects of a future legal separation/divorce (in terms of maintenance rights) are null and void in Italy. The most recent decisions on

this matter include Supreme Court, 30 January 2017 No 2224, Supreme Court, 26 April 2021 No 11012, and Supreme Court, 28 June 2022 No 20745.

The restrictive perspective and the reasoning against the validity of such agreements can be summarised as follows:

- the effects of the divorce are effects of the marriage;
- the effects of the marriage are regulated in Italy by Article 160 of the Italian Civil Code, which prevents spouses from entering into agreements that have the effect of giving up or modifying the rights and duties deriving from the marriage; and
- therefore, the spouses cannot validly enter into an agreement with respect to maintenance rights subsequent to a divorce.

Agreements in contemplation of a future legal separation/divorce are considered to be against public order, as they violate the principle of the non-negotiability of rights in matrimonial matters.

In any case, the issue of the nullity of prenuptial/postnuptial agreements is a recurring topic of discussion in Italy, and certain academics have more than once incited the courts to change the consolidated interpretation. In recent years, there have been some isolated signs of openness (above all: Court of Torino, 20 April 2012 and Supreme Court, 24 February 2021 No 5065), and a change of the majority position of the courts is not excluded in favour of a newer and more modern approach.

While prenuptial/postnuptial agreements are null and void in Italy, the choice of the matrimonial property regime (the regime governing the property acquired by the spouses during the marriage) is admitted by law and does not interfere with the effects of legal separation/divorce between the spouses. The matrimonial property regime and legal separation/divorce effects are different issues that are to be dealt with separately.

2.6 Cohabitation

The Italian system does not allow for the equitable distribution of assets between unmarried couples (even of the same sex) at the moment of the breakdown of the relationship. This means that, if Italian law applies, the judge has no power to split or reallocate assets or resources between the parties.

If there are common assets (ie, assets jointly purchased by the cohabitants), each party can ask for the division of these assets.

Moreover, according to Law No 76/2016, it is possible for cohabitants (even of the same sex) to sign a "cohabitation agreement" (as a public deed in front of a notary public or as a private agreement authenticated by a lawyer, in both cases registered at the municipality) specifying the election of the property regime and the expectation of financial rights and duties between them.

If the cohabitants did not enter into a cohabitation agreement, an Italian judge cannot award maintenance (paid monthly) to one of the parties, as unmarried parties are not able to ask for financial support from each other, no matter how long they have been together. (The parties are only entitled to ask for maintenance for children, which is not affected by whether the parents were married or not.)

In any case, if one of the parties is in a state of need when the relationship breaks down, the judge can award alimonies for a period proportionate to the duration of the relationship. Alimonies are not to exceed what is necessary for funding the survival of the beneficiary.

2.7 Enforcement

If spousal support is not paid by the spouse who is obliged to do so, maintenance credit can be enforced, as ordinary credits, through the enforcement of the assets of the debtors. The payment of spousal maintenance in Italy is guaranteed by the following methods provided for by Article 473-bis.36 and following of the Italian Civil Procedure Code for both legal separation and divorce:

- real or personal guarantees;
- registration of the legal mortgage on real estate;
- the seizure of assets; or
- an order against the spouse's third-party debtor (employer, tenant, etc) to pay the beneficiary spouse directly.

EU Regulation 4/2009 governs the enforcement of international financial orders, as follows:

- according to Article 17, a decision given in a member state bound by the 2007 Hague Protocol that is enforceable in that state shall be enforceable in another EU member state without the need for a declaration of enforceability; and
- according to Article 26, a decision given in a member state not bound by the 2007 Hague Protocol and enforceable in that state shall be enforceable in another member state when, on the application of any interested party, it has been declared enforceable there (the proceedings for the exequatur take place in front of the court of appeal).

Article 67 of the Italian International Private Law states that the exequatur for enforceability is requested if the decision is given in a non-member state.

2.8 Media Access and Transparency

The media and the press are able to report on family law matters but the names of the parties should be anonymised to protect their right to privacy. (This does not always happen in practice.)

2.9 Alternative Dispute Resolution (ADR)

In terms of mechanisms outside of the court process to assist parties in resolving their financial disputes, Italian law allows for mediation and collaborative practice (c *onvenzione di negoziazione assistita*). Arbitration in family law matters is currently not admitted in Italy.

Collaborative Practice

The procedure for collaborative practice is ruled by Decree Law No 132/2014 converted into Law No 162/2014, and offers the possibility for the spouses to divorce by reaching a mutual agreement, without lodging a petition with the court but with the (mandatory) assistance of (at least) a lawyer for each of the spouses.

The procedure is applicable in both the presence and absence of children. Extensive collaboration by the spouses, disclosure of the parties' assets and the (near) absence of conflict between the spouses are necessary.

The agreement reached by the parties with the assistance of the lawyer is subject to scrutiny by the public prosecutor, and will be authorised if it is in the best interest of the children. If there

are no children, the public prosecutor's check is merely formal.

Once the agreement is authorised and lodged with the Italian public records, it produces the same effects as a court order.

Mediation

The procedure for mediation (ruled by Legislative Decree No 28/2010) is managed by a third and impartial person (mediator), who tries to solve the dispute between the parties and also suggests some solutions. If an agreement is reached, it produces the same effects as a court order once it is authorised by the court.

ADR methods are suggested by the courts. The parties are free to choose if they prefer to follow an ADR process or standard judicial proceedings. In any case, the lawyers assisting the spouses are obliged by Italian law to inform them that they can try to solve the dispute through ADR, before starting any proceedings.

3. Child Law

3.1 Choice of Jurisdiction

According to Article 7 of EU Regulation 1111/2019, Italian jurisdiction in matters of parental responsibility is grounded if the child is habitually resident in Italy at the time the court is seized. Generally speaking, to safeguard the best interests of the child (which is the main factor the court considers when establishing jurisdiction), jurisdiction is first determined according to the criterion of proximity, as the judge geographically closest to the habitual residence of the minor is in the most favourable situation to assess measures to be taken in the interest of the minor.

The habitual residence of the minor is the place where the centre of their life and relationships is concretely located, and the place where the child has a certain integration in a social, educational and family environment. Habitual residence does not correspond to the place where the child is physically present or registered only. The judge has wide discretion in this regard.

Exceptions

There are some exceptions to this general rule.

- Lawful move (Article 8) – the courts of the member state of the child's former habitual residence shall retain jurisdiction for three months following the lawful move, to modify a decision on access rights given in that member state before the child moved, if certain conditions are met.
- Wrongful move (Article 9) – the courts of the member state where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another member state and certain conditions are met.
- Choice of court (Article 10) – the courts of a member state have jurisdiction if:
  - (a) the child has a substantial connection with that member state;
  - (b) the parties, as well as any other holder of parental responsibility, have agreed freely upon the jurisdiction, at the latest at the time the court is seized, or have expressly accepted the jurisdiction in the course of the proceedings; or
  - (c) the exercise of jurisdiction is in the best interests of the child.
- Transfer of jurisdiction to a court of another member state (Article 12) – the court of a member state having jurisdiction on the basis of the criteria of the Regulation can ask the

court of another member state to assume jurisdiction if it considers that a court of another member state with which the child has a particular connection would be better placed to assess the best interests of the child in the particular case.

Finally, according to Article 11 of EU Regulation 1111/2019, where the habitual residence of a child cannot be established and jurisdiction cannot be determined on the basis of a choice of court agreement, Italian courts have jurisdiction if the child is present in Italy.

In relation to children not residing in an EU member state, jurisdiction in matters of parental responsibility is ruled by the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, which Italy ratified in 2015.

3.2 Living/Contact Arrangements and Child Maintenance

Child Arrangements

Parental responsibility arrangements include:

- custody;
- placement; and
- visitation rights.

If the parents are married, parental responsibility issues are decided within legal separation and divorce proceedings. If the parents agree on parental responsibility issues and the judge considers that the parents' agreement adequately takes into account the best interests of the children, the agreement is approved by the judge within the final decision pronouncing legal separation/divorce. If the parents do not agree on parental responsibility issues, the decision on parental responsibility is up to the judge pronouncing the legal separation/divorce decision.

If the parents are not married, proceedings start concerning children's issues only. Before the recent reform of civil proceedings in Italy (contained within Law No 206/2021 and Legislative Decree No 149/2022), there were two different procedures for dealing with parental responsibility issues for the case of married parents and non-married parents. Now, only one procedure exists.

The recent reform has expressly introduced – in the case of litigation insofar as parental responsibility issues are concerned – the duty for both parents to submit the so-called *piano genitoriale* to the court before the first hearing (Articles 473-bis.12 and 473-bis.16 of the Italian Civil Procedure Code). The purpose of this document is to provide the judge with relevant information concerning the children's daily commitments and activities related to school, as well as their educational pursuits and extracurricular activities, regular relationships and vacations normally enjoyed. This information will enable the judge to better evaluate the best interests of the child and make decisions taking into account the children's past living situation and habits and the parents' proposals for the future. The judge may also suggest a different plan.

In the evaluation of the interests of the children and in taking decisions regarding parental responsibility, the judge can ask for the help of a psychologist appointed in order to make a report on the family and the relationship between its members.

Custody

Joint custody is the default choice in Italy, whereby both parents continue to exercise

parental responsibility over the children. According to Article 337-ter of the Italian Civil Code, decisions in matters of parental responsibility must have the primary purpose of protecting the children's interest to maintain relationships that are as strong and frequent as possible with both parents and with both families. Joint custody means that the most important decisions in terms of the life of the children (school, education, health, city of residence, religion, etc) are taken together by the parents, while day-to-day and routine decisions can be taken separately.

Sole custody (Article 337-quater of the Italian Civil Code) is an exceptional choice (applied in the minority of cases) that can only be adopted when one of the parents appears to be unable or unfit to take care of the children or not suitable for the role (dangerous behaviour, unregulated lifestyle, mental health problems, etc) and, consequently, joint custody is not possible. The parent who has sole custody has the right to make the most important decisions for the children autonomously.

Placement

Even when joint custody is granted, in most cases the court identifies a parent (most frequently, the mother) with whom the children are supposed to prevalently live. In order to guarantee the children's habits and environment, as well as their safe and balanced development, the family home is supposed to be awarded to the parent with whom the children are placed, so that they can continue living there.

Visitation rights

The court also rules on visitation rights (Article 337-ter of the Italian Civil Code) in favour of the parent who does not live with the children; in recent years, the time that children spend with such parent has lengthened considerably. Generally speaking, each parent spends alternate weekends (from Friday to Monday) with the children. During the week, the parent who does not live with the children can spend one or two afternoons and overnight visits with them. Holidays can also be divided 50/50.

Child Support

According to Article 3 of EU Regulation 4/2009, Italian jurisdiction in matters of children maintenance is established if:

- the defendant is habitually resident in Italy;
- the creditor is habitually resident in Italy; or
- Italian courts have jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings (unless that jurisdiction is based solely on the nationality of one of the parties).

Child maintenance is decided within legal separation and divorce proceedings. If the parents agree on child maintenance, the agreement is approved by the judge within the final decision pronouncing legal separation/divorce. If the parents do not agree on child maintenance, the decision is up to the judge pronouncing the legal separation/divorce decision.

If the parents are not married, proceedings start concerning children's issues only.

The procedure for granting child support in favour of children born in wedlock and those born out of wedlock is the same.

Ordinary costs

Child maintenance is a sum paid monthly by one parent to the other for the ordinary life needs of the children. The judge cannot order the transfer of any capital to the children, but the parents

can agree to this and such an agreement will be accepted by the judge.

There is no calculator or table indicating the amount of child maintenance; the amount is determined at the judge's discretion. Nevertheless, the judge must consider the following criteria:

- the children's needs;
- the standard of living enjoyed by the children while living with both parents;
- the time spent with each parent;
- the financial situation of both parents (taking into account the parties' disclosure of assets and the investigation made during the proceedings); and
- the financial value of the domestic and caregiver duties carried out by each parent.

It is always possible to modify the amount of child maintenance if new circumstances occur (concerning either the parents or the children).

Extra costs

In addition to child maintenance, the parents are supposed to share extra costs for the children that are not included in the monthly paid maintenance. In Italy, many courts have adopted their own protocols determining which costs are included within child support and which costs are excluded. Generally speaking, extra costs not included in the monthly payment are school fees, medical expenses, and sports and travel costs (ie, the costs that are relevant, not foreseeable and not part of the daily maintenance of a child).

These costs should be agreed between the parents beforehand and then divided between them proportionally (the judge sets a certain percentage for each parent).

Duration

In Italy, parents are obliged to support their children even if they are older than 18 years old but not economically independent. If the child is of age and not independent but is not diligently looking for a job or not actively studying, the judge can revoke support in said child's favour. If the children are older than 18 years old but do not live with their parents, maintenance can be paid directly to the children.

Children can apply for financial provisions themselves after they reach the age of 18. If one of the parents is still living with the child, the parent can continue to ask for child support as well.

3.3 Other Matters

Each parent can ask for the intervention of the judge when they have opposing views on specific issues (schooling, medical treatment, religion, holidays, etc) and are not able to make a shared decision. The judge has the power to make orders, with which the parents have to comply.

The decisions of the judge are made with the best interest of the child as a priority; the judge can ask for the help of a consultant (ie, psychologist or doctor) if necessary. The judge's decision is discretionary, but there are some general orientations in case law that must be considered. By way of example, public school is preferred over private school if there is disagreement between parents.

To solve parental responsibility disputes, the judge may inform the parents that they can be assisted by a mediator; the parties may also jointly ask the judge to appoint an expert (eg, parenting co-ordinator). These professionals are intended to help the parties in making decisions, reducing conflict and complying with the court order, focusing on the children's best interest. If

there is extensive conflict between the parents, a curator of the minor can be appointed.

In deciding according to the best interest of the child, children over 12 years old (or less than 12 years of age if they are capable of understanding) have the right to be heard in all matters and judicial proceedings that concern their interests, and their opinions must be taken into consideration by the judge when making the decision (in any case, the judge may depart from them if the children's views do not correspond to their best interests). In hearing the minors, the judge can be assisted by experts (ie, psychologists).

Parental Alienation

In the case of parental alienation (ie, the attitudes of one parent aim to distance the child from the other parent), the judge must investigate the concrete behaviours of the alienating parent and must make the consequent decisions in matters of parental responsibility with the aim of preventing such behaviours. The Italian Supreme Court has stated that the judge cannot ground any decision on the vague statement that the child suffers from Parental Alienation Syndrome (PAS): every single behaviour held by the alienating parent needs to be proved.

Sometimes, the judge states that the social services must take charge of the family and monitor the situation. According to Italian law, some sanctions (warning, payment of a sum, compensation for damages) can be imposed on the alienating parent (although in practice sanctions have a very limited application).

3.4 ADR

See **2.9 Alternative Dispute Resolution (ADR)**.

3.5 Media Access and Transparency

The media and the press are able to report on family law matters, but the names of the parties should be anonymised to protect their right to privacy. Children's cases are very sensitive, so more attention is paid to anonymisation in such cases than in others.

MALTA

Law and Practice

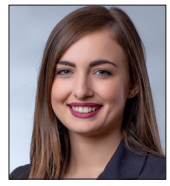
Contributed by:
John Bonello and Elian Scicluna
8Point Law

Contents

8Point Law has its roots in traditional legal services – the practice evolved from a small litigation and real estate advisory outfit to provide bespoke services to a more demanding clientele. 8Point Law's main areas of specialisation are dispute resolution, real estate and commercial law, whereas its family practice is mainly focused on services for international families with a Malta connection and expatriates who chose Malta as their base, thanks to the firm's international network of experienced family lawyers. 8Point Law also assists private clients – in particular, servicing the needs and interests of high net worth individuals and their families in residency and citizenship matters and cross-border family matters. Through its international network of collaborators, the firm prides itself in being at the forefront of legal cases that are complex, cut across multiple jurisdictions, and – in some cases – are outright ground-breaking.

Authors

John Bonello is the founding partner of 8Point Law and obtained a Doctor of Laws from the University of Malta in 2005, after completing a critical analysis on public procurement in Malta for his dissertation. John went on to achieve an LLM in international maritime law from the IMO International Maritime Law Institute and was admitted to the Maltese Bar in 2006. On invitation of the US Embassy in Malta, he completed an international visitor leadership programme in the USA (organised by the US Department of State) in 2010. John's involvement in cross-border family disputes led to him becoming a fellow of the International Academy of Family Lawyers in 2018.



Elian Scicluna joined 8Point Law in 2018. She achieved a Master of Advocacy degree and was admitted to the Maltese Bar in 2019. Elian mainly practises in dispute resolution both in civil and commercial matters, as well as the drafting of contracts – assisting several clients within the firm in their daily business operations.

8Point Law

19/9 Strait Street
Valletta
Malta

Tel: +356 2122 7237
Email: info@8pointlaw.com
Web: www.8pointlaw.com

1. Divorce

1.1 Grounds, Timeline, Service and Process

The concept of divorce was alien to Maltese law until 2011 when a referendum was called to decide on the matter. Despite the option of divorce being available for more than a decade now, it is customary in Malta to initially file for separation instead of divorce in the event of a matrimonial breakdown. Typically, once a separation is concluded, the involved parties may proceed to apply for a divorce order.

Personal Separation Under Maltese Law

When spouses seek separation in Malta, they are called for a mediation and reconciliation attempt. The mediator evaluates the possibility of reconciliation and submits a report to the Family Court. If reconciliation proves unattainable, personal separation may not take place except:

- on the demand of one spouse against the other, by filing an application before the Family Court; or
- by mutual consent of the parties, whereby a contract is signed before a notary public and then enrolled in the Public Registry of Malta.

In terms of the Maltese Civil Code, the grounds for a demand of separation are adultery, desertion for two years or more, cruelty, threats or grievous injury, and irremediable breakdown of the marriage where the couple has been married for at least four years – although it must be stated that the approach towards the last criterion is relatively liberal. If a spouse is found responsible for adultery or desertion, they may forfeit certain entitlements, such as maintenance, inheritance rights, and even their share of specific assets acquired through the efforts of the other spouse.

Upon conclusion of separation proceedings, the legal obligations between the spouses cease. The Community of Acquests regime, if applicable, ceases to apply and common property is liquidated.

Divorce

Separation does not terminate the matrimonial bond; hence, once collateral matters and a separation are concluded, it is advisable for the parties to demand a divorce order. The Family Court will issue a divorce order provided that certain conditions are satisfied, which are:

- the couple must have lived separately for a minimum of six months during the preceding year or, when the demand is made by one of the spouses against the other spouse, the spouses must have lived apart for a period of – or periods amounting to – at least one year in the preceding two years;
- reconciliation is deemed impossible;
- at least one of the two spouses must have had residency in Malta when submitting the divorce application; and
- the spouses and all of their children receive adequate maintenance (where this is due in terms of separation), according to their particular circumstances – either spouse may renounce their right to maintenance at any time.

Where an applicant wishes to proceed with divorce rather than first conclude a separation, the law places an obligation on the advocate of said applicant to discuss the possibility of reconciliation, provide the applicant with contact details of qualified professionals to help in the process of reconciliation, and ensure that the applicant is aware of the option of personal separation as an alternative to divorce. The same applies to the respondent's legal counsel.

In fact, the law further provides that – together with the divorce application – the advocate must file a declaration stating that this obligation has been fulfilled when the spouses are not legally separated.

Given that in Malta most marriages are celebrated in accordance with Catholic rites, it is pertinent to note that the effects of a divorce order are limited to the civil sphere. Unless such marriage is annulled by the competent church tribunal, a divorcee cannot contract a subsequent church marriage.

Annulment

Prior to the introduction of divorce, the only possibility for remarriage was for the parties to seek a declaration of nullity with regard to their failed marriage. Such a declaration implies that the marriage was null ab initio and therefore non-existent.

The jurisdiction over civil annulments is governed by the Marriage Act (Chapter 255 of the Laws of Malta) and an annulment petition is only allowed if at least one of the conditions specified in Article 19 of the Marriage Act are satisfied. An action for annulment of a marriage may only be brought before the Family Court by one of the parties to the marriage. The dissolution of a marital union through annulment can take place in the case of a defect in consent either through coercion, violence or fear, psychological anomalies, impotence that predates marriage, and lack of sufficient intellectual capacity at the time of marriage.

The grounds for a Catholic Church (canonical) annulment are governed by the Code of Canon Law. In terms of a treaty between Malta and the Holy See, once a competent church tribunal grants an annulment, either party may demand that the court of appeal order the registration of such decision in the Public Registry of Malta. In such cases, the court of appeal verifies and confirms that the church tribunal followed the correct procedure in granting the annulment.

Same-Sex Marriages in Malta

Following amendments to the Maltese Civil Code introduced in 2017, same-sex couples have been placed at par with heterosexual couples. In case of marital issues and breakdown, the ordinary separation and/or divorce procedures are to be followed.

Timeframe and Service

There is no set timeframe within which proceedings must be appointed for trial before the Maltese courts. Once an action is brought before the Family Court, a first hearing is typically scheduled within a few weeks.

Service of the personal separation or divorce application (where this is done by one spouse and is not joint) is effected at the defendant's residence or place of work. The procedure to be followed for valid service of any judicial act is set out in the Code of Procedure and must be adhered to meticulously. Once served, the defendant would have several days to reply to the plaintiff's pleas – after which, the case would be appointed for hearing before the Family Court.

No timeframe is imposed on the judiciary to deliver a decision. This will depend on several factors – mainly, the complexity of the case and the evidence brought by the parties.

1.2 Choice of Jurisdiction

As with all civil cases, national rules on jurisdiction are applied by Maltese courts; these rules apply also in matrimonial cases. In terms of the

Code of Procedure, the civil courts of Malta have jurisdiction to determine all actions concerning the following persons:

- citizens of Malta, provided they have not fixed their domicile elsewhere;
- any person as long as they are either domiciled or resident or present in Malta;
- any person, in matters relating to property situated or existing in Malta;
- any person who has contracted any obligation in Malta, but only with regard to actions stemming from such obligation and provided such person is present in Malta;
- any person who, having contracted an obligation in some other country, has nevertheless agreed to carry out such obligation in Malta, or who has contracted any obligation that must necessarily be put into effect in Malta – provided in either case such person is present in Malta;
- any person, with regard to any obligation contracted in favour of a citizen or resident of Malta or in favour of a body with a distinct legal personality or an association of persons incorporated or operating in Malta, if the judgment can be enforced in Malta; and
- any person who, expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.

In an action for divorce, at least one of the following requirements must be satisfied:

- one of the spouses is domiciled in Malta on the date of the filing of the demand for divorce before the court; or
- one of the spouses was ordinarily resident in Malta for a period of one year immediately preceding the filing of the demand for divorce.

In the case of disputes where a defendant is domiciled in an EU member state, the provisions of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) are applied by the Maltese courts.

2. Financial Proceedings

2.1 Choice of Jurisdiction

In the context of family proceedings, it is typical in Malta for all matters to be brought together in one process. Thus, a typical family case – be it a separation or a divorce – will include demands related to children's matters and financial matters. As such, the ordinary rules for jurisdiction as detailed in **1.2 Choice of Jurisdiction** apply in financial proceedings.

2.2 Service and Process

The service requirements and timelines outlined in **1.1 Grounds, Timeline, Service and Process** are applicable to financial proceedings.

2.3 Division of Assets

In terms of the Maltese Civil Code, three matrimonial regimes may apply in this jurisdiction: the Community of Acquests, the Separation of Estates, or the Community of Residue under Separate Administration (CORSA). The default position is the Community of Acquests – although couples may elect to have the regime of Separation of Estates regulating their financial matters. CORSA is seldom resorted to.

In terms of the Community of Acquests, assets acquired after marriage are deemed to be jointly owned by the spouses, thereby safeguarding the financial interests of the less affluent spouse.

However, personal possessions owned before marriage (paraphernal property) remain separate. Inheritance, even if acquired during marriage, is deemed paraphernal property. In terms of the Maltese Civil Code, the Community of Acquests applies automatically with regard to expatriates who relocate to Malta unless they agree to exclude such regime by public deed.

The regime of Separation of Estates aims to keep assets distinct so that acquests made by the individual spouses during marriage remain distinct. This regime shields family assets from potential creditors in the event of bankruptcy of a commercial undertaking of either spouse.

Specific rules apply to the matrimonial home. Irrespective of the ownership of the spouses' abode, the court may give specific directions as to which party may take up residence during and after separation.

In the ordinary course of proceedings, common matrimonial assets (often including the matrimonial home) end up being liquidated and the proceeds thereof shared between the parties. Given that the court can only order a sale through a court auction, it is reasonable to expect the parties to sell their assets through realtors. In the few cases where a court auction is the only option, the price realised is usually below the market value.

Maltese procedural law does not contain specific rules on disclosure. It is up to the parties to bring forward evidence to prove the extent of the common assets and, where relevant, of the individual assets of the other spouse. Given that many separations are concluded amicably, the parties must rely on the good faith of the other spouse. In contentious proceedings, the parties summon entities such as banks, public authorities, and employers to tender evidence of the holdings and earnings of the other party. This system is not ideal as it does not allow for complete and proper disclosure.

2.4 Spousal Maintenance

In Malta, maintenance for children is the rule not an exception. However, this is not the case for spouses in Malta who are parting ways. Circumstances of the case have a bearing on whether a spouse's request for spousal maintenance is upheld.

The Civil Code establishes a number of generic rules on maintenance – namely, that:

- the spouse has a prior right over the parents or other ascendants to maintenance – whereas, where both the spouse and children claim maintenance, they will be in a position of equality;
- no spouse may claim maintenance from the children or other descendants or from the ascendants if such maintenance can be obtained from the other spouse; and
- the duty of one spouse to maintain the other will cease if the latter, having left the matrimonial home, refuses – without reasonable cause – refuses to return thereto.

While common assets are divided equally between the spouses, the party responsible for the break-up may be ordered to pay maintenance to the other spouse. In determining maintenance, the court considers the working capacity of the spouses, especially in instances where the party claiming maintenance is deemed employable. In amicable separations, spousal maintenance is ordinarily waived.

Recent amendments to the laws on the matter underscore the importance of considering

means, work capabilities, needs, and various circumstances when determining maintenance. Additionally, it takes into consideration circumstances that impact the spouses' ability to support themselves and their children.

An interesting provision in the law relates to employability. The fact that the person to whom maintenance is due – in most instances, the wife – has had her chances of employability diminished because she has been out of the workforce for many years to take care of the children, the household and the husband will be taken into consideration when calculating maintenance. This clause intends to protect the stay-at-home wife or the wife who has had to abandon her career to take care of the family. A middle-aged woman who has been out of the workforce for more than a decade or two has limited chances, if any at all, of finding employment.

These legal provisions also consider every other income or benefit the spouses may receive other than social security contributions. The accommodation requirements of the spouse and of the children and the amount that would have been due to each of the parties (eg, a benefit under the pension scheme), which are being forfeited due to separation, are taken into consideration.

In Maltese divorce law, there is also a provision that aims to protect the right to maintenance in the form of a monetary guarantee. In fact, the law states that maintenance can be safeguarded by means of a guarantee in the form of a sum not exceeding the amount of maintenance for five years. The court will only order such a guarantee if it is shown that the person providing maintenance has, for example, consistently failed to pay maintenance, to the detriment of the children or spouse. If a divorcee receiving maintenance remarries or enters into a "personal relationship" – presumably also including cohabitation – then they will forfeit their entitlement to maintenance. This provision is also applicable in separation proceedings.

2.5 Prenuptial and Postnuptial Agreements

Maltese law permits spouses to enter into prenuptial or postnuptial agreements. Such agreements are governed by Article 1237 of the Civil Code. This provision allows prospective spouses to form agreements, provided they align with moral standards and the general principles outlined in the Maltese Civil Code. In both prenuptial and postnuptial contracts, couples can agree on the separation of property acquired during marriage or opt for CORSA. However, the Maltese Civil Code prohibits certain agreements, such as those establishing one spouse as the head of the family or altering the legal order of succession.

Before marriage, couples may modify the marriage contract with mutual consent. Post-marriage alterations require court authorisation to ensure the rights of third parties and children are safeguarded. Any provision disallowed in prenuptial agreements is also invalid in postnuptial agreements.

The subject matter of a contract is significant and Article 985 of the Civil Code prohibits contracts involving any subject matter that is impossible, prohibited by law, contrary to morality, or against public policy. Valid public deeds must be executed in the presence of a notary public.

2.6 Cohabitation

Prior to the enactment of the Cohabitation Act (Chapter 571 of the Laws of Malta) in 2017 (which has since been repealed and replaced by Chapter 614 of the Laws of Malta), Maltese law did not protect cohabiting couples. The only

protection cohabiting couples enjoyed was a quasi-contractual remedy of compensation for services rendered – that is, the liquidation of compensation for services rendered by the court upon the demand of a cohabitee (usually filed by an unemployed person against the breadwinner in the household).

The situation is now regulated in terms of law. The new Cohabitation Act generally entitles persons who consider themselves to be in an intimate relationship and who wish to live together to enter into a formal cohabitation relationship in terms of the Cohabitation Act. The new Cohabitation Act bestows several rights and protections upon couples who register their cohabitation pursuant to the provisions of the Cohabitation Act. These rights, similar to those enjoyed by married or civil union couples, include the following.

- Tenancy rights – a cohabitant is considered a tenant for all legal purposes, irrespective of the date of the lease and whether it is residential or commercial, granting them certain rights and protections in relation to such.
- Family membership – cohabitants registered under the Cohabitation Act are recognised as family members.
- Employment rights – cohabitants enjoy rights similar to those of married individuals or those in civil unions when it comes to work-related matters, including leave entitlements and other employment benefits.
- Designated next of kin – under the Cohabitation Act, a cohabitant is regarded as the closest person to the registered cohabitant. This designation carries certain legal implications, especially in matters involving inheritance and medical decisions.
- Children's allowance – cohabitants who have children are eligible to receive children's allowance in accordance with the relevant legislation. Children (if any) would also have the right to live in the common home, unless otherwise determined by a competent court.

A person who – immediately prior to the termination of the relationship or the death of the other party – was continually and habitually living with another person as a couple, and who had been living with the same person for a period of not less than two years, and whose relationship is not regulated under any law may file an application before the court within 12 months requesting the following rights (as the case may be and subject to certain limitations):

- the right of habitation in the common home for a period determined by the court; and
- the right to be compensated for any patrimonial loss that person may have suffered, where the other party would have enriched themselves to the former's detriment.

2.7 Enforcement

The Maltese courts issue executive acts to enforce court judgments and orders. These executive acts may take the form of either:

- warrants to seize property (movable and immovable); or
- garnishee orders intended to attach the funds of the debtor to third parties (usually banks).

Failure to pay maintenance when due constitutes an offence that is punishable by detention.

2.8 Media Access and Transparency

Proceedings before the Maltese courts are public. Similarly, all documents and records of the proceedings are accessible to the public. There are restrictions in the Family Court – although there is no blanket restriction on the media cov-

ering proceedings. Specific orders are made when necessary to protect individuals who require protection in the context of ongoing proceedings.

Keywords do not feature as a headline in the case law. However, the legal case management system used by the Courts of Justice in Malta offers a function whereby certain judgments deemed of interest to the public are indexed – ie, a set of keywords would be grouped together with a summary of the judgment linked to the record.

Since 2000, all case law is fully published in Malta via the portal of the Court Services Agency. Judgments delivered by the Family Court are anonymised. Over time, the Court Services Agency receives requests from individuals whose names appeared in judgments for their records to be removed from the public online database. The "right to be forgotten" pursuant to the EU's General Data Protection Regulation applies to such cases.

2.9 Alternative Dispute Resolution (ADR)

ADR methods in Malta cannot simply be considered in a vacuum. This is mainly because they are viewed as methods to address general civil claims, rather than being specifically established to address family law matters or as an alternative means of resolving financial disputes.

Even though court litigation is still one of the strongest forms of dispute settlement in civil matters in Malta, alternative methods do exist. Indeed, arbitration and mediation have become more popular in recent years. In 2004, mandatory mediation was introduced in most family cases and is used as a method to help parties reach an amicable settlement rather than go through costly and lengthy judicial proceedings.

In terms of the 1996 Arbitration Act, disputes concerning questions of personal civil status (including those relating to personal separation, divorce, or annulment of marriage) are not capable of settlement by arbitration. An exception was introduced in 1999 so that questions relating to the division of property between spouses may be referred to arbitration, subject to the competent court's approval of the arbitration agreement and of the arbitrator to be appointed. Unfortunately, this procedure is seldom resorted to.

3. Child Law

3.1 Choice of Jurisdiction

The jurisdictional grounds outlined in **1.2 Choice of Jurisdiction** are generally applicable to child proceedings, given that Maltese procedural law does not differentiate between classes of claims within the context of marital breakdown.

The jurisdiction of the Maltese courts is subject to the provisions of Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility (the "Brussels II bis Regulation"). A Maltese court will only have jurisdiction over divorce proceedings pursuant to the Brussels II bis Regulation.

3.2 Living/Contact Arrangements and Child Maintenance

Maltese legislation and case law gives utmost importance to the best interests of the child. Care and custody of a child is not simply based on who is the better parent but also on what decisions will be in the child's best interests.

Any arrangement by parents concerning a child requires the approval of the Family Court. Thus,

for instance, the court will not ordinarily favourably consider a living arrangement that does not provide for a certain degree of stability and routine for the child.

Children's matters in Malta are typically grouped under three categories, as follows.

Care and Custody

Normally, the parents agree that care and custody is to be shared, subject to an express agreement as to the residence of the child. In contentious situations, the court will only deprive a parent of care and custody if there are circumstances that warrant such action.

Where adverse indications arise, social workers will be asked to intervene and carry out their assessments. In the unlikely event that care and custody is vested in one parent to the exclusion of the other, certain matters will still require the consent of the other parent. These include matters relating to access or to the removal of the child to another country.

Visitation Rights

Visitation rights are afforded in a way that tries to eliminate disruptions to the child's schedule. Non-observation of visitation rights undoubtedly results in hardship on the other parent at the expense of the child and, in view of this, action may be taken if a court-sanctioned schedule is not followed.

Child Support and Maintenance

Generally speaking, and in accordance with Article 157 of the Maltese Civil Code, parents are obliged to maintain their children until the age of majority (ie, when the child reaches the age of 18). Maintenance encompasses necessities such as food, clothing, health, habitation, and child-related expenses for health and education. The amount of maintenance payable to the primary caregiver is determined based on the claimant's needs and the financial capacity of the person responsible for providing maintenance. When evaluating a claimant's ability to contribute to maintenance, consideration is given to their income. Assets owned by the claimant, both movable and immovable, are also taken into account.

In 2011, amendments to the Maltese Civil Code established that parents are obliged to continue offering sufficient maintenance for their children (depending on their means) until the children reach the age of 23 if the children are in full-time education or training. Likewise, maintenance obligations do not cease if a child has a mental or physical disability recognised at law.

Court orders in relation to child maintenance

Maintenance orders are enforceable by law and failure to pay maintenance is considered a breach that affects public order. Specifically, Article 338(z) of the Maltese Criminal Code stipulates that anyone who fails to pay maintenance as ordered by a court or as agreed in a contract, within 15 days following the due date, will be guilty of a contravention against public order. In cases of repeated offences, the person will be liable for a punishment of detention not exceeding three months or imprisonment for a term not exceeding two months.

In instances where the individual responsible for paying maintenance encounters legitimate difficulties that prevent them from fulfilling their obligations, ceasing payments unilaterally is not permitted. To avoid penalties under Article 338(z) of the Maltese Criminal Code, they must apply to court to either reduce the payment amount or be relieved of the obligation entirely.

Can children apply for financial provisions themselves?

Under Maltese law, a "child" is defined as an individual who has not yet reached the age of 18. Minors are subject to parental authority, with parents representing their children in all civil matters. However, parental authority may cease under certain circumstances – for example, when the child marries, when the child is emancipated to engage in trade, or when a parent consents to the child being allowed to sue or be sued.

While parents generally represent their minor children in civil proceedings, situations may arise where a conflict of interest exists due to personal stakes of the parents. In such cases, the court may appoint a curator to act on behalf of the child. This situation is likely to arise if, for example, a minor seeks to initiate proceedings against a parent for maintenance. The court is expected to assess whether the parent's intentions conflict with the child's interests, either on the court's own initiative (ex officio) or based on a request from the minor or any interested party (eg, a social worker).

If a parent with parental authority is unable or unwilling to represent the child or grant consent for the child to initiate legal action, the court of voluntary jurisdiction can grant the necessary authority, enabling the minor to apply to the court. This power is only granted in circumstances where the court deems it appropriate.

Thus, a child has the right to pursue maintenance from the parent responsible for providing it, particularly when the other parent refuses to do so. Although children cannot initiate legal actions independently, the option for a child to voice their concerns and advocate for their right to maintenance exists. The court may allow a third party (such as a curator or tutor) to represent the child – especially when the parents refuse or have conflicting interests – and thereby provide the child with the opportunity to assert their rights.

As mentioned earlier, maintenance obligations cease when a child reaches the age of 18. However, if the child continues their studies, these obligations extend until the age of 23. Once the child turns 18 and is legally considered an adult, they can apply for financial provisions independently if a parent fails to fulfil their maintenance responsibilities.

3.3 Other Matters

If the parents have conflicting and opposing views regarding specific issues (ie, schooling, medical treatment, or religion), the parties may seek a court decision. Whenever any individual desires to proceed before the Family Section of the Civil Court in connection with disputes between parents concerning the custody and maintenance of or visitation rights to their children (or variation of any agreement in relation to these matters), the claimant must first demand that mediation takes place. If the parties fail to reach agreement in mediation, the matter will be referred to the courts for decision.

Maltese law clearly states that there is no age limitation with regard to the witnesses who will take the stand during legal proceedings, provided that they understand that "it is wrong to give false testimony". Article 131(4) of the Civil Code of Malta states that in family matters the court must hear the parents and the child, if such child has attained the age of 14 years, and then suggest a way forward. If the disagreement between the parents persists, the court can also authorise "the parent whom it considers more suitable to protect the interest of the child in the particular

case to decide upon the issue". Exceptionally, in situations of imminent danger, any one of the parents may act and take urgent measures.

In cases involving children, the Family Section of the Civil Court may appoint a children's advocate in accordance with Regulation 3 of Subsidiary Legislation 12.20. Regulation 3(6)(a) goes on to outline the role of children's advocate, which includes:

- keeping the child's best interest in mind;
- providing legal assistance, representation, advice and information to minors;
- presenting the views of minors before the court, including through the submission of judicial affidavits; and
- explaining to the minors the potential consequences if the court were to align with their expressed wishes.

Children's advocates are appointed not only in cases of contentious separation but also in instances of amicable separation.

The official position of children's advocate was set up a few years back. One augurs that it will develop into a fully fledged institution for the protection of children's rights in family matters.

Parental Alienation

In IS and Others v Malta decided by the ECHR in 2021, the ECHR noted that the State did not abide by its positive obligation to protect the right to family life as established by Article 8 of the European Convention on Human Rights, as state authorities did not pursue all the necessary actions to reunite the applicant with his children. Aside from this case, the applicant had tried to seek effective redress through local remedies; nonetheless, these failed to implement the required measures to protect consistent contact and the relationship between the applicant and the child.

The court must ensure that any decision taken in the context of family matters is in the child's best interests. When faced with allegations of parental alienation, the court may appoint experts to assess the situation. They will recommend the necessary action to prevent escalation and to rebuild the relationship between the child and the rejected parent. A public agency supports families in these situations.

3.4 ADR

The only compulsory ADR in family proceedings in Malta is the mediation process a couple must go through before filing for separation or divorce. If mediation is successful, an agreement is drawn up to regulate the matter being addressed and is presented to the court for approval. Once signed by the parties, it is binding and – unless there is a serious change in circumstances – unlikely to be modified by the court.

In the context of financial matters, further information has been provided in **2.9 Alternative Dispute Resolution (ADR)**.

3.5 Media Access and Transparency

See **2.8 Media Access and Transparency**.

NETHERLANDS

Law and Practice

Contributed by:
Sandra Verburgt, Petra Beishuizen and Ivo Janssens
Delissen Martens Advocaten

Contents

Delissen Martens Advocaten is a full-service law firm with more than 40 lawyers, tax advisers, and mediators, offering expertise in virtually all areas of law – from corporate law to family law. The firm's broad approach enables it to deal effectively with both business and private matters. Delissen Martens Advocaten combines in-depth legal knowledge with contemporary issues such as sustainability, digitalisation and diversity. The firm's lawyers not only interpret the law, but also consider its impact and potential implications. This enables the team to provide innovative and practical solutions. Delissen Martens Advocaten's approach is one of openness, accessibility and engagement – advising not only from the perspective of the law book, but also based on a keen insight into social developments. As a result, the team offers expert and progressive legal advice that is in tune with today's challenges.

Authors

Sandra Verburgt is a partner at Delissen Martens Advocaten, with a special focus on international family law. Sandra is a trained collaborative divorce lawyer and skilled litigator who spent 25 years gaining experience in family law. Her work mainly concerns more complicated divorces, maintenance, and property settlements. Sandra frequently engages as an expert in foreign proceedings, in addition to providing advice on international estate planning and prenuptial agreements for high net worth individuals and business owners. She is a member of the Dutch Association of Family and Inheritance Lawyers and Divorce Mediators (vFAS) and the Association of Collaborative Professionals (VvCP), as well as president of the International Academy of Family Lawyers' European Chapter.

Petra Beishuizen is a partner at Delissen Martens Advocaten and has more than 25 years' experience in family law and business mediation. She guides business owners and professionals through complex financial and legal issues, focusing on rebuilding relationships and finding lasting solutions. Petra specialises in family business, partnership, and boardroom conflicts. She is also a peer counsellor and trainer in professional coaching. With an integrative, holistic approach, Petra looks beyond the legal aspects to the emotional and relational dynamics within a conflict. She is a member of the Dutch Association of Family and Inheritance Lawyers and Divorce Mediators (vFAS), the Association of Collaborative Professionals (VvCP), and the International Academy of Family Lawyers.

Ivo Janssens is a partner at Delissen Martens Advocaten. After gaining a degree in tax law, he worked for two large accountants and tax consultancy firms before becoming a member of the Dutch Bar Association in 2001. Ivo then continued his practice as a lawyer and tax consultant and is also a trained collaborative practitioner, who focuses on inheritance law and estate planning for directors/principal shareholders and wealthy private individuals. Ivo's multidisciplinary approach enables him to find creative and pragmatic solutions for complex issues entrusted to him. Ivo is a member and treasurer of the Association of Collaborative Professionals (VvCP).

Delissen Martens Advocaten

Sportlaan 40
2566 LB The Hague
The Netherlands

Tel: +31 (0) 70 311 54 11
Fax: +31 (0) 70 311 54 12
Email: info@delissenmartens.nl
Web: www.delissenmartens.nl

1. Divorce

1.1 Grounds, Timeline, Service and Process

Divorce

The Netherlands has had a no-fault divorce system since 1973. There is no requirement for a period of separation prior to a petition for divorce. Divorce will be granted by the Family Court on the request of one spouse if the marriage has broken down irretrievably or, if both spouses agree, by mutual consent. No distinction is made between the nature of the marriage, as marriage is open both to heterosexual couples and same-sex couples in the Netherlands. After the divorce is granted by the court, the parties must sign a waiver to appeal and also request the registration of the divorce in the Municipality Register by the Registrar of Births, Deaths, Marriages and Registered Partnerships of the municipality where they were married.

The divorce may also be registered by one spouse. In such case, this spouse must wait until the end of the full appeal term, which is three months after the divorce decision is rendered. Once three months have elapsed, the spouse may register the divorce. Registration must take place no later than six months after the date on which the decision can no longer be appealed. The divorce becomes full and final only once this registration has taken place.

Divorce by mutual consent

After agreeing on the maintenance provisions (if any), division of matrimonial assets, and pension provisions upon divorce, the spouses submit a joint petition for divorce by mutual consent – together with a divorce agreement – to the family division of the district court. The divorce agreement sets out all the arrangements with regard to spousal maintenance, pensions, and settlement of the matrimonial property regime, as well as the tax effects of these arrangements.

Upon receipt of the petition and agreement, the Family Court judge will consider whether the terms of the divorce agreement are in accordance with the law (ie, not against public policy) and also whether the requested provisions in the joint petition are in accordance with the divorce agreement. The Family Court judge renders a divorce judgment in which the judge declares the divorce of the spouses, makes the requested provisions and attaches their divorce agreement to the decision.

Divorce by mutual consent (with children)

The divorce proceedings follow the same track as per divorce by mutual consent where no children are involved. There is an extra condition for the granting of a divorce, however. Together with the divorce petition, the spouses must submit a signed parenting plan – details of which can be found in **3.2 Living/Contact Arrangements and Child Maintenance**.

Divorce upon request of one spouse

The petitioner may request for divorce and ancillary provisions (such as spousal support, the right to remain in the matrimonial home for six months after the divorce, and settlement of the matrimonial property regime). Pension equalisation will be provided for by law, unless the spouses have agreed otherwise in a marital contract (or divorce agreement). The other spouse will be granted a term within which to respond to the petition and ancillary provisions and may also ask the Family Court to make provisions on their behalf.

If the spouses have children, they should at least try to agree to the terms of a parenting plan, as mentioned earlier and elaborated upon in **3.2**

Living/Contact Arrangements and Child Maintenance. If they fail to agree to a parenting plan, then they may ask the Family Court to render a decision with regard to parental responsibility.

The Family Court judge will hear both spouses and then render a decision upon the request of the petitioner and respondent. The court may have made an order to divide or settle the matrimonial regime, but that decision in itself does not result in a transfer of the assets. The parties may need to implement further acts to establish the actual division of the assets – for example, sign a deed of division and transfer of real estate with a civil law notary.

Timeline

Contentious divorce proceedings take between one and two years on average. In contrast, divorce by mutual consent takes between three and six months (based on a divorce agreement).

Service of divorce petition

The divorce petition shall be served upon the other party within 14 days once the petition has been submitted to the Family Court. If the other spouse is habitually resident within the Netherlands, this spouse will be granted a term within which to respond of six weeks upon service. If the other spouse is not habitually resident in the Netherlands or does not have a known address in the Netherlands, the term within which to respond to the petition is three months upon service. If the respondent spouse instructs a lawyer, that lawyer may request an extension of the term within which to respond to the divorce petition, provided that such request is submitted before the expiration of the initial term of six weeks or three months. The Dutch court shall be deemed to be seised at the time when the divorce petition instituting the divorce proceedings is lodged with the Family Court.

Dissolution of Registered Partnership

The same grounds and procedure as outlined for divorce also apply to the dissolution of the registered partnership of registered partners with minor children.

Registered partners without minor children may submit a declaration in order to dissolve their partnership on the ground that it has irretrievably broken down to the Registrar of Births, Deaths, Marriages and Registered Partnerships of the municipality in which they live. This declaration shall be co-signed by a lawyer or civil law notary.

Religious Marriages

The Netherlands is a secular state. The Family Court only dissolves civil marriages and registered partnerships. Only a civil divorce has legal effect under Dutch law, just as only a civil marriage will be recognised as a marriage under Dutch law. It is forbidden to have a religious marriage before the civil marriage has been solemnised.

However, it has been assumed in case law that not co-operating in a religious divorce may conflict with the due care that should be observed concerning the other party. As early as 1982, the Supreme Court ruled that the husband's refusal to co-operate in bringing about a rabbinical divorce from his wife may be unlawful. In that case, the court may order him to co-operate after all. This ruling was confirmed again by the District Court of Rotterdam in a judgment of 8 December 2010 and the District Court of Amsterdam in a judgment of 10 April 2012. On 21 November 2017, The Hague Court of Appeal ruled in the same way in respect of the husband's refusal to co-operate in ending a Sunni religious marriage and sentenced him to co-operate within two weeks.

On 7 March 2023, the Senate adopted the bill to combat marital captivity, which subsequently entered into force on 14 April 2023 (Stb 2023, 114). This bill ensures that the court can make arrangements in the event of a divorce – as an ancillary provision to civil divorce proceedings – whereby a spouse is ordered to co-operate in the dissolution of a religious marriage.

Judicial Separation

A legal separation can also be requested on the ground that the marriage has broken down irretrievably. Unlike a divorce, a judicial separation will not result in the dissolution of the marriage. Judicial separation has traditionally been an option for spouses who do not wish to divorce for religious reasons. As a result of the judicial separation, the matrimonial regime will be dissolved and maintenance obligations may be determined.

Spouses cannot divorce after a judicial separation until three years have elapsed, unless the request for divorce is on a mutual basis. In that case, the term is one year after judicial separation. The spouses may reconcile, which will end the judicial separation.

1.2 Choice of Jurisdiction

Jurisdictional Grounds for Commencing Divorce Proceedings

The Netherlands is an EU member state and Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (the "Brussels II ter Regulation") applies when determining international jurisdiction in divorce matters following the dissolution of any marriage, whether it be a heterosexual marriage or a same-sex marriage. Jurisdiction will lie with the Dutch court if:

- the spouses are habitually resident in the Netherlands;
- the spouses were last habitually resident in the Netherlands (insofar as one of them still resides there);
- the respondent is habitually resident in the Netherlands;
- in the event of a joint application, either of the spouses is habitually resident in the Netherlands;
- the applicant resided in the Netherlands for at least a year immediately before the application was made;
- the applicant resided in the Netherlands for at least six months immediately before the application was made and is a Dutch national; or
- if both spouses have Dutch nationality.

Jurisdictional Grounds for Dissolving Registered Partnerships

As registered partners are not subject to any EU legislation with regard to the dissolution of their partnership, this is subject to Dutch procedural law. If the registered partnership was solemnised in the Netherlands, the Dutch authorities (whether it be the Family Court or the Registrar of Births, Deaths, Marriages and Registered Partnerships) have jurisdiction concerning any request to dissolve the partnership. If the registered partnership was solemnised abroad, the jurisdictional grounds are the same as those for commencing divorce proceedings.

Concepts of Domicile, Residence and Nationality

"Domicile" and "residence" are synonymous in Dutch law and refer to the place where an individual is habitually resident. It is the place that reflects some degree of integration – for example, the centre of one's social life or the location where a person's life actually takes place – as evidenced by the permanence of residence and

the intention to settle there. In the Netherlands, this generally means the municipality in which an individual is registered. A stay of several months for study or vacation, for example, is not considered to constitute a habitual residence – nor is the wish to be buried in the Netherlands considered as maintaining one's domicile in the Netherlands.

"Nationality" is the possession of citizenship of a country or countries.

Contesting Jurisdiction in Divorce Proceedings

Contesting jurisdiction in divorce proceedings is possible if there is a legitimate ground under the Brussels II ter Regulation or Dutch procedural law – for example, if the divorce application does not comply with the previously mentioned jurisdictional grounds. It would also be possible if divorce proceedings are already pending in another EU member state or non-EU member state and it is likely that the Dutch court would recognise that foreign divorce decision. Another situation in which jurisdiction could be contested is where a divorce decision has already been obtained in another jurisdiction and that decision is recognised in the Netherlands.

Staying Proceedings in Order to Pursue Divorce Proceedings in Foreign Jurisdictions

An application to stay proceedings for this purpose will only be successful if those divorce proceedings were issued earlier than the Dutch proceedings and if it is likely that the Netherlands would recognise that foreign divorce decision. When addressing this issue, the court considers factors such as:

- whether there is a jurisdictional ground for divorce based on Brussels II ter Regulation;
- the date on which the petition was submitted to the court in the other jurisdiction; and
- whether the divorce decision (if any) would likely be recognised in the Netherlands in the event of divorce proceedings in a non-EU member state.

The forum non conveniens concept is not an acceptable jurisdictional ground in the Netherlands (see **2.1 Choice of Jurisdiction** for further detail).

2. Financial Proceedings

2.1 Choice of Jurisdiction

Grounds for Jurisdiction

The EU Matrimonial Property Regulation and the EU Maintenance Regulation apply in the Netherlands. Matrimonial settlement and spousal support could be requested ancillary to divorce. The Dutch court seised with jurisdiction for divorce may also have jurisdiction to rule on maintenance obligations between spouses. A matrimonial settlement could be requested if the jurisdictional ground for divorce is not solely based on the habitual residence of the spouse-petitioner. If jurisdiction for divorce is solely based on the habitual residence of the spouse-petitioner, then an additional choice of forum agreement between the spouses is required. Where there is no choice of court agreement and the divorce jurisdiction is based on the habitual residence of the spouse-petitioner, the Dutch divorce court may accept jurisdiction only concerning Dutch real estate owned by the spouses.

In cases of separate matrimonial property proceedings after (foreign) divorce, the Dutch divorce court may accept jurisdiction based on the following grounds:

- choice of court agreement;
- common habitual residence in the Netherlands at the time the court is seised;
- last habitual residence in the Netherlands, where one of the spouses still resides at the time the court is seised;
- the respondent has their residence in the Netherlands at the time the court is seised; or
- both spouses have Dutch nationality.

If a matrimonial settlement has already been obtained as part of a foreign divorce, the court will likely consider that there is no interest for the spouses in second proceedings on the same subject. However, if the parties are co-owners of real estate in the Netherlands and that property has not been divided in the foreign divorce proceedings, each party may seek division of that real estate in the Netherlands.

Contesting Jurisdiction

A party's ability to contest jurisdiction is limited to certain defined situations. Where the estate of the deceased falls under the EU Succession Regulation but includes assets located in a third state, the Dutch court seised to rule on the matrimonial property regime may – at the request of one of the parties – decide not to rule on one or more of such assets if its decision is unlikely to be recognised and (where applicable) declared enforceable in that third state.

As previously mentioned, another reason to contest jurisdiction is when the jurisdiction is solely based on the habitual residence of the petitioner and there is no choice of court agreement between the parties.

Lis Pendens

If proceedings between the same parties on the same subject are already pending in another EU member state, any court other than the court first seised shall – of its own motion – stay its proceedings until the jurisdiction of the court first seised is established. Where related actions are pending in the courts of different EU member states, any court other than the court first seised may stay its proceedings.

Forum Non Conveniens

The forum non conveniens concept is not an acceptable jurisdictional ground in the Netherlands. In other words, if a foreign court would accept divorce jurisdiction merely on this ground and those proceedings are commenced later than the Dutch proceedings, it is unlikely that a request to stay Dutch divorce proceedings would be granted – nor is it likely that an anti-suit injunction order issued in the foreign jurisdiction would be recognised in the Netherlands.

2.2 Service and Process

If ancillary to divorce proceedings, the claim is instituted by ancillary request in the divorce petition and will follow the service process of the divorce proceedings (see **1.2 Choice of Jurisdiction**).

In the event of separate proceedings, the claim is instituted by summons and will be served upon the defendant by a bailiff if the defendant is resident in the Netherlands. After the defendant has been served, the summons will be lodged with the court. If the defendant is not habitually resident in the Netherlands, the summons will be served under the EU Service Regulation or the Hague Service Convention 1965.

Timeline for Financial Proceedings

If part of divorce proceedings, contentious proceedings could take between one and two years. However, financial proceedings tend to last between three and six months if based on a divorce agreement and including the negotia-

tions. Separate proceedings take two years or more.

2.3 Division of Assets

Dutch matrimonial law is codified in the law and therefore matrimonial property regimes are the basis for Dutch matrimonial law. The statutory regime is the limited community of property, which means that the spouses share all property except inherited wealth, donations and premarital property. If spouses do not wish to be married under the statutory regime, they must enter into a marital contract.

Dutch courts have no discretionary powers to divide or reallocate assets or resources other than that provided by the law or the marital contract of the spouses. In general, the scope of the discretionary powers of the court is very limited. The court may apply the concept of reasonableness and fairness only when the law provides for an open norm. The court is bound by the applicable matrimonial regime. If the parties have agreed in their marital contract that any community of property is excluded without any further settlement (so-called cold exclusion), the Dutch court cannot deviate from that principle and reallocate assets.

In its judgment of 7 December 1990, the Supreme Court considered an exception to the statutory division. Deviation from the law can only be accepted in very exceptional circumstances, whereby it would be unacceptable – according to standards of reasonableness and fairness – for one spouse to invoke the statutory division-by-half against the other spouse. In the case in question, a non-wealthy man married a much older, well-to-do woman in community of property. Five weeks after entering into marriage, the man took his wife's life (Murder Marriage, NJ 1991/593).

Financial Disclosure

Under Dutch procedural law, spouses must declare all information and evidence that is relevant to the case and the court's decision. However, there is no concept of contempt of court under Dutch law and therefore no procedural penalty for failing to declare all such information. In the event of a spouse finding out at a later stage that the other spouse did not declare all assets, there is a sanction in matrimonial law. It is also quite possible in financial proceedings to formulate a request to disclose specific financial information (843a Rv request). The request must be substantiated to prevent fishing expeditions.

A spouse who wilfully conceals, keeps hidden, or causes the loss of an item of community property or property that forms part of the nettable capital under a marital contract – the value of which is not included in the statutory division or the settlement under the marital contract as a result – may not settle its value but must transfer it entirely to the other spouse or compensate the other spouse in full instead. The cheated spouse may initiate new proceedings for this.

Trusts

The concept of trust is alien to Dutch law. Therefore, if the settlor of an English or American trust is a Dutch national and the trustee is habitually resident in the Netherlands, then it could well be that a Dutch court will not recognise the trust because of insufficient nexus with the Netherlands.

Further, in the Netherlands, there is a concept of "forced heirship", which may hinder the implementation of the trust. Under Dutch law, a contribution of capital to a trust that violates the forced heirship is valid in principle. The forced heir must ask for that legitimate share in the estate. In such a case, the forced heir could partially nullify the

contribution of assets to the trust. Since 2010, the Netherlands has made an arrangement in the form of the Dutch Separate Private Funds (*Afgezonderd Particulier Vermogen*, or APV) scheme for the taxation of – among other things – trusts.

Offshore trusts

In general, Dutch courts will deal with the matrimonial property regime as a whole, including foreign assets (if these are part of the matrimonial regime). However, when it comes to the enforcement of such orders, exequaturs must be obtained in the jurisdiction where such order is to be enforced. A Dutch court is not likely to consider an undefined claim in a trust in proceedings regarding the settlement of matrimonial property regimes because at the time of the divorce:

- it is not a given that the beneficiary will actually receive anything; and
- the amount of the claim is not fixed (were the beneficiary to receive anything).

If the claim itself is not awarded, it is unlikely that a Dutch court would want to make an order in respect of a property held in an offshore trust. A Dutch court will only make an award if the claim is defined at the reference date (ie, date of the divorce petition). One exception would be where foreign matrimonial law applies to the settlement of the matrimonial property regime and, under that foreign law, property held in a trust will be considered in the settlement of the matrimonial property regime. In that case, a Dutch court might be willing to make an order applying the foreign law. However, even then an exequatur must be obtained in the jurisdiction where such orders are to be enforced.

2.4 Spousal Maintenance

Under Dutch law, spousal maintenance is a separate provision from asset division. The concept of spousal maintenance is codified in the law; therefore, most prenuptial or postnuptial agreements will not contain a clause on spousal support. However, this does not mean that the parties can exclude maintenance obligations after divorce. On the contrary, under Dutch law, prenuptial contracts in which maintenance due according to the law is renounced are null and void.

As long as the parties are married, they have a financial obligation to support each other if there is a need for support. Interim spousal support is therefore granted if the needs for support are established and the other spouse has financial capacity to do so.

Calculation of Spousal Maintenance Obligations

According to Dutch maintenance law, spouses' obligation to contribute to each other's living costs depends on two factors – namely, "needs" and "capacity". Needs are based on the level of income and wealth the spouses had during the final years of the marriage. Since 1 January 2023, the calculation of the needs and capacity for spousal support is to a large extent formula-based.

Needs

The need for spousal maintenance can be determined using either a schedule of expenditures or the so-called 60% method. The starting point for the calculations is the net family income available during the marriage. Expenses for the children are deducted from this, which results in an amount remaining that is available to both partners. As the costs of living for a single person (parent) are higher than that for spouses living

together, half of the family income to be shared is increased by 20%.

Capacity

The court will take into consideration reasonable expenses – for example, housing expenses (30% of the net spendable income), health insurance costs, and a small portion for unavoidable miscellaneous costs. In standard cases, the expenses are capped at an amount equal to the social assistance benefit then increased by 30% of the net spendable income. Sometimes a comparison will be made between the capacity of the spouses. Family courts deem it reasonable that the maintenance creditor does not have more to spend than the maintenance debtor.

Impact of Children on Spousal Maintenance Obligations

Spousal support is not linked to children. Married persons without children might also have maintenance obligations towards each other. However, children will influence the level of maintenance indirectly – given that the parent with care for the children will most likely give up a career and work part-time or, in some cases, not at all. The career and income prospects will therefore most likely have a negative impact on the ability to become financially independent and self-supporting.

Spousal support is subject to reasonableness and fairness, whereas child support is considered a fact (see **3.2 Living/Contact Arrangements and Child Maintenance**). Allocation of spousal maintenance is very likely in the case of a long marriage with children, but it is not automatic. The older the children are, the more likely it is that a court will expect the parent with care to be (partially) self-supporting where possible.

Duration of Spousal Maintenance

The following terms apply, depending on the circumstances.

- Marriage without children – if spouses are married without children, the maximum term for spousal support is half the duration of the marriage (up to a maximum of five years).
- Marriage with children – if there are children from this marriage, the term for spousal maintenance will be extended until the youngest is 12 years old or for the statutory term (if the latter is longer).
- Long marriages – if the marriage lasts longer than 15 years and the maintenance creditor is less than ten years from the statutory retirement age, then the maintenance term will be prolonged until the statutory retirement age (currently 67) or for the statutory term (if the latter is longer).
- Remarriage or cohabitation – according to Dutch law, a maintenance obligation towards the other spouse will end if the maintenance creditor remarries or begins to cohabit with someone as though they were married under the law.

2.5 Prenuptial and Postnuptial Agreements

Marital Contracts

Spouses can exclude the statutory regime by entering into a prenuptial or postnuptial agreement. The mandatory form is a notary deed. They can define their own system, provided that the chosen arrangement is not contrary to the law, good morals, or public policy.

Cold Exclusion

Exclusion of any community of property without further settlement (“cold exclusion”) will result in the spouses having no claims whatsoever to settle against each other. This type of contract

is mostly made to insulate the family against a spouse-entrepreneur's business creditors during the marriage.

Netting Covenants

Many Dutch marital contracts provide for a separation of any community of property with a so-called periodical netting clause. By adopting such a clause, the parties undertake that they will settle their incomes annually after the household costs have been paid. What remains after deducting the household costs from the net incomes will be settled equally, which means 50/50.

These periodical netting clauses have been adopted frequently since the 1970s, resulting in a large stream of case law. In 2002, this case law was codified in the Law on Netting Clauses. If, at the end of the marriage, a periodical netting obligation agreed in the marital contract is not complied with, then the present capital is presumed to have been formed from what was netted – unless there is a different obligation, owing to the requirements of reasonableness and fairness with regard to the nature and extent of the netting obligation. In practice, the settlement of this regime will provide the same financial result as the settlement of the community of property.

Other Systems

The spouses can agree to a "less cold" exclusion contract – for example, they can agree to an exclusion of community of property during their lives, but with a so-called final netting clause or "as if" clause in the event the marriage ends by death or in the event the marriage ends by either death or divorce. Although the parties have excluded any community of property during their marriage, they agree to settle their matrimonial regime "as if" they were married in community of property. De facto, this means that they will divide the balance of each spouse's capital equally (50/50). Such a clause is mostly made to avoid high tax claims for the surviving spouse in the event of death.

The "Community of Benefit and Income" and "Community of Profit and Losses" are matrimonial regimes that lapsed on 1 January 2012. Spouses may still adopt these systems but will need to elaborate that system in full in the marital contract. Spousal maintenance cannot be waived in a prenuptial agreement.

Marital Contracts in Court Proceedings

As the concept of marital contracts is codified in Dutch matrimonial property law, marital contracts will be upheld by the Family Court and therefore matrimonial settlements upon divorce or after divorce (in the case of separate proceedings) will be determined under the marital contract. The statutory regime will apply in the unlikely event that the marital contract is not upheld. In such case, there will likely be a defect in either the marital contract itself or during the drafting stage of the marital agreement. Examples can be found in the Supreme Court judgments dated 20 January 1989 (NJ 1989, 766)("Civil-Law Notary of Groningen") and 9 September 2005 (NJ 2006, 99) ("Marital Contract of Zeeland"), respectively.

2.6 Cohabitation

Cohabitation Without Contract

If the partners have not signed a cohabitation agreement, in which they have arranged for their financial affairs after the breakdown of their relationship, then there is no statutory law or safety net that provides for certain rights or obligations – irrespective of whether they have children or not. Cohabitants do not acquire any rights by virtue of length of cohabitation or children born from their relationship. If they do have a cohabitation agreement, this is subject to the contrac-

tual rights and obligations as provided for by the Dutch Civil Code. Such a contract is not subject to the Family Code.

Registered Partnerships

Registered partnerships do have a basis in the Family Code. Registration of partnership takes place by means of a deed of registration of partnership drawn up by the Registrar of Births, Deaths, Marriages and Registered Partnerships. Matrimonial property law and spousal maintenance law have been declared applicable in the same way as they apply to marriages.

2.7 Enforcement

Court decisions dealing with matrimonial property law settlements and/or spousal maintenance are ordered to have immediate effect and therefore such a decision is enforceable. The decision can be served upon the spouse-debtor by a bailiff, with a request for compliance within a certain timeframe – failing which, the bailiff may take assets into custody or seize financial assets or the wage of the spouse-debtor.

International enforcement without international treaty is only available if an exequatur has been obtained from the Dutch court. Following the Supreme Court judgment dated 26 September 2014 (ECLI:NL:HR:2014:2838) ("Gazprom"), the foreign decision will need to meet the following conditions:

- the jurisdiction of the foreign court is based on a ground of jurisdiction that is generally acceptable by international standards;
- the foreign decision was taken in legal proceedings that meet the requirements of proper and sufficiently safeguarded justice;
- the decision is binding and can no longer be appealed against and, further, it can be enforced in the country of origin;
- the recognition of the foreign decision is not contrary to Dutch public policy; and
- the foreign decision is not incompatible with:
  (a) a decision of the Dutch court granted to the same parties; or
  (b) a previous decision of a foreign court that was granted to the same parties in a dispute that concerns the same subject matter and is based on the same cause – provided said earlier decision is eligible for recognition in the Netherlands.

The following terms apply where the financial order is subject to international regulations and conventions.

- Matrimonial property settlement subject to EU Matrimonial Property Regulation – recognition and enforcement is available based on the regulation.
- Spousal maintenance subject to the EU Maintenance Regulation – recognition and enforcement is available based on the regulation.
- Spousal maintenance subject to the Lugano Convention 2007 – recognition and enforcement is available based on the convention.
- Spousal maintenance subject to the Hague Convention on the International Recovery of Child Maintenance and Other Forms of Maintenance 2007 – recognition and enforcement of spousal support is only available if the request for recognition and enforcement is made simultaneously with the request for recognition and enforcement of child maintenance.

2.8 Media Access and Transparency

In the Netherlands, all family law cases are heard in closed session. The court will decide whether other individuals may attend a hearing. Usually, individuals other than the parties are only

allowed if both parties agree to their attendance and the court considers the information that these individuals may have useful for deciding the case. Court decisions are in writing and published anonymously on the website of the Judiciary.

Media and press will not have access to these closed court hearings. However, there are no reporting restrictions when referring to anonymously published court decisions.

2.9 Alternative Dispute Resolution (ADR)

In the Netherlands, parties may use several mechanisms to resolve financial disputes without going to court.

Mediation

The parties resolve their dispute together under the guidance of an independent mediator. The mediator assists the parties in clarifying their interests and positions. This is only available voluntarily. Once the parties have reached an agreement, the mediator will draft a divorce agreement in which the arrangements will be recorded. This will be submitted to the Family Court with a request to adopt the divorce agreement in its order. The divorce decree will be enforceable like any other court order.

Collaborative Divorce

Under this method, the parties resolve their dispute together with the assistance of their own lawyers, who work together to resolve the dispute of the parties in a respectful manner without interference from the court. This process is supervised by one or two neutral advisors – namely, a collaborative coach and sometimes a financial professional. Once the parties have reached an agreement, the lawyers will draft a divorce agreement in which the arrangements will be recorded. This will be submitted to the Family Court, together with a request to adopt the divorce agreement in its order. The divorce decree will be enforceable like any other court order.

Court-Offered Mediation

Mediation and collaborative divorce are not mandated by law – nor is there an obligation for the spouses to enter into mediation prior to seeking a resolution from the court. Nevertheless, the court will always offer the spouses mediation (*mediation naast rechtspraak*) before scheduling the case for a hearing. If both spouses accept the mediation offer, the case will be adjourned, pending the result of mediation. If mediation is successful, the mediation result or divorce agreement will be incorporated in the court decision, thereby becoming enforceable as per any other court decision. If mediation fails, the case will be scheduled for a hearing – following which, a court decision will be rendered.

Arbitration

Arbitration has been available since 2012 as a means by which the spouses can resolve their dispute by mutual consent without involving the court. This is not used very often in the Netherlands. Arbitration has its basis in Articles 1020—1077 of the Dutch Civil Procedure.

3. Child Law

3.1 Choice of Jurisdiction

Grounds for Jurisdiction

The Brussels II ter Regulation and the EU Maintenance Regulation are applicable in the Netherlands. Children's remedies and child support could be requested as an ancillary provision in divorce proceedings if either:

- the child has its habitual residence in the Netherlands; or
- the spouses are two Dutch nationals living abroad with their child and both agree that the Dutch divorce judge will decide upon the matters regarding parental responsibilities and/or child support.

Remedies for disputes concerning parental responsibilities or child support can also be requested in separate proceedings if the child is habitually resident in the Netherlands or the maintenance debtor is resident in the Netherlands. Grounds for jurisdiction may also be found in the Hague Child Protection Convention 1996 (the "1996 Hague Convention") and the Hague Protection of Minors Convention 1961 (in respect of non-contracting states to the 1996 Hague Convention).

As an EU member state, the Netherlands will apply the Brussels II ter Regulation when determining international jurisdiction in matters regarding parental responsibilities and the EU Maintenance Regulation when determining jurisdiction in matters regarding child support obligations. In these regulations, the concepts of domicile, residence and nationality are frequently used to determine jurisdiction (see **1.2 Choice of Jurisdiction** for further details and definition). Usually, the child's residence matches that of the parent with whom they live.

3.2 Living/Contact Arrangements and Child Maintenance

Child Arrangements

Divorce proceedings

As mentioned in **1.1 Grounds, Timeline, Service and Process**, there is an extra condition for the granting of divorce if the spouses have minor children. The spouses must submit – along with the divorce petition – a signed parenting plan, whereby they have agreed upon provisions with regard to:

- parental authority (eg, principal residence and the care and contact arrangement between the children and non-resident parent);
- information and consultation between parents on important matters in the lives of the children (eg, schooling, medical treatment, and religion); and
- financial matters (eg, child support and the management of the children's wealth).

If the parties do not agree to some of the elements of the parenting plan or cannot agree on any provision for the children, the Family Court will schedule a hearing in which they will hear the case and make the appropriate provisions. If the court deems it useful, the court may ask for advice from the Child Care and Protection Board. However, the court is not required to ask for such advice.

The main rule is that joint parental authority will be maintained upon divorce. Only in very rare cases will one parent be vested with sole parental authority – for example, in cases of domestic abuse or drug or alcohol abuse that poses a threat to the child's safety. Such a decision will not be rendered without investigations by and a written advisory report from the Child Care and Protection Board. For more information on how the courts approach disputes regarding parental responsibilities after divorce, please refer to **3.3 Other Matters**.

Joint parental responsibility for parents who are neither married nor registered as partners

On 1 January 2023, a bill entitled *Directe koppeling van erkenning en gezamenlijk gezag voor ongehuwde en niet-geregistreerde partners* (Stb 2022, 242) (in English: "Direct link between rec-

ognition and joint custody for unmarried and unregistered partners") entered into force. As a result, both parents will be automatically vested with parental authority – whether or not they are married or in registered partnerships. Parents will have joint parental authority for children born on or after 1 January 2023, provided the father recognises the child as his. For a completely domestic matter, it is thus still relatively easy to check whether both parents have parental responsibility.

Public policy

Child arrangements are a matter of public policy. This means that the Family Court always has the authority to vary an arrangement made by the parents if the court does not consider such arrangement to be in the best interests of the children.

Child Support

In the Netherlands, parents must financially support their children until said children reach the age of 21. Child support is defined as a contribution to the costs of care and upbringing if the child is still a minor (ie, under the age of 18) and a contribution towards the costs of care and education if the child is a young adult (ie, between 18 and 21 years old). Study costs also include the costs that must be paid from an additional, interest-bearing loan granted to the student. Parents may agree contractually to a longer term (ie, to continue their financial support beyond the child's 21st birthday) if they wish so.

Needs of minors

Needs do not have to be demonstrated when children are minors. In order to determine the need for a contribution to the costs of a child's care and upbringing, a system has been developed based on the income and spending patterns of families in the Netherlands as collected by Statistics Netherlands (*Centraal Bureau voor de Statistiek*, or CBS) in co-operation with the National Institute for Budget Information (*Nationaal Instituut voor Budgetvoorlichting*, or Nibud).

According to CBS research, parents spend a certain percentage of the family income on their children. This study also shows that, as more children are added to the household, the total costs of the children increase – although the average costs per child will decrease. Dutch courts calculate the child's needs according to the fixed amounts that can be found in the family net income tables provided by Nibud. In the Nibud table, the child allowance (*Kinderbijslag*) is not included in the figures. If there is additional health coverage for the children, the premium for this additional insurance shall be added to the figure.

Needs of young adults/students

The Nibud tables do not provide for the calculation of the needs of young adults aged between 18 and 21. No standards have been developed in order to determine the needs of young adults – usually, students who are subject to the Student Finance Act 2000 (*Wet Studiefinanciering*, or WSF).

According to the WSF, the budget for a student consists of a standard amount for living expenses, which is increased by tuition fees or a contribution towards the cost of tuition. For needs assessment generally, the WSF standard can be applied, whereby the student can demonstrate that they require a higher budget for a certain item. It is possible to calculate the needs of non-studying young adults using the WSF criteria, minus the study costs included therein (for books and learning materials). Health insurance is considered to be included in the WSF norm.

Calculation of support

Child support is formula-based and there are few factors to debate, given that courts expect responsible parents to financially contribute towards the costs of their children. The capacity of the parents is calculated using a formula set by the Dutch Judiciary's Maintenance Criteria Working Group: 70% of the "net spendable income" – (0.3 x net spendable income + social assistance benefit). The only variable elements are the net family income and the costs of the care arrangements (*Zorgkorting*), which vary depending on the amount of time spent by the non-resident parent with the child.

Zorgkorting are determined by the number of days per week – including holidays – that the child spends with the non-resident parent, as follows:

- for one day of care per week, there is a reduction of 15% of the needs of the child;
- for two days of care per week, there is a reduction of 25%; and
- for three days of care per week, there is a reduction of 35%.

If the child spends less than one day a week with the non-resident parent, a reduction of 5% of the child's needs is applied.

Parenting plan

Child support is one of the mandatory elements to be included in the parenting plan that must be submitted together with the divorce petition. If the parents agree on child maintenance arrangements without the involvement of the court, they may adopt their arrangements in the parenting plan and submit that plan to the Family Court.

As mentioned previously, child arrangements are a matter of public policy. As such, the Family Court can always vary the arrangements if it believes they are not in the interest of the child. This would be the case if the parents agreed in the parenting plan to a child support lower than the amount to be paid according to the statutory standards. However, parents can always agree to contribute a higher amount than that required by the statutory standards.

Court proceedings

If the parents cannot agree on child maintenance arrangements themselves, they can always seek a resolution from the court. In divorce proceedings, this is possible as an ancillary provision to the divorce. It is also possible to apply for child support payments in separate proceedings – either via the joint parental authority dispute resolution procedure ("1:253a BW case") for a prompt resolution from the court or in regular maintenance proceedings (see **3.3 Other Matters** for further details). These options are also available when there is a request to vary existing child support obligations.

Young adults between the age of 18 and 21 may seek a variation of existing child support contributions themselves in regular maintenance proceedings. Minor children are always represented by one of their parents in court proceedings.

3.3 Other Matters

Important Matters in Lives of Children

As discussed in **3.2 Living/Contact Arrangements and Child Maintenance**, in order to be granted a divorce, spouses must submit – together with the divorce petition – a signed parenting plan containing provisions on important matters in children's lives. This obligation also exists for cohabiting parents who break up and have joint parental authority but have opposing views on the upbringing of a child. If they cannot agree on these matters, they may seek the

resolution of the Family Court in the same way as per contact and care arrangements or child support contributions.

Disputes regarding parental responsibilities after divorce

Where parents cannot reach an agreement on a specific important matter regarding their child – ie, one for which a common decision is required by law – after their divorce, one parent may seek an order from the court in its place. Under the joint parental authority dispute resolution procedure (1:253a BW case), Dutch family law provides for parents with joint parental authority to seek a prompt resolution from the Family Court if they cannot agree on:

- a child's living arrangements and/or the time/contact the child will have with each parent;
- how they consult each other on important matters;
- how they share the costs of the child(ren); or
- how to manage the child(ren)'s assets.

The court will appoint the matter for a hearing within six weeks of the petition being submitted by one of the parents. The other parent has until the date of the hearing to submit a response.

In cases where only one of the parents is vested with parental authority, a parent may still seek a resolution from the Family Court. However, this will follow the regular dispute resolution process – meaning that, depending on the availability of the judges, it may take more than three months for the case to be appointed a hearing.

Hearing Children

The law provides for children aged 12 and above to be heard in matters involving them – except in child support cases, where children can be heard from 16 years old. In international child abduction cases, a child may be heard at a younger age depending on their maturity. In these cases, the child is represented by a guardian at litem. In cases about parentage, a child is always represented by a guardian at litem. The Family Court will hear the children in chambers without their parents and will consider what the child has told the court. However, the court – rather than the child – will decide. Children do not give evidence in court and there is no cross-examination of children.

Parental Alienation

Parental alienation is a topic that has gained more and more attention in the past few years. In January 2021, an advisory report by a team of experts on parental alienation and complex contact issues was published. The expert team recommends that the government takes responsibility for enforcement – in particular, by imposing sanctions – in the event of non-compliance with the statutory rules or non-compliance with parental agreements or court decisions.

Responsibility for enforcement should no longer be solely with the parents. A divorce advisory team should have resources at its disposal – via a quick court resolution mechanism – for civil law enforcement, such as fines and penalties. The law should be adjusted where necessary to implement these recommendations. Courts should uphold contact arrangements between a child and non-resident parent, whether unsupervised or supervised.

Introduction of Combined Family Names

On 1 January 2024, a bill called *Introductie gecombineerde geslachtsnaam* (Stb 2023, 116) (in English: "Introduction of Combined Family Name"), entered into force. It allows parents to give their child the family name of both parents.

It will not be mandatory to choose a double family name. However, if parents do not make a choice, a child will have the family name of the father or co-mother in the case of a marriage or registered partnership. For unmarried or unregistered partners, the child automatically has the surname of the birth mother.

With this bill, a double family name can consist of up to two names and is written without a hyphen. The bill provides that this will be possible for children born after 29 January 2019.

3.4 ADR

Mediation, collaborative law, and court-offered mediation are available in children's disputes as per financial disputes. For further details, please refer to **2.9 Alternative Dispute Resolution (ADR)**.

3.5 Media Access and Transparency

See **2.8 Media Access and Transparency**.

Trends and Developments

Contributed by:
Sandra Verburgt
Delissen Martens Advocaten

Delissen Martens Advocaten is a full-service law firm with more than 40 lawyers, tax advisers, and mediators, offering expertise in virtually all areas of law – from corporate law to family law. The firm's broad approach enables it to deal effectively with both business and private matters. Delissen Martens Advocaten combines in-depth legal knowledge with contemporary issues such as sustainability, digitalisation and diversity. The firm's lawyers not only interpret the law, but also consider its impact and potential implications. This enables the team to provide innovative and practical solutions. Delissen Martens Advocaten's approach is one of openness, accessibility and engagement – advising not only from the perspective of the law book, but also based on a keen insight into social developments. As a result, the team offers expert and progressive legal advice that is in tune with today's challenges.

Author

Sandra Verburgt is a partner at Delissen Martens Advocaten, with a special focus on international family law. Sandra is a trained collaborative divorce lawyer and skilled litigator who spent 25 years gaining experience in family law. Her work mainly concerns more complicated divorces, maintenance, and property settlements. Sandra frequently engages as an expert in foreign proceedings, in addition to providing advice on international estate planning and prenuptial agreements for high net worth individuals and business owners. She is a member of the Dutch Association of Family and Inheritance Lawyers and Divorce Mediators (vFAS) and the Association of Collaborative Professionals (VvCP), as well as president of the International Academy of Family Lawyers' European Chapter.

Delissen Martens Advocaten

Sportlaan 40
2566 LB
The Hague
The Netherlands

Tel: +31 (0) 70 311 54 11
Fax: +31 (0) 70 311 54 12
Email: info@delissenmartens.nl
Web: www.delissenmartens.nl

The Extent to Which Dutch Law Favours Married Couples and Registered Partners Over Informal Cohabitants

There were few legislative developments in the Netherlands in 2024 as the Dutch political parties spent the first half of the year negotiating a new government, resulting in almost a standstill in legislative activity. At present, administrative divorce is not on the legislative agenda – although this issue is revived from time to time with the aim of reducing legal costs for citizens and the workload of the courts, especially in cases where no children are involved, and has been raised again recently. It remains to be seen whether this will lead to legislation. In the absence of much activity on the legislative front, this article will focus on developments in case law in recent years regarding the rights and obligations of cohabitants.

Changing face of cohabitation in the Netherlands

One trend that is certainly noticeable is the increase in other forms of cohabitation outside marriage. The most traditional form of cohabitation is still marriage, but there is also an increasing use of registered partnerships and cohabitation agreements. In 2024, 44.2% of the population aged 15 and over in the Netherlands were registered as "married" or "in a registered partnership", whereas 41% were registered as "not married", 9% were divorced, and 5.7% were widowed. There is an increase in the number of couples living together who are not married (or who have not registered their partnership). On 1 January 2024, there were 1.12 million unmarried couples in the Netherlands, whereas there were 3.25 million married couples. According to Statistics Netherlands (*Centraal Bureau voor de Statistiek*, or CBS), of these 1.12 million unmarried couples, 651,190 are couples without children and 469,620 couples have children.

In 2024, 88,673 marriages and registered partnerships were solemnised in the Netherlands – of which, 64,057 were marriages and 24,617 were registered partnerships. In the same year, the CBS recorded that 61,062 marriages and registered partnerships were dissolved – 23,324 of which by divorce and 3,976 by termination of the registered partnership, with another 33,086 marriages ending due to the death of one of the spouses and 677 registered partnerships ending due to the death of one of the partners.

It is notable that the number of divorces has fallen in recent years. By way of example, in 2000 there were 34,650 divorces, whereas in 2024 there were almost 10,000 fewer divorces than in 2000. There is a trend for couples to marry later, to take more time to find the right partner and to prioritise their careers before settling down and starting a family. This may be one of the reasons for the decline in divorce.

The other reason may be that there are no conclusive figures on the number of couples who break up with a cohabitation agreement or no agreement at all. This is because it is not necessary to officially dissolve a cohabitation agreement. Sometimes it is enough to send a registered letter to the other partner. Couples who end a cohabitation contract do not (automatically) have to go to court. The procedure for separating is almost the same as for separating without a cohabitation contract. However, there is still a lot to arrange for cohabitees.

Lack of legal protection for cohabitants

What many couples do not realise is that there is a world of difference in legal rights and obligations between married couples and registered partners, on the one hand, and cohabitants with or without a cohabitation agreement on the oth-

er. This analysis looks at the differences between the two groups.

First of all, it is important to know that the Netherlands is a civil law jurisdiction and that it does not recognize the concept of "common law marriage". In other words, living together for a number of years does not create any legal rights or obligations towards the other partner. Married couples and registered partners have similar rights and obligations, which are codified in the the Family Code (Book 1 of the Dutch Civil Code). Other couples lack protection under the Family Code. They could only rely on general obligatory law and property law (Books 3, 6 and 5 of the Civil Code).

Maintenance

Spouses and registered partners have a legal obligation to support each other financially if circumstances require it. Spousal maintenance is granted if the need for maintenance is established and the other spouse is financially able to provide it (Article 1:157 of the Dutch Civil Code). The obligation is equal to half the duration of the marriage, with a maximum of five years (Article 1:157(1) of the Dutch Civil Code).

In the event of divorce, if the marriage has lasted at least 15 years and the maintenance creditor is less than ten years from the statutory retirement age, then the maintenance term will be prolonged until the statutory retirement age (currently 67) or for the statutory term (if the latter is longer) (Article 1:157(2) of the Dutch Civil Code). If the marriage lasted more than 15 years and the maintenance creditor was born on or before 1 January 1970 and is at least ten years away from retirement age, the maintenance obligation is extended to ten years (Article 1:157(3) of the Dutch Civil Code). If the spouses have children under the age of 12, the period of maintenance is extended until the youngest child reaches the age of 12, if this would result in a period of more than five years (Article 1:157(4) of the Dutch Civil Code).

Article 1:80e(1) of the Dutch Civil Code declares that Article 1:157 of the Dutch Civil Code also applies to registered partners.

Obligations during marriage or registered partnership

Article 1:81 of the Dutch Civil Code states that spouses are obliged to be faithful to each other, to help and support each other, and to provide each other with what is necessary. The obligation to provide maintenance is partly based on Article 1:81 of the Dutch Civil Code and constitutes a legally enforceable obligation (see: HR 20 June 1963, NJ 1964/452 and HR 25 June 1971, NJ 1972/58). During the marriage, the financial contribution of one partner to the other is not usually referred to as "maintenance", but rather as "household money".

Article 1:80b of the Dutch Civil Code declares Title 1.6 (rights and obligations between spouses), Title 1.7 (joint property) and Title 1.8 (marriage contracts) equally applicable to registered partners.

Maintenance rights and obligations of cohabitants

In some cohabitation agreements, the law on spousal maintenance (Article 1:157 of the Dutch Civil Code) is declared applicable. Only in this case can a cohabitant invoke the law on (spousal) maintenance in the event of separation. However, if there is no such clause in the cohabitation agreement or if the cohabitants have not entered into any agreement, the cohabitants have no legal rights or obligations towards each other in respect of financial support after separation. This applies regardless of the length of cohabitation.

Property relations

Spouses married without a marital contract are married under the statutory community of property. In short, this means that everything they acquire during marriage will be common property, but premarital capital, inheritances and gifts are private property. Each spouse has a 50% share in the community of property. Spouses may deviate from this by marital contract. Article 1:80b of the Dutch Civil Code declares that the sections on the community of property and marital contracts also applies to registered partnerships.

If spouses are married without any community of property, a right to compensation arises if property is taken from one spouse for the benefit of the other spouse, even if there is no contractual basis for the taking and the taking does not fulfil an overriding obligation of morality and decency (natural obligation). If the parties are married in a community of property, a right to compensation may arise if one spouse's private property is used for the benefit of the community property or vice versa.

Article 1:87 of the Dutch Civil Code provides for the right of one spouse to claim compensation from the other spouse for an investment with private (excluded) capital in the property of the other spouse or the community of property if applicable. In principle, the claim is equal to the proportion of the investment in the property at the time of repayment (investment theory). The spouses may deviate from this rule by marital or partnership agreement. In that case, the claim may be equal to the proportion of the investment in the property at the time of purchase (nominal repayment).

In the case of spouses and registered partners, any claim for compensation cannot be time-barred during the marriage or registered partnership. The limitation period for bringing such a claim is extended by six months from the end of the marriage or registered partnership if the limitation period would expire during the existence of the marriage or registered partnership (Article 3:320 and Article 3:321(1)(a) and (g) of the Dutch Civil Code). This was because it was considered undesirable for spouses or registered partners to have to take legal action against the other spouse or registered partner during the marriage or registered partnership in order to prevent their right from being extinguished or time-barred.

Property relationship between cohabitants

In cohabitation agreements, the sections on the community of property can be declared applicable. Only in this case can a cohabitant invoke the law in the event of separation. However, if there is no such clause in the cohabitation agreement or if the cohabitants have not entered into any agreement, a cohabitant cannot apply for any share in the ex-cohabitee's wealth based on the Family Code.

The landmark judgment is HR 10 May 2019, ECLI:NL:HR:2019:707. In this Supreme Court judgment, it was ordered that the starting point is that the property relationship between partners who live together on the basis of an affective relationship is not governed by the rules set out in Title 1.6, Title 1.7 and Title 1.8 of the Family Code for spouses and registered partners, and that these rules cannot be applied by analogy to the relationship between informal cohabitants.

The court of appeal therefore correctly held that the man's reliance on an analogous application of Article 1:87 of the Dutch Civil Code was unfounded and that the question of whether the woman could claim compensation from the man for her investment in the house had to be assessed on the basis of the general law of obli-

gations. In doing so, it is appropriate to examine whether there is an agreement between informal cohabitants that (also) regulates the property law aspects of their cohabitation (Article 6:213 of the Dutch Civil Code), taking into account the supplementary effect of reasonableness and fairness referred to in Article 6:248(1) of the Dutch Civil Code. Such an agreement may exist because the informal cohabitants have concluded a written cohabitation agreement or have expressly or tacitly agreed on who is to bear the costs of their cohabitation or certain expenses.

In addition, it is possible that one of the informal cohabitants – if the conditions for undue payment (Article 6:203 of the Dutch Civil Code) or unjust enrichment (Article 6:212 of the Dutch Civil Code) are met – has a claim on one of these grounds for restitution or reimbursement of certain expenses that were given to or benefited the other informal cohabitant.

i) Rights of cohabitants to compensation for property

However, this does not alter the fact that there is a legal relationship between informal cohabitants, which is also governed by the principles of reasonableness and fairness. The fact that informal cohabitants have refrained from entering into a legally regulated form of cohabitation (marriage or registered partnership) or from making express or tacit agreements on the property aspects of their cohabitation does not prevent this. In practice, the agreement to cohabit inevitably affects their property relations.

Even if the right of one cohabitant to compensation from the other cohabitant in respect of certain expenses cannot be assumed on the basis of an agreement concluded between the parties or on the basis of the other legal provisions of Book 6 of the Dutch Civil Code, such a right may arise from the requirements of reasonableness and fairness referred to in Article 6:2(1) of the Dutch Civil Code in connection with the particular circumstances of the case.

Another landmark judgment in this regard was rendered by the Dutch Supreme Court on 17 November 2023, ECLI:NL:HR:2023:1571. In this matter, the woman and the man had lived together for a long time on the basis of an affectionate relationship. Initially each had their own home. The woman sold her home in 2002 and subsequently moved in with the man. At some point in time, the parties jointly bought a house, in which they started living together. They took out a savings deposit mortgage and a bridging loan. Linked to the savings deposit mortgage was a savings policy called “savings deposit insurance”. The man sold his home after this. The proceeds from his home amounted to EUR226,264.79. Subsequently, the man repaid the bridging loan of EUR214,000, from his own funds.

Years later, the parties entered into a notarised cohabitation agreement. In this cohabitation agreement, the parties had not made any specific provision for the repayment of the bridging loan taken out by the man. The affective relationship ended at some point thereafter. The woman left the joint home. Since then, the man had lived there alone. The man claimed compensation from the woman for his investment in the jointly owned home, including half of the repayment of the bridging loan. The Supreme Court rejected the man’s claim to the right to compensation.

Article 3:172 of the Dutch Civil Code does not imply that if a property is jointly owned by informal cohabitants and one partner has contributed to the financing of the purchase of that property to a greater extent than his share in the property,

then that partner has a right to compensation from the other partner. Article 3:172 of the Dutch Civil Code implies, in so far as it is relevant here, that the partners must contribute proportionately to the expenses arising from acts performed for the benefit of the joint property. These must be acts carried out for the maintenance and upkeep of the joint property. The taking out or repayment of a loan by a member to finance the common property does not constitute such an act.

ii) Statute of limitations

The question now arises whether the extension ground for prescription from Article 3:320 and Article 3:321(1)(a) and (g) of the Dutch Civil Code also applies to informal cohabitants. This is still not decided. A legal claim for performance of a contractual obligation expires five years after the due date (Article 3:307 of the Dutch Civil Code). This applies, for example, to a claim for damages based on an agreement or a contractual right of recourse.

The same applies to a claim based on undue payment (Article 3:309 of the Dutch Civil Code). This claim expires five years after the creditor has become aware of both the existence of their claim and the person of the beneficiary and, in any case, 20 years after the claim arose. As this is a claim between informal cohabitants, the limitation period will normally be five years. After all, the recipient will be known.

A claim based on unjust enrichment is also generally time-barred after five years and, in any case, 20 years after the claim arose (Article 3:310 of the Dutch Civil Code). In this case, too, the recipient will be known – given that they are an ex-partner. In all other cases, the claim expires after 20 years (Article 3:306 of the Dutch Civil Code).

The question is whether it is reasonable to expect informal cohabitants to claim compensation from their partner during their cohabitation, when the legislator did not consider this desirable for spouses and registered partners. After all, any good relationship can be destroyed by taking legal action during the relationship. This issue is still undecided. Some judges apply the extension ground for married and registered partners under Article 3:320 and Article 3:321(1)(a) and (g) of the Dutch Civil Code analogously to informal cohabitants (eg, The Hague Court of Appeal, 4 February 2020, ECLI:NL:GHDHA:2020:409). Other judges apply the law strictly and do not extend the limitation period (eg, Arnhem-Leeuwarden Court of Appeal, 7 September 2021, ECLI:NL:GHARL:2021:8479 and The Hague Court of Appeal, 13 December 2022, ECLI:NL:GHDHA:2022:2458).

In a Supreme Court case dated 8 November 2024 (ECLI:NL:HR:2024:1598), a decision from The Hague Court of Appeal was quashed on the grounds that the court had wrongly accepted an offer of proof by the cohabitee who asked for a share in the surplus value of a property in the name of the other partner based on a tacit agreement. This matter has now been referred to the Amsterdam Court of Appeal for a further decision.

However, in the advice of the Advocate General to the Supreme Court dated 9 February 2024, the concept of prescription – and, in particular, the analogous extension of Article 3:320 and Article 3:321(1)(a) and (g) of the Dutch Civil Code to informal cohabitants – was dealt with as follows.

"*As such, the limitation regime for informal cohabitants is clear: Articles 3:306-310 of the Dutch Civil Code apply directly to their rights of action. Thereby, the starting point is that the*

limitation period can commence during the informal cohabitation. However, exceptions to that starting point are conceivable. The rationale for the extension ground for spouses and registered partners may, of course, also apply to informal cohabitants. Indeed, even in the case of informal cohabitants, the performance of acts of interruption could lead to disruption of the relationship. In my view, however, this does not mean that the ground for extension for spouses and registered partners can equally be declared applicable to informal cohabitants. In my view, such a categorical approach requires a statutory basis, also in view of the restrictive enumeration that serves the purpose of legal certainty and the limits of the judge's legislative function, which is why I believe that the court should be able to apply the restrictive ground to informal cohabitants."

Therefore, as a matter of principle (and separation of powers), it is up to the legislator to declare Article 3:320 and Article 3:321(1)(a) and (g) of the Dutch Civil Code equally applicable to informal cohabitants or not. Nevertheless, the Advocate General considers it justifiable – on a case-by-case basis – to treat informal cohabitants in certain circumstances as spouses or registered partners (who are not legally separated) within the meaning of Article 3:321(1)(a) and (g) of the Dutch Civil Code.

Whether there are grounds for such equivalence in a specific case will depend on all the relevant facts and circumstances of the case. Decisive factors for such equivalence could be:

- whether the parties have lived together as spouses or registered partners (not legally separated);
- factual circumstances, such as having (or having had) an affective relationship and a (permanent) common household; and
- circumstances of a more legal nature, such as whether a (written) cohabitation agreement has been concluded and whether there is a common home.

If such circumstances are present, there may indeed be more reason to equate them with spouses or registered partners within the meaning of the extension ground in Article 3:321(1)(a) and (g) of the Dutch Civil Code.

In summary, there is a great deal of uncertainty for informal cohabitants when it comes to claims for compensation for investments in the assets of the other (informal) cohabitant. It is certainly not excluded that these claims can be made, but the path to compensation is not as straightforward as for spouses and registered partners.

Pension equalisation

Under Dutch law, pension rights built up during marriage will be equalised under Article 1:155 of the Dutch Civil Code when the marriage is dissolved through divorce. This law applies for all matrimonial systems – ie, both the statutory community of property regime and the marital contract system (prenuptial and postnuptial agreements). The standard division by law is 50/50. Spouses and registered partners can exclude the Equalisation of Pension Rights in the Event of Divorce Act by marital agreement/partnership agreement or by divorce agreement/termination of partnership agreement, so that – in the event of divorce and legal separation – no equalisation or set-off of rights to old-age pension will be made.

If a spouse or registered partner prematurely passes away, the widowed spouse or registered partner is entitled to a surviving spouse/partner pension. The same applies for divorcees or for-

mer registered partners, unless they have made other arrangements by contract.

Pension-sharing rights of cohabitants

Informal cohabitants cannot derive any rights from the Equalisation of Pension Rights in the Event of Divorce Act. Even if they have lived together for 20 years, if they separate, they will not share in the pension rights built up by the other partner during their informal cohabitation.

If cohabitees have entered into a formal cohabitation agreement, they can include a pension-sharing clause in this agreement. Under certain circumstances, some pension schemes will accept these cohabitees as partners for pension-equalisation purposes when they separate. In most of these pension schemes, a declaration must be made at the beginning of the cohabitation, immediately after the cohabitation agreement has been concluded – failing which, the partner will still not be accepted by the pension fund as a partner for pension equalisaton upon separation

If an informal cohabitant dies prematurely and the other partner was not considered a partner under the pension scheme, there is no entitlement to a survivor's pension.

Succession law

If a spouse or a registered partner has not made a will, the spouse or registered partner will have protection under the Law of Succession (Book 4 of the Dutch Civil Code). A testator can exclude a spouse or registered partner only from an inheritance by will. Under extreme circumstances, the law excludes an "unworthy" spouse or registered partner from inheritance – for example, where the spouse murders their spouse (Murder Marriage, NJ 1991/593).

Protection of cohabitants under Dutch inheritance law

(Informal) partners are not protected by Dutch inheritance law. The only way they can inherit from their partner is if the partner makes a will naming their partner as an heir. In the unfortunate event that no will is made, this could result in a surviving partner being evicted from their home after a long cohabitation because the heirs of the deceased partner want to liquidate the estate.

Outlook for informal cohabitants in the Netherlands

While marriage remains the most traditional form of cohabitation in the Netherlands, there is also an increasing number of couples living together who are not married (or who have not registered their partnership). These 1.12 million unmarried/non-registered Dutch couples do not have the same protection of the law as spouses or registered partners. When they separate, there is a lot of uncertainty about their financial situation, especially for those cohabitants who are (partly) dependent on their partner. They are not entitled to maintenance or pensions, nor do they automatically inherit from their partner. Their property situation depends very much on what they have agreed together – preferably in writing – and even then it may not be straightforward.

Until legislation is introduced to protect informal cohabitants, it is recommended that cohabitants seek advice from a specialist family lawyer or notary and make written arrangements in a cohabitation agreement – preferably at the start of their cohabitation, but certainly when they buy a property together to make it their home. It is also a good idea to make a will naming one's partner as one's heir. This can protect surviving partners from being evicted from their home by their partner's heirs.

PORTUGAL

Law and Practice

Contributed by:
João Perry da Câmara, Teresa Silva Tavares, Sofia Vaz Pardal and Joana Salazar Gomes
Rogério Alves & Associados

Contents

Contributed by: João Perry da Câmara, Teresa Silva Tavares, Sofia Vaz Pardal and Joana Salazar Gomes,
Rogério Alves & Associados

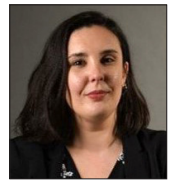
Rogério Alves & Associados was founded in 2013 and has its main office in Lisbon, with a branch office in Oporto. The firm has a dedicated, qualified and multidisciplinary team of 30 lawyers, organised by practice areas and working in all areas of law. Presenting solutions for clients' every needs, advice is given in a competent, permanent and supportive manner, so that they can exercise their rights and fulfil their duties. RA has a family law department consisting of seven lawyers with relevant practice in their different areas, particularly in private international family law and succession law.

Authors

João Perry da Câmara is a lawyer with more than 35 years of practice in areas of private law, especially family and succession law, and with a focus on private international family law. He is a founding partner of Rogério Alves & Associados, where he heads the family and succession department, and is a full member of the Portuguese Bar Association and a member of IAFL, AIJUDEFA and Reunite International.

Teresa Silva Tavares is a lawyer with more than 27 years' experience in the areas of family and succession law, particularly private international law and family and children's law. She has an extensive practice in divorce and children's matters, particularly in cases of custody regulation, international child abduction and maintenance. Teresa has been a partner at Rogério Alves & Associados since 2020, where she works in the family and succession department, and is a full member of the Portuguese Bar Association and a member of Reunite International.

Sofia Vaz Pardal is a lawyer with more than 18 years' experience in family and succession law. She has an extensive practice in divorce and children's matters, particularly in cases of custody regulation, adoption, international child abduction and maintenance. Sofia has been an associate at Rogério Alves & Associados since 2013, where she works in the family and succession department, and is a full member of the Portuguese Bar Association and a member of Reunite International.



Joana Salazar Gomes is a lawyer with more than eight years' experience in family and succession law. She has a significant practice in divorce as well as in children's matters, namely in cases of custody regulation, adoption and maintenance. She also has a practice in the area of inheritance and the accompaniment of adults. Joana has been an associate at Rogério Alves & Associados since 2018, where she works in the family and succession department, and is a full member of the Portuguese Bar Association.

Contributed by: João Perry da Câmara, Teresa Silva Tavares, Sofia Vaz Pardal and Joana Salazar Gomes,
Rogério Alves & Associados

Rogério Alves & Associados

Avenida Alvares Cabral, 61,
4th floor
1250-017
Lisbon
Portugal

Tel: +351 21 391 10 40
Fax: +351 21 391 10 41
Email: Geral@raassociados.pt
Web: www.raassociados.pt

1. Divorce

1.1 Grounds, Timeline, Service and Process

In Portugal, a divorce can be decreed by mutual consent or without the consent of one of the spouses. In the first situation, the parties do not have to disclose the reasons for the divorce. In the second situation, the grounds for divorce are established in Article 1781.º of the Portuguese Civil Code, as follows:

- de facto separation for one consecutive year;
- the alteration of the other spouse's mental faculties, when it has lasted for more than one year and, due to its seriousness, jeopardises the possibility of living together;
- absence, without news of the absentee, for a period of not less than one year; or
- any other facts which, regardless of the fault of the spouses, show the definitive breakdown of the marriage.

The law does not establish different grounds for divorces between same-sex spouses. Portuguese law does not recognise civil partnerships, which is the reason why there are no grounds for ending this kind of relationship.

If the divorce is by mutual consent, it can be requested in the Civil Registration Office and it will be decreed in two to three months, depending on whether there are minors.

In a divorce without the consent of one of the spouses, the one that wants to divorce must file for that in court. One of the grounds for divorce is the de facto separation for one consecutive year.

When a spouse files in court against the other, that court will serve the other party.

Catholic marriage has the same effect as a civil marriage (Article 1587.º nº 2 of the Portuguese Civil Code). All other religious marriages do not have a civil effect, which is the reason why, in these cases, a civil marriage is mandatory.

Besides divorce, a marriage can be declared null and void by a decree issued by the court rendered in a specific process filed by any of the spouses or by someone who, according to Portuguese law, has the right to ask for it in the name of the spouse if they cannot do it by themselves.

Depending on the grounds for the nullity of the marriage, the application can be filed only within a certain period, namely, if the reason for the nullity is that one of the spouses is underage, until six months after reaching majority. If the ground for nullity is a lack of will or a vicious will, the deadline to file for the application requesting nullity will be six months after the parties acknowledge the lack of will or the vicious will cease.

It is also possible to petition the court for judicial separation, but it does not end the marital bond; it only extinguishes the cohabitation duty. In relation to assets, the effects of judicial separation will be the same as divorce.

It is important to emphasise that one year after the court decision rendering judicial separation final and binding, any of the spouses can judicially request that the separation be converted into divorce.

1.2 Choice of Jurisdiction

As Portugal is a member state of the European Union, Regulation 2019/1111, dated 25 June 2019, must be applied to establish the international competence of a Portuguese court. Article 3 sets down the relevant connections for competent international jurisdiction, which mainly relate to the habitual residence and nationality of the spouses, even if they are a same-sex couple.

According to the aforementioned Regulation, the concept of residence is considered on a case-by-case basis. A person's place of residence is where the centre of that person's life is established, namely, where they work, live, have family, friends, etc.

In a divorce, if one of the parties considers that the court that has been seized is not internationally competent for the divorce, they can contest the jurisdiction.

According to Article 17 of the Regulation, the court is seised when the document instituting the proceedings is lodged with the court or, if the document has to be served before being lodged with the court, when it is received by the authority responsible for service.

To stay proceedings, a party can invoke that they have already filed for divorce in another jurisdiction. In this situation, and according to Article 20 of the Regulation, the court where the process has been filed in second place will stay its proceedings until the jurisdiction of the court first seised is established.

2. Financial Proceedings

2.1 Choice of Jurisdiction

While divorce proceedings are pending and until the final decision, a party can ask for financial provisional measures: provisional alimony and provisional use of the marital home. In both cases, the party must allege the necessity of it, their weaker economic capacity, and the economic capacity of the other spouse to grant alimony and also to find a new house for themselves.

If there are children, alimony for the benefit of the children can be requested, with proof of the children's needs and the economic capacity of the parent obliged to pay for it.

A party can contest the international competence of a jurisdiction, if there are grounds for that: namely, that the court of another country has exclusive jurisdiction to decide about a certain type of assets, eg, real estate.

In a lis pendens situation, the proceedings can be stayed until it is decided which court has jurisdiction.

However, if the questions to be decided are different and according to international rules, both states are internationally competent to decide on the issue presented to each one, and the processes can run independently.

After a foreign divorce, if the Portuguese court has international jurisdiction at the time of the filing, it can hear financial claims. For instance, following a divorce decreed in Spain, if both or one of the spouses comes to live in Portugal and, at some point, needs alimony, the Portuguese court can be internationally competent to decide on that.

2.2 Service and Process

Service in financial proceedings is always made by the court in which the process is filed. The process and the timeline for financial proceedings depend on the complexity of the situation and the need to translate documents, etc.

For example, the processes in provisional and final alimony are different, either in terms of procedural rules or the kind of proof required. The provisional process will take less time to decide.

Another example is the process when one spouse seeks to end the maintenance obligation. This process will take longer, as it is necessary to prove that the situation justifying the maintenance obligation no longer exists: namely, the party obliged to pay alimony can no longer pay that amount or the party that receives alimony does not need it anymore.

2.3 Division of Assets

On divorce, the assets will be divided according to the matrimonial regime. In Portugal, there are three main matrimonial regimes:

- separation of all assets;
- communion of all assets; and
- communion of assets acquired after the marriage.

Division will be necessary only in the communion regimes of assets. The rule is that the assets should be divided 50%–50% between the spouses.

In the communion of all assets, there is a rule that, in divorce, none of the spouses can receive more assets in the division than they would receive if the marital regime was the communion of assets acquired after the marriage.

In Portugal, assets can be divided only after the divorce. Division can be made by agreement or by judicial proceeding. In a judicial proceeding, the court considers all of the assets (assets and liabilities) and determines the amount each spouse will be entitled to.

The parties should inform the court of their assets and liabilities, but there is no disclosure process. However, if one party considers the other to be hiding assets, they can claim that. The party making the claim should provide proof of the existence of the hidden assets.

The court has limited powers regarding disclosure. In relation to third parties, a rule states that everybody should co-operate with the court when asked to do so. The court can ask for bank secrecy to be lifted.

There is no concept of trusts in Portuguese legislation. Family courts encounter considerable difficulties when dealing with cases with international connections involving trusts, even if the court has to apply a foreign law.

2.4 Spousal Maintenance

In Portugal, the rule is that, after the divorce, each spouse should provide for their own maintenance (Article 2016.º n.º 1 of the Portuguese Civil Code). Despite that, following the breakdown of a marriage, either spouse has the right to request provisional maintenance from the other spouse, taking into consideration basic life needs.

The party will have to prove the need or lack of capacity to provide for their own needs and the capacity of the other spouse to provide maintenance. Provisional maintenance can be requested by the party, or the court can make the determination.

A spouse can also ask for final maintenance, alleging that they have no means to survive without it. Under Article 2016.º-A of the Portuguese Civil Code, the court will take the following into consideration:

- the duration of the marriage;
- the contribution of that spouse to the couple's economy;
- the age and state of health of the spouses;
- their professional qualifications and employment possibilities;
- the time that they may have devoted to raising children; and
- their income and earnings, etc.

2.5 Prenuptial and Postnuptial Agreements

In Portugal, only prenuptial agreements are recognised. The courts fully apply prenuptial agreements.

The only way to change the regime of assets after the marriage is through a judicial proceeding of separation of assets.

2.6 Cohabitation

For unmarried couples, the only division of assets possible is where the assets were acquired by both of them. In this case, there is a co-ownership, and with the breakdown of the relationship, each of the co-owners can make a specific application to the court requesting the division of common property.

After two years of cohabitation, in case of a relationship breakdown, the ex-cohabitants will acquire the right to use the marital home (whether it is rented or belongs to the other or to both).

Also, after the death of one of the cohabitants, the other has the right to use the family home for a period of five years. After this period, they can still live in the family house as a tenant. If the house is to be sold, the cohabitant has a preferential right in the sale of the house under the same conditions as the buyer.

Cohabitants are not heirs of each other. If they have children, they must regulate the exercise of parental responsibilities in the same way married couples do.

2.7 Enforcement

If a party fails to comply with an order concerning alimony, the other party can ask for coercive fulfilment. For instance, the court can order that

the amount due be paid directly by the employer to the creditor.

The international enforcement of financial orders, namely concerning alimony, is permitted in Portugal. Specifically, Portugal has to apply Regulation (EC) No 4/2009, dated 18 December 2008, in relation to alimony arising out of a family relationship, parentage, marriage or affinity. The Regulation provides measures to facilitate the payment of alimony in cross-border situations. It regulates the way the orders should be enforced, whether issued by member states that are also obliged by the Hague Protocol of 2007 or by states not obliged under that Protocol.

2.8 Media Access and Transparency

In Portugal, family judicial processes are confidential, so only the lawyers and the parties can gain access. Parties are free to speak about the processes in which they are involved, but where processes relate to minors, they have the duty not to expose details relating to the children.

Also, when one of the parties decides to disclose procedural information, they must take into consideration the personal data protection act, which limits the possibility of public disclosure of personal data concerning any individual.

2.9 Alternative Dispute Resolution (ADR)

In Portugal, mediation is available as an alternative dispute resolution. It is not mandatory, and for that reason, there are no penalties for non-compliance. If the parties decide to use mediation and they are able to reach an agreement, depending on the agreement concerned, different steps need to be taken.

For instance, a divorce must always be decreed either by a judge or by a civil registry chief officer. An agreement reached concerning parental responsibilities must always be supervised by the Public Prosecutor and approved by the court or by the civil registry chief officer.

An agreement in relation to the division of assets involving real estate must be formalised in a public deed.

3. Child Law

3.1 Choice of Jurisdiction

According to Portuguese law and the EU Regulations that Portugal must comply with, the rule is that a court's international competence is determined by the child's habitual residence.

In exceptional circumstances, the court of a member state with jurisdiction to decide on the merits of a case can, on its own motion or at the request of one of the parties, suspend the process if it considers that a court of another member state with which the child has a particular connection is better placed to evaluate the best interests of the child, determining a deadline for the process to be transferred to the other court.

The most important item for a court to decide about a child is the consideration of their best interests.

3.2 Living/Contact Arrangements and Child Maintenance

Each parent can ask the court to regulate the exercise of parental responsibilities, defining the following:

- with whom the child will live;
- whether the child will live with both parents (for instance, a week with each one);

- the regime of visits (if it is established that the child lives with one parent);
- the quantum of the alimony; and
- the holidays the child will spend with each parent, etc.
- The court will always make decisions in the child's best interests.

Parents can decide how to regulate parental responsibilities by mutual consent, or if they are not able to agree, they must apply to the court. In both situations, as there are minors involved, the Public Prosecutor must agree with the defined arrangement.

The only restriction that the court has is to respect the best interests of the child, the right that the child has to have both parents in their life, and the emotional stability of the child.

Article 2003.º of the Portuguese Civil Code defines child maintenance as all that is indispensable for sustenance, housing, clothing, instruction, and education.

Child maintenance is calculated based on the child's needs and the economic capacity of both parents to provide for them. If one parent earns less than the other, the court can establish that the one with the more economic capacity should pay more.

By agreement, the parties can establish all regulation of parental responsibilities, including child maintenance. However, to be enforceable, the agreement will always have to be approved by the court or by the chief of the civil registry office after the Public Prosecutor's agreement to the regulation's content.

Child maintenance should be kept until the end of academic studies or, the limit, until reaching 25 years old (Article 1905.º n.º 2 of the Portuguese Civil Code).

The maintenance fixed in favour of the child during minority will be maintained until the child reaches the age of 25 unless the respective education or vocational training process is completed before that date, it has been freely interrupted or, in any case, the person obliged to pay maintenance proves that it is unreasonable to demand it.

When a minor reaches the age of majority (18 years old), they can personally ask for financial support. Until that age, it must be requested by the parent who lives with the child.

3.3 Other Matters

When parents are not able to reach an agreement in matters that are relevant in the life of the child, the court can decide on that issue following a request by one of the parents against the other. Such matters include:

- the school the child attends;
- specific medical treatments that can put the life of the child at risk;
- religion issues;
- having or not having psychological support;
- authorising the child to travel with one of the parents or alone or with third parties; and
- place of residence, etc.

Parental alienation is very difficult to prove, and the Portuguese courts are not so used to this.

Decisions granted by the Portuguese courts usually do not mention it, but if one parent prevents the other from being with the child and that behaviour is recurring, the court can take measures, such as transferring the child's residence to the other parent.

In fact, Article 1906.º n.º 5 of the Portuguese Civil Code states that the court will determine the child's residence and rights of access according to the child's best interests, taking into account all relevant circumstances, in particular, any agreement between the parents and the willingness shown by each of them to promote the child's habitual relations with the other.

The court can hear children. It is mandatory for the court to hear children when they reach 12 years of age, but the court can decide to hear younger children if they show the capacity to understand the issues and the maturity to answer.

Moreover, the court can decide to hear the children as witnesses. In some particular situations, when the court understands that the interests of the children conflict with the interests of the parents, the court should nominate a lawyer for the children.

3.4 ADR

Mediation is available, but it is not mandatory. It can assist the parties in resolving financial issues.

In a court process of regulation of parental responsibilities, the court decides whether the parties should go through a period of mediation, which the parties can refuse.

The parties cannot refuse to undergo a phase of specialised technical evaluation, during which the social security services will try to reach an agreement between the parents and, finally, provide a report to the court setting out their views and conclusions.

Any agreement about regulation of parental responsibilities reached via a non-court process should be approved by the court or by the chief of the civil registration office after the agreement of the Public Prosecutor. Thereafter, the agreement is enforceable.

Alternative dispute resolution is not mandatory, which is the reason it cannot be imposed.

3.5 Media Access and Transparency

Processes concerning the children are confidential and cannot be accessed without authorisation. The press can report cases without identifying the name and pictures of the children.

The protection of children is always granted and is mandatory. If members of the media reveal data relating to children that allow their identification, the parents can take judicial action against the press.

SCOTLAND

Law and Practice

Contributed by:
Ciara Wilson, Gillian Crandles and Lauren McDonach
Turcan Connell

Contents

Turcan Connell is a premier private client firm based in Edinburgh, Glasgow and London, and is one of the largest in the UK. It specialises in providing legal, tax and business advice to individuals and families, servicing their personal and commercial interests. Its clients are landowners, farmers, philanthropists, business owners, entrepreneurs, charities and trustees. The strength and depth of the firm's expertise enables it to specialise in providing efficient tax, estate and succession planning across family generations. Its clients naturally value its ability to draw on the expertise of the wider firm throughout key lifetime events: land and property, divorce and family law, and family business. Clients also appreciate the firm's personalised support as a source of wise counsel, as they do its exceptional technical expertise and advice.

Authors

Ciara Wilson is a premier private client firm based in Edinburgh, Glasgow and London, and is one of the largest in the UK. It specialises in providing legal, tax and business advice to individuals and families, servicing their personal and commercial interests. Its clients are landowners, farmers, philanthropists, business owners, entrepreneurs, charities and trustees. The strength and depth of the firm's expertise enables it to specialise in providing efficient tax, estate and succession planning across family generations. Its clients naturally value its ability to draw on the expertise of the wider firm throughout key lifetime events: land and property, divorce and family law, and family business. Clients also appreciate the firm's personalised support as a source of wise counsel, as they do its exceptional technical expertise and advice.

Gillian Crandles is Turcan Connell's managing partner and head of family law. She is accredited as a specialist in family law by the Law Society of Scotland and is the only family lawyer in Scotland that Chambers UK recognises as an "eminent practitioner". She is dual qualified as a solicitor in England and Wales and is often instructed in cross-border cases. Gillian is an interdisciplinary collaborative practitioner, having been involved in the introduction of collaborative law to Scotland, and is trained as a mediator and family law arbitrator. Gillian has been selected to participate in the "Portraits of Women in Law 2025" exhibition, which amplifies advances in the legal profession.

Lauren McDonach is an associate in the family law team at Turcan Connell. She advises clients on a variety of family law matters, including financial provision on divorce, cohabitation claims, and the preparation of prenuptial and postnuptial agreements. Further, she has a keen interest in child law issues and routinely runs her own childcare, adoption, and parental order cases both in court and out. Lauren is also a tutor at the University of Strathclyde and a mentor for the Lawscot Foundation.

Turcan Connell

Princes Exchange
1 Earl Grey Street
Edinburgh
EH3 9EE
Scotland
UK

Tel: +44 131 228 8111
Email: enquiries@turcanconnell.com
Web: www.turcanconnell.com

TURCAN CONNELL

1. Divorce

1.1 Grounds, Timeline, Service and Process

Grounds for Divorce

In Scotland, there are two grounds for divorce. The pursuer (applicant) either is required to establish that the marriage has broken down irretrievably, or parties can apply for divorce where one party has been issued with an interim Gender Recognition Certificate. Irretrievable breakdown can be established by any one of the following:

- the defender's (non-applicant spouse) unreasonable behaviour since the date of the parties' marriage;
- the defender has committed adultery since the date of the parties' marriage;
- the parties have lived separately for one year or more, and the other party consents to the divorce; or
- the parties have lived separately for two years or more, in which case consent of the other party is not required.

The same grounds apply for divorce of same-sex couples. However, adultery is not a means by which to establish irretrievable breakdown as it is for heterosexual couples.

In Scotland, termination of a civil partnership is known as a dissolution and the grounds for dissolution are the same as the grounds for divorce. However, as with same-sex couples, adultery is not a means by which to demonstrate irretrievable breakdown for dissolution, owing to its definition.

Process and Timeline for Divorce

While parties are not required to attend court where a divorce is uncontested, in Scotland parties do have to commence court proceedings to obtain a divorce.

Where no financial orders are sought, and if there are no children under the age of 16, parties can apply for divorce using the "simplified divorce procedure". The applicant is required to complete a form and, if divorce is sought on the basis of one year's separation, their spouse must signify their consent. The form is then submitted to the court and divorce tends to be granted within a few months.

Where spouses do not meet the criteria for the simplified divorce procedure, or where there remains dispute over financial or child-related matters, full divorce proceedings must be raised. Legal pleadings are prepared, and issued by the pursuer specifying the orders sought. Once served, the defender has strict time limits within which to defend the action, and lodge their pleadings setting out the basis of opposition. If the action is undefended, the pursuer can ask the court to grant divorce by submitting a "minute" and other supporting documentation to include affidavits, following which the court should grant the divorce within a few months.

Where defences are lodged, and the divorce proceeds are contested, the court will ultimately fix a full evidential hearing, known as a proof, to consider the matters in dispute. In terms of the likely timeline for a contested action, much will depend on the availability of the relevant court and the nature of the issues in dispute; however, this will generally take between one and two years to conclude.

Rules for Service of Divorce Proceedings

Sheriff court

The initial writ (the initiating document that sets out the detail of the claim in ordinary civil

actions in the sheriff court) is sent to the relevant sheriff court for warranting. Upon review of the papers, a sheriff shall issue a warrant, which is the court's authority to serve the proceedings on the defender.

Once the initial writ is warranted, the documentation can then be served either by post, using first-class recorded delivery, or personally on the defender by a sheriff officer (process servers). The sheriff officer shall serve the documentation personally on the defender or can leave the initial writ in the hands of a resident at the person's dwelling place or with an employee at their place of business. Where a sheriff officer is unsuccessful in executing service, they may, after making diligent enquiries, serve the documentation by depositing at the person's dwelling place or place of business, or leave it at the dwelling or place of business in such a way that it will be brought to the defender's attention. Alternatively, the defender's solicitor can accept service on the defender's behalf with their authority.

Court of Session

The summons (the initiating document which sets out the detail of the claim in ordinary civil actions in the Court of Session) is sent to the Court of Session for signetting. A judge shall review the papers and return the signetted summons, which is the court's authority to serve the proceedings on the defender.

Once the summons is signetted, the documents can then be served either by post to the known dwelling place of the defender, or personally by "messengers at arms" (process servers). The messengers at arms shall serve the documentation personally on the defender or can leave the documentation in the hands of another person at the person's dwelling place or, failing which, by leaving it in their dwelling place if after enquiring they have reasonable grounds to believe the defender resides there. The messenger at arms can also deposit it with someone at, or at, the defender's place of business if they have reasonable grounds to believe the defender carries on business there. Alternatively, the defender's solicitor can accept service on the defender's behalf, with their authority.

Religious Marriages and Divorces

The Marriage (Scotland) Act 1977 regulates marriage in Scotland. Religious marriages are treated similarly to civil marriages in the sense that the following steps are required to ensure the marriage is solemnised.

- Each of the parties must submit to the district registrar a marriage notice stating their intention to marry not more than three months before the date of marriage, and not later than 29 days before the ceremony is to take place.
- The marriage must be solemnised by an approved celebrant or registrar in the presence of two witnesses who are over the age of 16.
- Following the ceremony, the parties, together with the approved celebrant or registrar, are required to sign the marriage schedule.
- In the case of a civil ceremony, the registrar shall return the signed marriage schedule to the registrar's office for registration. Where parties opt for a religious or belief ceremony, they must personally return the schedule to the local registrar after the wedding and within three days of the ceremony.

The above-mentioned formalities must be complied with in order for the marriage to exist.

The means by which to obtain a divorce in Scotland are the same irrespective of whether par-

ties are married in a civil or religious or belief ceremony.

Processes in Relation to Ending a Marriage

In Scotland, nullity proceedings can be brought, in which case the marriage may be found to be void or voidable. A void marriage is one that was not legally valid because the parties were closely related, one or both parties were under the age of 18 (or under the age of 16 if the marriage took place prior to 27 February 2023), or if either party was already married or in a civil partnership. If the marriage was not legally valid, it is treated as never having existed.

Alternatively, it is possible to annul a marriage for various reasons, such as where a party has not consented to the marriage or was incurably impotent. In such circumstances, the marriage legally exists until it is successfully annulled, and such parties acquire the same rights to financial provision as they would have had had they divorced.

Parties can be judicially separated in Scotland and the same grounds apply as for divorce. The parties can live apart albeit remain married, and all responsibilities and rights arising from the marriage shall continue.

1.2 Choice of Jurisdiction

Jurisdictional Grounds to Commence Divorce Proceedings

A Scottish court has jurisdiction if either party to the marriage is domiciled in Scotland or if either has been habitually resident in Scotland throughout the year immediately before the divorce action is raised. If proceedings are raised in a sheriff court, parties must additionally demonstrate that one of the parties has either been resident in the relevant sheriffdom for a period of at least 40 days prior to the proceedings being raised, or was resident in the sheriffdom for a period of at least 40 days that ended not more than 40 days prior to the proceedings being raised, and has no known residence in Scotland on that date.

Jurisdiction for divorce is regulated by the Domicile and Matrimonial Proceedings Act 1973.

Same-Sex Spouses and/or Civil Partners

The same rules apply to same-sex spouses and civil partners. However, notwithstanding the additional criterion for a sheriff court to have jurisdiction (as outlined in "Jurisdictional Grounds to Commence Divorce Proceedings"), Edinburgh Sheriff Court shall have jurisdiction to entertain proceedings for the divorce of parties in a same-sex marriage if the parties married each other in Scotland, where no court has, or is recognised as having, jurisdiction, and it appears to the court to be in the interests of justice to assume jurisdiction in the case (a "jurisdiction of last resort").

Concepts of Domicile, Residence and Nationality

The concepts of domicile and nationality are relevant to determining jurisdiction for divorce in Scotland. While not defined in the Domicile and Matrimonial Proceedings Act 1973, the concepts are to be given their ordinary meaning.

Domicile is a common law concept used by the courts to determine which legal system applies to an individual at a specific time. It can be considered as an individual's permanent home, or where they have the closest connection.

Residence is where an individual lives.

Contesting Jurisdiction

A party to divorce proceedings can contest jurisdiction, and priority is given to the jurisdiction within the British Isles in which the parties to the marriage or civil partnership last resided together. Provided that one of the parties to the marriage was habitually resident in the relevant jurisdiction throughout the year prior to when the couple ceased to reside together, proceedings raised elsewhere in the British Isles must be sisted (halted) regardless of where proceedings were first raised.

Otherwise, a party can seek to sist (halt) proceedings in Scotland if they can demonstrate that proceedings are already ongoing before another court of competent jurisdiction, and that that court is a more appropriate forum for the case to be heard in all of the circumstances of the case. This is known as a discretionary sist and consideration shall be given to the general forum non conveniens factors, including where the parties' assets are located, where they are now living, and how far proceedings have progressed.

Stay of Proceedings Relating to Foreign Jurisdiction

See "Contesting Jurisdiction".

2. Financial Proceedings

2.1 Choice of Jurisdiction

Grounds for Jurisdiction for Commencing Financial Proceedings

Jurisdiction for divorce is regulated by the Domicile and Matrimonial Proceedings Act 1973. The Scottish courts have jurisdiction if either of the parties has been habitually resident in Scotland throughout the year before the action is raised or if either of the parties is domiciled in Scotland.

Contesting Jurisdiction

A party to financial proceedings can contest jurisdiction.

Stay of Proceedings

Within the British Isles (eg, England or Jersey), the Domicile and Matrimonial Proceedings Act 1973 affords priority to the jurisdiction where the parties last resided together. Where at least one party was habitually resident in that jurisdiction for the year before the parties last lived together, if proceedings are raised in that jurisdiction, proceedings raised in any other part of the British Isles must be sisted (stayed), regardless of where proceedings were first raised.

In other cases, the Scottish courts have discretion to sist based on the common law doctrine of forum non conveniens. The party seeking the sist must show that there are proceedings ongoing in another competent jurisdiction, and that it would be in the interests of justice for the case to be heard there.

Financial Claims After a Foreign Divorce

A foreign divorce will generally be recognised in Scotland if it was obtained by means of proceedings and one of the parties was a national of, habitually resident in, or domiciled in the country in which the divorce was obtained, and the divorce is effective in that country.

Where an overseas divorce is obtained otherwise than by means of proceedings (eg, without the involvement of a court), it will be recognised only if both parties are domiciled in the country in which the divorce was obtained. If either party was habitually resident in the UK throughout the year before such a divorce was obtained, it will not be recognised.

Recognition of foreign divorces can be refused if one party was not given sufficient notice or was denied an opportunity to take part in the proceedings, or otherwise on public policy grounds.

There are no procedural requirements – although parties may seek a declarator of recognition of a foreign divorce if there is doubt as to the recognition of the relevant foreign divorce in Scotland.

There are limited grounds under which an application can be made for financial provision following a foreign divorce, with the jurisdictional test requiring a connection of the parties to Scotland – eg, habitual residence or domicile. Essentially, the court will apply Scots law and seek to place the parties in the financial position that they would have been in had the divorce proceeded in Scotland.

2.2 Service and Process

Service requirements in financial proceedings are the same as for divorce proceedings, as is the process and timeline for financial proceedings.

2.3 Division of Assets

Court's Approach

The parties are subject to the provisions of the Family Law (Scotland) Act 1985 (the "1985 Act"), which includes a defined concept of matrimonial property providing for fair sharing on divorce – ie, it has no propriety consequences during the marriage. Parties may enter into a nuptial agreement to modify the effect of the 1985 Act.

The 1985 Act provides a framework for financial provision on divorce. The overriding principle is to ensure fair sharing of the matrimonial property, which is broadly defined as the net value of all assets acquired by the parties during the marriage, which are still held at the date of separation, except assets acquired by way of gift or inheritance from a third party.

The fair-sharing principle applies unless there are circumstances justifying a different outcome, such as where the source of the funds used to acquire a matrimonial asset did not derive from the income or efforts of the parties during the marriage.

Fair account should be taken of any economic advantage derived by one party from contributions of the other, and of any economic disadvantage suffered by either party in the interests of the other party or the family. The economic burden of caring for children under the age of 16 should be shared fairly between the parties.

Where one party has been substantially dependent on the financial support of the other, they should be awarded such provision as is reasonable to enable them to adjust to the loss of support over a period not exceeding three years. A party who is likely to suffer serious financial hardship as a result of the divorce should be awarded such provision as is reasonable to relieve them of hardship over a reasonable period.

Regulation or Reallocation of Assets or Resources on Divorce

The main financial orders courts will make are:

- payment of a capital sum;
- transfer of property;
- payment of a periodical allowance (maintenance post-divorce);
- a pension-sharing order; and
- incidental orders such as the sale of a property.

When making such orders, courts will consider the factors set out in "Court's Approach".

Identification of Assets
There is a duty of full disclosure on the parties, and the court can enforce disclosure in the event of non-compliance by a variety of means, including against third parties

Property Regimes
Property regimes do exist in Scotland. See the discussion in "Court's Approach".

Trusts
The courts in Scotland recognise trusts. Property held in trust is owned by the trustees and will generally be excluded from the value of the matrimonial property where one party is the settlor or beneficiary. Arguments can nonetheless be advanced that an interest in a trust is matrimonial property and/or is available as a resource. Transfers into trust can be set aside where they have been made for the purpose of defeating the other party's claim. There is no concept of the constructive or resulting trust in Scots law as is known in some common law countries.

2.4 Spousal Maintenance
There is a strong emphasis on achieving a financial clean break. Awards of periodical allowance (post-divorce support) are the exception rather than the norm, and they will only be awarded if a capital sum or property transfer would be inappropriate or insufficient. In all but the most extreme circumstances, orders for periodical allowance are limited to a maximum period of three years from divorce.

Spouses owe an obligation of maintenance (known as aliment) to each other while they are married. The amount is determined by reference to the needs and resources of each party. The obligation subsists only until divorce is granted.

Interim Maintenance
Following the breakdown of a marriage, a party can apply for interim maintenance pending the final outcome.

Ongoing Maintenance
See the foregoing paragraphs regarding ongoing maintenance.

2.5 Prenuptial and Postnuptial Agreements
Marital (nuptial) agreements have long been considered to be enforceable in Scotland. A court will only interfere with a validly executed agreement if, at the time the agreement was entered into, the circumstances were such that it was not fair and reasonable. There is neither need for specific provision to be made for either spouse, nor for the terms of the agreement to bear any reference to the orders a court would usually make upon separation.

The opportunity to take legal advice, the extent of disclosure, and the time afforded to the parties to consider the implications of the agreement are all factors in determining the enforceability of nuptial agreements. The position should be the same in the case of a foreign nuptial agreement being relied on in a Scottish court.

Key Case Law
Key case law includes:

- C v M 2021 SLT (Sh Ct) 319;
- Bradley v Bradley 2018 SC (SAC) 7; and
- Gillon v Gillon (no3) 1995 SLT 678.

2.6 Cohabitation
Division of Assets for Unmarried Couples
The Family Law (Scotland) Act 2006 (the "2006 Act") gives rights to unmarried couples to bring claims against each other within one year of

separation. Compensatory payments can be sought from a former partner for contributions made during the relationship, whether financial or otherwise. The applicant must show that they have suffered economic disadvantage in the interests of the other party or of a child of the relationship, or that the other party has derived economic advantage from contributions made by the applicant.

The court may award a capital sum, which may be payable in instalments, or such interim order as it sees fit. Many orders available on divorce are not available to former cohabitants – for example, property transfer orders or pension shares.

Acquisition of Rights

Cohabitants do not per se acquire any rights by virtue of length of cohabitation, children, etc, but these would be factors relevant to decision.

2.7 Enforcement

Enforcement of Compliance

A registered minute of agreement between the parties is directly enforceable and has the same status as a court order. All means of diligence are available – for example, arrestment and inhibition, and ultimately sequestration (bankruptcy).

International Enforcement

International enforcement of a financial order is permitted in Scotland.

2.8 Media Access and Transparency

Media and Press Reporting

Scottish courts have a long tradition of open justice and, other than in specific and limited circumstances, the media will be allowed to attend and report on court proceedings.

In general terms, where legal proceedings in Scotland are heard in public, they are capable of being reported, provided such publication is contemporaneous and in good faith, failing which they are liable to be treated as being in contempt of court (Contempt of Court Act 1981). The court may, however, determine that it would be appropriate to postpone or restrict such publication, and there are specific statutory exclusions relating to family law and child cases.

Undefended and simplified divorce actions do not call in open court. The consequence is that such cases cannot be reported until decree of divorce has been granted, at which time the media would have access to the names of the parties and the date on which they were divorced.

The Judicial Proceedings (Regulation of Reports) Act 1926 provides that, in the case of actions of divorce or dissolution, the media may only publish:

- the names, addresses and occupations of the parties and witnesses;
- a concise statement of the orders sought and the defences;
- details of any legal issues arising and the view taken by the court; and
- the final judgment and any observations made by the judge.

Where proceedings involve a child aged 16 or under, the court may, in terms of Section 46 of the Children and Young Persons (Scotland) Act 1937, make an order that the child or children must not be capable of being identified by any newspaper report. This would normally mean that any subsequent judgment will be anonymised.

No such order is required in respect of a child concerned in exclusion order proceedings by virtue of Section 44 of the Children Scotland Act 1995. Likewise, Section 182 of the Children's Hearings (Scotland) Act 2011 makes provision for a child involved in a children's hearing or other proceedings under the Act. In both cases, the relevant sections simply provide that any publication that could identify such a child is prohibited.

Similarly, adoption and permanence proceedings are heard and determined in private in accordance with Section 109 of the Adoption and Children (Scotland) Act 2007, unless the court decides otherwise. Again, where a judgment is produced, this will ordinarily be anonymised so that the parties, and the child(ren), cannot be identified.

Unless specifically excluded by statute, members of the media may be permitted to attend proceedings that are closed to the public (Sloan v B 1991 SC 412). They may utilise live text-based communications while within a courtroom, but they are nevertheless expected to adhere to the reporting restrictions noted above. Photography is not permitted within court buildings without prior judicial approval and similarly electronic devices may not be used with the exception of solicitors, who may use them for the purposes of proceedings only.

Where the relevant reporting restrictions do not automatically apply by operation of statute (as set out earlier), parties may prevail upon the court's general discretion in terms of the Contempt of Court Act 1981 – Section 11 of which empowers the court to prohibit publication of a name or a matter in connection with the proceedings. Any such order must, however, be sent to any interested person, which will include the press, and must be published on the Scottish Courts and Tribunals website. This may have the unintended consequence of drawing their attention to an action that might have otherwise proceeded unnoticed.

Where a judge exercises their discretion to impose reporting restrictions, they must first make an interim order that specifies why they are making the order. They must thereafter allow any interested person the opportunity to make representations before making a final determination on the matter. Once an order has been made, it remains open to any person aggrieved by such an order to apply for its revocation or variation.

There is also scope for the relaxation of reporting restrictions in relation to children's hearings and other proceedings under the Children's Hearings (Scotland) Act 2011, where to do so would be in the interests of justice.

Anonymising Proceedings

See the discussion in the preceding paragraphs.

2.9 Alternative Dispute Resolution (ADR)

Mechanisms Outside the Court Process

There is a strong and established culture of extrajudicial negotiations being used to achieve settlement between parties, with the court action then being limited to that of a change of status alone and all financial matters dealt with contractually in advance.

Mediation, arbitration and collaborative law are all available.

Mandated ADR Methods

There is scope for the court to order parties to attend mediation – it is rarely used, less so successfully, and there is no penalty for non-compliance.

Status of Agreement Reached via Non-Court Process

If in the form of a registered minute of agreement, an agreement reached via a non-court process has the force and effect of court orders and can be enforced as such.

3. Child Law

3.1 Choice of Jurisdiction

Jurisdictional Grounds

In actions relating to children (including parental responsibility, residence and contact actions), jurisdiction is established through the child's habitual residence in Scotland or, in the case of an emergency, through their presence in Scotland. If an action is raised in the sheriff court as opposed to the Court of Session, then the child must be habitually resident within the geographical boundary of the sheriffdom.

Domicile, Residence and Nationality

As in "Jurisdictional Grounds", jurisdiction in actions relating only to children is primarily based on the habitual residence of the child.

Should issues of parental responsibility arise in the context of other legal proceedings such as a divorce, the court seized for the divorce is also able to make orders in relation to children and their care even though they are not resident in Scotland.

In cases where a litigation has concluded and final orders are granted in relation to parental responsibility, should a party seek to revisit or vary the orders granted, they must do so with an application to the court which granted the final orders.

3.2 Living/Contact Arrangements and Child Maintenance

Application to Court

Either parent can apply to the court for a residence order, regulating the arrangements for where and with whom a child should live, or for a contact order, regulating the arrangements for maintaining personal relations and direct contact with a child.

Before the court will grant an order, the sheriff or judge needs to be satisfied that:

- firstly, the proposed order is in the best interests of the child; and
- secondly, it would be better for the order to be made than no order at all.

Beyond that, the sheriff or judge must take into consideration the views of any child, provided that the child is capable of expressing a view.

Legal Approach to Custody and Parental Responsibility

In Scotland, mothers have automatic parental rights and responsibilities (PRRs) regardless of their marital status. If the father was married to the mother at the time of the child's birth, he too has automatic PRRs. Unmarried fathers obtain PRRs if they are registered as the father on the child's birth certificate or obtain an order via the court.

Under the Children (Scotland) Act 1995, parental responsibilities include the responsibility to safeguard and promote their child's health, development and welfare and the responsibility to provide guidance and direction. A parent is also responsible for maintaining contact with their child. Parental rights mirror the responsibilities, and their function is to enable parents to fulfil their parental responsibilities. A child is defined

as a person under the age of 18, but most PRRs only apply to a child who is under the age of 16, except the responsibility to provide guidance. Most court orders cease to apply when a child turns 16.

In Scotland, there is no concept of custody and access, but rather residence and contact. There are no presumptions in relation to an equal division of time between separated parents but the generally held view in Scotland is that a child should enjoy a meaningful relationship with both parents. Accordingly, it is common for a child to reside with one parent and have contact with the other.

A parent may not remove a child from the UK without the consent of the other parent or a court order allowing the child to be removed.

Restrictions on the Court

The court can make any order as it sees fit, including residence, contact and orders granting or restricting PRRs, so long as the order is in the best interests of the child and it would be better for the child to make the order than make no order. Specific-issue orders can regulate aspects of a child's life including schooling and medical treatment.

Child Maintenance

Child maintenance is a sum of money paid to the parent with whom the child resides (whether by agreement or by court order) by the other parent regardless of whether the parents are married.

Child maintenance can be agreed via a private arrangement between parents or, where all parties reside within the UK, administered through the Child Maintenance Service (CMS), which is a government scheme. If parents use the CMS to calculate an appropriate amount of maintenance, then a statutory formula is applied. This is calculated as a percentage of the "non-resident" parent's (the parent with whom the child lives less frequently) gross weekly income, minus any pension contributions. An adjustment is made to take account of the number of nights that the child lives with the non-resident parent each week. When childcare is shared exactly equally between parents, no child maintenance is payable.

In Scotland, the CMS has exclusive jurisdiction for assessing and enforcing payment of child maintenance where both parents and the child live in the UK, and the child is under the age of 16 or 19 if they remain in full-time, non-advanced education. If parties cannot agree an appropriate amount of child maintenance, then, in most situations, the only remedy is to apply to the CMS for an assessment. The CMS has wide-ranging powers to investigate the non-resident parent's income.

Parents have the ability to agree an amount of child maintenance between them and for that amount to be recorded in a contract to be enforced as required. After one year from signing such a contract, either party can apply to the CMS for an assessment that would override the amount agreed in the contract.

Where all parties are in the UK, the CMS has exclusive jurisdiction to determine child maintenance. There are, however, limited situations where a court can make an order, as follows.

- The court can make a top-up order when the CMS maintenance calculation demonstrates that the paying parent's gross income exceeds GBP3,000 per week from all sources.

- The court may make an order where the CMS does not have jurisdiction because one or more parties reside outside of the UK.
- From the age of 16 to 25, a child can bring a claim for maintenance in the court against one or both of their parents directly, provided they are undergoing full-time, advanced education, such as studying at university.
- The court can make a freestanding or top-up order when the child has expenses attributable to a disability. This is determined on a case-by-case basis and takes into account expenses such as the costs of a carer or the cost of an adapted home.
- An order can be sought from the court to cover educational costs, such as private school fees.

When making any of the above-mentioned orders, the court will consider the needs of the resident parent, the resources of the non-resident parent, and generally all circumstances of the case.

Children can make a claim against their parents if they have reached sufficient age and maturity, which is deemed to be 12. Young adults up to the age of 25 may make a claim against their parents, provided they are undergoing trading or education. The courts will make an award based on needs, resources, and all circumstances of the case.

3.3 Other Matters

Courts' Power in Cases of Disagreement

In circumstances where parents disagree about a particular issue in relation to the upbringing of their child, either parent can apply to the court for a specific issue order under Section 11(2) of the Children's (Scotland) Act 1995 to determine the matter in dispute. By way of example, if parents disagree about what school a child should attend, the court has the power to make an order in respect of the child's schooling. As with all child-related matters that come before the court, the welfare of the child is the paramount consideration for the sheriff or judge.

Parental Alienation

Parental alienation is not a term that is defined in Scottish family law, but practitioners are increasingly seeing the issue raised in high-conflict parenting disputes. It is commonly used to describe a situation where a child rejects their parent, often displaying extreme negativity towards them, which is allegedly the result of psychological manipulation by the other parent. Often the child or the aligned parent will offer a variety of reasons to justify the child not wanting to have contact with their other parent, such as domestic abuse concerns.

When making an order in respect of a child, the sheriff or judge's paramount consideration is the welfare of the child. In addition, the sheriff or judge must consider a range of factors, known as the welfare checklist, before making an order. The factors include ascertaining the wishes and feelings of the child concerned as well as the need to protect the child from abuse.

The decision about whether or not a child has been alienated is a question of fact for the sheriff or judge to determine at a proof. Often in cases where parental alienation is alleged, the sheriff or judge will appoint an independent expert, such as a child psychologist, to investigate and report to the court the underlying issue for the child and for the parents, and possibly make recommendations for contact. Although an independent expert's report is not determinative, it is often of assistance to the sheriff or judge in understanding the reasons for the child's rejec-

tion and reaching a decision on what is in the best interests of the child.

Children's Evidence

Children can give evidence in court – although it is uncommon in family law cases, as children should be shielded from their parents' dispute as far as possible. If a child is called as a witness and they are under the age of 16, they would be classed as a vulnerable witness and special measures can be used to help the child give evidence. This includes taking of evidence remotely or by a live link, use of a screen, or assistance from a supporter in court.

3.4 ADR

Mechanisms Outside the Court Process

ADR refers to several different methods used to resolve disputes other than applying to court. The following are the most commonly used types.

Mediation

This is a popular method used by many separated parties to resolve both the financial aspects and childcare disputes arising from their separation. It is a voluntary process whereby an independent third-party mediator channels a discussion between the parties, which can be extremely useful in helping them to understand the other's perspectives. If parties reach agreement at mediation, they would be encouraged to instruct their own solicitors to prepare a minute of agreement on their behalf, reflecting the terms agreed.

Arbitration

This is a voluntary process where both parties have legal representation, but they appoint a private judge, known as an arbitrator, who is a specialist-trained family lawyer affiliated with the Family Law Arbitration Group Scotland (FLAGS), to adjudicate upon their case. Both parties will put their arguments to the arbitrator, who will make a decision that is legally binding on both parties.

Collaborative law

This is a process whereby both parties appoint a solicitor who is collaboratively trained. The parties and their respective solicitors have a series of non-adversarial, roundtable meetings to discuss settlement. At the outset of the case, all parties contract to resolve all issues without resorting to court, so as to ensure all are fully engaged with the process.

ADR Methods Mandated by Court

Parties cannot be compelled to engage in ADR prior to raising a court action. However, in court actions involving a child, a sheriff or judge may, at any stage, refer the action to mediation – although compliance is not compulsory.

Status of Agreement Reached via a Non-Court Process

If agreement is reached at mediation or using the collaborative process, the parties will be encouraged to instruct their solicitor to embody the terms of settlement into a minute of agreement, which is a legally binding contact that, once registered, has the effect of a court order. In arbitration, any decision of the arbitrator is legally binding on the parties.

Requirements Imposed by Statute

ADR is a voluntary process in Scotland. Parties cannot be compelled to engage in it.

3.5 Media Access and Transparency

Media and Press Reporting

The principle of open justice is enshrined in Scots law and, other than in specific and limited circumstances, the media will be allowed

to attend and report on cases. That said, the general principle can be departed from where an order restricting reporting is made, which is particularly common in child law cases.

Where proceedings involve a child, it is open to solicitors to move the court in terms of Section 46(1) of the Children and Young Persons (Scotland) Act 1937 to make an order that the child or children must not be capable of being identified in newspaper reports.

As per financial proceedings (see **2.8 Media Access and Transparency**), no such order is required in respect of a child concerned in exclusion order proceedings by virtue of Section 44 of the Children Scotland Act 1995. Likewise, Section 182 of the Children's Hearings (Scotland) Act 2011 makes provision for a child involved in a children's hearing or other proceedings under the Act. In both cases, the relevant sections simply provide that any publication that could identify such a child is prohibited.

Similarly, adoption and permanence proceedings are heard and determined in private in accordance with Section 109 of the Adoption and Children (Scotland) Act 2007, unless the court decides otherwise.

Where the relevant reporting restrictions do not automatically apply by operation of statute (as set out earlier), parties may prevail upon the court's general discretion in terms of the Contempt of Court Act 1981 – Section 11 of which empowers the court to prohibit publication of a name or a matter in connection with the proceedings. Any such order must, however, be sent to any interested person, which will include the press, and must be published on the Scottish Courts and Tribunals website. This may have the unintended consequence of drawing their attention to an action that might have otherwise proceeded unnoticed.

Anonymising the Child

Prior to the publication of a judicial opinion, there exists the opportunity for a sheriff or judge to anonymise an opinion – for example, by using initials instead of a person's name. This commonly happens in family law judgments, particularly in cases involving a child.

The effect of such a step is not the same as an order restricting reporting. The media will still be able to report the proceedings (unless the media is prohibited because an order in terms of Section 46(1) of the Children and Young Persons (Scotland) Act 1937 has been granted). However, it does allow for other personal information to be excluded from the opinion where it is not, in the eyes of the judicial office holder, relevant to the decision or necessary for the purposes of pronouncing judgment.

Trends and Developments

Contributed by:
Jenny Jarman-Williams
Turcan Connell

Turcan Connell is a premier private client firm based in Edinburgh, Glasgow and London, and is one of the largest in the UK. It specialises in providing legal, tax and business advice to individuals and families, servicing their personal and commercial interests. Its clients are landowners, farmers, philanthropists, business owners, entrepreneurs, charities and trustees. The strength and depth of the firm's expertise enables it to specialise in providing efficient tax, estate and succession planning across family generations. Its clients naturally value its ability to draw on the expertise of the wider firm throughout key lifetime events: land and property, divorce and family law, and family business. Clients also appreciate the firm's personalised support as a source of wise counsel, as they do its exceptional technical expertise and advice.

Author

Jenny Jarman-Williams is a consultant in the family law team at Turcan Connell. She specialises in complex, high net worth cases and cohabitation and nuptial agreements, including those with an international element. Originally trained as a corporate lawyer, she is often instructed in cases where one or both parties have valuable business interests. She has spent periods of time living, working and studying abroad and has significant experience of multi-jurisdiction cases. She was accredited by the Law Society of Scotland as a specialist in family law in 2019 and is also a Family Law Arbitration Group Scotland (FLAGS)-accredited family law arbitrator and a member of the Family Law Association.

Turcan Connell

Princes Exchange
1 Earl Grey Street
Edinburgh
EH3 9EE
Scotland
UK

Tel: +44 131 228 8111
Email: enquiries@turcanconnell.com
Web: www.turcanconnell.com

TURCAN CONNELL

The Ongoing Reform of Family Law in Scotland

Current developments in the field of family law in Scotland centre around potential reform of the law with regard to cohabitation, child law, and domestic abuse. There is less focus, for the moment at least, on updates to the court processes and procedures and on the expansion of non-court dispute resolution.

Cohabitation

In 2006, the Scottish Parliament introduced rights for cohabitants. Cohabitants who are domiciled or habitually resident in Scotland are now able to make a financial claim against the other on the breakdown of the relationship, or when a partner dies without a will. Eighteen years on, reform is on the horizon, following the publication of a lengthy report by the Scottish Law Commission and an accompanying Draft Bill in November 2022.

Many would say the original legislation has not fulfilled its potential. Scotland's current cohabitation laws have been criticised for their complexity and vagueness, with courts given significant discretionary power without a guiding framework. This has made it difficult for legal advisers to predict outcomes for clients and, arguably, led to some unjust outcomes. They have recommended that change should be made and proposed wide-ranging reform. The Scottish government's initial response stated: "The report is very thorough, impressive and readable. It provides a sound basis for reforming the law in this area." It went on to say it intends to consult on the Scottish Law Commission's recommendations. The recommendations, if adopted, would bring extensive changes aimed at giving the court a wider range of powers and providing greater clarity and predictability as to outcome.

The key recommendations and proposed changes are as follows.

- Updated definition of "cohabitant" – the Scottish Law Commission advocates modernising and redefining "cohabitant" to better represent contemporary relationships. At the moment, cohabitants are defined as a couple who live together as though married. Under the proposed change, a cohabitant would be defined as a person in an enduring family relationship with another, focusing on the relationship's characteristics rather than likening it to marriage. Factors such as co-residence, financial interdependence, child-bearing, and the relationship's length would guide courts in making determinations about cohabitant status.
- Guiding principles for financial awards – to address the vagueness of the law in relation to financial claims, the report suggests a principled framework for financial provision. The proposed new test requires the court to make such orders as are justified on the application of any or all of a set of guiding principles and reasonable having regard to the resources of the cohabitants. The guiding principles are an almost exact replica of those applicable in a divorce and so are familiar to all Scottish family lawyers and judges. They are:
  (a) any economic advantage derived by one cohabitant from the contributions of the other should be fairly distributed between the cohabitants;
  (b) any economic disadvantage suffered by a cohabitant in the interests of the other cohabitant or of a relevant child should be fairly compensated;
  (c) where a cohabitant seems likely to suffer serious financial hardship as a result of the cohabitation having ended, such financial provision should be awarded as

is reasonable for the short-term relief of that hardship; and

(d) the economic responsibility for caring for a relevant child (that is, a child of whom the cohabitants are parents, or who has been accepted by them as a child of the family) after the end of the cohabitation should be shared fairly between the cohabitants.

The Scottish Law Commission has also recommended that assistance in applying the guiding principles should be provided, by inclusion of lists of factors relevant to the application of each guiding principle. Those factors are again very like those from the divorce legislation and include:

(a) the terms of any agreement between the cohabitants;

(b) whether either cohabitant's behaviour, including abusive behaviour, has resulted in economic advantage or disadvantage or affected the resources of either cohabitant; and

(c) all the other circumstances of the case.

- Expansion of court orders – one of the key criticisms levelled at the Scottish legislation is that the orders available to the court are too limited. The report recommends diversifying court orders beyond simple monetary awards to include property transfer orders and periodic payment orders for short-term relief. Courts would also gain powers to address occupancy rights in shared homes, valuation and sale of property, and incidentals related to financial provision. This extended range allows courts to more flexibly support cohabitants during transitional periods after separation.
- Time limit flexibility for financial claims – the report is critical of the existing rigid one-year limit for cohabitation-related financial claims and proposes courts should have discretion to accept a late claim on special cause shown within a further one-year period. This would be subject to a two-year absolute deadline. It also recommended that provision be introduced allowing cohabitants to agree, in writing, to extend the one-year time limit, so as to enable them to negotiate with a view to settling their claims for financial provision. Where such an agreement is entered into, the time limit for making a claim would be extended to 18 months from the date of cessation of cohabitation, but the two-year absolute deadline would continue to apply. This adjustment is intended to allow time for negotiation and mediation, providing couples with the opportunity to resolve disputes without immediately resorting to legal action.
- Recognition of cohabitation agreements – as things stand, there is no special provision under which to challenge an unfair cohabitation agreement. The contract will stand unless a party can meet one of the common law grounds of challenge (ie, error, fear, force, or fraud). There is a recommendation that a new provision should be introduced, allowing the court to vary or set aside an agreement (or any term of an agreement) between cohabitants if the agreement was not fair and reasonable at the time it was entered into. This would bring cohabitation agreements in line with prenuptial and postnuptial agreements.

While the Scottish government has not yet implemented these reforms, the report and draft Bill lay a foundation for potentially significant changes in cohabitation law. Those changes would bring it closer to the existing provision for financial provision on divorce, without mirroring it. If (or when) these changes proceed, most agree they would mark an important improve-

ment in how Scottish law recognises and supports non-marital relationships.

Civil remedies for domestic abuse

There is a focus on the impact of domestic abuse across society and, as part of that, the impact it has on family law cases. There is also current political enthusiasm for tackling it. The Scottish Law Commission is conducting a review of the civil remedies available to victims/survivors of domestic abuse.

The current law in this area is spread over several pieces of legislation and multiple different remedies are available. Therefore, to achieve the most effective protection in law, a victim of domestic abuse needs to rely on multiple statutes, cumulatively building up the protective measures in place. The level of protection available also varies depending on the relationship between the victim and the perpetrator. The picture that emerges is of a complex and fragmented legal regime for victims and their advisers to navigate. The legislation is complicated, confusing and piecemeal. Further criticisms of the current law include that the terminology is confusing and inconsistent and that the remedies themselves are not working as well as they should.

The Scottish Law Commission is floating possible options for reform of occupancy rights. It is seeking views on whether cohabitants should have the same occupancy rights as spouses/civil partners and on whether the court should be required to consider making an exclusion order suspending a person's occupancy rights where that person is convicted of a domestic abuse offence.

The consultation also focuses heavily on a proposal for a new law, and a new suite of remedies, to help victims of domestic abuse. They are seeking views on a new proposed law that will address the complexity of the current regime by introducing a new "purpose-built" scheme (a statutory delict of domestic abuse). It also seeks views on the introduction of a new definition of domestic abuse or abusive behaviour in civil law, based on the equivalent definition of abusive behaviour in the Domestic Abuse (Scotland) Act 2018, with some additional factors: tech abuse, immigration abuse and economic abuse. It is possible they will include a defence of reasonableness of the behaviour in the particular circumstances.

The second part of this would be a bespoke set of remedies for victims of abuse, if the delict of domestic abuse is established in court. The remedies would be a court order provisionally called a Domestic Abuse Civil Protection and Redress Order (DACPRO). This is an umbrella term covering a range of different orders:

- a protection order to prohibit any future abusive conduct (and an extension of that order to protect other named people, such as children of the household);
- a redress order to compensate a victim/survivor for losses suffered by way of damages;
- a civil barring order that would exclude the perpetrator from the home for a fixed period;
- an order for the delivery of specified documents;
- an order for the delivery of specified property and personal effects; and
- an order regulating the care of and responsibility for a pet, or for the delivery of a pet and potentially others.

They propose that a victim should be able to seek any element of a DACPRO either alone, or in combination with any other element, to suit their individual needs.

Child law

The Children (Scotland) Act 2020 (the "2020 Act") was passed by the Scottish Parliament in late 2020, although many of its provisions have yet to enter into force. The timeline remains unknown and does not appear imminent. If/when it does come in to force, it will introduce notable changes.

- As things stand, the position is that all children should be given an opportunity to express a view in any court action relating to their welfare. There is a presumption that a child aged over 12 is mature enough to do so, although this is increasingly being extended to younger children. Once their view has been expressed, the court then determines how much weight to give to their views considering the child's age and maturity. The 2020 Act will change this. It provides that all children, regardless of age, may be capable of providing their views in some manner and ought to be given the opportunity to do so. The method will be determined by the child and will vary. They might speak to a child welfare reporter or use a less formal approach such as writing a letter, or drawing, via play therapy or they may record a video. This will be child led. The court will only stipulate how their view is to be ascertained if the child does not express any preference or if the method suggested by the child is impractical. The court may determine that a child is too young or immature to provide a view. A child also cannot be forced to provide a view against their wishes. Once the child's views are known, the court will, as they do now, determine how much weight should be given to them.
- In cases where abuse is a factor, the 2020 Act states consideration should be given to the ability of the person who committed the abuse to care for the child. The court will also need to consider how any order made might affect the ability of a parent to care for the child and consider the impact that abuse might have on anyone who would need to interact with the abuser in order to facilitate the contact ordered by the court, most commonly at handovers. How the abuse or risk of abuse will affect the care arrangements for the child must be given careful consideration. Abuse will include physical, verbal and emotional abuse.
- At the moment when the court makes a decision about a child, they inform the parties, and they then tell the child. Once in force, the Act requires the judge to ensure that their decision(s) are explained to the child. That may be done by the judge themselves or by the child welfare reporter, if there is one. The only time that it is not required is if the child would be incapable of understanding the decision, if it would not be in their best interests to be provided with an explanation, or if the child's whereabouts are unknown.
- The 2020 Act provides that if the court accepts that there has been a failure to comply with an order relating to the care of a child, the court must establish why that happened. The court will be obliged to seek the views of the child before deciding whether to hold the person who failed to comply in contempt of court and/or to vary or recall the order.
- The 2020 Act provides that the local authority must take steps to promote personal relationships and facilitate direct contact between a looked-after child and their siblings. The local authority will also be obliged to ascertain the views of siblings (and, where they have an ongoing relationship, anyone else the child has lived with where the relationship has the character of a sibling relationship) before

making any decision relating to a child they are looking after.
- Once enacted, there will be a requirement for there to be a Register of Child Welfare Reporters and a Register of Curators ad litem. Child welfare reporters are generally family lawyers or social workers. They investigate and report to the court on the circumstances of a child and on proposed arrangements for the care and upbringing of the child. Curators ad litem are professionals who are appointed to represent and protect the interests of an individual lacking full capacity, including a child, in court proceedings. This will standardise the current practice of appointments to these roles and will ensure that all child welfare reporters and curators ad litem are appropriately trained.
- There will be a new requirement that Scottish Ministers must make funding available for non-court dispute resolution/ADR for child-related disputes.
- Child contact centres will need to be regulated and only regulated contact centres may be used if supervised/supported contact is ordered by the court.

Divorce process

One area in which there is a proposed update to the court procedure is in relation to divorce applications. There are two different procedural routes available when applying for divorce. The first is the simplified procedure, which is essentially a tick box application form. The second is the ordinary procedure, which requires a longer and fuller type of application and also demands two (or more) sworn affidavits to be submitted.

At present, the simplified procedure is restricted to those with no children of the marriage under the age of 16. Hence, a subset of potential applicants are required to use the more complex, more costly, and more time-consuming ordinary procedure. This is considered to be unduly burdensome and procedurally unfair. Subject to including appropriate safeguards, there is now a proposal to open the simplified procedure route up to those with children where the arrangements for their care have been agreed. If approved, this would be a significant procedural improvement.

SINGAPORE

Law and Practice

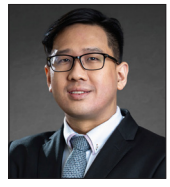
Contributed by:
Loh Wai Mooi, Wang Liansheng, Valerie Goh and Petrina Tan
Bih Li & Lee LLP

Contents

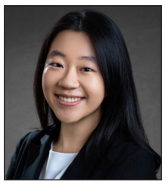
Bih Li & Lee LLP has a strong reputation both in contentious and non-contentious litigation matters. The firm and its lawyers have been ranked and cited in international legal publications and are well respected as subject-matter experts in their areas of practice. The firm's lawyers have cross-disciplinary knowledge in areas of trust, conveyancing, investment, non-profit and company matters, allowing them to serve the needs of clients holistically. The firm has a very active practice in family and matrimonial matters, advising and acting for high net worth individuals, both local and expatriate. Many of the cases the firm handles involve cross-border disputes where the firm's lawyers are instructed as counsel or co-counsel by lawyers from other jurisdictions. The family law team also has extensive experience in matrimonial disputes, probate matters, succession planning and mental capacity matters, as well as trust and private client matters.

Authors

Loh Wai Mooi is one of the founding partners of Bih Li & Lee LLP and is now a senior consultant with the firm. Wai Mooi has almost four decades of experience as an advocate and solicitor, and was one of the first lawyers to be appointed as a child representative by the family justice courts. With her wealth of experience, she is well placed to handle high-conflict matrimonial and estate matters. She is also an accredited mediator who has served as a mediator with the family justice courts and on private engagements.



Wang Liansheng is a partner at Bih Li & Lee LLP and oversees the firm's family and private client practice. Experienced in both contentious and non-contentious family work, Liansheng has worked on a broad spectrum of matters, from cross-border divorces to high-value estate disputes. He has also represented clients at various levels of the courts and has assisted many individuals with estate planning and mental capacity matters. Liansheng graduated from the National University of Singapore and was called to the Singapore Bar in 2014. He is effectively bilingual in Chinese and English.



Valerie Goh is a senior associate in the family and private client practice at Bih Li & Lee LLP. She has represented a wide range of clients and has accumulated experience in contentious and non-contentious divorce and estate matters in the family justice courts and the High Court of Singapore. Valerie graduated from the National University of Singapore and was called to the Singapore Bar in 2020.

Petrina Tan is an associate in the litigation and family and private client practices at Bih Li & Lee LLP. Her experience in both areas of work makes her particularly well suited to assist on contentious matrimonial and estate disputes, including those involving high net worth individuals. Petrina also recognises the importance of therapeutic justice in family disputes and works closely with clients to help them resolve disputes amicably.

Bih Li & Lee LLP

1 Coleman Street #10-07
The Adelphi
Singapore 179803

Tel: +65 6223 3227
Fax: +65 6224 0003
Email: gen@bihlilee.com.sg
Web: www.bihlilee.com

1. Divorce

1.1 Grounds, Timeline, Service and Process

Grounds for Divorce

There is only one ground for divorce that may be relied on by a married couple in Singapore – that of irretrievable breakdown of the marriage. In addition to this ground, the court would also need to be satisfied that it would be just and reasonable to grant the divorce, having regard to all relevant circumstances, including the conduct of the parties and how the divorce would affect any children of the marriage.

As a threshold requirement, an individual is generally permitted to file for divorce after three years have passed since the registration of the marriage. In special circumstances, such as exceptional hardship suffered by an applicant or exceptional depravity on the part of the respondent, the court may allow an application for divorce to be made within the first three years of marriage. The requirement enshrines the sanctity of marriage in Singapore, and the representation of marriage as a serious obligation undertaken by both parties.

With the passing of the Women's Charter (Amendment) Bill No 43/2021 on 10 January 2022, and from 1 July 2024 onwards, there are now presently six "facts" that parties may rely on to establish an irretrievable breakdown of their marriage:

- one party ("X") has committed adultery, and the other party ("Y") finds it intolerable to live with X;
- X has behaved in such a way that Y cannot reasonably be expected to live with X;
- X has deserted Y for a continuous period of two or more years immediately before the application for divorce;
- the parties have lived apart for a continuous period of three or more years and consent to a divorce being granted by the court;
- the parties have lived apart for a continuous period of four or more years (regardless of either party's consent); or
- the parties agree that the marriage has irretrievably broken down, subject to the court's discretion should it consider that there remains a reasonable possibility that the parties may reconcile.

It is important to mention that proof of adultery would require Y to establish that sexual intercourse has taken place between X and a third party. In this respect, intimate messages or improper conduct between X and a third party may be insufficient, unless the circumstances of the case are such that adultery might reasonably be assumed as a result of an opportunity presented for its occurrence. Nonetheless, the improper association of a husband/wife with a third party may be relied on as a circumstance giving rise to the allegation that one has behaved in such a way that the other cannot reasonably be expected to live with them.

The party commencing the divorce should also take note of the six-month "grace period" afforded by the Women's Charter 1961. Should the parties continue to live together as husband and wife for a period exceeding six months following the incidents (of adultery or unreasonable behaviour) relied on, other (more recent) incidents may need to be provided and relied on.

The introduction of the sixth fact – that is, allowing for divorce by mutual agreement – illustrates the further commitment and emphasis placed on

the concept of therapeutic justice and facilitating amicable divorces by placing less focus on the "fault" of a party for the breakdown of the marriage.

As Singapore presently does not recognise same-sex marriages or civil unions, the above-mentioned ground would only apply to registered marriages between a man and a woman.

Processes and Timelines for Divorce

Parties filing for divorce would need to commence an action in the family justice courts of the Republic of Singapore (pursuant to Part 10 of the Women's Charter 1961), on the basis of an irretrievable breakdown of their marriage (as detailed in the preceding subsection) in order to obtain a divorce. No mandatory periods of separation between the parties are required, prior to the commencement of the action, unless a party intends to rely on one of the three facts that stipulate periods in which one party has deserted the other and/or the parties have lived apart.

Pursuant to Section 94A of the Women's Charter 1961 and Section 3 of the Women's Charter (Parenting Programme) Rules 2016, all parents with children under the age of 21 are required to attend the mandatory co-parenting programme before filing for divorce. This applies even to parties who are able to reach an agreement with their spouse on the facts to be relied on to support the irretrievable breakdown of the marriage and/or all ancillary matters. Attendance of this programme has been mandatory for all parents with children under the age of 21 since 1 July 2024.

Divorce proceedings formally begin when an applicant files their originating application for divorce. The originating application is to be filed in accordance with Form 2A of the Family Justice (General) Rules 2024, and may include:

- a certificate of completion of the mandatory co-parenting programme (if applicable);
- an affidavit of split care and control (where the parties have agreed that each will care for different children);
- a draft ancillary reliefs order;
- a copy of the parties' marriage certificate (and any translations);
- a copy of the children's birth certificates (and any translations);
- an agreement that the marriage has irretrievably broken down (for parties relying on divorce by mutual agreement); and
- bankruptcy search results.

The new Family Justice (General) Rules 2024 critically remove the need for a statement of claim or statement of particulars to be filed – instead, the information that was previously contained in both documents is now included in Form 2A. Form 2A, which is a combination of both multiple-choice options and open-ended questions, is intended to be more accessible and user-friendly for litigants in person.

After service of the originating application (when served within Singapore), the respondent has to file the following documents:

- a notice to contest (within 14 days);
- a reply to the originating application for dissolution of the marriage (if any) (within 28 days); and
- a cross-application (within 28 days).

Service of Divorce Proceedings

The applicant is to serve the originating application personally on the respondent within 14 days after the issuance of the originating application.

Alternatively, service may be properly effected on a party via their solicitors, who have indicated that they have instructions to accept service on the party's behalf.

Despite personal service of the originating application not having been properly effected, personal service may be deemed to have been effected on a person if:

- the person to be served files a notice to contest;
- the person to be served files a reply; or
- the applicant (i) files an affidavit of service exhibiting any document to indicate that the person to be served has received the originating application; and (ii) the court is satisfied that the document exhibited indicates that the person to be served has received the originating application.

In civil proceedings, the court's approval is generally required for service of the originating application out of Singapore. However, Part 7 Rule 10 of the Family Justice (General) Rules 2024 states that the court's approval is not required for service of an originating application or other court documents relating to any proceedings under Part 10 of the Women's Charter 1961 out of Singapore.

Religious Marriages and Divorces

The Women's Charter 1961 does not apply to marriages solemnised or registered under Muslim law. Instead, the Administration of Muslim Law Act 1966 governs Muslim marriages, with the Syariah Court deciding matters concerning divorces in Muslim marriages.

Customary marriages entered into before 2 June 1967 are also recognised as valid marriages. Post 2 June 1967, marriages solemnised in Singapore are only recognised as valid marriages if they are in accordance with the Women's Charter 1961.

Judicial Separation/Annulment

An individual may file an originating application for judicial separation based on any of the six '"facts" as set out in "Grounds for Divorce". Parties may file for judicial separation prior to the three-year time limit. Thereafter, they may commence divorce proceedings on the basis of an irretrievable breakdown of their marriage (as detailed previously) in order to obtain a divorce.

Following a judgment of judicial separation, the parties are no longer obliged to cohabit with each other. Parties that are judicially separated (but remain married) and who pass away intestate are not entitled to claim for part of the deceased spouse's estate.

Parties may also choose to annul their marriage if it fulfils the requirements for annulment under Sections 105 or 106 of the Women's Charter 1961. There are two types of annullable marriages: "void" or "voidable marriages". The following civil marriages are void under Section 105 of the Women's Charter 1961:

- a marriage between persons who are Muslims;
- a marriage between persons who, at the date of the marriage, are not respectively male and female;
- a marriage where one party is already lawfully married to a spouse under any law, religion, custom or usage;
- a marriage where one party is below the age of 18 years (and there is no authorisation by a special marriage licence);

- a marriage within specific degrees of kindred relationship and affinity (as set out in the First Schedule of the Women's Charter 1961);
- a marriage that has not been solemnised with a valid marriage licence and by a registrar or a licensed solemniser; and
- a marriage of convenience.

The following marriages are voidable under Section 106 of the Women's Charter 1961:

- a marriage that has not been consummated owing to the incapacity of either party or wilful refusal by one party to consummate it;
- a marriage where one party did not validly consent to it;
- a marriage where, at the time of the marriage, a party who is capable of giving valid consent was suffering from a mental disorder of such a kind or to such an extent as to make them unfit for marriage;
- a marriage where, at the time of the marriage, one party was suffering from a venereal disease in a communicable form; and
- a marriage where, at the time of the marriage, one party was pregnant by some person other than the spouse.

An applicant commencing a legal action to annul a marriage must file their originating application in accordance with Form 2B of the Family Justice (General) Rules 2024.

1.2 Choice of Jurisdiction

Singapore as the Jurisdiction for Divorce

A Singapore court has jurisdiction to hear an application for divorce where either or both of the parties:

- are domiciled in Singapore at the time of commencement of proceedings; or
- have been habitually resident in Singapore for a period of three years immediately prior to the commencement of proceedings.

A Singapore citizen is deemed, until the contrary is proved, to be domiciled in Singapore. A person's domicile of origin (ie, their place of birth) would prevail when determining domicile, unless that person acquires a new domicile of choice or dependence subsequently. The party who alleges that a domicile has been changed would bear the burden of proving the claim. A person cannot have more than one domicile at any one time (Peter Rogers May v Pinder Lillian Gek Lian (2006) SGHC 39).

The concept of habitual residence is distinct from that of domicile. An individual would be habitually resident in a place that they are ordinarily or normally resident in, apart from temporary or occasional absences of long or short duration. The residence should also be one that is voluntarily adopted, with a degree of settled purpose (Lee Mei-Chih v Chang Kuo Yuan (2012) SGHC 180).

Given that Singapore does not recognise same-sex marriages or civil unions, queries as to the jurisdictional grounds for divorce in these categories would be a non-starter in Singapore.

Contesting Jurisdiction

The applicant who commences an originating application for divorce would need to state, in Form 2A, the basis on which the court has jurisdiction to hear the matter – that is, whether reliance is placed on the parties' domicile or habitual residence.

If a respondent wishes to contest the jurisdiction of the Singapore courts to hear the matter, they will have to indicate this intention in the reply

to the originating application for dissolution of the marriage. The respondent should also file a summons to apply for the Singapore proceedings to be stayed pending a determination on the appropriate forum for divorce proceedings. In such an application based on the ground of forum non conveniens, the court of appeal has affirmed that the principles laid out in the seminal case of Spiliada Maritime Corporation v Cansulex Ltd (1987) AC 460 are applicable.

In brief, these principles are as follows.

- The court may grant a stay on the ground of forum non conveniens when there is an available forum, having competent jurisdiction, that is the appropriate forum.
- Generally, the respondent would bear the burden of proving that a stay should be granted. If the court is satisfied on a prima facie basis that another forum would be the appropriate forum, the burden shifts to the applicant to establish that there are special circumstances that warrant a continuation of proceedings in Singapore.
- The burden on the respondent extends to establishing that the alternative forum is clearly or distinctly more appropriate than the present forum.
- The natural forum is the place in which there is the most real and substantial connection to the action. The court will examine connecting factors such as convenience, the law governing the matter, the location of assets, and nationality.
- An application for a stay would typically be refused in situations where the court determines there is no other available forum that is clearly more appropriate.
- Conversely, a stay would usually be granted where there is an available forum that – at face value – is clearly more appropriate for the action, unless there are other countervailing considerations that conflict with the grant of a stay.

In situations where the court's jurisdiction may be a point of contention, parties should be wary of filing further pleadings and/or applications, as this may be seen as a submission to the jurisdiction of the Singapore courts (VH v VI and another (2008) 1 SLR 742.

2. Financial Proceedings

2.1 Choice of Jurisdiction

Jurisdiction in Financial Claims

As the court's power to order the division of matrimonial assets upon divorce flows from the granting of a judgment of divorce, the court's jurisdiction to hear the parties' financial claims follows from a grant of interim judgment of divorce. Contesting the court's jurisdiction, at this late stage, would likely be seen as extremely belated and might not be entertained. Financial claims are often dealt with at the ancillary matters' stage of the divorce proceedings – that is, after the interim judgment of divorce has been granted.

While a party is at liberty, at any stage, to make an application for a stay of proceedings, an application made on the basis of pursuing financial proceedings in an alternative jurisdiction is likely to require exceptional circumstances before it would be granted. Further, if the application is deemed frivolous or vexatious, it may also be dismissed with an adverse costs order against the party making the application. Generally, if there is any challenge to the appropriate forum for the proceedings, this should be made expeditiously and as early as possible.

Financial Claims in Foreign Divorces

Parties who have obtained a divorce in a foreign jurisdiction may apply to the court for leave to apply for financial relief consequential to said foreign matrimonial proceedings, in accordance with Sections 121A–121G of the Women's Charter 1961.

As a pre-condition to the granting of financial relief, either one of the following two conditions must be satisfied:

- one of the parties to the marriage was domiciled in Singapore:
  - (a) on the date of the application for leave; or
  - (b) on the date on which the divorce, annulment or judicial separation took effect in the foreign jurisdiction; or
- one of the parties to the marriage was habitually resident in Singapore for a continuous period of one year:
  - (a) immediately preceding the date of the application for leave; or
  - (b) on the date on which the divorce, annulment, or judicial separation took effect in the foreign jurisdiction.

Should this jurisdictional threshold be met, the party will need to apply for leave from the court for the application. Singapore should also be the appropriate forum for the relief to be granted.

When assessing whether there are "substantial grounds" for the application, the court will also review the merits and prospects of success of the application, in order to carry out the function of Section 121D of the Women's Charter 1961 as a "filter" against unmeritorious or oppressive actions (Harjit Kaur d/o Kulwant Singh v Saroop Singh a/l Amar Singh (2015) 4 SLR 1216).

Even after substantial grounds are shown, the courts will also consider the power of the foreign court to grant financial relief, as well as the orders already made and any other relevant circumstances – for example, why no orders were previously made. Further, in respecting international comity, Singapore courts are also reluctant to review and rewrite what a foreign court may already have decided.

2.2 Service and Process

Service

For matrimonial proceedings, the applicant is to arrange for the originating application to be personally served on the respondent(s). There are other methods of service provided for under the Family Justice (General) Rules 2024, including under the requirements of any written law or in a manner agreed to between the parties (see **1.1 Grounds, Timeline, Service and Process**).

Ancillary Matters Process

The first ancillary affidavit (FAA) is a sworn statement to be filed and served by each party 28 days after the interim judgment of divorce or judgment of judicial separation has been granted. The FAA was previously referred to as an "affidavit of assets and means" under the Family Justice Rules 2014. The new Family Justice (General) Rules 2024 also specify a default four-week timeline for the filing and exchange of FAAs, whereas previously timelines were left to the court's discretion.

The FAA is to set out each party's claim for ancillary relief and the particulars of the claim, as well as all relevant supporting evidence.

Following the filing of the parties' respective FAAs, a second ancillary affidavit in response to the matters raised in the FAA may be filed and served. This is also to be filed 28 days after

the filing of the FAAs (assuming that both parties file their FAAs on the same day), unless one party files an application for disclosure against the other party.

This application for the discovery of documents or to administer interrogatories following the filing of the FAA may be made with the underlying objective of unearthing documents and information that may lead to assets previously undisclosed in the FAA.

2.3 Division of Assets

Approach to Division

The court's approach to the division of matrimonial assets will largely depend on the nature and type of marriage. The two key criteria are whether it was a dual-income or single-income marriage and the length of the marriage. The court also considers the direct financial contributions and indirect contributions (both financial and non-financial) of the parties in ascertaining a just and equitable division.

In dual-income marriages, the leading case is that of ANJ v ANK (2015) 4 SLR 1043, which sets out the following steps.

- Ascribe a ratio that represents each party's direct contributions (ie, monetary contributions) to the acquisition or improvement of the matrimonial assets, relative to the other party.
- Ascribe a second ratio which represents each party's indirect contribution (counting both indirect financial and indirect non-financial contributions) to the well-being of the family, relative to the other party.
- Using both ratios, the court derives each party's average percentage contribution to the family, which will form the basis to dividing the matrimonial assets (subject to any further adjustments depending on the circumstances of the case).

In long, single-income marriages, the division of matrimonial assets would tend towards equality (TNL v TNK and another appeal, and another matter (2017) 1 SLR 609).

Financial Orders

The courts are afforded a wide range of options when deciding the financial orders to be made in regulating or reallocating marital assets. A non-exhaustive list of options includes:

- the sale of immovable property and division of net sale proceeds;
- the transfer of one spouse's share in an immovable property to another upon payment of a specified sum;
- the transfer of financial assets (eg, shares) to the other spouse;
- the payment of a lump sum; and
- orders for maintenance (as discussed in **2.4 Spousal Maintenance**).

The factors listed in Section 112(2) of the Women's Charter 1961 are key considerations when deciding what orders should be made with respect to the division of matrimonial assets. These factors are:

- the contributions of each party in money, property or work done towards acquiring, improving or maintaining the matrimonial assets;
- any debts or obligations incurred by either party for the parties' joint benefit or for the benefit of a child of the marriage;
- the needs of any children of the marriage;
- the contributions of each party to the welfare of the family;

- any agreement between the parties with respect to the ownership and division of matrimonial assets made in contemplation of divorce;
- the assistance or support one spouse provided to the other; and
- the factors considered in the granting of maintenance orders.

Identifying Assets

Matrimonial assets would include:

- any asset acquired during the marriage by one or both parties;
- any asset acquired before the marriage but ordinarily used or enjoyed during the marriage by both parties or their children for shelter, transportation, household, education, recreational, social or aesthetic purposes;
- any asset acquired before the marriage that has been substantially improved during the marriage by the other party or by both parties to the marriage; and
- the matrimonial home.

Gifts or inheritance monies received during the marriage and which have not been substantially improved on during the marriage would ordinarily not be classified as a matrimonial asset. A matrimonial home is the exception to the rule (subject to any third-party interests).

Parties are expected to list all their assets in their FAA. In situations where a party has chosen not to participate in proceedings, the court may make orders for the Central Provident Fund (CPF) Board to provide disclosure of the non-participating spouse's CPF monies.

Property Regimes

Singapore adopts a "deferred community of property" approach, whereby all matrimonial property is treated as community property (unless otherwise taken out of the pool) upon the termination of the marriage (Lock Yeng Fun v Chua Hock Chye (2007) 3 SLR(R) 520). The regime is reflected in the provisions in Section 112 of the Women's Charter 1961 and applied accordingly.

Trusts

Although the family justice courts remain open to concepts such as a resulting trust in favour of one spouse, where it is alleged that a third party holds a property on resulting trust for one spouse, a separate third-party civil action may need to be taken in order to ascertain the beneficial ownership of the property.

Where the parties to the trust are the spouses themselves, the same may be more appropriately regarded and classified as a gift made by one spouse to the other – in which case, it will be returned to the matrimonial pool for division along with other significant gifts (Yeo Gim Tong Michael v Tianzon Lolita (1996) SGCA 14).

If a trust property is held by one party for the benefit of the spouse or children, it is also likely that the same would be considered matrimonial property (subject to the nature of the trust – for example, whether the trust is revocable or otherwise).

2.4 Spousal Maintenance

In Singapore, the only persons who may apply for maintenance are current or former wives, or incapacitated husbands.

An incapacitated husband is defined in the Women's Charter 1961 as a husband who:

- during the marriage, becomes:

(a) incapable of earning a livelihood, owing to any physical or mental disability or illness; and
(b) unable to maintain himself; and
- continues to be unable to maintain himself.

Courts have interpreted the definition of an incapacitated husband to mean that the husband should be incapacitated from earning a livelihood before falling under the definition provided above (USA v USB (2020) 4 SLR 288). In this respect, a certain degree of permanence should be met before a husband would be deemed "incapacitated". Nonetheless, other circumstances – such as the husband's level of education and the corresponding type of work he is likely to perform – may also be taken into account (VJF v VJG (2020) SGFC 54) in determining whether maintenance would be payable.

In addition to maintenance post-divorce, wives and incapacitated husbands may also apply for maintenance from their spouse during the subsistence of the marriage, pursuant to Section 69 of the Women's Charter 1961.

Interim Maintenance

A wife or incapacitated husband would be able to make an application to the court for interim maintenance from a spouse, pending the final determination of the ancillary matters. The factors considered by the court when determining the quantum of interim maintenance granted (if any) are the same as those considered when deciding the quantum of maintenance post-divorce. Interim maintenance to provide for the needs of any children of the marriage may also be ordered while proceedings are pending.

The key difference between interim and final maintenance orders is which factors are relevant, based on the facts at the time the application is made. As an order for interim maintenance would be based on the circumstances prevailing at the time of the application, the quantum of such interim maintenance (if ordered) would be affected by circumstances that may be fluid – for example, the ability of a former spouse to find employment or alternative accommodation, or where the children of the marriage are residing. With the objective of the interim maintenance order being to "tide over" the spouse and any children until the final ancillary matters hearing, a corresponding decrease or increase in this quantum may be ordered at the final ancillary matters hearing, depending on the circumstances.

Quantum of Maintenance Post-Divorce

The overarching consideration of the court when deciding the quantum of any maintenance to be awarded is to adequately provide for the needs of the spouse and any children of the marriage. In doing so, it will have regard to all the circumstances of the case, including the factors listed in Section 114 of the Women's Charter 1961 – namely:

- the income, earning capacity and assets each of the parties has or is likely to have in the foreseeable future;
- the financial needs and responsibilities each party has or is likely to have in the foreseeable future;
- the standard of living enjoyed before the breakdown of the marriage;
- the age of each party and the duration of the marriage;
- any physical or mental disability of either party;
- the contributions of each party to the welfare of the family; and
- any benefits lost as a result of the divorce.

The parents are jointly responsible for the maintenance of their children up until the age of 21, or beyond that age if the court is satisfied maintenance is necessary – for example, because the child has enrolled in tertiary education or has special needs.

Spousal maintenance is also often complementary to the division of matrimonial assets, which may be used to even out financial inequalities between spouses, taking into account any economic prejudice suffered by the wife or incapacitated husband during the marriage (BG v BF (2007) 3 SLR 233).

An order for maintenance may be in one lump sum in order to provide parties with a "clean break" from the marriage or may be in monthly instalments. However, the court in TDT v TDS and another appeal, and another matter (2016) 4 SLR 145 has cautioned that the purpose of spousal maintenance is not for the husband to act as an "insurer" for the former wife – in line with this approach, the courts have previously ordered no maintenance for wives who are employed and able to provide for their own needs.

2.5 Prenuptial and Postnuptial Agreements

Prenuptial and postnuptial agreements are not automatically enforceable/recognised by the Singapore courts. Such agreements will be subject to the scrutiny of the court.

The Singapore courts have the overarching power to divide the matrimonial assets in such proportions as the court thinks just and equitable (Section 112(1) of the Women's Charter 1961). In determining what is "just and equitable", the court shall have regard to all the circumstances of the case, and this includes whether there is "any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce" (Section 112(2)(e) of the Women's Charter 1961). Ultimately, the court will decide how much weight ought to be accorded to the prenuptial or postnuptial agreement.

In the case of postnuptial agreements, the court may accord them more weight than prenuptial agreements in the exercise of its discretion (TQ v TR (2009) 2 SLR (R) 961). Nevertheless, how much weight the court accords to such agreements will depend on the precise circumstances of the case – for example, whether the parties knew the legal consequences of entering into the agreement and whether the circumstances have changed since the parties entered into the agreement. The court is unlikely to accord significant weight to a prenuptial or postnuptial agreement if doing so would result in an outcome that is not just and equitable.

For prenuptial agreements relating to children's issues, the court would be especially vigilant and would be reluctant to enforce agreements that are not apparently in the best interests of the child or the children concerned (TQ v TR (2009) 2 SLR (R) 961).

The paramount consideration in determining custody, care and control, and access arrangements for a child/children is the welfare of the child/children. Therefore, prenuptial agreements relating to the custody, care and control of a child are presumed to be unenforceable unless it can be clearly demonstrated by the party relying on the agreement that the agreement is in the best interests of the child/children involved (TQ v TR (2009) 2 SLR (R) 961).

If a prenuptial agreement is entered into by foreign nationals and governed by (as well as valid according to) a foreign law (and assuming the foreign law is not repugnant to the public policy of Singapore), then the court may afford significant weight to the terms of that agreement, in order to avoid forum shopping. However, the court has maintained that it retains the overall discretion in determining the division of matrimonial assets.

2.6 Cohabitation

Singapore does not recognise de facto relationships or cohabitation under the matrimonial law regime. For unmarried couples, the assets would be governed by principles of contract, trust or property law. Parties also do not acquire additional rights by virtue of the length of cohabitation. Children born of unmarried couples are considered illegitimate.

Assets acquired during premarital cohabitation are not subject to division unless they have been transformed into matrimonial assets by meeting certain statutory criteria. Similarly, the court should not take into account parties' indirect contributions during the period of premarital cohabitation when determining the extent of each party's contribution to the marriage (USB v USA and another appeal (2020) 2 SLR 588).

2.7 Enforcement

A party may apply for the following enforcement orders:

- an enforcement order for attachment of debt;
- an enforcement order for seizure and sale of property; and
- an enforcement order for delivery or possession of property.

Naturally, if the other party fails to comply with a court order, then an application for committal may also be commenced against the defaulting party.

A party may also apply for the following to enforce maintenance orders:

- sentencing of the respondent to a maximum of one month's imprisonment for each month of unpaid maintenance;
- an enforcement order for attachment of debt, which could include an order for the respondent's employer to deduct the portion of maintenance from the respondent's salary and make direct payment to the applicant;
- an order for the respondent to give a banker's guarantee against future defaults;
- an order for the respondent to undergo financial counselling; and/or
- an order for the respondent to perform community service.

2.8 Media Access and Transparency

The media and press are allowed to report on family justice court proceedings, save that Section 10 of the Family Justice Act 2014 provides that all hearings in the family justice courts are generally heard in camera, and Section 112 of the Children and Young Persons Act 1993 prohibits the publishing or broadcasting of any information that could lead to the identification of any child or young person concerned in the proceedings.

Judgments for matrimonial proceedings that involve children below the age of 21 years are also redacted and/or anonymised to adhere to Section 112 of the Children and Young Persons Act 1993.

2.9 Alternative Dispute Resolution (ADR)

There has been significant push for parties to resolve matters amicably. To this end, parties have the option to commence pre-writ mediation, and there are bodies (eg, the Singapore Mediation Centre, the Law Society of Singapore, and the Singapore International Mediation Institute) and numerous private practitioners in Singapore who provide mediation services for family proceedings.

In the court system, mediation is mandatory for divorcing couples with children under the age of 21 years. Mediation can also be ordered in all other cases (including probate and mental capacity cases), if the court deems fit. The court may also order parties to attend private mediation for an amicable resolution. Practitioners are also expected to inform their clients about ADR options, such as mediation. If the parties do not make reasonable attempts at resolving their disputes through ADR mechanisms, then the court retains the right to make costs orders against the defaulting party.

If an agreement is arrived at via a non-court process, then such agreement can be recorded as an order of court (if there are pending court proceedings). Alternatively, a signed settlement agreement can also bind the parties. Generally, such mediated agreements are enforceable.

3. Child Law

3.1 Choice of Jurisdiction

The jurisdiction requirements for matrimonial proceedings are set out in **1.2 Choice of Jurisdiction**. Generally, matters related to children in divorce proceedings are dealt with at the ancillary matters stage, after the granting of the interim judgment of divorce. The factors which the court would consider are also set out therein.

3.2 Living/Contact Arrangements and Child Maintenance

If the parents cannot agree on a child's living arrangements, then a party can apply for the court to determine the same under the Guardianship of Infants Act 1934 (if no divorce proceedings have been commenced). For all matters concerning child-related issues, the principle is that the welfare of the child is paramount (BNS v BNT (2015) 3 SLR 973) and the court will strive to make decisions which are in the best interests of the child. This is encapsulated in Section 3 of the Guardianship of Infants Act 1934. In divorce proceedings, the same principle is set out at Section 125 of the Women's Charter 1961. In deciding a child's living arrangements, the court can consider the wishes of the parents of the child and the wishes of the child, where they are of an age to express an independent opinion.

In considering the best interests of the child, the court will consider the following factors (which are non-exhaustive):

- the current status quo;
- the age of the child;
- the parties' respective financial abilities;
- the support and environment each party is able to provide;
- the preservation of a mother–child bond if the child is young; and
- the general approach that siblings should not be separated.

The courts have the power to decide on the following matters pertaining to a child:

- custody;
- care and control; and

• access.

Custody relates to the power to make major decisions regarding the child, such as education, religion and healthcare matters. Care and control relates to the day-to-day care of the child. The party that is not granted care and control of the child would have access (ie, contact time with the child). Access arrangements include considerations as to whether the contact time would include overnight or overseas access, as well as the terms of holiday, public holidays or special occasions access.

For child maintenance, Section 68 of the Women's Charter 1961 mandates that it is the duty of a parent to maintain their child. The court must take into account the following factors in deciding on the quantum of maintenance to order:

- the financial needs of the child;
- the income and earning capacity of the parents;
- the age of the parents;
- the assets and financial resources of the parents;
- the standard of living enjoyed by the family;
- the manner in which the parents expect the child to be educated; and
- the conduct of the parents.

Generally, if the child is over 21 years, then the child would have to make the application in their personal capacity. Children over the age of 21 may apply for maintenance if they:

- have a mental or physical disability;
- are or will be serving full-time national service;
- are still in education or undergoing training for a trade, profession or vocation; or
- if there are special circumstances such that the court is satisfied that the provision of maintenance is necessary.

Parties can (and are encouraged to) resolve matters amicably and also come to an agreement on maintenance matters. If there is a settlement, the same can be recorded as an order of court (if there are pending court proceedings) or be encapsulated in a settlement agreement.

3.3 Other Matters

See **3.2 Living/Contact Arrangements and Child Maintenance**.

3.4 ADR

See **2.9 Alternative Dispute Resolution (ADR)**.

Further, for legal proceedings involving children's issues, the courts may also:

- appoint child representatives in highly acrimonious cases;
- call for appropriate reports to assist the court in coming to its decision; or
- appoint a parenting co-ordinator to provide assistance in resolving access issues.

3.5 Media Access and Transparency

See **2.8 Media Access and Transparency**.

Trends and Developments

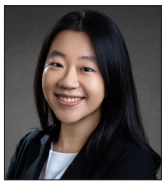
Contributed by:
Loh Wai Mooi, Wang Liansheng, Valerie Goh and Vaithieiswariy Kumar
Bih Li & Lee LLP

Bih Li & Lee LLP has a strong reputation both in contentious and non-contentious litigation matters. The firm and its lawyers have been ranked and cited in international legal publications and are well respected as subject-matter experts in their areas of practice. The firm's lawyers have cross-disciplinary knowledge in areas of trust, conveyancing, investment, non-profit and company matters, allowing them to serve the needs of clients holistically. The firm has a very active practice in family and matrimonial matters, advising and acting for high net worth individuals, both local and expatriate. Many of the cases the firm handles involve cross-border disputes where the firm's lawyers are instructed as counsel or co-counsel by lawyers from other jurisdictions. The family law team also has extensive experience in matrimonial disputes, probate matters, succession planning and mental capacity matters, as well as trust and private client matters.

Authors

Loh Wai Mooi is one of the founding partners of Bih Li & Lee LLP and is now a senior consultant with the firm. Wai Mooi has almost four decades of experience as an advocate and solicitor, and was one of the first lawyers to be appointed as a child representative by the family justice courts. With her wealth of experience, she is well placed to handle high-conflict matrimonial and estate matters. She is also an accredited mediator who has served as a mediator with the family justice courts and on private engagements.

Wang Liansheng is a partner at Bih Li & Lee LLP and oversees the firm's family and private client practice. Experienced in both contentious and non-contentious family work, Liansheng has worked on a broad spectrum of matters, from cross-border divorces to high-value estate disputes. He has also represented clients at various levels of the courts and has assisted many individuals with estate planning and mental capacity matters. Liansheng graduated from the National University of Singapore and was called to the Singapore Bar in 2014. He is effectively bilingual in Chinese and English.



Valerie Goh is a senior associate in the family and private client practice at Bih Li & Lee LLP. She has represented a wide range of clients and has accumulated experience in contentious and non-contentious divorce and estate matters in the family justice courts and the High Court of Singapore. Valerie graduated from the National University of Singapore and was called to the Singapore Bar in 2020.

Vaithieiswariy Kumar is an associate in the family and private client practice at Bih Li & Lee LLP. She specialises in all areas of family law, including contentious and uncontentious divorce proceedings, maintenance for spouses and children, division of matrimonial assets, family violence matters, cross-border disputes, probate, and mental capacity matters. She is passionate about community law, as it allows her to utilise her skills and legal knowledge to give back to society by impacting someone's life in a meaningful way. Vaithieiswariy is empathetic and sensitive when dealing with clients, and strives to give them the best possible solution to their problems.

Bih Li & Lee LLP

1 Coleman Street #10-07
The Adelphi
Singapore 179803

Tel: +65 6223 3227
Fax: +65 6224 0003
Email: gen@bihlilee.com.sg
Web: www.bihlilee.com

BIH LI& LEE

The Family Justice Courts' Therapeutic Justice Model

Therapeutic justice is the driving principle in the practice of family law in Singapore today. Family disputes invariably involve non-legal considerations and the outcome of a family dispute has far-reaching consequences on those beyond the parties – namely, the parties' children and extended families.

On 21 October 2024, Singapore's Chief Justice, Sundaresh Menon, launched the Therapeutic Justice Model (the "TJ Model") at the 10th Anniversary of the Family Justice Courts. This was created with the aid of representatives from the bench, the bar, academia, ministries, statutory boards and government departments, as well as accredited mediators nominated by the family justice courts.

The TJ Model states: "Therapeutic justice at the family justice courts is about helping families accept the past and move towards their best possible future. It involves a judge-led process where parties and their lawyers, along with other professionals, work together to find timely and enduring solutions to the family's disagreements, within the framework of the law."

The TJ Model is aimed at "helping families accept the past and move towards their best possible future". As Chief Justice Menon mentioned in his opening remarks at the 10th Anniversary of the Family Justice Courts: "The new rules introduce several significant changes – most notably, the strengthening of the judge-led approach by equipping family judges with a wider range of tools, so as to ensure that cases can be resolved effectively, proportionately and expeditiously while reducing acrimony, costs and time."

In particular, the objectives of the TJ Model are:

- for parties to resolve their family disagreements amicably;
- for parties to reduce acrimony and conflict;
- for parties to focus on resolving their underlying issues in the longer-term interests of the family and children;
- where children are involved, their welfare must come first;
- for parties to treat one another with respect, attention, empathy and support;
- for outcomes to be timely and enduring, and for parties to move forwards, enabled and equipped (eg, with enhanced co-parenting skills) to resolve any future disagreements amicably by themselves.

Further to the TJ Model, the family justice courts also provided guidance on the roles of parties during the family proceedings, as follows.

- Parties play a central role in the TJ Model. They are to take ownership of the family's issues and co-operate with each other to find timely and enduring solutions to these issues. Particularly where children are involved, the parties are to prioritise the welfare of the children above their own and focus on their shared interests and future. This involves being willing to compromise in the spirit of give and take, and carrying out agreed or ordered arrangements with a co-operative spirit.
- Lawyers are to explain to the client the aims of therapeutic justice and the court's approach under the TJ Model. Lawyers should seek to reduce acrimony, as well as help parties to find common ground and generate solutions for better outcomes. They should consider whether instructions from the client will serve to escalate or prolong the

conflict between the parties and/or between the parents and children. If so, they should guide the client towards alternatives that are less inflammatory and which take into consideration the long-term interests of the family/children.

The TJ Model also provides guidelines on the conduct expected of parties under the model – for example, prioritising the interests of the children and the psychological well-being of the members of the family and focusing on the future and the parties' shared interests.

In addition to the focus on therapeutic justice and the judge-led approach, there are also several legislative reforms being introduced to streamline the processes and provide a more straightforward approach in dealing with family matters.

New Family Justice Rules 2024

The new Family Justice Rules 2024 came into operation on 15 October 2024.

The new Family Justice Rules 2024 comprise the following four volumes, providing a systematic guide to each aspect of family law:

- Family Justice (General) Rules;
- Family Justice (Probate and Other Matters) Rules;
- Family Justice (Protection from Harassment) Rules; and
- Family Justice (Criminal Proceedings in Youth Courts) Rules.

Amicable divorce

In Singapore, there is only one ground for divorce and that is "irretrievable breakdown of marriage". Prior to 1 July 2024, a party could rely on one of five facts to prove the irretrievable breakdown of a marriage.

With effect from 1 July 2024, however, divorce by mutual agreement (DMA) – a new factual matrix – was introduced. There are now six factual matrices (including DMA) that can be cited to prove the irretrievable breakdown of a marriage.

DMA is at the heart of therapeutic justice. Under this factual matrix, regardless of whether there are children involved, parties may obtain a divorce amicably if they can:

- agree on the reasons leading to the parties' irretrievable breakdown of marriage;
- provide details of efforts taken to reconcile and yet show that the parties agree that the marriage cannot be salvaged; and
- show that the parties have considered and reached an agreement in relation to their financial affairs and child matters (if applicable).

This enables the divorce process to be completed expeditiously on a no-fault basis and reduces the need for one party to lay the blame on the other (something that increases acrimony between the parties involved).

Child matters

Mandatory co-parenting programme

Another key change introduced by the new rules is the requirement for parties to attend the mandatory co-parenting programme if there are children under 21 years old in the marriage, regardless of whether the divorce application is by way of simplified divorce or contested divorce. The aim of this is to support parents in making informed decisions for the well-being of the children and to avoid making impulsive and/or irrational decisions.

Custody of the child(ren)

Another principle that is pivotal to the family law landscape in Singapore is the welfare of the children. This is the first and paramount consideration in every family law case.

Hence, Singapore courts now almost always award joint custody unless they deem a parent to be "unfit". A parent can be considered "unfit" for various reasons, even though such circumstances are rare. Some examples include:

- a history of family violence or emotional abuse towards the child;
- mental health issues that impede a parent's ability to make informed decisions for the child;
- chronic substance abuse;
- a criminal history that could endanger the child; and
- signs that show a parent's neglect and failure to make informed decisions and/or provide for the child's basic needs.

These are considerations that are unique to the circumstances of each case and they depend on the facts of each case.

Care and control of child(ren) and access

In the past, sole care and control was common where the children would reside with a parent and the other parent would have reasonable access to the children. However, in recent times, there has been a trend towards shared care and control, with more detailed arrangements on matters pertaining to the child, such as:

- who will drop the children off at school and on which days of the week;
- who will pick the children up from school and on which days of the week;
- what the periods of contact time with the respective parents will be; and
- whether there will be extended periods of contact during school holidays, including overseas contact time.

Stronger enforcement of child access orders came into effect on 2 January 2025

There have been developments in family law processes to achieve the outcomes of therapeutic justice. Non-compliance with access orders can significantly obstruct and impede the process of healing and moving forwards. As such, to signal the importance of complying with court orders, there has been stronger enforcement of child access orders.

To ensure that the parties comply with child access orders, the family justice courts now have the power to make orders for compensation of expenses, security pledges, performance bonds, make-up access and mandatory counselling, as follows.

- Compensation of expenses – compensation expenses are to compensate a parent who pays for holiday accommodation or travel fares for the children but is deprived of child access by the other parent. In such an event, the parent who was gatekeeping and refusing access has to compensate the parent who paid for travel fares and/or holiday arrangements.
- Security pledges and performance bonds – security pledges and performance bonds are also measures put in place to ensure that the parent with care and control allows access to the other parent.
- Counselling and mediation – the family justice courts may order parents who breach access orders to attend mandatory counselling or mediation sessions. Through these sessions,

parents should hopefully be able to address underlying conflicts and develop strategies to improve their co-parenting skills.

The court's powers under this new regime are wide, as they are also empowered to order a jail term or fine as a last resort if the access orders are breached without a valid reason. The burden of proof is also shifted onto the parent with whom the child lives to explain any alleged breaches of the child access orders.

The enhanced enforcement of child access orders helps strengthen the rule of law in family proceedings, as well as prioritise a child's well-being by promoting regular contact between the child and the parents.

Continued commitment to achieving therapeutic justice

It is expected that family law processes in Singapore will continue to develop to support therapeutic justice. Beyond the processes, it is also expected that the law will evolve and develop in a similar direction.

As it stands, the family justice courts already take a "broad brush" approach when determining a just and equitable division of the matrimonial assets. The courts do not entertain an arithmetic exercise to calculate each party's contributions.

Another aspect crucial to the practice of therapeutic justice is the determination of costs. In many cases, the courts will be reluctant to award costs (or costs on the scale of commercial disputes) against a party in family proceedings to avoid exacerbating hostility between the parties. At the other end of the spectrum is the use of costs as a tool to discourage aggressive practices that undermine therapeutic justice.

SOUTH AFRICA

Law and Practice

Contributed by:
Beverley Clark, Jana van Breda, Elmarie Erasmus and Jessica Clark
Clarks Attorneys

Contents

Contributed by: Beverley Clark, Jana van Breda, Elmarie Erasmus and Jessica Clark, **Clarks Attorneys**

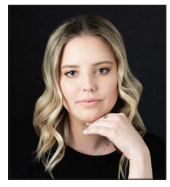
Clarks Attorneys is one of South Africa's pre-eminent boutique family law firms, working at the cutting edge of the rapidly changing field of family law in South Africa, and specialising in matters with an international angle. The firm is situated in Johannesburg, South Africa's largest city, but services clients from around the country and elsewhere in the world. It has extensive experience in those areas usually associated with family law, such as divorce and termination of domestic partnerships, parental rights and responsibilities, maintenance and adoption; it also has particular expertise in high net worth divorces, trusts, international child abduction, foreign divorces for expatriate or non-resident South Africans, divorces between South Africans and foreign or non-resident spouses, prenuptial agreements and all manner of cases involving children. The firm hosts a highly regarded family law conference every spring in Johannesburg.

Authors

Beverley Clark has practised family law for 30 years and is also an experienced mediator. She has been a Fellow of the International Academy of Family Lawyers since 2007, has acted as a High Court Judge, is on the steering committee of the Cambridge Forum on International High Net Worth Divorce, and is Chair of the Gauteng Family Law Forum, an organisation representing family lawyers in Gauteng and seeking to promote reforms and improvements in the family law field and the administration of justice as it affects the public.

Jana van Breda has practised at Clarks Attorneys for 13 years and is a director of the firm. She is a particularly talented mediator.

Elmarie Erasmus is a director of Clarks Attorneys. Since joining the firm, she has achieved success in several important public interest cases, notably against the state in a transgender rights matter, and in the landmark KG v Minister of Home Affairs case, which has changed the law as it relates to antenuptial contracts. Elmarie works frequently with high-value financial cases, but matters relating to children are closest to her heart.



Jessica Clark has been at Clarks Attorneys since 2018 and is a senior associate.

Clarks Attorneys

Block A2
34 Impala Road
Chislehurston
Johannesburg
2196
South Africa

Tel: +27 11 783 1066
Email: admin@clarks.co.za
Web: www.clarksattorneys.co.za

1. Divorce

1.1 Grounds, Timeline, Service and Process

Grounds for Divorce

In South Africa, there is a "no fault" divorce system. The grounds for divorce apply to all marital relationships, including monogamous heterosexual marriages, monogamous same-sex marriages, and both monogamous and polygamous marriages recognised under African custom.

The Divorce Act 70 of 1987 (the "Divorce Act") provides the following two no-fault grounds for divorce.

- Irretrievable breakdown of the marriage relationship (Section 4) – the court must determine on evidence that the relationship has deteriorated to a point where restoration is no longer possible.
- Mental illness or continuous unconsciousness of one spouse (Section 5) – there must be no reasonable prospect of recovery.

Service, Process and Timeline in Obtaining a Decree of Divorce

A period of separation is not a legal prerequisite for filing for divorce. However, if the parties have been separated for at least a year before initiating proceedings, this serves as rebuttable evidence of an irretrievable breakdown (Section 4(2)(a) of the Divorce Act).

The procedure to be followed and the timeline to finalise a divorce vary depending on whether the divorce is unopposed (uncontested) or opposed (contested). In both cases, one spouse (the plaintiff) initiates the process by serving a combined summons on the other spouse (the defendant). This document must be personally delivered by a sheriff of the High Court. Subsequent documents need not be served by the sheriff.

If the defendant resides outside South Africa, the plaintiff must bring an application to court for consent to serve the summons outside the country by way of edictal citation. If the defendant's whereabouts are unknown and all reasonable efforts to locate them have failed, the court may authorise alternative methods of service (eg, email or WhatsApp), pursuant to an application to court for substituted service.

After the summons has been served, the defendant has ten court days to notify the court and plaintiff of their intention to defend the divorce if both parties live within the court's jurisdiction, or one month if the defendant resides outside the jurisdiction.

Uncontested Divorces

When the plaintiff and defendant have entered into a settlement agreement prior to the divorce summons being issued, the divorce action will proceed on an unopposed basis and a decree of divorce will be granted incorporating the settlement agreement.

If a summons is issued (with or without a settlement agreement having been reached) and the defendant does not defend the action within the allowed time and proper service is proven, the plaintiff can request a court hearing for a decree of divorce to be granted by default. The court will grant a divorce order if it is satisfied that:

- the grounds for divorce have been met;
- the summons was properly served on the defendant; and
- the defendant had adequate time to file an intention to defend the action.

Divorces that proceed on an unopposed basis can be finalised within three to four months from the date the summons is issued.

Contested Divorces

Contested divorces generally follow four stages:

- pleadings;
- discovery;
- pre-trial; and
- trial.

Pleadings

After notifying their intention to oppose, the defendant has 20 court days to file their plea and counterclaim. The plaintiff then has 15 court days to respond. Pleadings close thereafter. In certain jurisdictions, such as Gauteng, comprehensive financial disclosure forms must be submitted after pleadings have closed in instances where the disputes include maintenance or proprietary aspects of the divorce.

Discovery

Both parties must disclose the relevant documents they plan to rely on during the trial. Parties exchange discovery notices (calling for the other to disclose the documents they seek to rely on) and submit sworn discovery affidavits under cover of which they disclose such documents, and may request additional documentation. Experts may also be engaged, and witnesses subpoenaed.

Pre-trial

Pre-trial conferences aim to resolve as many issues as possible before the trial and finalise practical arrangements between the opposing attorneys and counsel. Once all pre-trial steps are complete, the matter is certified as trial-ready.

Trial

After certification, the court schedules a trial date. While strict compliance with rules could make cases trial-ready within 12 months, the allocation of the trial date is at the court's discretion and is influenced by a number of factors, including the number of matters enrolled and the availability of judges.

The above process pertains to High Court divorce proceedings. Regional courts can also

hear divorce cases, but different procedural rules and directives apply.

Religious Marriages

Historically, religious marriages (such as Muslim and Hindu) were not recognised in South Africa. However, this has changed following the decision in Women's Legal Centre Trust v President of the Republic of South Africa and Others (2022) ZACC 23, in which the court declared parts of the Marriage Act and Divorce Act unconstitutional for excluding Muslim marriages. Marriages that are concluded according to Islamic rites are now recognised.

Void and Voidable Marriages

A void marriage fails to meet the requirements for a civil marriage as set out in the Marriages Act 25 of 1961 and is considered non-existent, with no legal consequences.

A voidable marriage is valid until set aside by a court owing to specific legal grounds present at the time of the marriage.

Requirements for a valid marriage include:

- solemnisation by an authorised marriage officer;
- the presence of both parties during the ceremony (proxy marriages are not allowed);
- the absence of prohibited blood relationships; and
- legal capacity of both parties.

1.2 Choice of Jurisdiction

In terms of Section 2(1) of the Divorce Act, a court has jurisdiction over a divorce if one or both parties are:

- domiciled in the court's jurisdiction on the date the divorce is initiated; or
- ordinarily resident in the court's jurisdiction and have resided in South Africa for at least one year prior to filing.

If jurisdiction is disputed by the defendant, the court may consider:

- whether the matter involves the same cause of action as a matter pending in another jurisdiction (lis alibi pendens) and, if so, which jurisdiction is more appropriate (forum conveniens); and
- relevant facts of the matter at hand, such as:
  - (a) applicable foreign law;
  - (b) the location of evidence, children and assets;
  - (c) procedural advantages or prejudice; and
  - (d) costs and timelines in different jurisdictions.

Domicile, Residence and Nationality

Domicile refers to a person's intended permanent home. South Africa uses the lex domicilii matrimonii principle to determine marital property laws – ie, the proprietary consequences of the marriage are governed by the laws of the husband's domicile at the time the marriage was concluded. This principle will likely be overturned if an appropriate case tests the constitutional validity of the principle.

Residence refers to where an individual ordinarily lives. It is used to determine jurisdiction.

Nationality refers to the legal belonging to a nation state. However, it does not impact jurisdiction in South African divorce cases if legal requirements are met.

2. Financial Proceedings

2.1 Choice of Jurisdiction

Jurisdiction in Financial Proceedings

In South African divorce cases, all financial claims between the parties are resolved as part of the divorce action. Financial claims are not dealt with separately except in certain rare cases, by order of court. For details on jurisdiction, please see **1.2 Choice of Jurisdiction**.

Challenging Jurisdiction

Jurisdiction in divorce proceedings can be contested if the requirements outlined in Section 2(1) of the Divorce Act are not met. For further information, see **1.2 Choice of Jurisdiction**.

Staying Financial Proceedings

South African courts have discretionary authority to suspend ongoing proceedings before them (for instance, if the matter is being dealt with before another court). For further details, please see **1.2 Choice of Jurisdiction**.

Financial Claims After a Foreign Divorce

In South Africa, there is no mechanism for initiating financial claims after a foreign divorce (akin to English Part III proceedings), unless a particular term in a foreign order needs to be recognised and enforced within the country, or if there are allegations of fraud, mistake or undue influence (ie, common law grounds for setting aside an agreement). However, claims for child maintenance or a variation of spousal maintenance may be pursued in South Africa following a foreign divorce, as the courts have jurisdiction over any child within the country's borders.

2.2 Service and Process

As outlined in **2.1 Choice of Jurisdiction**, South African courts address financial claims as part of the divorce action. For additional details, please see **1.1 Grounds, Timeline, Service and Process**.

During a divorce action, a party may request an interim court order for the following by launching an application in terms of Rule 43 of the Uniform Rules of Court:

- maintenance (for themselves and/or the children);
- contact arrangements with the children; or
- a contribution towards their legal costs.

2.3 Division of Assets

Court's Approach to Division of Assets

The first consideration when determining a division of assets is which matrimonial property regime governs the proprietary consequences of the parties' marriage. In South Africa, the default matrimonial property regime (ie, in the absence of a prenuptial contract) is currently a universal community of property. This does not apply to Islamic marriages, in which there is instead a right to an equitable redistribution of assets.

In a marriage in community of property, the net joint estate (which includes all assets in both parties' name, including premarital assets) is automatically divided equally between the parties, unless a forfeiture order is made in limited circumstances.

Where the parties have a South African prenuptial contract out of community of property incorporating the accrual system, the party whose estate has accrued (grown) less during the marriage compared to other spouse's estate has a claim to half the difference in the spouses' respective accruals (unless forfeiture is ordered in limited circumstances).

Where parties have a South African prenuptial contract out of community of property without the application of the accrual system, each party retains assets in their own names – unless the court makes an order for the redistribution of certain assets, having regard to a number of factors.

If the proprietary consequences of the marriage are governed by the laws of another country, the South African courts apply that particular country's laws to the division of assets, as if the divorce were being heard in that country. Therefore, expert evidence about the applicable law will be necessary. The choice of law in relation to the proprietary consequences will be determined in accordance with the lex domicilii matrimonii, or by a choice of law clause in a prenuptial agreement, or by the contents of the prenuptial agreement itself.

Financial Orders to Regulate or Reallocate Assets

If the parties have not reached an agreement regarding this, the court has the authority to make an order regarding:

- the payment of maintenance for any period;
- the transfer of assets;
- lump sum payments;
- periodic payments; and/or
- the transfer of pension interests.

As a starting point, the court will consider the matrimonial property regime that governs the marriage. If there are other claims (such as a forfeiture of benefits, redistribution or a spousal maintenance claim), these will also be taken into account. Factors the court will consider include whether:

- the order is just and equitable;
- the party contributed directly or indirectly towards the maintenance or increase of the other party's estate; and
- the party saved expenses that would otherwise have been incurred.

Identifying Assets and the Disclosure Process

During litigation, parties are required to make full financial disclosure to one another and the court. In Gauteng and Limpopo, this initially occurs by way of a detailed Financial Disclosure Form, which is signed under oath and is subject to penalties for perjury. Specified supporting documents are required to be provided with this form. Other provinces in South Africa are in the process of considering and implementing the Financial Disclosure Form.

The parties can also make use of the Uniform Rules of Court, which provide for extensive discovery under oath, specific documents to be called for, and the power to subpoena documents and call witnesses. Subpoenas are commonly used to procure documents and information from banks, employers and relevant companies and trusts, but cannot be issued on foreign entities or individuals other than by way of special procedures, which can be costly and take a long time.

Property Regimes and the Division of Assets

In South Africa, there are two primary matrimonial property systems: marriages in community of property and marriages out of community of property.

As stated above, "community of property" (universal community) is the default system for civil marriages in South Africa. Under this system, a "joint estate" is created where all the assets of both parties are combined and the parties are jointly responsible for the liabilities of the other.

Marriages "out of community of property" are established by entering into a prenuptial agreement. These marriages have a complete separation of property during the marriage, and parties can administer their own estates as they deem fit. The accrual system will automatically apply to all marriages out of community of property, unless the parties have expressly excluded its application in their prenuptial agreement. Under the accrual system, the increase in value of each party's estate (with a few exceptions) is shared upon the dissolution of the marriage by death or divorce.

Parties may also set commencement values and/or exclude specific assets from the accrual system in their prenuptial agreement.

In marriages out of community of property and excluding the accrual system, the court may take certain factors into account and order a redistribution of assets from one party to the other, to prevent unfairness.

Trusts

Trusts are separate legal entities recognised in South Africa. Trust property is held by the trustees according to the terms of the trust deed. The trustees are responsible for managing the trust property for the benefit of beneficiaries, whether individuals or entities.

Trust property is not, in the ordinary course, considered part of a person's estate in divorce proceedings. If it can be proven that the trust is the "alter ego" of one or more of the trustees, or that the trust is a sham, and that a party transferred assets into the trust during the marriage in a bad faith attempt to deprive the spouse of their legitimate claims on divorce, then the trust property could be considered to be part of the spouse's estate for the purposes of the divorce. Only then would the trust assets be included in the determination of the value of the estate of such party in divorce cases. As such, the bar is high for parties seeking to include trust assets in divorces.

2.4 Spousal Maintenance

Attitudes Towards Spousal Maintenance

During a marriage, parties have a reciprocal duty to support one another. However, the reciprocal duty of support that exists between spouses during the subsistence of the marriage terminates upon the dissolution of the marriage (by death or divorce). Accordingly, there is no automatic right to spousal maintenance post-divorce.

Parties may agree to the payment of maintenance by one party to another post-divorce. If there is no agreement, a court granting a decree of divorce has the discretion to make an order for spousal maintenance post-divorce. The party who has a need for maintenance must bring such a claim in the divorce action in terms of Section 7(2) of the Divorce Act. This section provides that a court granting a divorce may make an order for the payment of maintenance it deems to be just and equitable, after considering a number of factors, such as:

- the means of both parties;
- the duration of the marriage;
- the standard of living during the marriage;
- the conduct of the parties that gave rise to the breakdown of the relationship;
- the age of the parties; and
- the respective earning capacities of the parties.

Spousal maintenance post-divorce can be ordered either permanently (which is rare) or for a rehabilitative period.

If a marriage is dissolved through the death of one of the parties, a spouse may have a maintenance claim in terms of the Maintenance of Surviving Spouses Act 27 of 1990.

Interim Maintenance

There is a reciprocal duty of support between spouses throughout the marriage (stante matrimonio), meaning that a party is not entitled to change the status quo in respect of maintenance pending divorce.

If a party changes the status quo, or if a party requires interim maintenance during the course of the divorce litigation, that party may bring an application in terms of Uniform Rule 43 for an order for the payment of maintenance. A court order in such an application will remain in place until the finalisation of the divorce action. A litigating party may also utilise Uniform Rule 43 to claim a contribution towards their legal costs, in order to put the parties on an equal footing. This is also considered a form of maintenance.

Ongoing Maintenance

The court has the discretion to make any order for maintenance that it finds to be just and equitable. There are no restrictions in respect of the duration or quantum of maintenance. Maintenance orders can be made for a period of time, for the remainder of an ex-spouse's lifetime, or until the remarriage of the party who receives the maintenance payments.

The quantum of the maintenance ordered is based on the party's reasonable and necessary maintenance needs, as well as the means of the party paying the maintenance.

2.5 Prenuptial and Postnuptial Agreements

Prenuptial and postnuptial agreements are both recognised in South Africa.

Prenuptial Agreements

Prenuptial agreements are drafted in accordance with the Matrimonial Property Act 88 of 1984 (MPA). A prenuptial contract must be entered into by the parties before they enter into a marriage and must be signed before a notary public. The prenuptial contract is registered at the Deeds Office and becomes public record. If parties fail to register their prenuptial agreement, it is nevertheless binding between them, but does not affect third parties (eg, creditors).

Postnuptial Agreements

Postnuptial agreements are regulated by Section 21 of the MPA, which allows parties to jointly apply to a court for leave to change the matrimonial property regime that applies to their marriage. The court will consider whether there are sound reasons for the change to the matrimonial property system, and whether sufficient notice has been given to creditors and that no other persons will be prejudiced by the change. If the court is satisfied, it will grant the parties leave to enter into and register a postnuptial contract. Postnuptial agreements that seek to change the matrimonial property system but have not been permitted by order of court in terms of Section 21 are invalid. There is proposed legislation in the pipeline which will change this.

Court Handling of Prenuptial and Postnuptial Agreements

In considering the division of assets on divorce, a court will first consider the matrimonial property regime that governs the parties' marriage. If a valid prenuptial or postnuptial contract is in place, this will determine the matrimonial prop-

erty regime of the parties. The courts will enforce the terms of prenuptial or postnuptial agreements (unless agreed to otherwise between the parties).

In certain instances, parties may have claims that result in a distribution not in line with their prenuptial or postnuptial agreements, such as claims for the forfeiture of benefits or a redistribution of the assets in terms of Section 7(3) of the Divorce Act.

2.6 Cohabitation

Unmarried Couples and the Division of Assets

There is currently no legal duty of support for unmarried cohabitants in South Africa, either during the cohabitation or after the cohabitation ends. Accordingly, a cohabitant partner does not have a right to claim maintenance upon the termination of the relationship. Similarly, cohabitantsdo not have an automatic claim to the assets of their partner at the end of the relationship. Cohabiting parties will retain all assets in their respective names at the termination of the relationship, and there is no "asset sharing".

In certain circumstances, however, the common law rules governing universal partnerships may assist cohabitant partners by providing them with a legal claim. A universal partnership is a contract (which may be express or tacit, verbal or written) in which the cohabitants agree that their property will be shared between them. It is a difficult claim to prove, but South African law has developed to extend the remedy even to partners who may only have made a contribution to the partnership in the domestic sphere.

Rights of Cohabitants

Cohabiting partners do not acquire any rights or financial claims against their partner's assets by virtue of a cohabitation relationship. There is no provision for a claim for maintenance or a sharing of assets ("a financial claim"). This is the position regardless of the length of the cohabitation or whether the parties have children. There is no principle of a "common law marriage" in South Africa, and the duration of cohabitation does not influence a party's position for a financial claim.

Pursuant to a case in which the right to maintenance was awarded to a cohabitant whose partner had died, it is likely that the law will be varied in due course in relation to cohabitation, so that maintenance rights will be extended to cohabiting partners in certain circumstances.

If partners in a cohabitation relationship have children, this similarly does not impact their rights or legal claims as a partner. The only claims that would arise on the termination of such a relationship would be claims relating to the children, such as:

- care of children;
- contact with children;
- guardianship of children; and
- maintenance for children.

When entering into – or during – a cohabitation relationship, parties may elect to enter into a cohabitation agreement to regulate rights and claims in terms of the laws of contract.

2.7 Enforcement

Failure to Comply With a Financial Order

There are two types of financial orders that form part of divorce orders in South Africa. One is for maintenance in respect of a spouse and/or child and the other is in respect of the proprietary consequences of the marriage, which will depend on the parties' matrimonial property

regime, as explained in **2.3 Division of Assets**. These orders can be granted by South African High Courts or regional (lower) courts.

If a party fails to comply with a financial order (either maintenance or capital), there are various methods of enforcement, as follows:

- a writ of execution;
- an emoluments attachment order;
- a garnishee order;
- attachment of a pension, annuity, or other benefit; and
- a contempt of court order.

Writ of execution

If a party has failed to comply with a financial court order, the offended party (creditor) can prepare a writ of execution to be issued by the court. This writ of execution is accompanied by an affidavit, setting out the facts relating to the breach of the order, and the court order must be attached.

The writ of execution will be issued by the court without notice to the debtor and then served by a sheriff on the debtor. After service, the assets of the debtor will be attached in order to satisfy the debt. These assets can be any movable property (including bank accounts) or immovable property.

If a bank account is attached, the bank will be served with the writ, as well as a notice of attachment, and the funds held in the account will be frozen and then paid over to the creditor. If movables are attached, they will be removed and sold in execution to satisfy the debt. The attachment of immovable property is somewhat more complicated but, if successful, the property will be sold at auction.

Emoluments attachment order

The second method of enforcement is an emoluments attachment order. In this instance, a creditor would approach the court on application after a breach of a financial order. This application is made on notice, and the employer of the debtor will be cited in the application. If successful, the court will order that repayment of the debt is made to the creditor directly by the debtor's employer and deducted from the debtor's salary or wages. This can be done in a singular instance, if sufficient, or on an ongoing future basis if necessary.

Garnishee order

A garnishee order is to be distinguished from an emoluments attachment order. It allows the creditor to attach any debt owing to the debtor by a third party, for that debt to be paid directly to them. This application is made on notice, and the third party must be cited.

Attachment of a pension, annuity, or another interest

This method of enforcement is prescribed by Section 26(4) of the Maintenance Act 99 of 1998 and provides that a creditor may approach a court to seek an order that a pension, annuity, gratuity or compassionate allowance or other similar benefit in the name of the debtor be attached and paid to the creditor. In this instance, such an interest will be attached in terms of a writ of execution or another of the above-mentioned remedies that has already been granted. For example, if a writ of execution is successfully obtained, this method of enforcement can be used to attach a debtor's pension interest. This is done by application to the court on notice, and the financial institution that holds the policy must be cited. If successful, the court will order the financial institution to make payment of the debtor's pension interest (or a portion thereof)

directly to the creditor to satisfy the debt. This is only possible for maintenance orders.

Contempt of court order

If a debtor is in breach of a financial order, the creditor may make application on notice for the debtor to be held in contempt of court. This is only applicable to orders for the payment of maintenance, and not to orders for payment of a capital amount. In order to be successful, the creditor must show that:

- the debtor is aware of/has knowledge of the order;
- the debtor is in breach of the order;
- the debtor's breach of the order is wilful; and
- the debtor's breach of the order is mala fide (in bad faith).

If successful, a court will make an order of enforcement (ie, ordering the debtor to pay the debt), and this order will be coupled with an order for the debtor's imprisonment. This period of imprisonment will be suspended if the debtor complies with the enforcement order by making payment and if the debtor is not again found to be in contempt of the court order within a specified period. If the debtor is again found to be in contempt of the order within this specified period, they will be sentenced to a period of imprisonment.

International Enforcement of a Financial Order

In terms of divorce orders (which in South Africa contain financial orders), Section 13 of the Divorce Act states that South African courts will recognise the validity of a divorce order granted in a foreign country if, on the date on which the order was granted, either party to the marriage was a national, domiciled or ordinarily resident in the country concerned. This, however, does not mean that a South African court will enforce specific terms of such an order without prior steps being taken (albeit that the parties will be recognised to be divorced).

If one requires enforcement of a foreign divorce order or other financial order, steps can be taken to obtain enforcement of the order by a South African court. A party may bring an application in a South African court for a "mirror order" of the foreign order to be made.

Alternatively, in respect of maintenance orders only, a party may utilise the processes provided by the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 (REMO). In order to utilise this process, the foreign country where the maintenance order was granted must have entered into a reciprocal agreement with South Africa. REMO is only available in respect of maintenance orders, whereas an application for a mirror order to be made can be in respect of any type of foreign court order.

2.8 Media Access and Transparency

Media Reporting on Financial Cases

In South Africa, representatives of the media have the right to attend court proceedings for the purposes of reporting on such proceedings, unless specifically provided otherwise by law. However, there are exceptions to this. Divorce cases may not be reported on in a manner that in any way identifies the parties, but the media may report on the facts of a case.

Anonymising Proceedings

Judgments in all divorce matters are now anonymised, using only the parties' initials.

2.9 Alternative Dispute Resolution (ADR)

ADR mechanisms are encouraged in South Africa, and the South Africa Law Reform Commis-

sion (SALRC) has published a discussion paper relating to the codification of different manners of ADR, such as mediation, attorney-assisted mediation, parental co-ordination/facilitation, collaborative dispute resolution and arbitration. However, the Arbitration Act 42 of 1965 does not permit arbitration in matrimonial matters or any matters that are incidental thereto (Section 2(a)). Notwithstanding this, arbitration has long been advocated for in matrimonial matters, and the SALRC has recommended draft legislation to the Department of Justice in respect of the arbitration of disputes relating to patrimonial claims and issues relating to minor children, subject to the judicial oversight of the High Courts.

Mediation is encouraged and, in terms of Uniform Rule 41A, litigants instituting an action or application must, at the outset, confirm whether or not they agree to the referral of the dispute to mediation and provide reasons for their position. Adverse costs orders may be considered in circumstances where one party refuses to engage in mediation prior to trial.

Any agreements that are reached by way of ADR should still be incorporated into the parties' decree of divorce.

Any further agreements reached outside of a divorce action relating to maintenance should also be made orders of the appropriate court by way of an unopposed application to the relevant court (either the High Court or the maintenance court), to ensure that the obligations imposed on both parties are enforceable.

3. Child Law

3.1 Choice of Jurisdiction

Children's courts have jurisdiction to adjudicate a matter when the court is in the area in which the child involved is ordinarily resident or, if more than one child is involved, the court of the area in which any of those children are ordinarily resident (Section 44 of the Children's Act 38 of 2005). If the children's court has geographical jurisdiction, it is able to adjudicate a wide scope of matters relating to children, which are set out in Section 45 of the Children's Act and include:

- the protection and well-being of a child;
- the care of or contact with a child;
- guardianship of a child;
- the support of a child;
- the temporary safety of a child; and
- the adoption of a child, including an inter-country adoption.

The High Courts similarly have jurisdiction over matters where the child involved is ordinarily resident within the geographical area of the High Court. The High Court and the children's courts have concurrent jurisdiction over a number of issues, including guardianship of a child.

The domicile or nationality of a child who is ordinarily resident in South Africa has no impact on jurisdiction.

3.2 Living/Contact Arrangements and Child Maintenance

Living/Contact Arrangements

If parents are not able to agree on what care and contact arrangements will be in their child's best interests, and have not been able to resolve this dispute by way of mediation, then an expert will need to be appointed to conduct an investigation into the best interests of the child. This

expert will produce a report with recommendations regarding what care and contact arrangements will be in the child's best interests.

This forensic investigation can be conducted by the family advocate's office (at no cost to the parties) or – if the parties have the means – by a psychologist or social worker in private practice. This forensic investigation will take into account the factors set out in Section 7 of the Children's Act.

If one parent disagrees with and refuses to accept and implement the recommendations made by the appointed expert, the other parent can approach the court to ask for the implementation of the expert's recommendations in the child's best interests.

The courts prefer a single joint expert to be appointed, but parties are entitled to appoint their own experts should they so wish. The experts' duty, however, is to the court, and not to either of the parties.

As the upper guardian of minor children, the High Court has jurisdiction over all child-related matters and can make any order in the best interests of the child(ren), whether in accordance with the expert's recommendations or not.

Custody and Parental Responsibility

In terms of Section 18 of the Children's Act, married parents are co-holders of full parental responsibilities and rights in respect of a child, including the responsibility and right to:

- care for the child;
- maintain contact with the child;
- act as guardian of the child; and
- contribute to the maintenance of the child.

A biological mother of a child, whether married or unmarried, has full parental responsibilities and rights, as set out in Section 19 of the Children's Act. An unmarried father, on the other hand, only acquires full parental responsibilities and rights in the following circumstances:

- if, at the time of the child's birth, he was living with the mother in a permanent life partnership; or
- if he consents to be identified as the child's father or pays damages in terms of customary law and contributes or has attempted to contribute in good faith to the child's upbringing for a reasonable period, and contributes or has attempted to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

Restrictions on Court's Ability to Make Orders on Living and Contact Arrangements

A court can make any order as to the child's living and contact arrangements, but must be satisfied that the care and contact arrangements are in the child's best interest, having regard to the factors set out in Section 7 of the Children's Act. Any settlement agreement concluded between parties where minor children are involved must be sent to the family advocate's office for endorsement.

Section 6 of the Divorce Act regulates the safeguarding of interests of minor and dependent children, and states that a decree of divorce shall not be granted unless the court is satisfied that provision was made for the welfare of any minor or dependent child of the marriage.

Child Maintenance

Child maintenance refers to a child's direct and indirect reasonable monthly expenses.

Section 15(2) of the Maintenance Act 99 of 1998 states that maintenance extends to "such support as a child reasonably requires for [their] proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education".

Calculating child maintenance

Every parent has a responsibility to contribute to the maintenance of the child. Child maintenance is calculated pro rata according to the parents' means. There is no set formula for child maintenance in South Africa, unlike in many other jurisdictions, with each case being dealt with on its own merits.

The first step is to quantify the child's reasonable monthly expenses, considering both direct expenses (educational costs, extra-murals and the child's medical aid portion, etc) and indirect expenses (day-to-day living expenses, accommodation, etc). Indirect expenses are generally apportioned according to the principle of two parts per adult, one part per child, but there are instances where expenses are split equally between the parent(s) and the child. There is often a dispute as to the reasonability of expenses.

The second step is to determine the parents' respective means, which includes a party's income and their net asset base. Thereafter, the child's monthly maintenance requirements will be apportioned between the parents' pro rata, according to their means.

Agreement on child maintenance

Parties can agree directly between themselves on the child maintenance payable, or with the assistance and intervention of their respective legal representatives, or they can enter into mediation with the aim of amicably resolving this aspect. If they are unable to reach agreement, the matter can be decided by a court.

Once the parties have reached an agreement, they will enter into a comprehensive settlement agreement, to be made an order of court, dealing with all aspects of their divorce, or they can enter into a parenting plan as envisaged in Section 33 of the Children's Act. This parenting plan can either be registered with the family advocate's office or it can be made an order of court.

Court orders in relation to child maintenance

The court (ie, the High Court, regional court or maintenance court) can make orders in relation to child maintenance upon the application of either party or upon an application of a major dependent child against a parent.

Child Application for Financial Provision

A parent will claim maintenance on behalf of a minor child (a person under the age of 18 years). Once a child has attained the age of majority (ie, 18 years of age), the major dependent child may approach the court for a maintenance order for financial support until such time as they are self-supporting. However, a parent has the right (locus standi) to bring a claim on behalf of a major dependent child still living with them.

3.3 Other Matters

Major Decisions and the Court's Power

Section 30(2) of the Children's Act allows co-holders of parental responsibilities and rights in respect of a child to act without the consent of the other co-holder when exercising their parental responsibilities and rights, except where they are precluded from doing so in terms of the Children's Act, another law, or court order.

Section 18(3)(c) of the Children's Act specifies that the following decisions must be made jointly between all persons having guardianship:

- consent to the child's marriage;
- consent to the child's adoption;
- consent to the child's removal from South Africa (be it temporary or permanent);
- consent to the child's application for a passport; and
- consent to the alienation or encumbrance of any immovable property owned by the child.

Section 31 of the Children's Act relates to major decisions involving a child, which are not covered by Section 18(3)(c). It provides that due consideration must be given to the views and wishes expressed by the child before a person holding parental responsibilities and rights in respect of said child takes any decision involving the child as set out in Section 31(1)(b), bearing in mind the child's age, maturity, and stage of development.

Section 31(1)(b) defines these major decisions as those:

- relating to consent to a child's marriage or adoption, consent to a child's departure or removal from South Africa, the application for a passport, and alienation or encumbrance of immovable property owned by the child (Section 18(3)(c));
- affecting contact between the child and a co-holder of parental responsibilities and rights;
- relating to the assignment of guardianship or care to another person; or
- that are likely to significantly change or have an adverse effect on the child's living conditions, education, health or personal relations with a parent or family member or, generally, the child's well-being.

In addition, any co-holder of parental responsibilities and rights (usually the other parents) must be consulted in respect of any decision that is likely to significantly change the co-holder's exercise of parental responsibilities in respect of the child, or to have a significant adverse effect on the exercise of such responsibilities. A practical example of this would be a decision by one parent to move to another town or province, which would clearly have an adverse effect on the other party's right to contact.

If a dispute arises that cannot be resolved through mediation (or facilitation by a court-appointed parenting co-ordinator in some high-conflict matters), the aggrieved party is entitled to approach the High Court (the upper guardian of all minor children in South Africa) for the appropriate relief (eg, dispensing with the requirement that the other parent provides the requisite consent for international travel, directing which school a child should attend, or what medical treatment a child should undergo).

When making a ruling, the court will have regard to any expert report that has been filed. If no such report has been filed, the court may exercise its discretion in reaching a decision and/or order the appointment of a suitable expert to produce a report with recommendations to assist the court.

Parental Alienation

Parental alienation is considered a form of child abuse, and cases of such a nature are handled with extreme caution and urgency.

When dealing with parental alienation, the court will require the evidence of an expert psychologist, preferably with experience in parental alienation. This expert will conduct a full investigation into the child's circumstances, including the

family dynamics, and produce a report to the court with their findings and recommendations.

In matters relating to parental alienation, the court may make the following orders following the expert's recommendations:

- the appointment of a play therapist or personal therapist for the child;
- the appointment of a reunification therapist to assist in remediating the relationship between the parent and alienated child;
- the appointment of a parental co-ordinator or facilitator to assist the parents in navigating disputes in a more conciliatory and constructive manner;
- the appointment of a curator ad litem (who is normally an attorney or advocate) who has specific powers to investigate the matter and furnish a report and recommendations to the court; or
- in cases of severe alienation, the court may make a protective separation order and remove the child from the alienating parent for a period pending the above-mentioned therapeutic interventions.

Children Giving Evidence in Court

The Children's Act requires that the child concerned must, where appropriate, be informed of any action or decision taken in a matter concerning them and that affects them – taking into consideration their age, stage of development and level of maturity – and should be afforded an opportunity to participate in an appropriate manner and express their views and wishes. Children are given a voice but not a choice.

Although it is not unheard of, children are not ordinarily called upon to give evidence at court insofar as possible. Legal practitioners and parents are encouraged to shield children from the acrimony of litigation, and their views and wishes are normally presented by way of a report from an appointed psychologist or social worker pursuant to an investigation, or alternatively by way of a child participation interview. In some instances, a child may have an appointed legal representative to represent them in proceedings or be interviewed by a curator ad litem, who will make submissions to court on the child's behalf.

3.4 ADR

Mechanisms outside the court process that exist to assist parties to resolve financial disputes include mediation, negotiation (facilitated by the legal representatives) and the collaborative law process – which is still relatively unknown to the public and not generally practised.

The Children's Act expressly provides that parties should adopt a conciliatory and problem-solving approach in all matters relating to children, and avoid a confrontational approach wherever possible.

Mediation is all but mandatory and, in terms of Uniform Rule 41A, litigants instituting an action or application must, at the outset, confirm whether or not they agree to the referral of the dispute to mediation, and provide reasons for their position. Adverse costs orders may be considered in circumstances where one party refuses to engage in mediation prior to trial.

Arbitration in matrimonial matters is still not permissible in terms of Section 2 of the Arbitration Act 49 of 1965, but a long-anticipated amendment to the Arbitration Act is expected, so that divorce matters may be arbitrated by agreement between the parties.

Any agreements that are reached by way of ADR should still be incorporated into the parties' decree of divorce.

Any further agreements relating to maintenance that are reached outside a divorce action should also be made orders of the appropriate court by way of an unopposed application to the relevant court (either the High Court or maintenance court), to ensure that the obligations imposed on both parties are enforceable.

3.5 Media Access and Transparency

The media and press are able to report on child cases. However, no information may be reported that would lead to the identification of a minor child.

Divorce cases may not be reported on in a manner that in any way identifies the parties. Nonetheless, the media may report on the facts of a case.

Children's court matters are held in camera. All divorce judgments are now anonymised, using only the parties' initials.

SPAIN

Law and Practice

Contributed by:
Amparo Arbáizar
Arbáizar Abogados

Contents

Arbáizar Abogados is an independent law boutique focused on the international aspects of family law and the law of succession, with knowledge of international legislation, case law and practices. The firm operates nationwide through its office in Malaga, its network of collaborating firms, and connections spanning the globe, allowing it to plan and resolve legal issues in a wide range of jurisdictions. The firm's team of ten lawyers practise in civil law, family law, law of succession, criminal law and public law. Amparo Arbáizar leads the team on matters of international family law. Team members are expert family mediators who collaborate closely with tax advisers. The personal relationship and trust that is shared with clients is crucial for Arbáizar Abogados.

Author

Amparo Arbáizar has over 20 years of experience advising international clients in international family law, law of succession and cross-border estate planning. She is a litigation expert in the Spanish jurisdiction and has acted as a Spanish legal expert before the courts of the United Kingdom, Canada and the USA. Her significant experience involves all aspects of family law, covering divorce, financial settlements, pre and postnuptial agreements, liquidation of matrimonial property regimes, arrangements for children, international child abduction cases, maintenance obligation enforcement, civil partnership matters, unmarried couples, and same-sex marriages. Amparo is a family mediator and regards mediation as a valuable alternative to settling disputes. She is fluent in English and German.

Arbáizar Abogados

Calle Doctor Manuel Perez Bryan, 3-6
E-29005 Malaga
Spain

Tel: + 34 678 50 88 91
Email: amparo@arbaizarabogados.com
Web: www.arbaizarabogados.com

1. Divorce

1.1 Grounds, Timeline, Service and Process

The grounds for divorce are the same for all marriages and same-sex marriages. Civil partnerships are not considered marriages in Spanish family law, and their status is not regulated in the Spanish Civil Code or at a national level.

Several autonomous communities in Spain have established their own specific laws regarding civil partnerships, including provisions for a partnership register. These communities are:

- Andalucía;
- Aragón;
- Asturias;
- the Balearic Islands;
- the Basque Country;
- the Canary Islands;
- Castilla-La Mancha;
- Castilla y León;
- Extremadura;
- Galicia;
- Madrid; and
- Valencia.

In contrast, Catalonia only offers municipal registers for civil partnerships, and the existence of a partnership is verified through an authentic or notarial deed.

Each autonomous community regulates the register in a different way, and the effects of registration range from being simply declarative to having practical equivalence with marriage. Some autonomous communities do not provide for such a regional register.

"No-fault" divorce

Spain is a "no-fault" divorce jurisdiction. There are neither grounds for divorce nor a required period of separation. One or both parties can issue separation/divorce proceedings three months after the marriage. These three months will not be required in cases where there is a danger to the petitioner or the children.

The timescale for a first-instance divorce decree is approximately a year, although it is very different from court to court. The appeal may take about one year. If any party requests a psychological forensic report via the court, the timescale will be longer because forensic psychologists are overloaded with work.

Uncontested divorce proceedings are much quicker: between two and six months to obtain a Divorce Absolute.

Each court's head of the court administration (*Letrado de la Administración de Justicia*) is responsible for the service of documents and other acts of communication. Once a party has filed a divorce petition, the court will admit it and issue divorce proceedings, ordering service upon the other party. A court's agent will serve the other party at his residence in person.

Service by a particular method is also possible. The petitioner can request the court that his private court's clerk (procurator) personally serve the divorce petition.

Hague convention

Spain is a party to the Hague Convention on the service abroad of judicial documents signed on 15 November 1965. A form must be filled out and sent to the Spanish Central Authority with the divorce petition and documents. The Central Authority forwards the document to the Dean

Judge (*Juzgado Decano*) of the Courts of First Instance within the judicial territory (*partido judicial*) where the document is to be served. This court office is competent for distributing the different proceedings (including service of documents) among the judicial authorities that fall under its jurisdiction.

Although a different form of service is not prohibited in Spanish domestic law in principle, the Central Authority does not usually receive a special request by the applicant for service by a particular method.

Between member states of the European Union, Regulation (EU) 2020/1784 of 25 November 2020 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (recast) is applicable.

Religious marriages are recognised in Spain, as set out in Article 60 of the Civil Code. Catholic, Protestant, Jewish and Muslim marriages are recognised in Spain.

Separation proceedings are treated like divorce proceedings, with the same effects, except the dissolution of the matrimonial bond.

Nullity

The grounds for nullity are different, and it is much more difficult to obtain an annulment than a divorce or separation. To obtain an annulment of the marriage, you have to prove the grounds of annulment of a contract, such as lack of free consent or goodwill or that the spouse entered into marriage because of fear, deceit, threats, etc. It is governed by Article 73 of the Civil Code. Other grounds for nullity are marriage with a minor, a close relative or polygamy.

1.2 Choice of Jurisdiction

Spain is a party to Council Regulation (EU) No 2019/1111 of 25 June 2019 on the jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). This Regulation currently rules the Spanish international private law concerning international jurisdiction on divorce, and the grounds of jurisdiction set out in Article 3 of the Regulation apply. The Spanish Law on Judicial Power was reformed in 2015 with regard to international jurisdiction, and its Article 22 quáter (c) adopts the very same grounds for jurisdiction as Article 3 of the Regulation.

Spain retains the residual jurisdiction on divorce when the following apply:

- both parties are habitually resident in Spain at the time the proceedings are issued;
- Spain was the last matrimonial habitual residence, and one of the spouses still lives there;
- Spain is the respondent's habitual residence;
- in the case of uncontested divorce, when one of the spouses is habitually resident in Spain;
- the petitioner is habitually resident in Spain at least one year before proceedings are issued;
- the petitioner is Spanish and has been habitually resident in Spain for at least six months before proceedings are issued; and
- both spouses are of Spanish nationality.

The same grounds apply to same-sex marriages. Civil partnership status is not regulated in the Spanish Civil Code or at a national level. Civil partners are not considered to be married, and therefore, they cannot apply for divorce.

The main concept for determining jurisdiction is the habitual residence of the spouses. When

both spouses have Spanish nationality, they can also apply for divorce in Spain. "Domicile" is not a legal concept in Spain's jurisdiction.

A party can contest jurisdiction within ten days of being served with the divorce petition. Due to a lack of international jurisdiction, the "*Declinatoria*" proceedings are provided for by Articles 63–66 of the Spanish Law of Civil Procedure (LEC1/2000) and Article 39 of the Law on International Judicial Co-operation in Civil Matters (29/2015).

As explained above, it is not possible to apply to stay proceedings in order to pursue divorce proceedings in a foreign jurisdiction apart from a challenging jurisdiction.

Law No 29/2015

International lis pendens is ruled by Article 39 of Law No 29/2015, of 30 June, on International Judicial Co-operation in Civil Matters:

"*1. When there exist pending proceedings with an identical object and cause of action, between the same parties, before a Spanish court, the Spanish court may stay proceedings, at the instance of a party and following a report from the Public Prosecutor's office, always provided that the following requirements are met:*

The foreign court's jurisdiction is based on a reasonable connection with the litigation. The existence of a reasonable connection will be presumed when the foreign court has based its international jurisdiction on criteria equivalent to those provided for in Spanish Law for that specific case.

It is foreseeable that the foreign court will issue a resolution susceptible to being recognised in Spain; and

The Spanish court considers it necessary to stay proceedings in the interest of the proper administration of justice

2. The Spanish court may order the continuation of proceedings at any time at the instance of a party and following a report from the Public Prosecutor's Office when any of the following circumstances apply:

Should the foreign court have declared it has no jurisdiction, or should it, at the request of any of the parties, have failed to pronounce on its own jurisdiction;

Should the proceedings before the court of the other State have been suspended or finalised without issuing a resolution;

Should it be considered unlikely that the proceedings before the court of the other State will be concluded within a reasonable time;

Should the continuation of proceedings be considered necessary for the proper administration of justice;

Should it be understood that the final judgement that may eventually be handed down will not be susceptible to being recognised and, where appropriate, enforced in Spain?

3. The Spanish court shall end proceedings and close the case if the proceedings before the other State's court have been concluded with a decision susceptible of recognition and, where appropriate, enforcement in Spain."

Lis pendens is regulated in Article 20 of Council Regulation 2019/1111 and is applicable between EU member states:

"Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are instituted before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of the court first seised.

In that case, the party who instituted proceedings before the court second seised may bring those proceedings before the court first seised."

2. Financial Proceedings

2.1 Choice of Jurisdiction

Regarding Article 3 of the Council Regulation (EC) No 4/2009 of 18 December 2008 on the jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations in Member States, jurisdiction shall lie with:

- the court where the defendant is habitually resident;
- the court where the creditor is habitually resident;
- the court that, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings unless that jurisdiction is based solely on the nationality of one of the parties; or
- the court that, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings unless that jurisdiction is based solely on the nationality of one of the parties.

Article 22 quáter (f) of the Spanish Law on Judicial Power regulates the international jurisdiction of the Spanish courts on maintenance obligations, as set out in Article 3 of the "Maintenance Regulation".

Spain retains the residual jurisdiction on maintenance obligations when:

- the petitioner or the respondent is habitually resident in Spain; and
- the Spanish courts have jurisdiction concerning a person's status or parental responsibility, and the matter relating to maintenance is ancillary to those proceedings.

Spain is a party to the Council Regulation (EU) No 2016/1103 of 24 June 2016, which implements enhanced co-operation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes. This regulation is applicable between member states as of 29 January 2019.

According to this Regulation, jurisdiction in matters of the matrimonial property regime in the event of the death of one of the spouses will be retained by the court of the member state that is ruling the succession of the spouse pursuant to Regulation (EU) No 650/2012 on Succession. Jurisdiction in matters of the matrimonial property regime in cases of divorce, legal separation or annulment will be ruled by the court of the member state that is seised for the divorce, legal separation or annulment pursuant to Regulation (EU) No 2201/2003.

Article 22 quáter (c) of the Spanish Law on Judicial Power rules the international jurisdiction of the Spanish courts in matters of matrimonial property regimes. Spain retains the residual jurisdiction in matters of matrimonial property regimes when:

- both parties are habitually resident in Spain at the time the proceedings are issued;
- Spain was the last matrimonial habitual residence, and one of the spouses still lives there; and
- Spain is the respondent's habitual residence.
- It is impossible to apply to stay proceedings to pursue financial proceedings in a foreign jurisdiction.

The court can hear financial claims in Spain after a foreign divorce. First, the foreign divorce must be recognised by the Spanish courts. The financial claim must be related to immovable assets situated within the Spanish jurisdiction upon which the foreign judge did not have jurisdiction to rule. It might also consist of liquidating a Spanish property regime before the Spanish courts if it was not decided in the foreign divorce decree. This is not commonplace.

2.2 Service and Process

The service requirements in financial proceedings are the same as in any other civil proceedings. Each court's head of the court administration (*Letrado de la Administración de Justicia*) is responsible for the service of documents and other acts of communication. After a party has filed a financial petition, the court will admit it and issue financial proceedings, ordering service upon the other party. A court's agent will serve The other party at his residence in person.

Service by a particular method is also possible. The petitioner can request the court that his private court's clerk (*procurator*) personally serve the divorce petition.

Spain is a party to the Hague Convention on the service abroad of judicial documents signed on 15 November 1965. A form must be filled out and sent to the Spanish Central Authority with the divorce petition and documents. The Central Authority forwards the document to the Dean Judge (*Juzgado Decano*) of the Courts of First Instance within the judicial territory (*partido judicial*) where the document is to be served. This court office is competent for distributing the different proceedings (including service of documents) among the judicial authorities that fall under its jurisdiction.

Although a different form of service is not prohibited in Spanish domestic law in principle, the Central Authority does not usually receive a special request by the applicant for service by a particular method.

Between member states of the European Union, Regulation 2020/1784 of 25 November 2020 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (recast) is applicable.

The financial orders on divorce are spousal and child maintenance and the use of the matrimonial home in the child's best interests. The proceedings can take about one year for the first-instance court order and another year for the appeal at the Higher Court.

Spouses can issue court proceedings to liquidate the matrimonial property regime with the divorce petition or after the divorce decree has been rendered. There are two parts to the liquidation of the matrimonial property regime proceedings:

- to make the inventory of the assets and liabilities of the matrimonial property; and
- to distribute the matrimonial property between the spouses.

If there are many appeals, each part can take about one to two years. If the parties can reach an agreement, the liquidation of the matrimonial property regime will be much quicker.

2.3 Division of Assets

Financial Orders

The financial orders on divorce are spousal and child maintenance, using the matrimonial home in the child's best interests and liquidating the matrimonial property regime.

In the case of the separation of assets matrimonial regime, a compensation order to a spouse for their dedication to the family that has produced a corresponding loss of professional opportunities, as well as a financial order to put an end to the joint property ownership of the spouses, can both be made on divorce.

Spanish law does not provide for the possibility that, once the marriage is dissolved, the courts may ex officio establish patrimonial measures between the parties. On the contrary, any such measure between the spouses (such as spousal maintenance, financial compensation for family work or the allocation of the use of the family home) must be expressly requested by a party in the originating petition or in a defence and counterclaim to such petition, for the court to order (or not) corresponding measures in the judgment it issues.

The liquidation of a matrimonial property regime is a different matter, which can be decided in a later court proceeding, separate from the divorce action itself.

The court will only order spousal maintenance obligations if requested in the divorce petition. The aim of maintenance orders is to redistribute the family incomes in order to minimise the effects of the divorce, primarily upon the children's costs and expenses, and, secondarily, upon the spouses. The spouse with the larger income must pay more child maintenance and, eventually, maintenance to the other spouse. Maintenance obligations between spouses are not commonplace.

Capital orders are made regarding the rules of the liquidation of the matrimonial property regimes of the Spanish Civil Code. The assets and liabilities of the marriage will be split between the spouses following these articles in quite an impartial manner.

The exception is the matrimonial property regime of asset separation. If there is no matrimonial property on divorce, the court can issue an order to compensate one of the spouses for their dedication to the family, resulting in a corresponding loss of professional opportunities.

If the couple has children, child maintenance orders must be made by the court on divorce, regardless of whether there is an agreement or not. If there is an agreement, the judge and the Ministerio Fiscal must approve the settlement protecting the child's best interests.

The court can request disclosure obligations from the spouses, although there is no subsequent penalty if the spouses do not comply. The court can request information about the spouses' income from the Spanish Tax Revenue Office (*Agencia Tributaria*). The court can identify the spouses' properties at the Spanish Property Registry and obtain information from the Register of Companies and the Cars Regis-

ter. The main Spanish Banks co-operate with the court and can provide information regarding the spouses' bank accounts or investment funds in their companies.

The court cannot make orders for disclosure against third parties.

There are three matrimonial property regimes recognised in the Spanish Civil Code:

- joint ownership of acquisition of assets;
- separation of assets; and
- participation in acquisitions.

The matrimonial property regime will finish the ope legis on the date of the divorce decree. After the divorce decree, the parties can issue the specific liquidation of the matrimonial property regime and proceed to distribute the assets and liabilities between them. They can also make an out-of-court agreement and liquidate the matrimonial property regime in a notary public deed.

Spain is comprised of 17 autonomous communities (*Comunidades autónomas*), some of which have their own rules of law regarding family and succession. The common point is that, in all of them, you can choose your matrimonial property regime in a notary public deed. However, in the absence of an agreement, one of the following matrimonial property regimes will apply by default:

- Civil Code – joint ownership of assets (*Régimen de gananciales*);
- Catalonia, Aragón and the Balearic Islands – separate ownership of assets;
- Galicia – joint ownership of assets;
- Basque Country (differences between the counties) – joint ownership of assets/universal community of assets; or
- Navarra – matrimonial company of conquests (*Sociedad conyugal de conquistas*).

The matrimonial property regime can be implemented with a prenuptial or postnuptial agreement.

Spain is not a party to the Hague Convention of 1985, and trust is not a legal concept or regulated in Spain.

Foreign Trusts

Foreign trusts can be recognised by the Spanish courts subject to proof of the foreign trust law or providing the judge with a similar civil law legal concept that would meet the purpose of the trust on a case-by-case basis: eg, donations, agency, company, mortgage, mandate, fiducie and foundation. On divorce, the court will check the nature of the assets held in a trust, the owner of the assets held in the trust, who was the owner of the assets before the transfer to the trust, etc, to calculate the matrimonial assets.

2.4 Spousal Maintenance

After a divorce, it is generally expected that each spouse will support themselves. The main aim of spousal maintenance is to help the ex-spouse to maintain the same "standard of living as during the marriage". The main criteria for spousal maintenance are:

- if the divorce produces an adverse economic imbalance for one of the spouses; and
- if there has been a loss of professional opportunities because of the marriage.

Age, health, duration of the marriage and the spouse's career prospects and ability to earn a living are also taken into account.

The compensation usually consists of temporary maintenance payments for a couple of years, but a single payment can also be considered. Lifelong spousal maintenance orders are rare and only apply in cases where the marriage is very long and the spouse is of an age with no prospects to earn a living after having invested their life in the family's welfare.

A party can apply for interim maintenance pending the final outcome. This amount, for the spouse, until there is a divorce order, is considered an obligation for family support during the marriage.

2.5 Prenuptial and Postnuptial Agreements

Prenuptial and postnuptial agreements, although not included in the Spanish Civil Code (CC), will be recognised by the Spanish courts on the basis of the principle of freedom of party autonomy (Article 1.255 CC) and the freedom of agreements between spouses (Articles 1323 and 1325 CC). These marital contracts must meet the criteria for a valid contract, such as free consent, object and motive (Article 1261 CC). Moreover, the principle of goodwill and compliance with the ordre public have to be observed. The most recent judgment of the Spanish Supreme Court (*Tribunal Supremo*) on marital contracts is *Sentencia número*428/2022, dated 30 May 2022, proceedings *Casación número*6110/2021.

Spousal maintenance obligations or financial terms will be binding on divorce. Terms regarding child arrangements and the use of the family home will be taken into account by the court, but they will be checked by the judge and the public prosecutor to protect the child's best interests.

Marital agreements are recognised as private contracts under Spanish law and are therefore binding on the contracting parties if they are not against the child's best interests and the Spanish ordre public. The marital agreement will be enforceable when included in a court order after the divorce proceedings.

A marital agreement can be directly enforceable if it is granted in a deed executed before a Spanish notary public. Marital agreements can cover a spouse's financial claims on divorce, such as maintenance. However, they cannot deal with child maintenance or other claims regarding children, which must be approved by the judge and the *Ministerio Fiscal*, who protects the child's best interests.

The election of the matrimonial property regime must be granted in a deed executed before a Spanish notary public.

2.6 Cohabitation

In the absence of children, parties can claim compensation and an order to sell their joint properties. Claims must be lodged in the civil courts; they are not under the jurisdiction of family law.

In order to make a financial claim, a party must prove that the couple had joint properties, joint bank accounts, etc. The grounds for making a financial claim are the intention and existence of shared estates between the cohabitees.

Parties can prove that they are in a civil partnership where they were not registered by virtue of the length of cohabitation or the existence of children, but they do not acquire any rights other than those granted to civil partners by each autonomous community.

2.7 Enforcement

A party can file an enforcement application before the same court that rendered the divorce order. In the enforcement application, the petitioner can provide the court with information regarding the other party's assets and request disclosure from the other party.

The petitioner can also request the court's help to investigate the other party's assets at the Spanish Land Registry, Register of Companies, Cars Register, Spanish Banks, Spanish Tax Revenue, Spanish Employment Office, Spanish National Social Security System, etc.

The court will charge the enforced party's assets, including their payslips, bank accounts, etc.

International enforcement of a financial order is permitted when this order has been recognised in Spain. The European Regulation 4/2009 of 18 December 2008 on maintenance obligations rules the enforcement of maintenance obligations between European Union member estates. The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (the "2007 Hague Convention") is applicable to enforce maintenance orders from signatory countries in Spain.

Capital orders regarding the liquidation of the matrimonial property will be enforced according to Council Regulation (EU) No 2016/1103 of 24 June 2016, which implements enhanced co-operation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of the matrimonial property regime between member estates of the European Union and Spain.

Otherwise, exequatur proceedings before the Spanish court will be needed for the recognition and enforcement of a financial order.

2.8 Media Access and Transparency

The media and press are not able to report on financial cases because family proceedings are private, and the public cannot access them.

2.9 Alternative Dispute Resolution (ADR)

Parties can resolve their financial disputes by signing an agreement or liquidating their matrimonial property before a public notary. The notary deed will have the same effects as a court order.

No ADR methods are mandated by the court. Courts always offer the parties the option to stay the divorce proceedings to attend mediation. However, there is no penalty if any party decides not to participate in mediation or any other ADR.

There are family arbitrators and collaborative lawyers, but they are not commonplace.

An agreement reached via a non-court process is a private contract between the parties, and for it to be enforceable, it must be included in a consent court order.

3. Child Law

3.1 Choice of Jurisdiction

Council Regulation (EC) No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) is the applicable law on jurisdiction in Spain regarding parental responsibility.

Article 7 of Council Regulation No 2019/1111 rules that the member state's courts where the child is habitually resident at the time the court is seised shall have international jurisdiction for parental responsibility and childcare arrangements. Spain will have jurisdiction for bringing children proceedings when the children are habitual residents in Spain when the court is seised.

Article 10 of Council Regulation No 2019/1111 rules the choice of court by the parents:

"*1. The courts of a Member State shall have jurisdiction in matters of parental responsibility where the following conditions are met:*

(a) the child has a substantial connection with that Member State, in particular by virtue of the fact that:
(i) at least one of the holders of parental responsibility is habitually resident in that Member State;
(ii) that Member State is the former habitual residence of the child; or
(iii) the child is a national of that Member State;
(b) the parties, as well as any other holder of parental responsibility, have:
(i) agreed freely upon the jurisdiction, at the latest at the time the court is seised; or
(ii) expressly accepted the jurisdiction in the course of the proceedings, and the court has ensured that all the parties are informed of their right not to accept the jurisdiction; and
(c) the exercise of jurisdiction is in the best interests of the child."

The applicable law on international jurisdiction in maintenance obligations is European Council Regulation (EC) No 4/2009 of 18 December 2008 on maintenance obligations. According to Article 3 (b), Spain would have jurisdiction for child maintenance when the child has a habitual residence in Spain.

The most relevant concept for determining jurisdiction in children matters is the child's habitual residence at the time the court is seised. In the case of Articles 10 and 12 of Council Regulation (EC) No 2019/1111, the nationality of the child can be a factor in proving a special connection of the child with that state for an agreement between the parents on the choice of court or a transfer of jurisdiction to the court of another member state.

3.2 Living/Contact Arrangements and Child Maintenance

Parental Responsibility and Custody

Article 156 of the Civil Code states that both parents have the same parental responsibility and must agree on the child's upbringing, such as schooling, medical treatment, religion, holidays, etc. In case of dispute, either parent can issue a proceeding and the judge, after having heard both parents and the child (mandatory for children older than 12 years), will issue an order stating which parent can decide on this specific matter. The parental responsibility matters of Article 156 are urgent proceedings on family law that must be heard in court within a month.

Parental responsibility will not be affected by a divorce. In Spain, "rights of custody" refers to "parental responsibility" for both parents. When they cannot agree on an issue, they must take the matter to a court, which will issue an order stating which parent decides on this specific matter.

The court must decide at the time of the divorce which parent the child lives with (physical custody) and which parent has the "right of access".

There is no difference between married or unmarried parents in the exercise of rights of custody.

The legal approach now to (physical) custody is that joint custody subsequent to post-marital separation is the optimal solution to safeguarding the "interests of the child". Law No 15/2005, of 8 July, amending the Civil Code and the Civil Judicial Proceedings Act in matters of separation and divorce, introduced joint custody into the Spanish Civil Code. According to Article 92 of the Civil Code, judges could henceforth order joint custody even without the agreement of both parents.

The court must automatically make a child arrangements order on divorce. The *Ministerio Fiscal* must be invited to the divorce proceedings to protect the child's best interests. Members of the *Ministerio Fiscal* represent the Spanish authorities' protection of the child's best interests. The *Ministerio Fiscal* co-operates closely with the court and has a similar education and professional background as a judge; however, members of the *Ministerio Fiscal* are not independent because they are Spanish government civil servants.

A parent can also request the court to order interim measures regarding maintenance, custody, access rights, and use of the family home until the divorce decree is produced.

Children's orders can be made until the children are 18 years old. Normally, however, they stop at the age of 16 because, at this age, it is purposeless and counterproductive to oblige a child to visit or live with a parent if they do not want to.

A father who has been accused of violence against his spouse/partner cannot be granted his children's custody by the court on divorce or separation.

Child Support

Content of child support

Article 142 of the Civil Code provides for child maintenance, such as food, clothing, housing, health assistance, and education. Each parent will support their children according to their wealth and income.

Proportionality test

The amount of child support must be proportional to the parent's wealth and income and the child's needs and circumstances (Article 146 Civil Code). The judge will check the proportionality test on a case-by-case basis.

Calculation of child support

The petitioner must provide the court with evidence regarding the child's costs, such as school fees, schoolbooks, extra-curricular activities, clothing, housing, etc. Each parent must also inform the court about their income and wealth, with the aim of covering the child's necessities.

Apart from the monthly child support, each parent will bear the cost of 50% of the following.

- Extraordinary expenses – construed as expenses that are exceptional, unforeseeable, necessary and appropriate to the financial capacity of both parents, as well as expenses due to illness, eyeglasses, dental or hearing prosthesis, or any other health expenses not covered by the public health system under the Social Security, which has this character, provided that the parent who intends to make the expense consults the other parent beforehand about the convenience or need of the expense (except in exceptional and urgent cases where it is not possible to inform

the other immediately of the emergency event and the amount of the extraordinary expense). If there is no consent, the petitioner must seek judicial authorisation.
- Extra-curricular activities – if there is an agreement on them. In the event of failure to reach an agreement, the parent who has chosen them will be liable. Examples include summer camps, sports and dancing lessons.

The Spanish General Council of Judges' online portal provides a table to calculate child support by entering the parents' monthly incomes.

Payment obligation

The payment obligation starts on the date the application for child support is lodged in court (Article 148 Civil Code).

The parties can't agree on child maintenance arrangements without the court's involvement because any child arrangement must be approved by the judge and the public prosecutor (*Ministerio Fiscal*), who protects the child's best interests.

The court can order child maintenance until the child turns 18 or until the child is financially independent. The court can also terminate the child maintenance obligation if the supporting parent can prove that the young adult is neither studying nor seeking a job.

The child cannot apply for financial provision themselves until they turn 18 years old. An adult can make a claim for financial support directly against their parents when they are older than 18 and the child maintenance obligation has ended. The court will take into account the reasons and circumstances that force the adult to make a financial claim (eg, unemployment) and the parents' resources.

3.3 Other Matters

Article 156 of the Civil Code says that both parents have the same parental responsibility and must agree on the child's upbringing, such as schooling, medical treatment, religion, holidays, etc. In case of dispute, either parent can issue a proceeding and the judge, after hearing both parents and the child (mandatory for children older than 12 years), will issue an order stating which parent can decide on this specific matter. The parental responsibility matters of Article 156 of the Civil Code are urgent proceedings on family law that must be heard in court within a month.

The Constitutional Act No 1/2004 of 28 December on Integrated Protection Measures Against Gender Violence was promulgated to combat male violence against women, and, as a result, Spanish law contains a variety of mechanisms that target male violence. As a consequence, a father accused of violence against his partner will not have his children's custody and eventually, neither will he be able to have the right of access to his children. Although both the government and the General Council of the Judiciary have taken a stand against the deployment of the parental alienation syndrome in the legal system, this notion is used in family courts. Allegations of parental alienation and those of "false complaints" are made in an attempt to falsify denunciations of gender violence. They argue that women manipulate children or press charges falsely in order to:

- benefit from the opportunities of the law; and
- obtain custody of the children in question; or
- even stop the parents from having visitation rights to their children.

The Sentence TS:2016:129 of the Supreme Court rejected the appeal of a father who requested a

change of custody in his favour based on the alleged existence of parental alienation. Although the Sentence did not reject parental alienation in itself, the Supreme Court confirmed that there was no evidence that the children in question had suffered from parental alienation, dismissing the father's claim. However, there is no clear jurisprudence against parental alienation. The courts will check parental alienation allegations on a case-by-case basis, supported by strong evidence and the forensic psychologist's report.

Children are able to give evidence in court according to their age and maturity. They will be heard by the forensic psychologist and eventually by the judge alone. Children must be heard in court when they reach 12 years old. The court will take into account its evidence when convinced that it was free from any parent's manipulation or influence. When children are older than 16 years old, the court usually follows their wishes because the court considers that at this age, it is very difficult to make them abide by an order that they oppose.

3.4 ADR

Law No 15/2015 on *Jurisdicción Voluntaria* introduced the consent divorce before a notary in Spain. The notary will declare the dissolution of the marriage instead of the judge, but they will have the same competence by virtue of Law No 15/2015. The notary must check the legal terms and equity of the divorce agreement. If the notary finds the divorce agreement unfair for one of the spouses or their grown-up children, they can decide not to ratify it, and the spouses must go to court (the notary cannot amend the agreement, nor can the spouses go to another notary).

A notary from the spouses' last habitual residence or the habitual residence of one of them will have jurisdiction. The spouses must attend personally to sign the deed in front of the notary and be legally assisted by at least one lawyer representing both parties, who will usually write the divorce agreement.

The divorce agreement must address the use of the family home, spousal maintenance, and support for grown-up children. Any other agreement regarding the spouses, such as donations, can also be included. The liquidation of the matrimonial property regime can be done in the same agreement or afterwards. The notary deed (*escritura*) will be considered equivalent to a court order.

However, there is discussion in Spain about the legal nature of this new concept: whether it is a private divorce produced by the spouses' consent and willingness to dissolve their marriage (a private contract) or a consent divorce ratified by the notary as a public authority.

Spouses cannot divorce on the basis of a private divorce if they have minor or disabled children. However, they can divorce children older than 18, who must appear before the notary and sign the divorce deed if they are affected by the divorce agreement. The law does not refer to "common minor children," so it is unclear whether a notarial divorce is possible if only one of the spouses has minor children.

No ADR methods are mandated by the court. Courts always offer parties the option to stay in the divorce proceedings and attend mediation. However, there is no penalty if a party decides not to participate in mediation or any other ADR.

There are family arbitrators and collaborative lawyers, but they are not commonplace.

3.5 Media Access and Transparency

The media and press may report on relevant child cases, but the child must be anonymised in the case report. The media cannot access the proceedings' information, which remains a protected private matter.

Trends and Developments

Contributed by:
Amparo Arbáizar
Arbáizar Abogados

Arbáizar Abogados is an independent law boutique focused on the international aspects of family law and the law of succession, with knowledge of international legislation, case law and practices. The firm operates nationwide through its office in Malaga, its network of collaborating firms, and connections spanning the globe, allowing it to plan and resolve legal issues in a wide range of jurisdictions. The firm's team of ten lawyers practise in civil law, family law, law of succession, criminal law and public law. Amparo Arbáizar leads the team on matters of international family law. Team members are expert family mediators who collaborate closely with tax advisers. The personal relationship and trust that is shared with clients is crucial for Arbáizar Abogados.

Author

Amparo Arbáizar has over 20 years of experience advising international clients in international family law, law of succession and cross-border estate planning. She is a litigation expert in Spanish jurisdiction and has acted as a Spanish legal expert before in the courts of the United Kingdom, Canada, and the USA. Her significant experience involves all aspects of family law, covering divorce, financial settlements, pre and postnuptial agreements, liquidation of matrimonial property regimes, arrangements for children, international child abduction cases, maintenance obligation enforcement, civil partnership matters, unmarried couples, and same-sex marriages. Amparo is a family mediator and regards mediation as a valuable alternative to settling disputes. She is fluent in English and German.

Arbaizar Abogados

Calle Doctor Manuel Perez Bryan, 3-6
E-29005 Malaga
Spain

Tel: +34 678 50 88 91
Email: amparo@arbaizarabogados.com
Web: www.arbaizarabogados.com

Pets and Children's Shared Custody in Spain

Law number 17/2021, of 15 December 2021, updates the regulations regarding animals in Spanish Law. In accordance with Article 3 of the European Convention for the Protection of Pet Animals of 1987 and Article 13 of the Treaty on the Functioning of the European Union, the new Law 17/2021 considers that animals are sentient beings and have a special relationship with man.

Law 17/2021 of 15 December amended several articles of the Spanish Civil Code and Law of Civil Procedure to consider animal welfare requirements. This reform was necessary not only to adapt the Civil Code to the real nature of animals but also to the nature of the coexistence relationships established between animals and human beings.

For this reason, agreements on domestic animals and the criteria that the courts must follow to decide who will be made responsible for the animal's care, always considering the animal's well-being, have been introduced into the rules relating to family crises.

Article 333 bis of the Civil Code says that animals are sentient beings. The legal rules for movables and goods would only apply to animals as far as they are compatible with their nature and protection regulations. If an injury to a pet has caused death or damage to its physical or mental health, the pet's proprietor has a right to compensation.

Article 605 of the Law of Civil Procedure (Ley 1/2000, de Enjuiciamiento Civil) has been amended to state that pets cannot be seized in enforcement proceedings since they are not considered goods. Conversely, the proceeds that pets might produce can be seized.

Animals no longer fit the legal concept of movables, goods or mere things.

The new Law 17/2021, of 15 December 2021, affects the Spanish Family Law as well as the Law of Successions of the Civil Code and the Law of Civil Procedure on family proceedings at court.

Article 774, 4 of the Law of Civil Procedure (Ley 1/2000, de Enjuiciamiento Civil) has been amended to stipulate that on divorce or legal separation or children's arrangements, the court must rule the custody of pet animals considering the family members' best interest and the welfare requirements of animals. The court must also rule on the right of access to pets and the payments of their maintenance costs. The same applies to Article 771, 2 of the Law of Civil Procedure regarding provisional measures on divorce or legal separation or children's arrangements. (This rule does not apply to civil partnerships without common minor children.)

Article 94 bis was included in the Civil Code to regulate the care of pets in divorce:

"The judicial authority will entrust the care of the pets to one or both spouses and will determine, where appropriate, how the spouse to whom they have not been entrusted may have them in their company, as well as the distribution of the burdens associated with the care of the animal, taking into account the interest of the family members and the well-being of the animal, regardless of the ownership of the animal and who has been entrusted with its care. This order will be recorded in the corresponding animal identification record."

It is now possible to arrange for shared time with a pet between both spouses, making it feasible

to establish a regulatory agreement that ensures the pet spends equal time living with each partner – for example, one week with one spouse and the next week with the other.

In an amicable separation or through a consensual divorce, the spouses can mutually decide whether the pet will reside with only one of them while granting the other access or if they will divide the pet's time equally between them.

Spouses have the option to split their time with their pets equally or to establish an unequal arrangement. In the latter case, the pet may live primarily with one spouse, while the other spouse is granted specific days or weekends to visit and spend time with the pet. This visiting arrangement can include certain weekends, holidays, long weekends, or vacation periods.

In the event of a discrepancy, the judge will decide, considering the interests of the family members and the animal's well-being.

Following the reform carried out by Law 17/2021 on the legal regime for animals, the Civil Code began to consider animals as sentient beings, not mere things. From that moment on, multiple resolutions regulate the spouses' economic contribution to the burdens associated with animal care; therefore, a monthly maintenance payment can be established to cover this type of expense.

This pension covers all the costs associated with caring for the animal, including, among others:

- food;
- veterinary expenses;
- medicines and/or supplies associated with its health and well-being (for example, deworming collar, special soaps/shampoos); and
- grooming.

Shared custody of children will not be granted by the court in cases of domestic abuse upon the spouse or children. Ill-treatment or violence inflicted on animals with the intention to cause pain or control the spouse or children will be regarded as domestic abuse, Article 340, 2b) of the Criminal Code (Código Penal).

In the liquidation of the matrimonial property regime, pets are regarded as sentient beings rather than mere possessions. Consequently, they cannot be divided like other assets. While selling a pet and sharing the profits is allowed, this must be agreed upon by the parties and will not be determined in court. If the spouses cannot agree on selling the pet or who should have custody, the judge will decide the pet's future. The decision will consider the interests of both owners and the animal's welfare. The judge may also allocate shared custody and care responsibilities for the pet and associated costs.

On successions, Article 914 of the Civil Code rules that in the absence of a testament, the pet will be given to the inheritor who requests it. If there is no agreement on succession, the pet will be given to a third person (for example, Animal Protection Society) until the inheritors find an agreement. If there is no agreement, the judge will decide the pet's destiny, paying regard to the welfare requirements of animals and taking the necessary steps to ensure that the animal is handed over to an entity or organisation that will protect it.

Many people leave their pets as heirs, especially when they do not have forced heirs. However, Spanish law is forceful in this regard, and the Spanish legal system does not allow an inheritance to be left to an animal. However, the testator can choose through a will which heir the pet will be with, granting a legacy, for example.

The testator can also appoint the heir on the condition that he takes care of his pet to ensure that the new owner will take care of the pet until his death instead of getting rid of it.

Case Law on Pets

The Judgement nº 526/2023 of Pontevedra High Court (Audiencia Provincial de Pontevedra), dated 3 November 2023, orders a maintenance obligation of EUR40 per month for the care of the family pet. This measure was established in the divorce decree in addition to the children's arrangements.

The case is a divorce, in which, among other measures, it was ordered that the pet would be left in the care of the ex-wife, and her ex-husband would have to pay her maintenance to support part of the pet's expenses:

"The spouses' pet will be in the care of Ms. Sagrario, and the extraordinary and veterinary expenses will be paid in half. Mr Pablo will contribute to the cost of the animal with the amount of 40 euros per month, payable in the first five days of each month and updateable annually in accordance with the CPI. ".

The ruling also references the case law of the Spanish Supreme Court (STS nº 257/2013, of 29 April), which states that shared custody for children should be established unless it can be demonstrated that it would be harmful to the minor. Shared custody is not considered an exceptional measure and is viewed as the standard and even preferable arrangement. This approach ensures that children maintain relationships with both parents, even during times of crisis, whenever possible and appropriate.

Pontevedra High Court ordered that children's arrangements would be regulated through a system of shared custody with weekly exchanges. In addition, provisions were detailed for the Christmas, Easter and summer holidays.

According to the Judgement of Huelva High Court (Audiencia Provincial de Huelva) dated 23 February of 2023*: "as it is well known that the rapid affection and subsequent emotional bond that arises with respect to any pet when one lives with it, the equitable distribution between both spouses of the care and possession of the animal, as well as the burdens that this implies, should prevail as a general rule, without taking into account the specific ownership of the same, nor whether this cohabitation may have been more or less extensive unless there are circumstances of sufficient gravity and entity to promote the exception to the general rule."*

The Judgement of Madrid High Court (Audiencia Provincial de Madrid, secc.24), dated 16 March 2023, orders that:"*The"animal" belongs to the entire family unit, and its well-being depends on it being with the minors, and consequently with each of the litigating parties, in the periods in which they are entitled to be with their children, according to the established shared custody regime."*

The Judgment of the Supreme Court, number 1015/2024, dated 17 July 2024 (Tribunal Supremo, Sala de lo Civil), declares that pets are not subject to the same civil procedure rules that apply to proceedings regarding minor children, such as Article 752 of the Law of Civil Procedure (752 LEC). The protection of a child's best interests is a paramount principle of public order, whereas the protection of pets does not hold the same level of importance.

Children's Shared Custody in Spain

Following the Spanish Supreme Court case law (STS nº15/2020 of 16 January), the High Court reiterates that in the absence of fundamental causes, the application of shared custody will proceed: *"There is no cause in the procedure that advises against shared custody; therefore, it must be established. Article 92 of the Civil Code and the Supreme Court case law are violated since the interest of the affected minors has not been adequately safeguarded in a resolution that has not taken into account the parameters repeatedly established by the Supreme Court for the correct application of the principle of protection of the minor's interest to order sole custody, which in this case will not allow the daughters' right to interact with both parents to be effective."*

"On the other hand, as this High Court has already said on numerous previous occasions, the Court does not care so much about the past as much as the present and the future if the father's involvement was not as intense as the appellant wanted, or considered that it should have been, the opportunity for the father to do so is now, that is, through shared custody."

The Supreme Court recognises in its ruling of 29 November 2013 that the relationship between the parents is not a crucial factor in the application of this custody regime, and the fundamental thing is always to ensure the child's best interest: "*The relationship between spouses alone are neither relevant nor irrelevant to determine shared custody. They only become relevant when they affect, detrimentally, the interest of the minor*".

Shared custody is becoming the rule on a child's arrangements at court, and the burden of proof that it is not in the child's best interest lies in the party that applies for sole custody.

In this sense, the clear exception to the rule for shared custody is that a parent is involved in a criminal investigation for domestic violence or abuse as set out in Articles 94, 4 and 97,2 of the Civil Code:

Article 94.4 of the Civil Code: "*The establishment of a visitation or stay regime will not proceed, and if it exists, it will be suspended, with respect to the parent who is involved in a criminal process initiated for attacking the life, physical integrity, freedom, moral integrity or sexual freedom and indemnity of the other spouse or their children. It will also not proceed when the judicial authority notices, from the allegations of the parties and the evidence produced, the existence of well-founded indications of domestic or gender violence. However, the judicial authority may establish a visitation, communication or stay regime in a resolution motivated by the best interest of the minor and after evaluating the situation of the parent-child relationship."*

Article 92. 7 of the Civil Code: *"Joint custody will not apply when one of the parents is involved in a criminal process initiated for attempting to attack the life, physical integrity, freedom, moral integrity or sexual freedom and indemnity of the other spouse or the children. It will also not apply when the judge notes, from the allegations of the parties and the evidence produced, the existence of well-founded indications of domestic or gender violence. For these purposes, the existence of mistreatment of animals, or the threat of causing it, will also be considered as a form of controlling or victimising any of these people."*

UAE

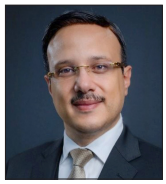
Law and Practice

Contributed by:
Hassan Elhais
Awatif Mohammad Shoqi Advocates & Legal Consultancy

Contents

Awatif Mohammad Shoqi Advocates & Legal Consultancy is a full-service law firm licensed to provide legal advice and advocacy services in all courts of the UAE. Its legal team consists of diverse, experienced legal practitioners who show a high degree of professionalism and dedication. The team's strong grasp of local laws, including family law, criminal and civil law, commercial and corporate law, maritime, banking and arbitration law, give it an edge in providing practical legal advice and committed legal representation. Awatif Mohammad Shoqi Advocates & Legal Consultancy has established a dedicated portal that offers legal information in the form of articles and case studies that are accessible to all individuals. The firm is specialised in divorce and family law, and is often asked to provide expert written advice on Sharia and UAE law matters in international court proceedings.

Author



Hassan Elhais has over 18 years' experience as a legal consultant at Awatif Mohammad Shoqi Advocates & Legal Consultancy, and has worked in many practice areas, including family law, criminal law, arbitration, inheritance law, and civil and corporate law. Dr Elhais specialises in drafting legal documents and legal opinions for clients, and regularly advises expatriates living in the UAE on UAE family law and cross-border issues, including enforceability of foreign financial awards and the international movement of children. He is also a regular contributor to major local and international newspapers and magazines.

Awatif Mohammad Shoqi Advocates & Legal Consultancy

29th Floor, 2901
H Hotel Office Tower
P.O. Box 40073
Sheikh Zayed Road
Dubai
United Arab Emirates

Tel: + 971 4 355 8000
Fax: + 971 4 358 9494
Email: info@alrowaad.ae
Web: www.alrowaad.ae

1. Divorce

1.1 Grounds, Timeline, Service and Process

Grounds for Divorce

Matters of personal status in the UAE are governed by Federal Law No 28 of 2005 on Personal Status (applicable until 15 April 2025 for Muslims), which regulates personal status matters for Muslims in the UAE; Federal Decree-Law No 41 of 2022 on Civil Personal Status, which governs personal status matters for non-Muslims in the UAE except Abu Dhabi; and Abu Dhabi Law No 14 of 2021 on Civil Marriage and its Effects in Abu Dhabi, which governs personal status matters in Abu Dhabi for non-Muslim citizens and expatriates who are citizens of a country that does not apply Sharia law principles in personal status matters.

Civil partnership and same-sex marriages are not recognised in the UAE.

According to Federal Law No 28/2005 on Personal Status (applicable until 15 April 2025 for Muslims), divorce is defined as the termination of the marriage contract, which can be initiated by the husband. However, a wife may also seek divorce under specific circumstances, such as those stipulated in the marriage contract, or if grounds of "harm" exist, such as fraud, sexual defects, non-payment of dowry, financial neglect, imprisonment or desertion.

After the divorce, the wife must undergo a waiting period, *idda*, which lasts approximately three months, to determine if she is pregnant. If she is pregnant, the waiting period extends until the child's birth. During this time, the husband is responsible for the wife's expenses. The period of *idda* also provides an opportunity for both parties to reconsider their decision about divorce.

The UAE has also introduced Federal Decree-Law No 41 of 2024 on Personal Status Law (applicable from 16 April 2025 for Muslims) to replace Federal Law No 28/2005 on Personal Status. This new law has made significant changes to both the custody of children and the financial rights of wives.

Federal Decree-Law No 41 of 2022, introduced on 1 February 2023, follows the provisions of previously enacted Abu Dhabi Law No 14 of 2021 on Civil Marriage and its Effects in the Emirate.

Both Federal Decree-Law No 41 of 2022 (applicable for non-Muslims in all Emirates except Abu Dhabi) and Abu Dhabi Law No 14 of 2021 (applicable for non-Muslims in Abu Dhabi) have introduced a no-fault divorce system. Under these laws, neither the husband nor the wife needs to provide reasons for the divorce. This law exempts parties from mandatory mediation. Unlike Federal Law No 28/2005 (applicable until 15 April 2025 for Muslims), there is no obligatory waiting period for the wife, and the divorce becomes effective with the court's judgment.

Process and Timeline for Divorce

There is no mandatory separation period under UAE law. In accordance with Federal Law No 28/2005 on Personal Status (applicable until 15 April 2025 for Muslims), before bringing the case to the family courts, spouses are instructed to undergo mandatory mediation with the Family Guidance department. If the parties reach an agreement on mutual divorce, then a settlement agreement can be certified at this stage. This agreement is then annexed to the divorce judgement. For a mutual divorce, the first step in the process includes an application to be filed before the family guidance committee of the respective emirate where the parties are residing. Family

Guidance receives the application and assigns a counsellor to the case. The role of the counsellor is that of an independent mediator – to try to resolve the disputes and issues raised by the parties. When the parties wish to enter into a mutual divorce, the Family Guidance department confirms the consent of both the parties and facilitate the steps for signing the terms of the settlement agreement, which finalises the divorce.

If any party does not agree to enter into a mutual divorce, then they may request that the Family Guidance department provide them with a referral letter in order to approach the family court.

In accordance with new Federal Decree-Law No 41 of 2024 (applicable from 16 April 2025 for Muslims), the case must be submitted to the court, which will then decide if it needs to be submitted to Family Guidance.

Expatriates and citizens subject to Federal Decree-Law No 41 of 2022 (applicable for non-Muslims in all Emirates except Abu Dhabi) and Abu Dhabi Law No 14 of 2021 (applicable for non-Muslims in Abu Dhabi) have the option to file for divorce by unilateral decision. A no-fault divorce could be granted to either party at the first court hearing without having to give any reason for the divorce.

Rules for Service of Divorce Proceedings

There are no specific procedural rules, particularly for the service of divorce proceedings in the UAE. The rules governing civil procedures in the UAE are also applicable for divorce proceedings. These rules are codified under Federal Decree-Law No 42/2022 on the Promulgation of Civil Procedure Law. At the time of registration of the lawsuit, the applicant has to provide the contact details of the opposing party. Once the lawsuit is registered, the court notifies the respondent.

Service is carried out by the court via email, SMS, phone, or delivery by a court clerk. If the respondent is unavailable, and in exceptional scenarios, the court may authorise advertisement in the newspaper or posting on the respondent's door.

Treatment of Religious Marriages and Divorces

Muslims in the UAE may marry before a marriage officer of the Sharia courts in the relevant emirate. Non-Muslims in the UAE may marry in accordance with their rituals and request their embassy to certify their marriage document. They may also choose to marry under Federal Civil Personal Status Law and Abu Dhabi Civil Personal Status Law. If the marriage was concluded outside the UAE, it should be certified by the UAE embassy in the country where the marriage took place.

The applicable law and the competent courts to decide on divorce and related matters will be based on various factors, including the residence of the parties, the place of marriage, the religion of the parties, and the nationality of the parties.

Other Processes (Annulment, Judicial Separation)

The UAE does not have any concept of judicial separation.

Either party may file a case before the competent family court (without going to the Family Guidance department) to request that the court annul the marriage. The court may enquire into various matters before issuing a decision on the validity of the marriage – eg, whether the mar-

riage was valid in the law of the place where it was concluded, or whether it goes against public policy. If the court finds that the marriage between the parties is invalid, it may proceed with an annulment.

1.2 Choice of Jurisdiction

Jurisdictional Grounds

Civil partnership and same-sex marriages are not recognised in the UAE.

In accordance with Article 5 of Federal Law No 28/2005 on Personal Status (applicable until 15 April 2025 for Muslims), the UAE courts shall have jurisdiction on family matters where the defendant is either a citizen or a resident of the UAE. Even if the respondent is not a UAE resident, the UAE courts could have jurisdiction in accordance with Article 6 of Federal Law No 28/2005 when the scenario concerns:

- a marriage (or opposition thereto) to be carried out the state;
- divorce from a husband who is or was domiciled in the UAE;
- children's or wives' expenses if they are domiciled in or their workplace is in the UAE;
- guardianship of UAE-domiciled child;
- a family dispute against someone who has no known domicile or residence;
- more than one respondent, one of whom is UAE-domiciled; or
- a respondent choosing to define the UAE as their domicile.

This provision has not been significantly amended in new Federal Decree-Law No 41 of 2024 (applicable from 16 April 2025 for Muslims).

According to Abu Dhabi Law No 14/2021 on Civil Marriage and its Effects in the Emirate of Abu Dhabi and Executive Regulation No 8 of 2022 (applicable for non-Muslims in Abu Dhabi), Abu Dhabi Courts shall have jurisdiction:

- when both the expats are residents of Abu Dhabi or have an existing or previous working address there;
- if the respondent's civil marriage was concluded in Abu Dhabi, even if they did not work or have an address there;
- if the respondent has chosen to live in Abu Dhabi or if the claimant has employment or a home in Abu Dhabi;
- if the child of a marriage is based in Abu Dhabi; or
- if the claimant is based in Abu Dhabi and the respondent's location is unknown.

Domicile, Residence and Nationality

In general, the Court of First Instance (the lowest tier of court) has jurisdiction over family cases filed against citizens or foreigners who are domiciled or resident in the UAE (in accordance with Article 5 of Federal Law No 28/2005 on Personal Status, which is applicable until 15 April 2025 for Muslims). Domicile is defined as a place where an individual resides, and which the individual considers to be their long-term home. Residence can be more temporary than domicile. In practice, a party would be seen to be domiciled or resident in the UAE for jurisdiction purposes if they are living in the UAE and holding an appropriate resident visa.

The jurisdiction of the UAE courts is public policy, and, therefore, the trial courts have the discretion to review the facts of cases to establish whether they have jurisdiction. If none of the criteria to establish jurisdiction in the relevant personal status laws or the civil procedures laws are satisfied, a party may contest the maintainability of their case on jurisdictional grounds.

If there are proceedings ongoing in another country, such proceedings may not suspend those of the UAE courts as long as there is no final judgment from the foreign courts.

2. Financial Proceedings

2.1 Choice of Jurisdiction

There are no separate jurisdictional grounds to commence financial proceedings in the UAE. The jurisdictional grounds for divorce mentioned in **1.2 Choice of Jurisdiction** shall also apply for financial claims.

Similar to divorce proceedings, if none of the criteria to establish jurisdiction in the relevant personal status laws or the civil procedures laws are satisfied, then a party may contest the maintainability of the case on jurisdictional grounds.

Also similar to divorce proceedings, if there are ongoing proceedings in another country, such proceedings cannot suspend UAE court proceedings as long as there is no final judgment from the foreign courts. If the UAE courts have jurisdiction on the dispute, then the courts will review the financial claims made on the basis of the facts and merits of the case, even if such claims were made after a foreign divorce.

2.2 Service and Process

There are no specific procedural rules, particularly for service of financial proceedings in the UAE. The rules governing civil procedures in the UAE also apply for financial proceedings. These rules are codified under Federal Decree-Law No 42/2022 on the Promulgation of the Civil Procedure Law. At the time of registration of the lawsuit, the applicant has to provide the contact details of the opposing party. Once the lawsuit is registered, the court informs the respondent. Service is carried out by the court via email, SMS, phone, or delivery by a court clerk. If the respondent is unavailable, and in exceptional scenarios, the court may authorise advertisement in the newspaper or posting on the respondent's door.

2.3 Division of Assets

There is no concept of a property regime or division of assets in the UAE. Under UAE Law, title determines asset ownership. Accordingly, whether acquired before or during the marriage, each spouse would maintain their own assets after divorce if acquired in their name. However, if a spouse shows that they helped purchase a property, they would be entitled to seek their share of that property from the other party.

In accordance with Federal Decree-Law No 31/2023 Concerning Trust, the competent court, as described in civil procedures law, has jurisdiction in the UAE over matters regarding trust.

There is no mandatory disclosure process in the UAE. However, in accordance with Abu Dhabi Law No 14 of 2021 (applicable for non-Muslims in Abu Dhabi), disclosure is voluntary before the Abu Dhabi Civil Family Court.

The requesting party needs to apply for the court to investigate the assets of the other party with the relevant departments, banks, and other authorities to establish the other party's financial position before the court, and to support their financial claims.

2.4 Spousal Maintenance

Article 63 of Federal Law No 28/2005 on Personal Status (applicable until 15 April 2025 for Muslims) provides that a husband is obliged to cover maintenance expenses such as food, clothing, accommodation, medical treatment, domestic

help, and all such amenities and conveniences necessary and suitable for a married couple. The above law protects a wife's right to claim maintenance, particularly if she does not have the means to support herself. However, there are no current provisions under UAE law for a husband to claim spousal support from the wife.

Interim Maintenance Pending Divorce

Article 68 of Federal Law No 28/2005 on Personal Status (applicable until 15 April 2025 for Muslims) provides that a wife can request temporary maintenance. There is also a provision for temporary maintenance under Federal Decree-Law No 41/2022 on Civil Personal Status (applicable for non-Muslims in all Emirates except Abu Dhabi) and Abu Dhabi Law No 14/2021 on Civil Marriage and its Effects, in the Emirate of Abu Dhabi (applicable for non-Muslims in Abu Dhabi). The petition for temporary maintenance can be submitted by the wife before the urgent matters court. While deciding on the petition, this court may review the wife's economic situation.

Further interim maintenance could be decided by the substantive court while the case is ongoing. In practice, a party may request this during proceedings before the substantive court.

Under Federal Law No 28/2005 on Personal Status (applicable until 15 April 2025 for Muslims), a wife is entitled to maintenance support during *iddah*, which could correspond to three menstrual cycles or three months, and could extend to the birth of a child if the wife is pregnant. The quantum of maintenance shall be subject to the husband's financial ability, and should match the current situation. If the husband divorces the wife without her consent, the wife is entitled to compensation for up to one year of her maintenance expenses. Moreover, if, during the marriage, the husband has refused to support the wife, the wife can claim reimbursement of backdated expenses. Under Federal Law No 28/2005, the period for reclaiming expenses was up to three years, but new Federal Decree-Law No 41 of 2024 on Personal Status (applicable from 16 April 2025 for Muslims) changes it to two years.

This provision was not significantly amended by Federal Decree-Law No 41 of 2024 (applicable from 16 April 2025 for Muslims).

Article 9 of Federal Decree-Law No 41 of 2022 on Civil Personal Status (applicable for non-Muslims in all Emirates except for Abu Dhabi) provides that a woman can apply to the court for alimony from her husband upon divorce based on certain factors, such as the duration of the marriage, her age, the financial conditions of the couple, the extent of the husband's contribution to the divorce, physical or moral harm caused to either party as a result of the divorce, financial damage incurred by either party due to the other party's decision to divorce, the presence of children, and whether the wife wishes to raise them. The total amount of alimony and its frequency may vary depending on the facts of each case. This amount could be one lump sum payment or a monthly payment for a certain period of time, decided by the court.

Abu Dhabi Law No 14/2021 on Civil Marriage and its Effects (applicable for non-Muslims in Abu Dhabi) provides for additional financial rights for women upon divorce. The court may consider the following standards to calculate the financial rights: i) a minimum of 25% of the last salary multiplied by the number of years in the marriage; ii) a percentage of the market value of the husband's assets, including, and not limited to, real estate, shares and company stock, jointly-owned assets and the parties' contribu-

tion in them. The court has the right to order the husband to make these payments in one lump sum or in instalments to ensure full settlement.

2.5 Prenuptial and Postnuptial Agreements

If a Muslim marries through an Islamic ceremony, they may have signed a marriage contract (*nikah*). This contract includes the provision of money or assets to the wife at the time of marriage, divorce, or the husband's death, which is why it is sometimes compared to a prenuptial agreement. However, these are two different contracts, one being concluded before the marriage and the other at the time of the marriage.

A prenuptial agreement should be re-signed after marriage and should not contain any clauses that would be in opposition to Sharia, public order, or morals in the UAE in order to ensure its enforceability in the UAE.

In the UAE, there is no concept of a prenuptial agreement. Where such agreements are drafted in other jurisdictions, they are unlikely to be enforced by the UAE courts, especially when the agreement is on matters related to children. They may be taken into consideration in the absence of an agreement on the conditions or controls of such alimony or other financial claims in the marriage contract, according to Article 9 of Federal Law 41 of 2022, which is applicable in all Emirates other than Abu Dhabi.

Article 13 of Federal Law No 5/1985 on Civil Transactions Law in the United Arab Emirates State provides that personal and financial issues, including divorce, shall be governed in accordance with the laws of the country where the parties were married. Therefore, theoretically, the court may consider the application of the laws of the country where the parties were married in accordance with Article 13 of Civil Transaction Law in determining the validity and subsequent enforceability of prenuptial agreements.

It is important to note that the courts have the discretionary powers to accept or reject any request in relation to the application of foreign laws based on the merits of individual cases. However, if any party is a dual national, the court may reject the application of foreign law in accordance with Article 24 of the Civil Transaction Law.

The UAE has implemented extensive legal structures for non-Muslim citizens and residents seeking civil marriages, as specified under Federal Decree-Law No 41/2022 on Civil Personal Status (applicable for non-Muslims in all Emirates except Abu Dhabi) and Abu Dhabi Law No 14/2021 on Civil Marriage and its Effects, in the Emirate of Abu Dhabi (applicable for non-Muslims in Abu Dhabi).

Under these laws, spouses can agree on contract conditions, considering rights during marriage and post-divorce. It is not mandatory to submit a marriage or pre-nuptial agreement, but it is permissible to do so.

To ensure compliance with the terms of the prenuptial agreement, it is advisable that the parties enter into a post-nuptial agreement signed before the Family Guidance department that is located within the premises of the Family Courts. They may execute the agreement on any date after the marriage, even on the day following the marriage.

2.6 Cohabitation

While cohabitation is legal in the UAE, the parties do not acquire rights against one another

similar to those acquired by spouses in a marital relationship.

In the case of children resulting from cohabitation, and if paternity is established, child support can be claimed from the father.

2.7 Enforcement

In the UAE, after a judgement is obtained, the judgement creditor – ie, the party benefiting from the judgement, has to file an execution case before the execution court. Upon registration and acceptance of the execution case, the execution court notifies the respondent, who is the judgement debtor, to pay the sums mentioned in the execution case within a specific time, usually seven days from the date of receiving the execution case notification. If the respondent does not comply with the execution case notice, the execution applicant can submit petitions to the execution judge to enforce the judgement. The petitions can take the form of, among other things, requests to attach and transfer funds based on investigations via the central bank; investigations and attachment of the respondent's file to block any transactions with departments such as the road transport authority, the Land Department, and the Department of Economics and Development; and requests for a travel ban against the respondent. In most cases, an arrest warrant could be issued against the respondent.

Federal Decree-Law No 42/2022 on the Promulgation of Civil Procedure Law lays down rules and regulations for enforcing foreign court orders or judgments in the UAE. Article 222 states that a petition must be submitted to the court by the party seeking an execution order for it to be enforced in the United Arab Emirates. When evaluating the application, the court will consider whether the foreign court that issued the order had the right to deliver it, and whether the UAE courts are the only courts with the power to hear the dispute. It will be confirmed whether the foreign court's order was made in compliance with the laws of the nation in which it was issued and legally ratified. The UAE courts will consider whether or not all parties involved in the claim for which the foreign order was made were duly summoned to appear. Additionally, it must be confirmed that the foreign order has obtained res judicata status, does not contradict a prior ruling or order of the UAE court, and does not violate UAE morals or public order. The judge has five days from the date the petition was submitted to render a decision. According to the judge's ruling, an appeal may also be made against the ruling. However, as long as the appellate courts do not decide to suspend enforcement, the filing of such an appeal by itself will not prevent enforcement.

2.8 Media Access and Transparency

The media can report on family cases for education purposes as long as confidential information regarding the parties is not disclosed and the court has not specifically ruled against the publication of the details of the judgement.

2.9 Alternative Dispute Resolution (ADR)

The conditions of a settlement agreement may be agreed upon by the parties. This agreement must outline the terms of the financial arrangement, as well as any other terms and conditions that the parties have agreed upon as a result of the marriage and divorce, such as guardianship rights, custody rights, travel, relocation, expenses for the children, spousal alimony and property division.

In order to execute a mutual divorce settlement agreement with the family court, one of the parties must open a file with the Family Guidance department. The department schedules a hear-

ing with one of its mediators. Since the purpose of this file with the department is to explore the possibility of a mutual divorce agreement, the parties may inform the mediator that they have agreed on certain terms for divorce settlement and that they would like to sign the agreement. Accordingly, the mediator may schedule another hearing where both parties may need to attend the hearing to sign the document. If the parties fail to reach an agreement, the department will issue a Non-Objection Certificate, which gives the parties the right to apply to the court for their claims, such as divorce, maintenance, custody, and visitation. Whereas Muslim couples mandatorily need to go through the family guidance department for divorce, for non-Muslims, divorce takes place during the first session upon registration of the lawsuit before the court, without the need to refer the case for family guidance. Non-Muslims still need to go through the family guidance process for other claims, such as maintenance.

If disputes arise once the agreement is signed, execution proceedings can be directly started pursuant to the agreement terms.

Federal law No 28 of 2005 on Personal Status (applicable until 15 April 2025 for Muslims) made it mandatory to submit any divorce, custody or maintenance claim to the Family Guidance Department. However, in accordance with Federal Decree-Law No 41 of 2024, effective from 16 April 2025, cases must be submitted to the court, which will then decide whether the case needs to go to family guidance. The new law may be applied to ongoing cases in the court that have not received a final order.

3. Child Law

3.1 Choice of Jurisdiction

There are no separate jurisdictional grounds for commencement of proceedings applicable to children in the UAE. The jurisdictional grounds for divorce mentioned in **1.2 Choice of Jurisdiction** will also apply. The concept of domicile explained in **1.2 Choice of Jurisdiction** also applies for children.

3.2 Living/Contact Arrangements and Child Maintenance

In accordance with Federal Law No 28 of 2005 on Personal Status (applicable until 15 April 2025 for Muslims), when family disputes arise, the mother has custody of the children. Custody is taken to mean to keep a child safe, provide care, and manage daily needs. However, the right to manage a child's affairs, such as education and travel, is granted to the guardian of the child. Custody is the physical safekeeping of the child ("physical" custody) whereas a guardianship is the legal or moral custody of the child. Previously, Article 148 of Federal law No 28 of 2005 stated that the responsibility for the health, property and education of a child must fall on the child's father.

The law was amended in October 2023 to grant responsibility for a child's education (educational guardianship) to the mother, considering this to be is in the child's best interests. If disagreements arise about what is best for the child, the parents can approach the Urgent Matters judge, who will decide after considering the guardian's financial situation (while preserving the educational guardianship of the mother).

Federal law No 28 of 2005 on Personal Status (applicable until 15 April 2025 for Muslims) considers that the mother is the natural custodian of

the child or children. When there are no circumstances affecting the interests of the child, the father can only claim custody from the mother when a boy turns 11 years old and a girl turns 13. The courts generally always consider the best interests of the child in custody matters. If the mother is considered the custodian, which happens in most cases, then she can claim child support.

In accordance with new Federal Decree Law No 41 of 2024, which is effective from 16 April 2025 and will replace Federal law No 28 of 2005 on Personal Status, the custody age now ends at 18, regardless of the child's gender, and the child has the right to choose between the parents at the age of 15, subject to the child's best interests.

Federal Decree Law No 41 of 2022 (applicable for non-Muslims in all Emirates except Abu Dhabi) and Abu Dhabi Law No 14 of 2021 on Civil Marriage and its Effects in Abu Dhabi (applicable for non-Muslims in Abu Dhabi) provide for custody to be shared between the parents, with Federal Decree-Law No 41 of 2022 (applicable for non-Muslims in all Emirates except Abu Dhabi) providing for joint custody until the age of 18 and Abu Dhabi Law No 14 of 2021 (applicable for non-Muslims in Abu Dhabi) providing joint custody until the age of 16. However, joint custody can be reconsidered if one parent poses a threat to the child or fails to fulfil their custodial duties. In such cases, the court can modify custody arrangements, always prioritising the child's best interests. When parents disagree on custody matters, either one can submit an application to the court for resolution, ensuring that the child's best interests are the primary consideration. Either parent may request removal of the other from the joint custody arrangement, temporarily or permanently, for reasons such as risk of the child/children in custody being exposed to domestic violence or abuse, unsatisfactory living conditions provided by the joint custodian to the child/children, the joint custodian having behavioural or psychological problems that would cause harm or expose a child to risk or neglect, commission of a crime by the joint custodian, preventing them from carrying out their duties or resulting in them posing a threat to the child in custody; abuse of drugs, alcohol, or any psychotropic substances; other health reasons preventing the joint custodian from carrying out their duties towards the child in their custody, or any other reasons determined by the competent court. It is important to note that, in custody matters, the court maintains discretionary power to make a decision on the basis of natural justice and best practice in personal status matters internationally.

The non-custodial parent may request visitation to meet with the child in custody with the other parent. The age of the child and the child's best interests must be the primary factors determining the visitation rights to be granted to the non-custodial parent. Visits could correspond to online as well as physical meetings. The visitation schedule, such as the number of hours in a day and the number of days per week, is decided by the court based on the child's age, best interests, and the facts of the case. Moreover, based on these factors, the court could also decide on whether the non-custodial parent may be allowed to accompany the child on trips away from the custodian parent, and stay overnight with the child.

At the beginning of 2021, Dubai Decision No 3 of 2021 set down visitation rights for non-custodial parents. However, this decision was issued for guidance purposes, and was not mandatory, and also only concerned the Emirate of Dubai.

As per Federal law No 28 of 2005 on Personal Status (applicable until 15 April 2025 for Muslims), the father has to financially support a son until he finishes his education and must support a daughter until she is married.

New Federal Decree Law No 41 of 2024, which is effective from 16 April 2025 and will replace Federal law No 28 of 2005 on Personal Status, provides that a daughter must be supported by her father until she marries or begins working.

Federal law No 28 of 2005 on Personal Status (applicable until 15 April 2025 for Muslims) provides that fathers must support their children after divorce; this support includes all aspects of maintenance, such as education, accommodation and healthcare. Maintenance is decided by the court, taking into account the financial capacity of the father and the needs and requirements of the children. The court has discretionary power to estimate the support due from the father to the children. Dubai Decision No 3 of 2021 sets down the maintenance amount. However, this decision was issued for guidance purposes, and was not mandatory, and also only concerned the Emirate of Dubai.

Federal Decree-Law No 41 of 2022 (applicable for non-Muslims in all Emirates except for Abu Dhabi) and Abu Dhabi Law No 14 of 2021 on Civil Marriage and its Effects in Abu Dhabi (applicable for non-Muslims in Abu Dhabi), provide for equal treatment of spouses, who are granted joint-custody rights. The court may increase or reduce maintenance amounts based on a court expert's report concerning the financial situation of the parties to ensure a decent living for the children. Moreover, the court may completely or partially exempt the father from paying an accommodation allowance if the mother is financially able to provide decent accommodation for the children during the joint-custody period. The evaluation of the parties' economic situations is subject to the discretion of the court.

The child support order will be in place while the custodial parent has the child in their custody. Either party may approach the court to increase or reduce the child support order based on new circumstances. The child can personally claim child support payments after the age of eighteen in the Emirate of Dubai; in other Emirates, this age increases to 21 at the time of publication of this piece (February 2025).

3.3 Other Matters

In accordance with Federal law No 28 of 2005 on Personal Status (applicable until 15 April 2025 for Muslims), the education guardianship of children shall be with the mother, but if the father considers that the best interests of the child are being compromised, he may approach the court to review the issue. A decision will be made on any dispute between the parents regarding the child's schooling. This law provides the father with the right to make decisions regarding the child's health and property. Likewise, if the mother believes that the child's best interests are being compromised, she may seek the court's intervention. If the mother wishes to travel with the child on a short trip but the father refuses to provide consent, the mother will have the right to raise a request with the family court for permission to travel with the child. The court will issue a decision based on the best interests of the child.

New Federal Decree-Law No 41 of 2024 (applicable from 16 April 2025 for Muslims) that replaces Federal law No 28 of 2005 on Personal Status provides that both the mother and the father have the right to travel alone with the child on one or more occasions per year, provided that the total travel period does not exceed 60 days

for either parent. The parents may travel after providing a proper guarantee to the other parent and that, if the latter objects, they will seek a decision from the court. The law gives both parents the right to request an extension of the 60-day period if it is in the best interests of the child, or in cases where medical treatment is required, or for any other reason accepted by the court.

Federal Decree-Law No 41 of 2022 (applicable for non-Muslims in all Emirates except Abu Dhabi) and Abu Dhabi Law No 14 of 2021 on Civil Marriage and its Effects in Abu Dhabi (applicable for non-Muslims in Abu Dhabi) give joint custody to the parents. Therefore, if the parents do not agree over any of the joint custody matters, either of them has the right to submit a request to the competent court to intervene and decide upon the disputed issue. The court will have the discretion to decide on these matters based on the best interests of the child and will endeavour, as far as possible, to maintain the stability of the child's education and sports life.

Within the joint custody period, if the joint custodian is unable to travel alone with the child because the other parent has refused to provide their consent, then the requesting parent may approach the court for a decision on this matter. The request will be subject to the court's discretion.

UAE laws prohibit parental alienation or the distancing of the children from one parent. Federal Law No 3/2016 on Child's Rights (also known as Wadeema's Law) provides that the child shall have the right to meet with their parents and maintain direct contact with them. If one parent has sole custody of the child, and if they breach the non-custodial parent's visitation rights, then the execution judge has the discretion to enforce these rights by ordering penalties/a fine or detention. The judge may also prepare a report indicating the number of times the custodian has breached the visitation contract, with the time and date of each breach. This report could be used by the other parent to claim custody at a later stage.

The testimony of children is not directly heard by the judge. The court may appoint a social worker to meet with the children and prepare a report for the court's review and consideration.

3.4 ADR

Please see **2.9 Alternative Dispute Resolution**.

3.5 Media Access and Transparency

Please see **2.8 Media Access and Transparency**.The media may publish content for educational purposes as long as confidential information regarding the parties is not disclosed and the court has not specifically ruled against the publication of the details of the judgement.

USA – ARKANSAS

Law and Practice

Contributed by:
Kathleen Egan, Hannah Lange and Aaron Bundy
Bundy Law

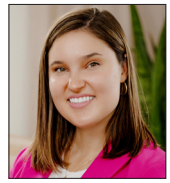
Contents

Bundy Law is a regional law firm covering Arkansas, Missouri, and Oklahoma, with a primary focus on family law matters in trial and appellate courts. Its attorneys are adept at handling fast-paced, complex cases ranging from jurisdictional contests to business valuation disputes. Known for their expertise and track record of success in high-value divorces and contentious child custody cases, the attorneys excel in negotiation and advocacy work for high-net-worth and ultra-high-net-worth individuals. Bundy Law has a firm culture that promotes consistent, clear communication and responsiveness with clients and co-counsel, and it has implemented a powerful, sophisticated software infrastructure to support its high-touch service model.

Authors

Kathleen Egan is a partner at Bundy Law and is an accomplished family lawyer with a diverse set of remarkable skills. A poised, compelling trial lawyer, she is also excellent at research and writing. Kathleen has obtained extraordinary results as a result of her advocacy both at trial and on appeal. As a fellow of the American Academy of Family Lawyers, she is certified to mediate complex divorce and child custody disputes. Kathleen is licensed to practice law in Oklahoma, Arkansas, and New York.

Aaron Bundy is the founding partner at Bundy Law and is a trial lawyer who practises law in Oklahoma, Arkansas and Missouri. A fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers, he represents individuals who are involved in contested family law disputes at private negotiation and trial.



Hannah Lange is based in Bundy Law's Bentonville office and practises family law in Arkansas, Oklahoma, and Missouri. She has a strong foundation in family law, having received training at the National Family Law Trial Institute and the National Criminal Defense College. Hannah has experience working across the full range of divorce and child custody cases, from defending parental rights in state-prosecuted juvenile deprived cases and private adoptions to spousal support claims and business valuation disputes. She also has a proven ability to quickly grasp complex legal issues and identify what matters for optimal case resolution.

Bundy Law

240 South Main Street
Suite 280
Bentonville
AR 72712
USA

Tel: +1 479 579 2121
Fax: +1 918 512 4998
Email: info@bundy.law
Web: www.bundylawoffice.com

1. Divorce

1.1 Grounds, Timeline, Service and Process

In Arkansas, there are multiple grounds for divorce under Section 9-12-301 of the Arkansas Code Annotated. These grounds can include, but are not limited to:

- a felony conviction for either party;
- living separate and apart for 18 continuous months without the benefit of cohabitation;
- habitual drunkenness for one year or more; and
- committing indignities against the other party so as to make their life in the marriage intolerable.

At the time of writing (January 2025), there are no separate dissolution procedures in the Arkansas Code Annotated for same-sex spouses.

Arkansas does not have a period of separation requirement unless the parties intend to file under the 18-month separation section of Section 9-12-301(b)(5). There is a mandatory 30-day waiting period before a divorce can be finalised after the date the complaint for divorce is filed. Even if all parties are in agreement as to the split of their assets, custody arrangement, and any other considerations, a judge will not grant a final divorce until after the 30-day waiting period has expired (Section 9-12-307(a)(1)(B) of the Arkansas Code Annotated).

Service of divorce actions in Arkansas is governed by Rule 4 of the Arkansas Rules of Civil Procedure. A summons must be issued to the defendant and be "styled in the name of the court and issued under its seal, dated and signed by the clerk or a deputy clerk, and directed from the State of Arkansas to the defendant to be served". The summons must also direct the defendant on the parties involved in the lawsuit, the timeline of response, the name and address of the plaintiff's attorney (if applicable – if not applicable, then the name and address of the plaintiff), and notice that failure to respond within the time could result in a judgment by default.

Following the issuance of a summons, the summons and a file-marked copy of the complaint must be served upon the defendant. This service can be by the sheriff of the county where the service is to be performed, a professional process server, other personal service pursuant

to Administrative Order No 20, or by alternative delivery of certified mail, first-class mail, or delivery service in particular circumstances (Rule 4 of the Arkansas Rules of Civil Procedure). There is a strong preference for personal service.

Annulments in Arkansas are available in limited circumstances, as laid out in Section 9-12-201 of the Arkansas Code Annotated. These circumstances include one or both of the parties being below the age of legal marriage (18 years of age without parental consent), one or both of the parties was unable to comprehend the marriage owing to mental incapacity or other incapacity, one or both of the parties were unable to physically consummate the marriage, or one or both of the parties were forced into the marriage or convinced to agree by fraud or other deception.

1.2 Choice of Jurisdiction

The jurisdiction of divorce proceedings in Arkansas falls under Section 9-12-303 et seq of the Arkansas Code Annotated. A divorce may be filed in the county in which the plaintiff resides. If the plaintiff is not a resident of the State of Arkansas, and the defendant is, the plaintiff may file the matter in the county in which the defendant resides. To meet the residency requirements for divorce in Arkansas, either the Plaintiff or the Defendant must be a resident of the state for at least 60 days preceding the filing of the action and continue living in the state for 30 days after the filing of the action, for a total of 90 days of residency before the final divorce can be granted. At the time of writing (January 2025), there are no separate jurisdictional requirements in the Arkansas Code Annotated for same-sex spouses.

In Arkansas, domicile and residence are distinct concepts (Rule 2.26-51-102(9) of the Arkansas Administrative Code). Based on Arkansas tax regulations, there is a three-prong test, and satisfaction of any one prong is sufficient to establish a party's residency in Arkansas.

- Any person domiciled in the State of Arkansas – domicile comprises an act coupled with an intent. A domicile is acquired by physical presence at a place coinciding with the state of mind (ie, intent) of regarding the place as a permanent home. A domicile arises instantaneously when these two facts occur. Every person must have one domicile but can have no more than one domicile, regardless of how many residences a person may have at any given time. A domicile, once established, continues until a new domicile of choice is legally established. An established domicile does not end by lack of physical presence alone nor by mental intent alone. The old domicile must be abandoned with the intention not to return to it. If one moves to a new location but intends to stay there only for a limited period of time (no matter how long), the domicile does not become the new location but rather remains unchanged.
- Any person who maintains a permanent place of abode within Arkansas and spends in the aggregate more than six months of the year within Arkansas – place of abode means a place where a person has established a permanent home, even though such person may be absent therefrom for a long period of time. A temporary home or residence would not be considered a place of abode, as there must be at least some degree of permanence. In addition, a person must actually spend more than six months of the tax year in Arkansas to fall within the scope of this provision.

Place of abode and residence are considered to mean roughly the same thing. However, domicile and residence are not considered to be synony-

mous. Residence denotes only an act (the act of residing), whereas domicile denotes an act (the act of residing) coupled with the intent that the residence be a permanent home. The distinction between domicile and place of abode is that, while a person can have several homes (or places of abode) at one time, only one of those homes can be the person's domicile. The home that the person intends or considers to be their permanent home (as in home base) would be the domicile.

- In situations where it is not clear if the requirements either of domicile or place of abode have been met, a residency determination can only be made after thoroughly reviewing the facts on a case-by-case basis.

If a party believes jurisdiction does not lie within the county in which the case was filed, that party is free to contest jurisdiction under Section 9-12-303 of the Arkansas Code Annotated.

A party to a matter involving child custody may request a stay in certain circumstances. A trial court's decision on a motion to stay is within the court's sound discretion.

2. Financial Proceedings

2.1 Choice of Jurisdiction

Jurisdiction for actions for alimony or spousal support in Arkansas is governed under Section 9-12-303 of the Arkansas Code Annotated, just as in divorce actions. If a party believes jurisdiction does not lie within the county in which the case was filed, that party is free to contest jurisdiction under Section 9-12-303 of the Arkansas Code Annotated.

A financial support proceeding under the Uniform Interstate Family Support Act may be stayed if there is a simultaneous proceeding in another court upon the timely, proper challenge of jurisdiction in Arkansas.

Arkansas courts may hear financial claims after a foreign divorce if the foreign divorce court did not have personal jurisdiction over the requesting spouse.

2.2 Service and Process

Service and process in financial proceedings are the same as that outlined for divorce actions in **1.1 Grounds, Timeline, Service and Process**.

2.3 Division of Assets

Property division in the event of divorce is governed by a statute – namely, Section 9-12-315 of the Arkansas Code Annotated. It provides that all marital property should be divided in half between the parties unless a 50/50 division would be inequitable. Factors for making an unequal division of property include:

- length of the marriage;
- age, health, and station in life of the parties;
- occupation of the parties;
- amount and sources of income;
- vocational skills;
- employability;
- estate, liabilities and needs of each party and opportunity of each for further acquisition of capital assets and income;
- contribution of each party in the acquisition, preservation or appreciation of marital property, including services as a homemaker; and
- the federal income tax consequences of the court's division of property.

When marital property is divided in a way that is not 50/50, the court must state the reasons for

not dividing the marital property equally between the parties.

The statute concerning property division excludes certain property from division, including the increase in value of property acquired prior to marriage. Historically, Arkansas trial courts used a judicially created analysis to assess the value of in-marriage appreciation of premarital property when the increase in value was due to the efforts of one of the spouses. However, in 2016, the Arkansas Supreme Court determined that the analysis conflicted with the plain language of the statute and overturned decades of precedent.

2.4 Spousal Maintenance

Spousal maintenance is a need-based concept in Arkansas. The party requesting support needs to provide evidence that support is required to sustain their needs. Judges can also consider many factors in awarding alimony or support to either spouse, including (but not limited to):

- one spouse's needs versus the other spouse's ability to pay;
- length of the marriage;
- each spouse's contribution to the marriage, both financial and otherwise; and
- marital and individual debts.

Courts may grant temporary alimony during the pendency of an action if requested by either party, but it is not required. The court will typically decide the amount and length of temporary support, taking into account more pressing matters such as living costs and court costs.

Arkansas also recognises rehabilitative alimony, which is a time-barred award of alimony to assist one spouse for a certain period of time following the divorce. This is in contrast with traditional or permanent alimony, which is more open-ended and typically only ends upon the death of either party or remarriage of the party receiving support.

2.5 Prenuptial and Postnuptial Agreements

The Arkansas Premarital Agreement Act is codified at Sections 9-11-401 to 9-11-413 of the Arkansas Code Annotated. Premarital agreements are enforceable by the courts, except if the party against whom enforcement is sought proves that:

- the party did not execute the agreement voluntarily; or
- the agreement was unconscionable and – before executing the agreement – the party seeking to avoid enforcement:
  - (a) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
  - (b) did not voluntarily and expressly waive after consulting with legal counsel, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
  - (c) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

For premarital agreements to be considered valid, it must be a written agreement, signed and acknowledged by both parties. The parties must also acknowledge that they have consulted with their respective attorneys, have read and understood the agreement, and are freely entering the agreement without coercion or undue influence.

2.6 Cohabitation

Family law courts in Arkansas treat unmarried individuals as separate individuals. The division of assets – in particular, with regard to real property – can depend on whether or not the real property was purchased as joint tenants, tenants-in-common, or whether only one person's name was attached to the property. Arkansas does not recognise common law marriage – no matter the length of time a couple has cohabitated or held themselves out as married.

2.7 Enforcement

If a party fails to comply with a valid court order, including a financial order, the party seeking enforcement can petition for the court to hold the offending party in contempt. A finding of contempt and subsequent punishment can include payment of the full terms of the financial order, an award of attorney's fees and court fees the moving party incurred in enforcement, or jail time. In extreme cases, a finding of contempt can impact custody.

2.8 Media Access and Transparency

In general, Arkansas courts are open to the public. Court records are also available for public access, except in limited circumstances. This flows from the Arkansas Freedom of Information Act of 1967. Judges can restrict public access to court proceedings, particularly when there are juveniles involved (either in delinquency or family law proceedings). Parties can file a request with the court to have records sealed if they involve sensitive information regarding the parties or their minor children.

2.9 Alternative Dispute Resolution (ADR)

Arkansas courts tend to look favourably upon the mediation process in divorce and financial disputes. Under Section 16-7-201 of the Arkansas Code Annotated, the General Assembly encourages the use of ADR in all types of cases and controversies across the state. Although ADR is not mandated across the state, some local policies and judges request attempts at mediation prior to trial, and Section 16-7-202(b) of the Arkansas Code Annotated authorises the circuit and appellate courts to order any domestic relations case to mediation. Arkansas has created the Alternative Dispute Resolution Commission, which is the governing body for the certification and professional discipline of certified mediators and is designed to encourage and support ADR across the state with various resources.

3. Child Law

3.1 Choice of Jurisdiction

Arkansas has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Under the UCCJEA, a child's home state is given exclusive jurisdiction over child custody cases. The home state is the state where the child lived with a parent for at least six months before the custody case began or wherever the child was born if the child is less than six months old. Like a divorce action, a child custody proceeding can be brought in the county where the child lives. If no home state exists for the child, the UCCJEA will then consider where the child has significant connections – ie, the state in which substantial evidence of the child's care, protection, training, and personal relationships exists.

3.2 Living/Contact Arrangements and Child Maintenance

Arkansas is a presumed joint-custody state and joint custody is favoured in Arkansas (Act 906 of 2019). If the parents do not agree on the particular split of time and contact, either can apply to the court for a hearing to present their respective plans for time and contact, along

with their assessment and evidence towards the child's best interest. Additionally, if there is a compelling best interest reason to deviate from the presumption of joint custody, either parent is able to bring such evidence to the court upon application.

Per Section 9-13-101(a)(1)(A)(iv) of the Arkansas Code Annotated, the presumption that joint custody is in the best interest of the child may be rebutted if:

- the court finds by clear and convincing evidence that joint custody is not in the best interest of the child;
- the parties have reached an agreement on all issues related to custody of the child;
- one of the parties does not request sole, primary, or joint custody; or
- a rebuttable presumption described in Section 9-13-101(c) or Section 9-13-101(d) of the Arkansas Code Annotated is established by the evidence.

Arkansas law states that the primary consideration in child custody determinations is the welfare and best interests of each minor child involved in the case. Arkansas appellate courts have said: "There is no exhaustive list of factors a circuit court must consider when analysing the best interest of the child." However, the law provides that courts should consider:

- the psychological relationship between the parent and the child;
- the need for stability and continuity in the child's relationship with the parents and siblings;
- the past conduct of the parents towards the child; and
- the reasonable preference of the child.

Promiscuous conduct or lifestyle in the presence of a child may be a factor against a parent receiving custody.

Child support is awarded pursuant to Administrative Order No 10. Each party is required to submit proof of their income and their gross monthly income will be used to calculate support. The support can be awarded on a joint or a non-joint basis, depending on the custody arrangement. Parties can agree to deviate up or down from the presumed child support award, provided the court approves the deviation and agrees that it is in the child's best interest. The court may order that a deviation is improper based on their review of the case and the child's best interests and it can subsequently order support in alignment with the presumed calculation. The amount of child support ordered lies within the discretion of the trial court.

3.3 Other Matters

Arkansas recognises the fundamental interest of parents to have and raise children. Fit parents are given presumption that they are acting in their children's best interests. Family courts have broad discretion and deference to determine a child's best interests. Family courts have permitted evidence related to parental alienation, including expert testimony, and their decisions have been upheld on appeal.

Children may give evidence in divorce and child custody cases and their preferences are allowed to be considered in awarding custody if the presiding judge determines such children are of sufficient age and maturity to express a preference (Section 9-13-101 of the Arkansas Annotated Code). If a judge interviews a minor child in camera, the judge is required to make a complete record of the interview.

If a child will be testifying in open court, the child's competency to testify should be determined by the trial judge as a preliminary matter (Rule 104(a) of the Arkansas Rules of Evidence). Courts have rejected a precise age at which a child would become competent to testify (Hoggard v State, 277 Ark 117, 122 (1982)). The court must also make findings on the record that the child is able to understand the difference between telling the truth and telling a lie, that they have observed relevant events, and that they can accurately recall relevant events. There are safeguards in place to protect any child who testifies in an open court, such as the presence of a support person or even the presence of a certified facility dog to provide comfort and reassurance to the child (Section 16-42-102 and Section 16-43-1002 of the Arkansas Annotated Code).

3.4 ADR

See **2.9 Alternative Dispute Resolution (ADR)**.

3.5 Media Access and Transparency

See **2.8 Media Access and Transparency**.

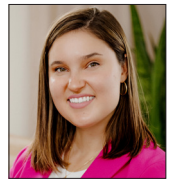
Trends and Developments

Contributed by:
Aaron Bundy and Hannah Lange
Bundy Law

Bundy Law is a regional law firm covering Arkansas, Missouri and Oklahoma, with a primary focus on family law matters in trial and appellate courts. Its attorneys are adept at handling fast-paced, complex cases, ranging from jurisdictional contests to business valuation disputes. Known for their expertise and track record of success in high-value divorces and contentious child custody cases, the attorneys excel in negotiation and advocacy work for high net worth and ultra-high net worth individuals. Bundy Law has a firm culture that promotes consistent, clear communication and responsiveness with clients and co-counsel, and it has implemented a powerful, sophisticated software infrastructure to support its high-touch service model.

Authors

Aaron Bundy is the founding partner at Bundy Law and is a trial lawyer who practises law in Oklahoma, Arkansas and Missouri. A fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers, he represents individuals who are involved in contested family law disputes at private negotiation and trial.



Hannah Lange is based in Bundy Law's Bentonville office and practises family law in Arkansas, Oklahoma, and Missouri. She has a strong foundation in family law, having received training at the National Family Law Trial Institute and the National Criminal Defense College. Hannah has experience working across the full range of divorce and child custody cases, from defending parental rights in state-prosecuted juvenile deprived cases and private adoptions to spousal support claims and business valuation disputes. She also has a proven ability to quickly grasp complex legal issues and identify what matters for optimal case resolution.

Contributed by: Aaron Bundy and Hannah Lange, **Bundy Law**

Bundy Law

240 South Main Street
Suite 280
Bentonville
AR 72712
USA

Tel: +1 479 579 2121
Fax: +1 918 512 4998
Email: info@bundy.law
Web: www.bundylawoffice.com

The Extent to Which Conduct Is a Factor in Assessing Child and Spousal Support Claims in Arkansas

Child support and spousal support (alimony) are both court-ordered financial obligations that involve payments from one parent or spouse to the other. Child support and alimony have different underlying policies, purposes, and determining factors.

Although the conduct, behaviour or fault of one parent or spouse may have led to the demise of the relationship and the disintegration of the nuclear family, conduct is not a factor for determining either child support or alimony. As a result, there is often a disconnect between the reason for separation or divorce and the information necessary to assess child support and spousal support claims.

Calculation of child support

In 2020, Arkansas reformed its child support calculation, moving to an "income shares model". Per the Arkansas Supreme Court, the income shares model is based on the concept that children should receive the same proportion of parental income that they would have received had the parents lived together and shared financial resources. The guidelines are presumptive, and a deviation from the guidelines requires written findings and an explanation for the deviation.

The Arkansas Supreme Court provides a non-exclusive list of factors that trial courts should consider when determining whether a deviation is appropriate, including the cost of education, the cost of insurance, significant income for the children, and whether there is a trust fund for the children. The underlying policy is that children should not have their resources diminished based on the decisions of their adult parents.

Prior to 2020, child support was based primarily on the income of the child support payor. According to economic data, moving to an income shares model is a national trend and represents a policy shift towards shared financial responsibility of raising children. Following review of Arkansas' child support guidelines in the context of national research and trends, a formal report to the Arkansas Office of Child Support Enforcement said: "The income shares model can better accommodate adjustments for specific case factors than the percentage-of-obligated parent income guidelines model can. This includes adjustments for additional children

for whom a parent has a legal duty to support, shared-parenting time, parents with limited ability to pay due to poverty income, variable healthcare costs, and other factors."

The new guidelines received some early criticism, as consideration of the income of the custodial parent often resulted in reduction of the payor's monthly obligation from what it would have been under the old rule. A year after implementation of the income shares model, Arkansas established a shared-parenting presumption. This statutory presumption for equal time often further impacts child support, as child support may be reduced for parents in a joint custodial relationship.

The new child support guidelines resulted in the Family Support Chart and a child support worksheet, which takes into account each parent's gross monthly income and the number of children requiring support and then produces a number that one parent will owe to the other on a monthly basis. The worksheet will also determine each parent's share of the total combined income for assistance in calculating the share of medical expenses not covered by insurance or other child-related expenses.

The worksheet allows parents to make adjustments and deductions in their child support obligation if they are the parent who pays for insurance for the children or if they have to pay for childcare while they are working. If one party also pays child support for children who are not part of the present case, they are allowed to report those payments on the worksheet as a small deduction in their support obligation in the present case.

Parents may reach private agreements regarding the amount of child support to be paid, but they must still provide a copy of the child support worksheet to the court for review. The court does not have to accept the parties' agreement as written and has the discretion to enter an order that both rejects the agreement and awards a different amount of child support based on the facts and circumstances of the case and the court's assessment of the children's best interests.

Role of conduct in determining child support

A recurring question from custodial parents is whether conduct is a factor for determining child support. Child support is established according to the Family Support Chart and child support worksheet, and is not designed to punish either parent for their behaviour or for ending their relationship. Child support is not based on the behaviour or wishes of either parent, but rather on each parent's respective gross monthly income and the custody arrangement of the parties.

Conduct is not a factor in determining child support. Conduct is only indirectly material to child support, as a parent's conduct may be one of several best interest factors assessed when establishing custody and parenting time. Although child support is primarily income-based, conduct may ultimately impact a child support payor's obligation if the conduct results in something less than shared parenting time, eliminating the payor's ability to seek a reduced child support amount based on joint custody.

Arrears

If one parent has not been involved with the support of the child up until the time of the case, or has had minimal involvement, the other parent who has been supporting the child may ask for retroactive or backdated child support. This support can be backdated by up to three

years or, if the child is under three years old, then to the date of the child's birth. Child support arrears can be paid in a lump sum amount or on a monthly basis until the arrears are paid. Any monthly payments on arrears will be in addition to the monthly child support obligation. If a parent is unwilling or unable to pay their child support or arrears, their wages can be garnished by the Office of Child Support Enforcement.

A parent's obligation to pay child support ends either when the child turns 18 years old or, if the child is still in high school, at the date of the child's high school graduation or when they turn 19 years old – whichever occurs first. If the paying parent has unpaid child support at the time the obligation for monthly support ends, the arrears must be satisfied even after their regular monthly child support obligation has ended. A parent's wages can still be garnished in order to pay off any unpaid child support arrears, long after their child has reached the age of majority.

Reasons for modification of child support oligations

A child support payor may not voluntarily reduce their income in order to lower or eliminate their duty of support. There must be an evidence-based and legitimate reason for the request to have child support modified, such as:

- a change in employment of the paying parent that impacts their income;
- an injury that negatively impacts the paying parent's employment; or
- a significant increase in the income of the party receiving support that lowers their need for support.

Any parent requesting modification of child support must show that it is in the best interest of the child for the support to be modified. Evidence that a parent has voluntarily reduced their income is conduct that may lead to child support not being modified, notwithstanding the change in that parent's income.

A parent may not file for bankruptcy to avoid having to pay child support. Under federal law, child support obligations – whether they are future obligations or past-due obligations – will not be eliminated, reduced or discharged in a bankruptcy proceeding.

Additionally, a parent cannot voluntarily give up their parental rights to any child to end their obligation for child support. Unless and until a child is adopted, the biological parents of a child are still responsible for the financial support of the child. Only when an adoption has been finalised and the child has a new legal parent or parents will the biological parents' duty to support the child end. If one biological parent keeps the child and one biological parent relinquishes their parental rights, the biological parent who has given up their rights will still owe a duty of support to the child.

Calculation of spousal support

Most divorces involve a disparity in incomes, as one spouse often makes more money than the other. The change in dynamics and resources upon separation and divorce can leave the lesser-earning spouse with insufficient income to support themselves and maintain a standard of living similar to what they had during the marriage. Spousal support (alimony) is intended to fill that gap, either on a rehabilitative or permanent basis, depending on the particular circumstances of each case. It is the responsibility of the spouse requesting alimony to provide evidence of their need for support. The spouse opposing an alimony award may offer their own evidence as to why the spouse seeking alimony

either does not have a need for support or has a lower need than that which has been presented to the court.

The main factors for a judge to consider when they are deciding whether or not to award alimony are the need of one spouse and the other spouse's ability to pay. The purpose of alimony is to provide a bridge for the frequent economic imbalance in the earning power and standard of living of the divorced parties.

Reasons for cessation or modification of spousal support obligations

Rehabilitative alimony means fixed payments for a specific period of time, designed to give the support recipient a reasonable amount of time to adjust to post-marriage life and their new financial situation, to find employment, or to reach retirement age and draw upon income associated with retirement. Rehabilitative alimony is a transitional concept intended to permit the recipient to get back on their feet after a divorce.

Permanent alimony is an award of spousal support that does not have a defined end date. It is continuous unless and until:

- the support recipient remarries or cohabitates with a new romantic partner;
- either party dies; or
- alimony is recalculated based on a change in the financial circumstances of either party.

There must be a legitimate, significant change in circumstances to modify alimony. An alimony payor may not voluntarily reduce their income to avoid paying alimony or to have it recalculated. Likewise, an alimony recipient may not voluntarily reduce their income to create a claim for more support from the paying party. Examples of significant changes include retirement, loss of employment, injuries leading to medical expenses, and other major health events.

Importance of conduct among factors determining spousal support payments

Trial courts may consider many factors when awarding either rehabilitative or permanent alimony, such as the value of the jointly owned property, how the property is going to be split between the spouses, the standard of living that each party became accustomed to during the marriage, each party's earning capacity and earning potential, any other current or anticipated income of either party, the award of child support in the case, and any medical support needs of either party that would impact monthly expenses or the ability to pay support.

A spouse may not be punished for improper behaviour through an award of alimony. A spouse's conduct (or fault) can impact the amount of alimony awarded only in the limited circumstance where the behaviour is directly related to one spouse's need for support or the other spouse's ability to pay support. Otherwise, fault is not a factor in deciding whether to award alimony.

Overall impact of conduct on maintenance claims

Although conduct may be the underlying reason for a divorce, it is not a direct factor in determining either child support or spousal support. While a parent's conduct may indirectly influence child support by affecting custody arrangements and thus the calculation, the focus remains on each parent's financial resources and the child's needs.

Similarly, alimony – intended to address disparities in income and standard of living post-divorce – is determined by the needs of one

spouse and the other's ability to pay, and not by marital misconduct. Conduct only plays a limited role indirectly or if either parent or spouse attempts to manipulate their income to unfairly reduce a support obligation or enhance a support claim. The focus is on economic realities and the well-being of minor children, rather than assigning blame.

USA – DELAWARE

Trends and Developments

Contributed by:
Curtis P Bounds
Bayard

Bayard is one of Delaware's premiere law firms. Its philosophy is simple – to provide clients with the highest level of legal service in a timely and cost-effective manner. The firm is known for its sophisticated specialisation (found at larger firms) and its attorney accessibility (more often found at smaller firms). Bayard provides a full range of domestic legal services to high net worth individuals in the areas of divorce and separation, property division, child custody and support, negotiation of prenuptial agreements, and adoption. The firm focuses on its clients' business or personal legal challenges without the inefficiencies associated with multiple layers of professionals and achieves success via innovative approaches to clients' most demanding business and legal challenges.

Author

Curtis P Bounds is a director at Bayard and senior attorney in the family law group. Experienced across all areas of domestic relations law, he works on business valuation and dissolution of marital estates for high net worth clients. Curtis has appeared in all state courts in Delaware, including appeals to the Delaware Supreme Court, and has litigated in the Delaware District Court enforcing parents' rights in international child abduction cases, and prosecuting discovery requests under 28 USC Section 1782 for use in foreign proceedings. He is a certified family law mediator and arbitrator and has mediated or rendered arbitration decisions for families in disputed property division and support claims.

Bayard

600 N King Street
Suite 400
Wilmington
DE 19801
USA

Tel: +1 302 655 5000
Fax: +1 302 658 6395
Email: cbounds@bayardlaw.com
Web: www.bayardlaw.com

How Divorce Serves as an Essential Aspect of the Marital Contract

When Delaware adopted laws allowing persons of the same sex to enter civil unions (a precursor to same-sex marriage within the state and other jurisdictions), five same-sex couples immediately filed for a divorce in the Delaware Family Court. There were, in total, 16 divorces of same-sex couples in 2012, so more than a quarter of these divorces began as soon as the law was enacted.

The push for same-sex unions has a long legal and emotional history, even though it seemed to rush upon the United States with a flurry of legislation, culminating in the US Supreme Court's decision to make same-sex marriage legal in all states in Obergefell v Hodges. But questions and problems surrounding same-sex unions arose from various corners and stages: marriage equity, the right to preside over the affairs and estate of a deceased partner, the right to ownership of property protected by joint ownership, the right to retirement and welfare benefits, and – perhaps most importantly – the right to human dignity. For reasons not explained at the time, not much was said about same-sex couples desiring marriage so that they could divorce.

Most – if not all – the 16 Delaware divorce petitions in 2012 arose from domestic unions or marriages recognised in other authorities, where the couple had since relocated to Delaware and could not obtain a divorce. It is not necessary to look individually at any of these divorces for insight into why the couples married or divorced. Regardless of those details, it is possible to draw one important understanding – often missed by critics and advocates of divorce alike – and that is the importance of divorce to the institution of marriage.

Marriage is a contractual relationship. It is not, however, the initial promises made before an officiant, whether in a religious or secular ceremony. Those promises are often illusory and unenforceable in a legal sense. By way of example, if one party files for divorce the very next day, that party can typically obtain a divorce without financial consequences unless the couple made specific legal agreements before marriage (ie, in an antenuptial agreement). Marriage, as a contract, develops over its course. Each party engages in actions and exchanges, large and small, that shape the marital relationship – for example, "you wash the dishes and I will take out the trash" or "you take the children to school and I will wait for the dishwasher repair". These everyday interactions are micro-contracts involving offer, acceptance, performance or, at times, breach and damage – all of which make up the contract of marriage.

In a marriage where the parties' promises are made by the couple and kept, trust between them is not broken and their communication remains intact, the success over time "until death do us part" can be safely predicted because the couple are able to continually make the small agreements day-to-day that are necessary to form the contractual basis of their marriage. But every marriage undergoes small breaches – failing to follow through on small obligations or more significant issues such as infidelity, financial mismanagement, or abuse – and, as these damages to the marriage contract accumulate over time, they often lead to a dissolution of the trust and the concomitant communication necessary between marriage partners. Such breakdowns are the primary causes of divorce, even though society and media focus on the secondary causes of human behaviour. While issues such as disagreements over finances or infidelity often dominate discussions about why mar-

riages fail, therapists and counsellors consistently point to the inability to communicate and the loss of mutual trust as the underlying cause.

To understand marriage (and divorce) as a contract further, it is worth looking at contract law and its theory of damages, which identifies three primary forms: restitution, reliance, and expectancy. Restitution aims to return the injured party to the position they were in before the contract. Reliance damages go further, compensating for losses arising from the breach. Expectancy damages, the most comprehensive, seek to provide the injured party with the benefit they anticipated from the contract. These principles can be analogously applied to divorce settlements.

Applying this theory of contract damages to remedies in divorce, the commentators on divorce law note, by analogy, that – for short-term marriages – restitution is often sufficient. Each party may leave with what they brought into the relationship, and financial entanglements are minimal. For longer-term marriages, however, reliance and expectancy damages come into play. A spouse who gave up a career to care for children, for example, may be entitled to receive alimony as well as child support from the other party to account for the reliance on the marriage's promises. In the longest marriages, courts often aim to provide the economically disadvantaged spouse with a share of the marital estate and future income to such an extent that they receive something closer to the "benefit of the bargain" – a standard concept in contract law.

This concept of contractual damage in a divorce is connected to this idea that could be described as a "phantom" marriage. Unlike other areas of the law, where specific monetary awards are sufficient to award damages, the remedies of divorce – generally described earlier as restitution, reliance and expectancy – are often tied up in long-term obligations of dividing property over time, paying support and, especially as related to children, telling each party what they have to do and where they have to be at a given point in date and time. As such, the remedies in marital dissolution orders and agreements are the embodiment of substitute contracts to ensure that the responsibilities and obligations of the actual marriage do not vanish at the couple's dissolution.

Society cares so deeply about marriage as an institution, such that it compels formerly married parties to remain in a phantom marriage until the practical and economic ties of the relationship of that phantom marriage are finished. Divorce laws and the courts that enforce them substitute in the place of the micro-contracts of marriage a set of new, final (or at least penultimate) arrangements between the parties. These agreements often ask or require individuals to accept terms they might otherwise reject, ensuring that neither party can simply abandon the other without consequence.

Returning to the problem faced formerly by same-sex couples, they did not have this remedy, and first had to seek marriage equality so that they could receive the benefits of divorce equality. Why divorce equality was not much voiced in the promotion of same-sex unions and marriage may have been political, but it may also have been due to society's failure to recognise divorce as a public good. After all, "why would anyone want to get married just so that they could get divorced?" is an easy question that fails to recognise the public need for divorce laws.

Making divorce the perceived enemy of marriage, instead of its companion, is also to blame

for allowing the patricidal-/matricidal-like behaviour that is commonly associated with divorce litigation. Cue here society's and media's lampooning or deriding divorce as in the film *The War of the Roses*. Making divorce the bogeyman for a failed marriage creates a pattern of letting the parties to the divorce off the hook when they could have obtained a suitable outcome had they been given the proper guidance from their counsellors, both legal and otherwise.

Even – and especially – in cases of particularly contentious divorces, lawyers serve as a substitute for the trust and communication that have broken down between the parties. While the divorcing spouses may no longer be able to negotiate directly due to mistrust or conflict, their attorneys function as intermediaries. By channelling their clients' needs and expectations through professional dialogue, lawyers can establish a framework for resolution. This process relies on trust and communication between the attorneys, which effectively replaces the trust and communication that no longer exists between the parties. When attorneys collaborate effectively, they create an environment where their clients can achieve a fair and sustainable outcome. However, when adversarial tactics dominate, the process can exacerbate conflicts, prolonging the resolution and increasing the emotional and financial toll on the parties.

Ultimately, when the parties and their lawyers are not capable of providing a substitute set of contracts for the parties to engage with and even enrich the rest of their phantom marriage, the court of jurisdiction steps in to provide the parties with their last set of contracts. Litigants may view the court's actions as a form of public taking– ie, "the court is telling me what to do/what I can keep/what I am to receive". But, really, the court is giving the parties what they cannot do for themselves because they presently lack the ability to form any new contracts and are without the necessary trust and communication required to do so. In time, many formerly married couples do learn a new basis of trust and communication that allows them to separate themselves from the authority of the court.

The importance of divorce law becomes apparent when considering its role in maintaining societal stability. Without fair and enforceable divorce laws, individuals might avoid marriage altogether, fearing the potential consequences of a contentious break-up. This fear of marriage is in part becoming true as young people hesitate to marry, fearing the possibility of a difficult and painful divorce. They fail to realise that a long and healthy union – particularly in a society such as the USA, which may not have the strong social safety net of other Western countries – is unsustainable without remedies if that relationship ends. It calls to mind two famous Hollywood actors who have maintained a long relationship and also famously without marriage – the difference being that each of these individuals is independently wealthy from one another and can maintain their relationship free from economic entanglements and solely on the bonds of human love and affection.

Divorce should not be viewed as the enemy of marriage, but as its necessary counterpart. By providing a pathway for resolving irreconcilable differences, divorce laws ensure that marriage remains a viable and respected institution. Without the option of divorce, marriage could become a trap rather than a partnership, discouraging individuals from entering into it or causing them to stay in harmful relationships. Divorce law, when applied with fairness and compassion, offers couples a way to untangle

their lives while preserving their dignity and protecting their interests.

The societal importance of divorce lies in its role as a corrective mechanism. It allows individuals to move forwards, it allows families to be restructured on new contractual terms, and it permits resources to be redistributed in a way that reflects the realities of a dissolved marriage. Rather than undermining marriage, divorce laws strengthen it by ensuring that it remains a commitment undertaken with care and respect. In this way, divorce serves not as a failure but as an essential aspect of the marital contract, providing a framework for resolution when the relationship can no longer fulfil its intended purpose.

USA – FLORIDA

Law and Practice

Contributed by:
Elisha D. Roy
Sasser, Cestero & Roy

Contents

Sasser, Cestero & Roy provides top-quality legal representation to its clients on sophisticated and complex family law matters both domestically and abroad. Its family law practice includes litigation, appeals and alternative dispute resolution. Committed to excellence, the partners at the firm are Florida board-certified specialists in marital and family law. The firm's clients are captains of industry, celebrities, professional athletes, small business owners, homemakers and working individuals. Although its client base varies, its philosophy of service remains the same: providing exceptional, professional legal services, maintaining a high standard of client service while respecting clients' confidentiality. The firm specialises in high-profile cases with clients whose complex legal matters involve the distribution of multimillion-dollar holdings and require sophisticated financial expertise. Its strategic approach generally involves negotiating, when possible, to keep matters out of the public eye, but litigating when necessary to help its clients work towards their goals.

Author

Elisha D. Roy is board-certified in marital and family law and a fellow of both the American Academy of Matrimonial Lawyers (AAML) and the International Academy of Family Lawyers. Throughout her career, Ms Roy has been active in local and state Bar associations. She is immediate past president of the Florida Chapter of the AAML and past chair of the Family Law Section of the Florida Bar. Ms Roy has been integral in legislative work that has changed the face of Florida family law. She is a frequent lecturer and author on international issues, legislative issues and other practice-related topics.

Sasser, Cestero & Roy

2041 Vista Parkway
Suite 200
West Palm Beach
FL 33411
USA

Tel: +1 561 689 4378
Email: eroy@sasserlaw.com
Web: sasserlaw.com

1. Divorce

1.1 Grounds, Timeline, Service and Process

Per the Florida Statutes ("Fla. Stat."), which are the codified, statutory laws of Florida, in order to have subject matter jurisdiction and to commence dissolution of marriage proceedings in the State of Florida, one of the parties must reside in the state for six months prior to filing (Fla. Stat. § 61.021). Subject matter jurisdiction is required for a Florida court to dissolve the marriage. Personal jurisdiction is required for a Florida court to adjudicate support and property rights. Personal jurisdiction can occur by service in the State of Florida, but can also be obtained if served outside the state and the required information is contained in the initial pleading which primarily is that the parties maintained a matrimonial domicile in Florida or resided in Florida prior to the filing, even if not with the spouse. These are the same grounds for same-sex spouses. Florida does not allow civil unions.

Residency is relevant in determining subject matter jurisdiction in Florida. A party must reside in Florida for six months prior to filing a Petition for Dissolution of Marriage. Under Florida law, residency constitutes an actual presence and intent to reside in the State of Florida.

Domicile is not relevant to determining subject matter jurisdiction in divorce matters, but it does matter for personal jurisdiction. Domicile refers to where a person has a fixed and permanent home. However, they may not actually reside there. See Latta v Latta, 645 So. 2d 1043 (Fla. 1st DCA 1995).

Additionally, nationality is not relevant in determining jurisdiction in divorce matters. An individual can establish residency in Florida without being a US citizen so long as they meet the six-month residency requirement. See Markofsky v Markofsky, 384 So. 2d 38 (Fla. 3rd DCA 1980).

A party can contest jurisdiction in divorce matters on the bases of lack of personal jurisdiction or subject matter jurisdiction.

A party can apply to stay proceedings in Florida in order to pursue divorce proceedings in a foreign jurisdiction. A party may file a motion to stay or for an anti-suit injunction. Florida courts consider the following factors when addressing this issue.

- Florida is a first-to-serve state, not a first-to-file state. Mabie v Garden St. Mgmt. Corp., 397 So. 2d 920, 921 (Fla. 1981) (citing Martinez v Martinez, 153 Fla. 753, 15 So. 2d 842 (Fla. 1943)).
- Where courts within one sovereignty have concurrent jurisdiction, the court that first exercises its jurisdiction acquires exclusive jurisdiction to proceed with that case. This is called the "principle of priority". 20 Am. Jur.2d Courts § 128 (1965).
- The "principle of priority" is not applicable between sovereign jurisdictions as a matter of duty. As a matter of comity, however, a court of one state may, in its discretion, stay a proceeding pending before it on the grounds that a case involving the same subject matter and parties is pending in the court of another state. Bedingfield v Bedingfield, 417 So. 2d 1047, 1050 (Fla. 4th DCA 1982).
- This does not mean that a trial court must always stay proceedings when the prior proceedings involving the same issues and parties are pending before a court in another state but only that ordinarily this should be the result. "There may well be circumstances under which the denial of a stay could be

justified upon a showing of the prospects for undue delay in the disposition of a prior action". Norris v Norris, 573 So. 2d 1085, 1086 (Fla. 4th DCA 1991) (citing Schwartz v DeLoach, 453 So. 2d 454, 455 (Fla. 2d DCA 1984)).

In cases regarding children's issues, as described in detail below, if the child(ren) had been a resident of Florida for six months prior to filing the petition for dissolution of marriage and Florida is the home state of the child(ren), as defined by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the court may stay all other issues and retain jurisdiction to determine the pending child-related issues. See Norris, at 1086.

1.2 Choice of Jurisdiction

The grounds for a divorce in Florida are that the marriage is irretrievably broken. Florida is a "no-fault" state, so the party filing for divorce does not have to prove anything to obtain a divorce, other than to state the marriage is irretrievably broken. Florida does not recognise civil unions or common law marriages. These grounds are the same for same-sex marriages.

While there are certainly other ways to accomplish a divorce, as discussed in 3.4 ADR, for a court to finalise a dissolution of marriage, court proceedings must be commenced by the filing of a Petition for Dissolution of Marriage (§ 61.043, Fla. Stat). The Petition for Dissolution of Marriage must be served within 120 days of the issuance of a summons. Once served, the receiving party has 20 days to file a responsive pleading, known as an Answer, and file a Counterpetition if they choose.

Florida has a simplified dissolution process that only applies to parties who do not have any minor or dependent children together, neither party is pregnant, and they have made a satisfactory division of their property and agreed as to the payment of their joint obligations, and neither party has legal counsel. Further, neither party may seek spousal support. The timeline for a simplified dissolution of marriage is typically less than 90 days.

The length of time a divorce takes largely depends on the complexity of the issues presented. Most cases do settle, but obviously cases that go to trial generally take longer than cases that settle. Cases with complex and intricate financial issues often take longer, as the process of obtaining and synthesising discovery and information can be time-consuming. Less complex cases can be resolved in four to six months, generally, and more complex cases can take a year or more.

Florida law provides for civil divorces "from the bonds of matrimony" only. The court can neither require the parties to participate in a religious marriage ceremony nor to secure a religious divorce. Turner v Turner, 192 So. 2d 787 (Fla. 3d DCA 1966).

A marriage may be annulled for any cause which has prevented the parties from contracting a valid marriage. However, annulments are unusual in Florida. The court must find one of these factors for invalidity:

- a want of legal capacity to contract, or a statutory prohibition against the type of marriage in question;
- a want of mental capacity to contract;
- a lack of actual consent to the contract;
- a consent wrongfully procured by force, duress, fraud or concealment; or
- a lack of physical capacity to consummate.

Sack v Sack, 184 So. 2d 434, 436 (Fla. 3d DCA 1966) (citing 10 Fla. Jur., Divorce, Separation and Annulment, Section 308).

2. Financial Proceedings

2.1 Choice of Jurisdiction

The grounds for jurisdiction for commencing financial proceedings in Florida are that the marriage is irretrievably broken.

There is also the ability to seek support unconnected with a dissolution of marriage. While it is unusual, in cases where a party does not want to get divorced but has been financially abandoned by their spouse, they can seek both alimony/spousal support and child support.

In order to resolve issues regarding support or property, the court must have both subject matter jurisdiction and jurisdiction over the person. There are three methods to obtaining jurisdiction over the person. They are: in personam, in rem, and quasi in rem.

If a person is a Florida resident the court has in personam jurisdiction. Patten v Mokher, 184 So. 29 (Fla. 1938). A person can also voluntarily appear in Florida, consenting to jurisdiction. See Brown v Brown, 786 So. 2d 611 (Fla. 1st DCA 2001). If a party is personally served while voluntarily in Florida not by fraud or for another court appearance, in personam jurisdiction is established. See Wolfson v Wolfson, 455 So. 2d 577, 578 (Fla. 4th DCA 1984). Lastly, in personam jurisdiction may be acquired through Florida's long-arm statute (§ 48.193 Fla. Stat).

A party may timely contest personal jurisdiction. Fla. Fam. L. R. P. 12.140(b)(2). However, if a party seeks affirmative relief or participates in the case without contesting jurisdiction, the objection is waived. Scott-Lubin v Lubin, 49 So. 3d 838, 840 (Fla. 4th DCA 2010).

A party is able to apply to stay proceedings in order to pursue divorce proceedings in a foreign jurisdiction. A party may file a motion to stay or for an anti-suit injunction. Florida courts consider the following factors when addressing this issue.

- Florida is a first-to-serve state not a first-to-file state. Mabie v Garden St. Mgmt. Corp., 397 So. 2d 920, 921 (Fla. 1981) (citing Martinez v Martinez, 153 Fla. 753, 15 So. 2d 842 (Fla. 1943)).
- Where courts within one sovereignty have concurrent jurisdiction, the court that first exercises its jurisdiction acquires exclusive jurisdiction to proceed with that case. This is called the "principle of priority". 20 Am. Jur.2d Courts § 128 (1965).
- The "principle of priority" is not applicable between sovereign jurisdictions as a matter of duty. As a matter of comity, however, a court of one state may, in its discretion, stay a proceeding pending before it on the grounds that a case involving the same subject matter and parties is pending in the court of another state. Bedingfield v Bedingfield, 417 So. 2d 1047, 1050 (Fla. 4th DCA 1982).
- This does not mean that a trial court must always stay proceedings when the prior proceedings involving the same issues and parties are pending before a court in another state but only that ordinarily this should be the result. "There may well be circumstances under which the denial of a stay could be justified upon a showing of the prospects for undue delay in the disposition of a prior action". Norris v Norris, 573 So. 2d 1085, 1086 (Fla. 4th DCA 1991) (citing Schwartz v

DeLoach, 453 So. 2d 454, 455 (Fla. 2d DCA 1984)).

In cases regarding children's issues, if the child(ren) had been a resident of Florida for six months prior to filing the petition for dissolution of marriage and Florida is the home state of the child(ren), the court may stay all other issues and retain jurisdiction to determine the pending child-related issues. See Norris, at 1086.

Florida courts may hear some financial claims after a foreign divorce for the purpose of enforcement.

- Florida courts may enforce a foreign court's alimony award, however, it may not be modified. The foreign court retains continuing and exclusive jurisdiction over the alimony award. § 88.2051(6) and § 88.2061(3), Fla. Stat.
- Full faith and credit are given to all final and non-modifiable judgments from other states entered in accordance with constitutional due process rights to all parties. Fisher v Fisher, 613 So. 2d 1370 (Fla. 2d DCA 1993).
- Foreign judgments may be domesticated in Florida pursuant to §55.501–§55.509, the Florida Enforcement of Foreign Judgments Act.

2.2 Service and Process

Service of process for financial proceedings may be accomplished by personal service, substitute service or constructive service.

Service may be made by an officer authorised by law to serve process or by any competent individual, not interested in the action and appointed by the court.

If service is not effectuated within 120 days after filing the initial pleading, the court must direct that service be initiated within a certain time period or dismiss the action. After service has been completed for financial proceedings, the parties have 45 days to exchange financial documents through mandatory disclosure pursuant to Rule 12.285 of the Florida Family Law Rules of Procedure.

2.3 Division of Assets

Florida approaches the division of assets with the premise that that division should be equitable, which generally results in an equal division of assets, pursuant to § 61.075, Fla. Stat. The court must make specific factual findings in distributing assets. The court starts with the presumption that all assets and liabilities acquired during the marriage are marital, and therefore subject to equitable distribution, and that all assets and liabilities that existed before the marriage are non-marital, and therefore not subject to distribution. If a party is claiming that a pre-marital asset is marital or an asset acquired during the marriage is non-marital, the burden of proof is on that spouse to prove same.

By a showing of extraordinary circumstances, the court can enter an order for partial equitable distribution of assets during the pendency of a case, pursuant to § 61.075(5), Fla. Stat. This statute was recently expanded to permit an interim distribution to avoid or prevent the loss of an asset through repossession or foreclosure, the loss of housing, the default of a debt, or the levy of a tax lien, and can be for the purpose of making funds available for the payment of attorney's fees and costs. However, this is statutorily driven and often difficult to accomplish, and the moving party must strictly comply with the procedural requirements of § 61.075, Fla. Stat., or they will be prohibited from receiving this form of relief. The court's determination in this order

is considered part of the court's final judgment dissolving the party's marriage.

A final judgment contains the court's order on the equitable distribution of assets. The court can order the unequal distribution of assets. The court considers the following factors to justify an unequal distribution:

- each party's contribution to the marriage, including contributing to caring for and education of the children and services as a homemaker;
- the parties' individual and collective economic circumstances;
- the duration of the marriage;
- any interruptions to their careers or the educational opportunities of either party;
- if there is a desirability to retain a specific asset; for example, if a party has a specific interest in retaining their interest in a business without interference from the other party;
- the parties' contributions to the acquisition or enhancement of a marital or non-marital asset or debt;
- the parties' desire to maintain the marital home as a residence for a dependent or minor child;
- if either party intentionally depleted assets after the petition for dissolution of marriage was filed or within two years of the filing; and
- any other factor necessary to do justice between the parties.

The basic premise of equitable distribution of assets in Florida is a three-step process: (i) identify marital and non-marital assets; (ii) value the marital assets; and (iii) distribute the assets between the parties. The same process is used for marital debts or liabilities.

Marital assets are assets that were:

- acquired during the marriage by either party individually or jointly;
- interspousal gifts during the marriage;
- the paydown of principal of a note or mortgage secured by non-marital real property and a portion of the property's passive appreciation;
- the enhancement in value of a non-marital asset due to the efforts of either party during the marriage; and
- all vested and non-vested benefits or rights accrued during the marriage in the parties' pensions, annuities, deferred compensation plans or insurance plans.
- the marital interest in a closely held business which must be determined by calculating the fair market value of the business, assessing enterprise and personal goodwill and a strict requirement that a non-compete cannot be the basis to determine there is no enterprise goodwill.

Parties identify the subject assets through the discovery process. The discovery process is the exchange of financial and other documents (either formally or informally) so as to be able to properly identify and value the marital assets. In a family law case, the parties are subject to "mandatory disclosure", pursuant to Fla. Fam. L. R. P. 12.285. Mandatory disclosure is the compulsory production of certain financial records by both parties to the other party. As part of a party's mandatory disclosure, the parties are required to execute a complete Florida Family Law Financial Affidavit. However, recent changes to the Family Law Rules of Procedure allow for Financial Affidavits to be waived if certain requirements are met. This is a sworn affidavit wherein the parties are obligated to list all of their current assets and liabilities.

In addition, parties are able to request the production of additional financial records beyond what is required by mandatory disclosure. Fla. Fam. L. R. P. 12.350 governs the production of documents. Further, the parties can be subject to depositions, which is a witness's out-of-court testimony that is reduced to writing (usually by a court reporter) for later use in court or for discovery purposes. Fla. Fam. L. R. P. 12.310 governs the deposition process. There are other discovery mechanisms to ensure the disclosure of assets and liabilities.

The court can compel the production of financial records from third parties. This is done through the court's subpoena power. A subpoena is a writ or order commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply. (Subpoena, Black's Law Dictionary (11th ed. 2019)). The court's subpoena power is governed by Fla. Fam. L. R. P. 12.351 and 12.410.

Additional recent changes to statutes regarding distribution of assets include a clarification that any gift of real property to a spouse must be in writing. In addition, if it is necessary for there to be a payout over time of cash to equalise the distribution of assets and liabilities, the court may award security assuming that the full award vests on the date of the award and requires a reasonable rate of interest on same.

There are no property regimes in Florida.

Florida courts do recognise the concept of trusts. Under Florida law, an irrevocable trust is a trust that cannot be revoked by the settlor (the individual who established the trust) and is treated as a separate and distinct entity from the settlor. See Nelson v Nelson, 206 So. 3d 818, 820 (Fla. 2d DCA 2016). However, a revocable trust, which is a trust that can be revoked ("undone") by the settlor, is still treated as the property of the settlor. See Collier v Collier, 343 So. 3d 183, 186 (Fla. 1st DCA 2022) (recognising that property held in a revocable trust remains the property of the settlor). Therefore, the nature of the trust will affect the court's approaches and powers over the trust for both property distribution and support. Generally, property held in an irrevocable trust is not subject to equitable distribution under § 61.075, Fla. Stat. because it is viewed as its own entity owned by neither party. Alternatively, property held by a revocable trust, where one or both of the parties is a settlor, is subject to equitable distribution because it is still considered within the ownership of one or both of the parties.

2.4 Spousal Maintenance

Spousal maintenance in Florida is referred to as alimony. Alimony is codified under Florida law pursuant to §61.08, Fla. Stat. Effective 1 July 2023, Florida's approach to alimony changed drastically. An alimony award is based upon the respective parties' "need" for the support and the other party's "ability to pay". The requesting spouse has the burden to prove their need and the other party's ability to pay. For the purposes of determining an alimony award, the courts will look to the length of the marriage; short-term marriages are less than ten years, moderate-term marriages are more than ten years but less than 20 years, and long-term marriages are longer than 20 years. Temporary alimony can also be awarded during the pendency of a case, based on the same need and ability factors. The length of the marriage is not a bar to this temporary award.

There are three primary types of alimony awarded in Florida:

- Bridge-the-gap alimony – This is ordered to aid one party as they transition from married to single life. There must be evidence of a legitimate and identifiable short-term need. Bridge-the-Gap alimony may not be modified in duration or amount, and it may not exceed a period of two years. This is generally seen in only very short-term marriages.
- Rehabilitative alimony – This is to assist the other party in redevelopment of previous skills or to acquire the necessary education or training for skills or credentials necessary for employment so the person can become self-supporting. This type of alimony cannot exceed five years and can be modified or terminated if the person has not complied with the plan for rehabilitation, if the person has completed the rehabilitative plan, or if there is a substantial change in circumstances. For example, if a spouse has a specific plan to finish required courses to obtain an incomplete degree, they may be eligible for an award of rehabilitative alimony. This is generally awarded when one spouse abandoned a career in lieu of child-rearing and/or other aspects of a marital relationship and needs re-education or new education to become employable and capable of self-support. It can also be used as a creative defence to an alimony request, providing a plan for the spouse seeking alimony to be able to rehabilitate themselves. A rehabilitative plan of alimony cannot exceed five (5) years.
- Durational alimony – This was codified in 2010 and significantly amended in 2023. It may not be awarded in marriages of less than three years. An award of durational alimony may not exceed 50% the length of a short-term marriage, 60% the length of a moderate-term marriage, or 75% the length of a long-term marriage. The court is not required to award the full length. These guidelines are maximum terms; however, there are statutory bases to extend the alimony award beyond these guidelines, which include the recipient spouse's own physical or mental health disabilities or the need to care for a child with same. Guidelines regarding the amount of durational alimony were also implemented in July 2023, whereby the amount cannot exceed the lesser of the recipient spouse's need OR 35% of the differential between the parties' net incomes. Durational alimony terminates with the death of either party or the remarriage of the recipient spouse.

In awarding alimony, the court must first determine there is the requisite need and ability to pay. If that burden has been met, the court then applies the factors in 61.08 Fla. Stat. to determine the type, length and amount of the alimony award. These factors include an evaluation of the lifestyle of the parties, the ability of the recipient to go back to work, the income available to each party, including that from assets distributed in the dissolution process and from non-marital sources.

Changes to the national tax laws have made it such that alimony is not taxable to the recipient or deductible by the paying spouse. See 26 USCA § 61 (wherein alimony/support payments are no longer included in the definition of gross income); see also Topic No 452 Alimony and Separate Maintenance, IRS.gov (last updated 11 January 2023). However, awards entered prior to 31 December 2018 that are taxable/deductible awards will maintain that status. This also means that modifications of these pre-31 December 2018 spousal support awards remain taxable/deductible unless otherwise agreed to by the

parties. See Publication 504 (2021), Divorced or Separated Individuals, IRS.gov (last updated 1 February 2022).

Unless agreed to by the parties, all alimony awards are modifiable in amount, and depending on the type, may be modifiable in duration. See Ispass v Ispass, 243 So. 3d 453, 456 (Fla. 5th DCA 2018) (standing for both propositions). The standard to modify alimony is a substantial and permanent change in circumstances that was unknown at the time of the entry of the final judgment or the last order on support. See Valby v Valby, 317 So. 3d 147, 151 (Fla. 4th DCA 2021). For the most part, modifications are generally downward in nature, the paying spouse seeking to reduce their obligations, as opposed to the recipient seeking more. That does not mean upward modifications do not occur, but the vast majority are downward.

While a future retirement is arguably known at the time of the entry of the Final Judgment, Florida Statutes provide that retirement age is in itself a substantial change in circumstance to allow for the modification of an alimony. The payor must be at retirement age as defined by the particular profession (such as police officers and firefighters, who often have mandatory retirement) or the Social Security Administration (for most that age is around 67). The request for modification can be filed no more than six months before the expected retirement.

2.5 Prenuptial and Postnuptial Agreements

Both pre and postnuptial agreements are recognised in Florida. Prenuptial agreements are differentiated by their entry date. Prenuptial agreements, now referred to as premarital agreements, entered after 1 October 2007, are governed by the Uniform Premarital Agreement Act (UPAA).

Prenuptial Agreements, Entered Prior to 1 October 2007 and Postnuptial Agreements

The key case law on these agreements is Del Vecchio v Del Vecchio, 143 So. 2d 17 (Fla. 1962) and Casto v Casto, 508 So. 2d 330 (Fla. 1987).

The validity of these agreements is determined by a two-pronged analysis. An agreement can be determined invalid by meeting either prong.

- Prong 1 – a spouse may set aside or modify an agreement by establishing that it was reached under fraud, deceit, duress, coercion, misrepresentation or overreaching. Masilotti v Masilotti, 29 So. 2d 872 (Fla. 1947).
- Prong 2 – a spouse looking to set aside the agreement must establish that the agreement makes an unfair or unreasonable provision for that spouse, given the circumstances of the parties.

Once the claiming spouse establishes that the agreement is unreasonable, a presumption arises that there was either concealment by the defending spouse or a presumed lack of knowledge by the challenging spouse of the defending spouse's finances at the time the agreement was reached.

The burden then shifts to the defending spouse, who may rebut these presumptions by showing that there was either:

- a full, frank disclosure to the challenging spouse by the defending spouse before the signing of the agreement relative to the value of all the marital property and the income of the parties; or

- a general and approximate knowledge by the challenging spouse of the character and extent of the marital property sufficient to obtain a value by reasonable means, as well as a general knowledge of the income of the parties. Casto, 508 So. 2d at 333.

Prenuptial Agreements, Entered After 1 October 2007

Agreements entered after 1 October 2007, referred to as premarital agreements, are governed by the UPAA.

Premarital agreements must be in writing and signed by both parties.

Pursuant to Florida Statutes § 61.079, a premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

- the party did not execute the agreement voluntarily;
- the agreement was the product of fraud, duress, coercion or overreaching; or
- the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
  - (a) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
  - (b) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
  - (c) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

Premarital and postnuptial agreements may contract regarding property rights, disposition for property, spousal support, rights in and disposition of death benefits from a life insurance policy, choice of law governing the agreement and any other personal rights not in violation of public policy or a law imposing a criminal penalty.

Premarital and postnuptial agreements may not contract with respect to children's issues or temporary support.

Pre and Postnuptial Agreements Regardless of Entry Date

All pre and postnuptial agreements are interpreted and construed like any other contract. See Famiglio v Famiglio, 279 So. 3d 736 (Fla. 2d DCA 2019) (asserting same in the context of a prenuptial agreement); Chipman v Chipman, 975 So. 2d 603 (Fla. 4th DCA 2008) (asserting same in the context of a postnuptial agreement).

It is important to understand that, when interpreting any agreement, the court must first look to its plain language to determine the parties' intent. Famiglio, at 739. When interpreting the agreement, the court may only consider extrinsic evidence outside of the agreement's plain language, known as parol evidence, when the agreement contains an ambiguity. Id.

Florida law staunchly supports parties' rights to contract. It is never the role of a trial court to rewrite a contract to make it more reasonable for one of the parties. Id.

Famiglio is a key case explaining, in immense detail, the process trial courts must employ when interpreting and construing marital agreements.

2.6 Cohabitation

In Florida, no legal rights or obligations are established from a non-marital, cohabitation relationship. Posik v Layton, 695 So. 2d 759 (Fla. 5th DCA 1997).

In Castetter v Henderson, 113 So. 3d 153 (Fla. 5th DCA 2013), the court determined that "a court may, however, impose a constructive trust to do equity between unmarried cohabitants". Evans v Wall, 542 So. 2d 1055, 1056 (Fla. 3d DCA 1989). The party seeking to establish a constructive trust "must establish it by proof to the exclusion of all reasonable doubt". Smith v Smith, 108 So. 2d 761, 764 (Fla.1959); see also Harris v Harris, 260 So. 2d 854, 855 (Fla. 1st DCA 1972). "Before a constructive trust in real property will be created, the person claiming such interest must prove beyond a reasonable doubt by clear and convincing evidence those factors which give rise to the trust". The four elements that must be established for a court to impose a constructive trust include: (i) a promise, express or implied; (ii) a transfer of property and reliance thereon; (iii) a confidential relationship; and (iv) unjust enrichment. Provence v Palm Beach Taverns, Inc., 676 So. 2d 1022, 1024 (Fla. 4th DCA 1996); Heina v LaChucua Paso Fino Horse Farm, Inc., 752 So. 2d 630, 637 n. 4 (Fla. 5th DCA 1999).

Cohabitants do not acquire rights by virtue of length of cohabitation. Cohabitants may acquire rights to child support by virtue of children born of the relationship upon the establishment of a support obligation.

In addition, while not called cohabitation, Florida Statute 61.14 recognises a supportive relationship as a basis to modify alimony. Essentially, the paying spouse must prove the spouse who is receiving alimony is living with another person like married couples, sharing in property ownership, bank accounts, life activities, but not actually marrying to avoid the termination of alimony that comes with remarriage.

2.7 Enforcement

Many different forms of relief exist when a party fails to comply with a financial order. However, the nature of the financial order can dictate the types of relief available to the enforcing party. These remedies can be used to enforce international financial orders, subject to the applicable statutes and rules.

Civil Contempt

A party may move the court to hold a non-complying party in civil contempt. Civil contempt is used to coerce an offending party into complying with a court order rather than to punish the offending party for a failure to comply with a court order. Johnson v Bednar, 573 So. 2d 822 (Fla. 1991). A support award can be enforced by contempt proceedings and incarceration. Braswell v Braswell, 881 So. 2d 1193, 1198 (Fla. 3d DCA 2004). A party's incarceration for violation of a support order is meant purely to coerce compliance, not to punish. Therefore, a party must be released once they have complied with their support obligation(s). However, orders concerning property awards cannot be enforced by contempt and incarceration. Randall v Randall, 948 So. 2d 71 (Fla. 3d DCA 2007).

Income Deduction Orders/Income Withholding Orders

Income deduction orders/income withholding orders ensure compliance by requiring a non-complying party's employer to deduct support obligations directly from the party's pay. § 61.1301(1)(a), Fla. Stat. states that, "Upon the entry of an order establishing, enforcing, or modifying an obligation for alimony, for child

support, or for alimony and child support, other than a temporary order, the court shall enter a separate order for income deduction if one has not been entered". The court's ability to enter income deduction orders/income withholding orders is subject to the dictates and limitations of UIFSA (Ch. 88, Florida Statutes).

Writs

As part of an action to enforce a final divorce decree, a party can seek the court to impose certain writs. A writ is a court's written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act. (Writ, Black's Law Dictionary (11th ed. 2019)). There are many types of writs recognised by the laws of the State of Florida.

Writ of ne exeat

When either party is about to remove himself or herself or his or her property out of the state, or fraudulently convey or conceal it, the court may award a ne exeat or injunction against the party or the property and make such orders as will secure alimony or support to the party who should receive it. § 61.11, Fla. Stat. Writs of ne exeat can also be used to enjoin a party from fraudulently conveying or concealing property subject to a final divorce decree. See Sandstrom v Sandstrom, 565 So. 2d 914, 915 (Fla. 4th DCA 1990) (§ 61.11, Fla. Stat. applies to attempts to dissipate marital assets before or after final dissolution judgment).

Writ of garnishment

Separate and apart from income deduction orders/income withholding orders which are used to enforce support obligations, a party can seek compliance through a writ of garnishment to enforce property obligations. "Garnishment" consists of notifying a third party to retain something he or she has belonging to the defendant, to make disclosure to the court concerning it, and to dispose of it as the court shall direct. Writs of garnishment are governed by Chapter 77 of the Florida Statutes. § 77.01, Fla. Stat. in part states, "[e]very person or entity who has sued to recover a debt or has recovered judgment in any court against any person or entity has a right to a writ of garnishment, in the manner hereinafter provided". Writs of garnishment are limited in that they cannot be applied to property existing outside of the State of Florida. See Power Rental Op Co, LLC v Virgin Islands Water & Power Authority, M.D.Fla.2021, 2021 WL 268472.

Writ of sequestration

A writ of sequestration is a court order. Writs of sequestration are governed by § 68.03, Fla. Stat. and Fla. Fam. L. R. P. 12.570. They prohibit a party's access to certain property to prohibit the conveying or concealing of the property. Moreover, writs of sequestration can order non-parties with possession of the subject property to act on the court's behalf to ensure the property is disposed of in accordance with the court's order.

Writ of attachment

Writs of attachment are governed by Ch. 76, Fla. Stat. and Fla. Fam. L.R.P. 12.570(c)(1). §76.01, Fla. Stat. states, "[a]ny creditor may have an attachment at law against the goods and chattels, lands, and tenements of his or her debtor under the circumstances and in the manner hereinafter provided". Essentially, this allows a Florida court to direct what happens to property located in the State of Florida that is subject to a domestic or foreign divorce decree.

2.8 Media Access and Transparency

All family law cases in Florida are public record and open for anyone to see or watch. Many of

the filings in family law cases in Florida are available online and anyone can go directly to the courthouse and request to review cases and see pleadings and documents filed in the court file. Other than juvenile dependency cases, all family law cases are open to the public.

There are Rules of General Practice and Judicial Administration (RGPJA) that protect some of the material that may be filed in the court. This includes account information; children's names, addresses and social security numbers; social security numbers of the parties, etc. In addition, allegations that might stem from dependency can be held confidential. All of this is governed by RGPJA 2.420 and 2.425 and requires a proper filing with the clerk's office to ensure redactions occur on the files.

Parties can also agree to Confidentiality Orders protecting items from being filed in the court file and only being shared between parties, but, for example, the Financial Affidavit that is required to be filed in most cases filed in Florida cannot be waived, sealed or kept out of the court file.

RGPJA 2.420 also provides a mechanism whereby someone can request a file be sealed and/or held confidential or portions of a file be held confidential; however, a very detailed order must be entered upon findings for this step to be taken and, ironically, the order sealing the records and explaining why they are being sealed must be published in a public area, both on the clerk's website and in the clerk's office for a period not less than 30 days. This requirement can have an unintended consequence: it may draw more attention to the file and the confidential records than if nothing had been done to seal them in the first place.

2.9 Alternative Dispute Resolution (ADR)

ADR is highly favoured in Florida, and in most jurisdictions across the state there are local Administrative Orders in place requiring mediation to occur before any matter is brought before a judge for resolution.

The primary ADR method used in financial cases in Florida is mediation. Mediation is a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution. The mediation process is governed by Chapter 44 of the Florida Statutes and Florida Family Law Rules of Procedure 12.740 and 12.741. Most cases in Florida go to mediation, at least once. Mediation is generally done with a Supreme Court Certified mediator agreed upon by the parties, but the courthouse in many areas does offer sliding scale mediations for lower cost. Since the COVID-19 pandemic, many mediations are done by Zoom, but in-person mediations are beginning to resume.

Parties are expected to appear for mediation and govern themselves accordingly. An agreement resolving financial issues, not related to minor children (ie, child support), reached through the mediation process is binding and enforceable upon the parties' execution.

Voluntary Binding Arbitration

Arbitration is a process whereby a neutral third person or panel, called an arbitrator or arbitration panel, considers the facts and arguments presented by the parties and renders a decision which may be binding or non-binding. § 44.1011(1), Fla. Stat. Binding arbitration means that the decision rendered during arbitration is binding on the parties and the court. Arbitration in family law matters is governed by Chapter 44

of the Florida Statutes and Florida Family Law Rules of Procedure 12.740.

Generally speaking, voluntary binding arbitration does not happen in family law cases in Florida as it cannot be used when there are minor children involved in the case. See § 44.104(14), Fla. Stat.; Toiberman v Tisera, 998 So. 2d 4, 6 (Fla. 3d DCA 2008) "The plain language of section 44.104(14) prohibits binding arbitration of child custody, visitation, or child support matters". However, in dealing with only financial issues it is possible.

Voluntary Trial Resolution

Similar to voluntary binding arbitration, voluntary trial resolution is a process by which a trial resolution judge considers the facts and arguments presented by the parties and renders a decision. See § 44.1011(1), Fla. Stat. The private judge must be agreed to by the parties, must be a member of the Florida Bar in good standing and have been practicing for at least five years. See § 44.104(2), Fla. Stat. The private judge is appointed by the presiding judge via court order. The presiding judge cannot require parties to use this alternative method.

This private judge method is often used in cases that are very complex and knowing that the judge can block off the necessary number of days, etc, for continuity in the process is helpful. Many jurisdictions rotate judges on a bi-annual basis, and for complex cases, this could cause more than one judicial rotation during the life of the case. Private judges can be very beneficial for maintaining consistency in the case.

Collaborative Law

Florida Statutes established the Collaborative Law Process in Florida, which allows parties to settle their cases via a collaborative contract. Each party has a lawyer, and the lawyer and the parties contract to this confidential process of resolution. Joint experts, in both financial and mental health, can be involved to help the parties find creative resolution to their divorce without any litigation. However, if the collaborative process is unsuccessful, the parties must hire new lawyers, start the process over from the beginning and hold all things discovered during the collaborative process confidential. The Collaborative Law Process is very successful in certain parts of Florida and less so in others.

3. Child Law

3.1 Choice of Jurisdiction

Florida has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Pursuant to § 61.514, Fla. Stat., Florida courts have jurisdiction to make an initial child custody determination if:

- Florida is the child's home state on the date of filing or was the home state of the child within six months before filing if the child is absent from Florida but a parent or person acting as a parent continues to live in Florida;
- a court of another state does not have jurisdiction under the first bullet point, or a court of the home state of the child has declined to exercise jurisdiction on the grounds that Florida is the more appropriate forum and:
  - (a) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with Florida beyond their physical presence; and
  - (b) substantial evidence is available in Florida concerning the child's care, protection, training and personal relationships;
- all courts having jurisdiction under the first two bullet points have declined to exercise

jurisdiction on the grounds that a court of Florida is the more appropriate forum to determine the custody of the child; or
- no court of any other state would have jurisdiction under the criteria specified in the bullet points above.

The courts look at the child's home state to determine jurisdiction. A child's "home state" is the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child younger than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period. § 61.503(7), Fla. Stat. The court does not consider the child's domicile or nationality, but their residence. The child's physical presence is not necessary to make a custody determination. Florida may invoke emergency jurisdiction under the UCCJEA if necessary.

3.2 Living/Contact Arrangements and Child Maintenance

Child Arrangements

Whether parents agree on child arrangements or not, a parenting plan must be entered in Florida that governs the parties' relationship and timesharing with the minor child. Florida takes a two-pronged approach to parenting, one being decision-making, the other timesharing, or where the child lays their head at night. In addition to providing a "regular" timesharing schedule, the parenting plan will also deal with holidays, school breaks, and assist in decision-making parameters for the parties. If the parties do not agree, then the court will decide, based on § 61.13, Fla. Stat., an appropriate timesharing schedule and create the parenting plan. Effective 1 July 2023, there is a rebuttable presumption that an equal timesharing schedule is in a child's best interests and can only be overcome by a preponderance of the evidence in applying the factors contained in the statute. The court is required to make findings regarding any timesharing schedule ordered by the court other than one agreed upon by the parties.

The decision-making aspect is referred to as shared parental responsibility, and there is a presumption in Florida that it will be awarded in all cases. This means the major decisions for a child's life must be made together by the parties, and not unilaterally. This would include primarily medical and educational decisions as well as other major decisions that may affect a specific family. In some circumstances, the court can award "ultimate decision making" to one parent, but that must be limited to narrow and specific issues.

Occasionally, the court may award sole decision-making, but that requires a finding by the court that shared parental responsibility would be detrimental to the child and that is a high burden to meet.

Child-related issues are always subject to modification, but for a timesharing schedule to be modified it is necessary for there to be a substantial change in circumstance and a finding that a modification is in the child's best interests.

Child Support

Pursuant to § 61.29, Fla. Stat. each parent has a fundamental obligation to support his or her minor or legally dependent children. Child support is the obligated payment of monetary support for the maintenance of a child. See § 61.046, Fla. Stat.

Child support is calculated by a statutory guideline based upon the parents' combined net income estimated to have been allocated to the child as if the parents and child(ren) were living together in one household, § 61.29, Fla. Stat. After determining the total support obligation, this is divided between the parents based upon each parent's percentage of the overnights with the child(ren). The difference between the amounts is used to determine which parent is the payor and the amount of the payment necessary to care for the child(ren). These amounts are adjusted for each parent's contributions to the child(ren)'s health insurance and day care expenses, producing the final support amount, § 61.30, Fla. Stat.

Parents may enter an agreement concerning their child support obligations so long as the agreement serves the best interest of the child, however, they may not waive or contract away their child's right to support. Lester v Lester, 736 So. 2d 1257 (Fla. 4th DCA 1999) (citations omitted). Contracts between the parents regarding the support of their minor child are subject to the plenary power of the state to control and regulate. Zolonz v Zolonz, 659 So. 2d 451 (Fla. 4th DCA 1995).

The court may make orders in relation to child support. All child support orders and income deduction orders must provide for child support to terminate on a child's 18th birthday unless the court finds or previously found that a child is dependent due to a mental or physical incapacity which began prior to the child turning 18 or if a dependent child is between the ages of 18 and 19, and is still in high school performing in good faith with a reasonable expectation of graduating before age 19. § 61.13, Fla. Stat, § 743.07(2), Fla. Stat.

Florida law does not provide an avenue for a child to seek support on their own.

3.3 Other Matters

Courts have broad discretion in entering orders on children's issues. See Miller v Miller, 842 So. 2d (Fla. 1st DCA 2003). When parents have opposing views on specific issues the court may modify parental responsibility to allow one parent ultimate decision-making authority on the specific issue. For example, in Hancock v Hancock, 915 So. 2d 1277 (Fla. 4th DCA 2005), when parents could not agree on a school for their child, the lower court was directed to award ultimate decision-making and designate one parent to make educational decisions for the child.

The courts cannot order or provide decision-making authority to a third party. As such, if there is an impasse on parenting decisions, and this is brought before the court, the court will not likely make the actual decision, but will give one parent ultimate decision-making authority over that specific issue or topic. For example, if the parties do not agree on which school a child shall attend, after a hearing, the court would award one parent with ultimate decision-making on that issue.

Unless there is evidence that the order would harm the child, the court may not choose one parent's religious beliefs and practices over another's. This would violate the First Amendment. Mesa v Mesa, 652 So. 2d 456, 457 (Fla. 4th DCA 1995).

Parental alienation is a bit of a misnomer but is really about gate-keeping behaviours. Florida courts recognise that parental alienation, if proved by competent, substantial evidence, can justify a post-dissolution request for a modification of a time-sharing designation in a final judg-

ment. See McKinnon v Staats, 899 So. 2d 357, 361 (Fla. 1st DCA 2005). Parental alienation is not a crime in Florida, however if the court finds evidence of parental alienation, it may result in reduced timesharing.

In Florida, children are able to give testimony in family law cases, but it is disfavoured and unusual. If a party wants a child to testify, they must seek permissions pursuant to Rule 12.407 Florida Family Law Rules of Procedure to bring them to court or even just to have them deposed. Generally, courts do not want to put children in the position to testify "against" a parent or in a position to believe they have a say or choice in the result of a court case, and perhaps more importantly, do not want to put a child in a position of "picking" a parent. As such, child testimony is generally very rare and limited to fact-based issues that usually surround behaviours or incidents a child has witnessed. The court generally will do an in-camera examination of a child outside of the presence of the parents and their counsel to avoid the child needing to testify in the presence of their parents.

Florida also has a fairly strict relocation restriction with a statute dedicated to if and when same will be granted. Florida Statute 61.13001 provides very specific terms that a parent seeking to move greater than 50 miles from where they lived at the time of Final Judgment must follow. Generally speaking, unless the other parent already lives outside that area OR is not involved in the child's life, relocations are rarely granted. However, effective 1 July 2023, if a parent was living greater than 50 miles from the other parent at the entry of a Final Judgment and they move within the 50-mile radius, that is a substantial change in circumstances to warrant a modification of timesharing. So, if a parent was living out of state and moves closer to the child, they have the ability to modify their timesharing schedule for more time with the child.

3.4 ADR

In Florida, different from many other jurisdictions, all aspects of the dissolution process, namely parenting, equitable distribution, alimony, child support and any other matters to resolve for the family, come before one judge and are typically all decided at the same time. While sometimes cases may be bifurcated, it is unusual for the financial issues to be bifurcated from the child-related issues as they all work off each other. What is distributed to each party must be known to determine incomes for the need and ability to pay the component of alimony. The alimony amount and timesharing schedule must be known to determine child support.

To encourage resolution of issues without court involvement, mediation is required in most cases before ever appearing in front of a judge. Mediation is a process, generally speaking, where each party has their own attorney and a mediating professional (either a lawyer or someone certified by the Supreme Court) serves as a conduit between the parties to seek amicable resolution of their issues. If that is possible, a marital settlement agreement and parenting plan are usually signed by the parties at the conclusion of mediation and, other than a very brief final hearing for the court to enter a final judgment, the litigation is concluded. Sometimes more than one mediation is necessary to resolve a matter, but mediation and amicable resolution is generally quite successful in Florida.

As mentioned above, arbitration is not permitted in Florida for child-related cases. The parties can agree to use a private judge to resolve child-related issues.

Collaborative Law Process. §§ 61.55-61.58, Fla. Stat. established the Collaborative Law Process in Florida, which allows parties to settle their cases via a collaborative contract. Each party has a lawyer, and the lawyer and the parties contract to this confidential process of resolution. Joint experts, in both financial and mental health, can be involved to help the parties find creative resolution to their divorce without any litigation. However, if the collaborative process is unsuccessful, the parties must hire new lawyers, start the process over from the beginning and hold all things discovered during the collaborative process confidential. The Collaborative Law Process is very successful in certain parts of Florida and less so in others.

3.5 Media Access and Transparency

The courts have decided that not all dissolution of marriage cases involving children have an absolute right to privacy. Barron v Florida Freedom Newspapers, Inc., 531 So. 2d 113 (Fla. 1988).

Pursuant to Florida Family Law Rules of Procedure Rule 12.012 pleadings and documents shall comply with court rules to minimise the filing of sensitive information. Rule 2.425 Fla. Rules of Gen. Prac. and Jud. Admin requires minors to be identified by their initials and not full legal names in court filings. However, there is an exception in court orders relating to parental responsibility, timesharing or child support where children's names may be used. Florida allows for the determination of confidentiality and sealing of court files in family law cases. Florida Rule of General Practice and Judicial Administration 2.420.

Trends and Developments

Contributed by:
Elisha D. Roy and Carolyn D. Ware
Sasser, Cestero & Roy

Sasser, Cestero & Roy provides top-quality legal representation to its clients on sophisticated and complex family law matters both domestically and abroad. Its family law practice includes litigation, appeals and alternative dispute resolution. Committed to excellence, the partners at the firm are Florida board-certified specialists in marital and family law. The firm's clients are captains of industry, celebrities, professional athletes, small business owners, homemakers and working individuals. Although its client base varies, its philosophy of service remains the same: providing exceptional, professional legal services, maintaining a high standard of client service while respecting clients' confidentiality. The firm specialises in high-profile cases with clients whose complex legal matters involve the distribution of multimillion-dollar holdings and require sophisticated financial expertise. Its strategic approach generally involves negotiating, when possible, to keep matters out of the public eye, but litigating when necessary to help its clients work towards their goals.

Authors

Elisha D. Roy is board-certified in marital and family law and a fellow of both the American Academy of Matrimonial Lawyers (AAML) and the International Academy of Family Lawyers. Throughout her career, Ms Roy has been active in local and state Bar associations. She is immediate past president of the Florida Chapter of the AAML and past chair of the Family Law Section of the Florida Bar. Ms Roy has been integral in legislative work that has changed the face of Florida family law. She is a frequent lecturer and author on international issues, legislative issues and other practice-related topics.

Carolyn D. Ware is an associate attorney with Sasser, Cestero & Roy. In 2024, she attained board certification in marital and family law. Carolyn is active in the family law section of the Florida Bar and currently serves on the section's executive council and as vice chair of its publications committee.

Contributed by: Elisha D. Roy and Carolyn D. Ware, **Sasser, Cestero & Roy**

Sasser, Cestero & Roy, P.A.

2041 Vista Parkway
Suite 200
West Palm Beach
FL 33411
USA

Tel: +561 689 4378
Fax: eroy@sasserlaw.com
Web: www.sasserlaw.com

Florida family law is truly in an interesting state of flux. While Florida Statutes Chapter 61 governs almost all of family law, the courts rely heavily on the appellate opinions from the Florida Supreme Court and the six District Courts of Appeal across the State. Major changes to alimony/support, parenting and equitable distribution that occurred over the past two legislative sessions have yet to really make their way through the appellate courts so that it is possible to know how they will ultimately be applied. It is not uncommon for the decisions of the Appellate Courts or Florida's Supreme Court to change what might appear to have been the plain meaning of a statute.

Alimony

In 2023, Florida drastically amended its alimony statute, eradicating permanent alimony and creating guidelines for both amounts of alimony and lengths of time for awards. These changes came after decades of fighting among stakeholders in Florida family law, including both the proponents and antagonists to alimony. What has yet to become clear is how judges are going to apply and address the statutory changes in practice.

For example, in 2010, the alimony statutes were modified to provide that "permanent alimony" could only be granted to a spouse in a long-term marriage if no other form of alimony was able to provide for the recipient's needs and necessities. Durational alimony, formed also in 2010, was not to exceed the length of a marriage, and, as a result, would answer the need in most cases, so permanent alimony should not be required. However, and almost immediately, the appellate courts issued opinions that, notwithstanding the clear language in the statute, if you were the needy spouse in a long-term marriage, permanent alimony was still the presumption. Now, with permanent alimony completely gone in Florida statutes, will the appellate courts still find a way to "create" permanent alimony? With the new guidelines, in a long-term marriage (in excess of 20 years), a recipient is to be awarded alimony that does not exceed 75% the length of the marriage. The court can exceed that statutory amount based on certain circumstances, so practitioners should be looking to see if the appellate courts create another hard and fast rule in this regard, perhaps creating "permanent alimony" once again.

Another interesting development to watch is the interplay between the new alimony statute and the changes to Florida Statute 61.14 regarding alimony modifications. Prior case law providing that retirement in itself is a substantial change to warrant a modification of alimony was codified in 2023. This means that a person who is retiring needs show no other change for a retirement to open the door to a modification. How will this work both in modification and initial awards? What if someone is already past retirement age when an initial divorce is filed? Does it preclude a less moneyed spouse from even seeking alimony? We know that, if a person retires and seeks a modification, the court can change the type of alimony awarded. In other words, if the recipient spouse was awarded permanent alimony, the payor retires and files a modification, then the court can change the alimony to another type of alimony, most likely durational. And now that the length of the award is changed, the court may also modify the amount. If the court changes the alimony type to durational, do the new guidelines apply, and, if so, is the length and amount based on the years of marriage or some other number? Because permanent alimony could have been awarded in a case up to July 2023, most modifications coming to the court will likely be seeking to modify a permanent alimony award. In many of those cases, it is entirely possible that a payor is seeking a modification having already paid alimony for longer than the length of the actual marriage! Regardless of the facts, an example helps illustrate the possible issues that could arise: A couple were married for 20 years and a spouse is awarded permanent alimony at an initial divorce in 2015. Then, in 2025, the paying spouse seeks a modification due to legitimate retirement. If the court changes the alimony to durational, what would the duration be? Would it be 75% of the 20 years the couple were married? Or can the court pick any duration? And what about amount of alimony? Current guidelines say that alimony should not exceed the needs of the recipient spouse or 35% of the differential in their net incomes. What "need" are we looking at – at the time of the divorce or current at the time of the modification? The same goes for the couple's incomes. Is the court looking at their incomes at the time of divorce or at their current incomes? This is particularly interesting when you consider that one of them may have been working and earning a particularly high income but is now seeking a modification after retirement at a time when they have no income. It is expected that many of these issues will be hashed out in the appellate courts in Florida over the next few years.

Parenting

Modifications in Florida law as it pertains to children should be expected based upon changes to the State's parenting statute (61.13), changes to the Parentage laws (most well known as paternity cases) and changes taking place in the US regarding rights for the LGBTQ+ community (rolling back numerous advances over the past decade, with more expected).

With effect from 1 January 2023, Florida has a rebuttable equal timesharing presumption. This means that, for every case, initial petitions for timesharing or modifications to this, begin with the presumption that equal timesharing is in the minor child's best interests. Notwithstanding the fact there is a tremendous amount of literature to the contrary, the adoption of this legislation is truly not a deviation from what was happening in practice in most of Florida prior to its adoption. While Florida ended the concept of a "tender years doctrine" – ie, that children should be with the mother most of the time – in the late 1960s, in the early 2000s Florida judges had already started at a place where both parents should have

equal access and equally divide the overnights with their children. Florida sits in an interesting place with a parenting statute that requires the court to consider the best interests of the child in direct conflict with a constitutional right for parents to raise their children how they wish, free from government interference. As such, for a court to interfere with how parents function with their children is a high burden. Until the appellate courts really start dealing with equal timesharing presumption cases, it is unclear how significant that burden really will be and what it will take to deviate from the presumption. As practitioners in Florida, rebuttable presumptions are generally hard to overcome in other areas, including equitable distribution, so the assumption should likely be no different with parenting.

However, it should go without saying that most paternity cases, where the mother and father were never married, should arguably be treated differently, and they are not. If a child was born to a mother, unbeknownst to the father or known to the father who was not involved, and, at some later date, a paternity action is filed – should it be the presumption that equal timesharing is in the child's best interests if that child never knew the other parent? Should there not be a period of time where the child meets and gets to know the other parent? This is a difficult premise from a litigation perspective, as the court system in Florida does not allow for the court to create a self-evolving schedule, meaning that the court cannot say "this is the schedule for X months, followed by this", and so on, until the parties transition to an equal timesharing schedule. The Florida court system is created such that the court can only enter one schedule it determines to be in the child's best interests at that exact time. Even though it can be inferred that a one year-old will eventually develop a closer relationship with their father over a few months or years, the Court cannot plan for what will be in the child's best interests at that time. If a parent wants to change the timesharing schedule, they must prove a substantial change, and in this scenario that substantial change would be becoming better acquainted with the child, and the hope is that this will be sufficient to overcome the hurdle to modify. Another change to the 2023 version of the statute took out the previous requirement that any change be unanticipated, but it is unclear how the court will apply that change in practice. In reality, settlement and resolution of child related issues is really based upon what is best for the child, as it allows flexibility.

In the same vein, it will be interesting to see what the court does in applying the presumption to modification cases. For example, an order for timesharing that predates the 2023 statute change could include that the division of time between the parents with the child is 60% to one parent and 40% to the other parent. If a substantial change is found, the law says that the rebuttable equal timesharing presumption must be applied. With the removal of the unanticipated circumstance for modification and the presumption of equal timesharing once the change is proven, it is arguably going to be much easier for parents who agreed to and/or were awarded less than equal to make their way back to court to obtain that equal award. Is that what is the best for the children? It remains to be seen how the courts will address this.

Another issue, which is somewhat controversial but definitely needs to be top of the mind awareness in Florida family law, has to do with same-sex couples. In 2015, the United States legalized gay marriage and, shortly thereafter, Florida ended its ban on homosexuals being able to adopt children. In addition, Florida has a presumption

that a child born during a marriage is the biological child of the married couple. The result of this trifecta is that children born or adopted to a married, same-sex couple should be deemed a child of that union, and that, in the event of dissolution of the marriage, both parents should be presumed to have equal timesharing. However, with President Donald Trump's recent scrapping of diversity, equality and inclusion policies, there is a legitimate concern that gay marriage and other rights given to the LGBTQ+ community may now be at risk too. What will this do to children born to a same-sex couple during an intact marriage if there is legislation or an executive order that gay marriages are deemed invalid? What if gay adoption is also determined to be invalid? What will happen to the permanency of those children adopted into same-sex couples? What will happen if you've got a biological mother who birthed the children to a same-sex couple but the other mother does not have biological ties to the child? These troubling issues should be at the forefront of practitioners' minds and protecting the children of these families in the USA as we head into the next few years.

Equitable Distribution

The major change to equitable distribution in Florida was effective on 1 July 2024 and this statutory change deals with the valuation of businesses in the State. Through the evolution of case law over the last ten to fifteen years, the concept of actual business valuation in Florida has all but gone by the wayside. A series of appellate opinions essentially made it so that only one of the three methods of valuation – the asset approach – was really appropriate in valuing most Florida businesses during a divorce. Essentially, the law morphed the application of all three methods into holding that if any non-compete or non-solicitation clause were to be required for the owner spouse to be out of the business, then no enterprise goodwill could exist, leaving the asset approach as the only valuation method necessary. The new statutory change requires the court to identify whether there is value over and above the presence of the owner spouse to value enterprise goodwill, and makes it clear that a non-solicitation or non-compete cannot create a presumption that there is no enterprise goodwill. In practice, this should boost the value of most types of businesses for divorce purposes, other than those in the personal service sector. This change will truly benefit the non-owner spouse. As with all the changes, however, it will be interesting to see what the courts do with cases as they are appealed. It was the appellate courts that created the erosion of business valuation in Florida and, arguably, more opinions could come out chipping away at this most recent statutory change.

USA – INDIANA

Law and Practice

Contributed by:
Drew Soshnick
Faegre Drinker Biddle & Reath, LLP

Contents

Faegre Drinker Biddle & Reath, LLP has a team of 12 attorneys – practising in Indiana, Colorado, Minnesota, and New York – who focus on counselling, mediating, and litigating high net worth complex divorce proceedings that involve business and professional practice valuations, private equity and venture capital, professional licences, patents and royalties, alimony and spousal maintenance, and all other financial considerations. The firm combines zealous advocacy with empathetic sensitivity to complicated issues to protect assets. Recent work includes successfully defending the valuations of manufacturing concerns, legal, accounting, medical, and veterinary practices and ambulatory surgery centres; successfully defending tax elements of both businesses and non-business activities; and counselling on international divorce property division aspects.

Author

Drew Soshnick is a partner at Faegre Drinker Biddle & Reath, LLP, concentrating his practice in complex divorce cases involving sophisticated financial issues such as business and professional practice valuations, private equity, venture capital, and stock and stock options. He is a cum laude, Order of the Coif graduate of Northwestern University Pritzker School of Law, a diplomate of the American College of Family Trial Lawyers, a fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers, and a faculty member of the National Family Law Trial Institute.

Faegre Drinker Biddle & Reath, LLP

300 N. Meridian Street
Suite 2500
Indianapolis
IN 46204
USA

Tel: +1 317 237 1243
Fax: +1 317 237 1000
Email: drew.soshnick@faegredrinker.com
Web: www.faegredrinker.com

1. Divorce

1.1 Grounds, Timeline, Service and Process

Grounds

The grounds for divorce in Indiana for both opposite and same-sex marriages are: irretrievable breakdown of the marriage, conviction of a felony after marriage, impotence if it existed at the time of the marriage, and incurable insanity of a party for at least two years (Indiana Code Section 31-15-2-3). Indiana does not recognise common law marriages entered into after 1 January 1958 (see Indiana Code Section 31-11-8-5).

Process and Service

The divorce process begins with the filing of a petition for dissolution of marriage (see Indiana Code Section 31-15-2-5) and, by statute, cannot end a marriage by approving a settlement agreement or conducting a final hearing less than 60 days after the filing of that petition or a petition for legal separation that was converted to a divorce petition (see Indiana Code Section 31-15-2-10). There is no pre-filing or other period of required separation. A party may, but is not required to, respond to a petition for dissolution of marriage or for legal separation (Indiana Code Section 31-15-2-8) Courts can enter provisional orders governing matters during the pendency of a divorce case (Indiana Code Section 31-15-4-1 et seq). If parties reach an agreement, courts may dissolve a marriage without conducting a final hearing (Indiana Code Section 31-15-2-13). Additionally, if parties resolve some, but not all, issues, they may submit the resolved issues for approval by summary disposition order (Indiana Code Section 31-15-2-14).

Indiana Code Section 31-15-2-8 and the Indiana Rules of Trial Procedure govern service and provide for certified mail, personal process server, or waiver of formal service of process. See Indiana Trial Rules 4 (and subparts) and 5.

Religious Marriages

Religious marriages and divorces, if viewed as legitimate under Indiana law, are generally given full faith and credit.

Void and Voidable Marriages

Indiana has statutory provisions for void marriages – ie, marriages that were never valid because, for example, one of the spouses was married at the date of the new marriage, the marriage was to a close relative, or one of the spouses was incompetent (see Indiana Code Section 31-11-8-0.3 et seq). Indiana also has statutory provisions for voidable marriages – ie, a valid marriage that has grounds to be voided, such as incapacity to marry because of age or mental incompetence or fraud (see Indiana Code Section 31-11-9-1 et seq). A void marriage can be declared as having never occurred upon a proper showing. For a court to order a void marriage, a petition for voidable marriage must be filed and requisite statutory proof provided.

1.2 Choice of Jurisdiction

One party must be a resident of a county (or stationed at a US military installation within the county) in the State of Indiana for three consecutive months and of the State of Indiana for six consecutive months for subject-matter jurisdiction over a divorce (Indiana Code Section 31-15-2-). There also must be personal jurisdiction over the responding party (see Indiana Trial Rule 4.4(A)).

Domicile is the place where a party resides or intends to return from a temporary absence to reside. Residence is where a party physically lives. Nationality (the place of origin of a person)

generally is addressed by residency and domicile and does not often become relevant.

Contesting Jurisdiction and Staying Proceedings

A party to divorce proceedings may contest jurisdiction for lack of subject matter jurisdiction or personal jurisdiction, but not simply to stop a divorce from occurring. A party may obtain a divorce without stating a fault ground.

A party may request a stay of proceedings to pursue divorce proceedings in a foreign jurisdiction if there is a lack of subject matter or personal jurisdiction or a lack of jurisdiction over property or children's issues. Also, a divorce proceeding may be stayed under certain circumstances if there is a bankruptcy proceeding pending. Statutory and common law precedent are a guide in each of these instances.

2. Financial Proceedings

2.1 Choice of Jurisdiction

As mentioned in **1.2 Choice of Jurisdiction**, one party must be a resident of a county (or stationed at a US military installation within the county) in the State of Indiana for three consecutive months and of the State of Indiana for six consecutive months for subject-matter jurisdiction over a divorce (Indiana Code Section 31-15-2-6). There also must be personal jurisdiction over the responding party (see Indiana Trial Rule 4.4(A)).

A party to divorce proceedings involving property division may contest jurisdiction for lack of subject matter or personal jurisdiction or to allege that a court does not have jurisdiction over property.

A party may request a stay of proceedings to pursue divorce property division proceedings in a foreign jurisdiction if there is a lack of subject matter or personal jurisdiction or if there is a lack of jurisdiction over property. Statutory and common law precedent are a guide.

Courts hear financial claims after a foreign divorce court enters property orders, generally, to enforce foreign orders. Courts do not typically revisit the foreign orders, but there can be more scrutiny given to orders from non-Hague Convention countries.

2.2 Service and Process

See **1.1 Grounds, Timeline, Services and Process** (Process and Service).

2.3 Division of Assets

Marital Property

By statute, marital "property" is defined as all assets (and liabilities, per case law interpreting the definition of marital property) of either party or both parties, including:

- a present right to withdraw pension or retirement benefits;
- the right to receive pension or retirement benefits that are not forfeited upon termination of employment or are vested (as defined by IRC Section 411), but that are payable after divorce; and
- the right to receive disposable retired or retainer pay (as defined by 10 United States Code (USC) 1408(a)) acquired during the marriage that is or may be payable after divorce (Indiana Code Section 31-9-2-98).

Just and Reasonable Division

Marital property is to be divided in a just and reasonable manner, and can be divided in kind, by setting aside the property of one party to

the other party, ordering the sale of property, or ordering the distribution of pension or retirement benefits (see Indiana Code Section 31-15-7-4). Courts presume that an equal division of all marital property is just and reasonable, but that presumption may be rebutted by consideration of relevant evidence, including consideration of five statutory factors:

- the contribution of each spouse to the acquisition of property, regardless of whether the contribution was income producing;
- premarital, gifted, or inherited property;
- the economic circumstances of each spouse;
- conduct leading to the disposition or dissipation of property; and
- the earnings or earning ability of the parties (Indiana Code Section 31-15-7-5).

Courts look for meaningful reasons to deviate from the presumed equal equitable distribution.

Most courts require financial declarations stating under oath the identity and value of all marital assets and liabilities. Parties may also conduct discovery such as depositions, interrogatories, requests for production of documents, and requests for admissions (see Indiana Trial Rules 26, 30, 31, 33, 34 and 36). There also is the right to request documents from non-parties (see Indiana Trial Rule 34(C)). Courts have the authority to enforce discovery compliance from parties and non-parties (see Indiana Trial Rule 37).

Trusts

If vested, trusts are considered marital property and part of a marital estate presumed to be equally divided. If trust documents do not allow the division of trust property, the trust beneficiary spouse may be ordered to offset other property or make property settlement payments to achieve the overall distribution of the parties' marital estate – see, for example, Loeb v Loeb, 301 NE 2d 349 (Indiana 1973).

2.4 Spousal Maintenance

Upon the filing of a petition for dissolution of marriage or legal separation, a party may seek and be awarded temporary spousal maintenance (see Indiana Code Section 31-15-4-1 et seq).

Indiana does not have classic post-divorce alimony or spousal maintenance. There are three statutory grounds for spousal maintenance:

- physical or mental incapacity of a party to the extent it materially affects a party's income-earning capacity;
- the need to forgo employment to care for a disabled child, as well as the lack of sufficient property to provide for needs; and
- rehabilitative maintenance – after considering education, interruption in education, and earning capacity – for a maximum of three years from the date of divorce (see Indiana Code Section 31-15-7-2).

Spousal maintenance is not often a factor in Indiana divorces.

For post-divorce spousal maintenance, incapacity and caregiver maintenance is based on the incomes and expenses of the parties for the duration of the incapacity or caregiver responsibilities. For rehabilitative maintenance, the amount is often based on costs for retraining, restoring a licence, or classwork related to returning to the workforce. There are no formulae or calculations to guide the courts. It is wholly discretionary.

2.5 Prenuptial and Postnuptial Agreements

Indiana has adopted the Uniform Premarital Agreement Act (Indiana Code Section 31-11-3-1 et seq) for prenuptial agreements executed after 1 July 1995, and has robust case law that promotes the validity and enforceability of premarital agreements so long as there is no fraud, duress, coercion, or unconscionability. Case law on postnuptial agreements is less developed and the validity and enforceability of postnuptial agreements is discretionary and often determined based on whether the contract is necessary to extend a marriage that otherwise would be dissolved. The history of the case law for postnuptial agreements has evolved from 1991 to the present date, balancing public policy considerations with freedom-of-contract principles.

Courts presume the validity and enforceability of prenuptial agreements. It is a more fact-sensitive analysis with postnuptial agreements. For prenuptial agreements, see In re Marriage of Boren, 475 NE 2d 690 (Indiana 1985) and its progeny. For postnuptial agreements, see Hall v Hall, 27 NE 3d 281 (Indiana Court of Appeal 2015).

2.6 Cohabitation

Indiana case law treats the separation of cohabiting couples far differently than divorce. Only the joint property of the cohabitants is divisible and there is no statutory presumption as to the division of that property. There are no statutory provisions and situations are assessed based on contract, quasi-contract, unjust enrichment, equity, and similar principles. For the history of the development of this common law, see Glasgo v Glasgo, 410 NE 2d 1325 (Indiana Court of Appeal 1980) and its progeny.

While there is no statutory provision and only selected case law guidance, the length of cohabitation, roles of each party, economic contribution of each party, non-economic contribution of each party, and other factors may affect how a court divides the property of the cohabitants that is subject to division.

2.7 Enforcement

If a party fails to comply with a financial order, the other party may file a motion to enforce the financial order. That motion may seek enforcement by contempt (not applicable to money judgments), compelling compliance with the terms of the divorce decree, an income withholding order, or any other remedies available for the enforcement of a court order (see Indiana Code Section 31-15-7-10). In an effort to avoid enforcement issues, the receiving party may request security, such as pledge of assets, liens on stock or membership units, direct payment provisions, life insurance, and other assurances.

International enforcement of financial orders is permitted in Indiana – again, with more scrutiny given to orders from non-Hague Convention countries.

2.8 Media Access and Transparency

In Indiana, the media and press are able to report on financial cases. Courts are open to the public. However, if there are issues that would fall within the confidentiality of the Indiana Rules on Access to Public Records Act, courts may restrict access to proceedings and court documents. Trade secrets, confidential and proprietary financial and other information, and other types of non-public information may be protected from disclosure.

There are two primary methods of seeking anonymity of proceedings. Parties may file a divorce case in any county in Indiana (subject to the other party requesting to move the case back to a

county of residence) to try to limit likelihood of access. Some counties permit filings with initials as opposed to full names, but that is discretionary. Indiana allows for public access to the Chronological Case Summary of Filings and Proceedings (but not the actual filings for non-lawyers) for most types of family law cases (but not orders of protection, adoptions, and other categories).

2.9 Alternative Dispute Resolution (ADR)

Indiana has rules for ADR. Mediation, arbitration, and private judging is available to assist parties to resolve financial disputes.

Several Indiana counties, by local rule, require mediation before a final hearing. If a party is non-compliant, courts can impose sanctions.

Mediated agreements on financial issues are generally enforceable upon execution and are approved by courts as an order of the court. Agreements are favoured under Indiana law to promote amicable resolution of disputes (see Indiana Code Section 31-15-2-17).

3. Child Law

3.1 Choice of Jurisdiction

Indiana does not separate financial issues from children's issues in divorce cases. However, there are separate statutes that address jurisdiction for child custody proceedings if children's issues are not part of a divorce case, such as paternity, post-divorce children's issues, guardianships, and children's issues from other jurisdictions. Indiana has adopted a version of the Uniform Child Custody Jurisdiction Act (styled UCCJA rather than Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)) (see Indiana Code Section 31-21-1-1 et seq). While not absolute, the six-month home state rule – the state where the child has lived with a parent or a person acting as a parent for at least the last six consecutive months is the child's "home state" – applies in many situations. There are exceptions for emergencies and other situations. In addition to home state considerations, the best interests of children are considered when establishing jurisdiction.

Home state is most relevant for children in determining jurisdiction when children's issues are not part of a divorce case. In those instances, for the parents, having some nexus to Indiana is relevant – although the three-month county and six-month state requirements are not technically applied as in divorce cases.

3.2 Living/Contact Arrangements and Child Maintenance

Custody Disputes

If there is a dispute over custody and parenting time, courts will address those issues upon application of a party. Indiana has statutes and case law that govern the determination of both legal custody (making major life decisions for children) and physical custody (deciding what parenting time each parent will have). "Children" are defined as under the age of 18, for purposes of custody and parenting time (see Indiana Code Section 31-9-2-13). Courts may make orders that are in children's best interests as to custody and parenting time so long as they are constitutional and do not improperly infringe on a parent's right to have access to and raise children.

A custodian may determine the children's upbringing, including education, healthcare, and religious training, unless limited by court order due to the children's physical health being endangered or emotional development significantly impaired (see Indiana Code Section

31-17-2-17). An award of joint legal custody does not require an equal division of physical custody of the children (see Indiana Code Section 31-17-2-14).

As to physical custody and parenting time for children, courts look at the statutory factors (Indiana Code Section 31-17-2-8 for initial custody determinations and Indiana Code Section 31-17-2-21 for custody modifications).

Indiana Code Section 31-17-2-8 provides for the determination of custody and entry of an initial custody order, in accordance with the best interests of the children. In determining the best interests of the children, there is no presumption favouring either parent. Courts shall consider all relevant factors, including:

- the age and sex of the children;
- the wishes of the parties;
- the wishes of children (with more consideration given to the wishes of children aged 14 or older);
- the interaction and interrelationship of the children with the parties, siblings, and other persons who may significantly affect the children's best interests;
- the children's adjustment to homes, school and community;
- the mental and physical health of all individuals involved;
- evidence of a pattern of domestic or family violence of either party;
- evidence that children have been cared for by a de facto custodian (defined in Indiana Code Section 31-9-2-35.5 and with additional factors for consideration set forth in Indiana Code Section 31-17-2-8.5); and
- a designation in a power of attorney of a party or a de facto custodian.

Indiana Code Section 31-9-2-67 defines "joint legal custody" as parties sharing authority and responsibility for major decisions concerning the children's upbringing, including the children's education, healthcare, and religious training. Indiana Code Section 31-17-2-13 indicates that courts can award joint legal custody if the court finds it is in the best interests of the children. In determining whether an award of joint legal custody is in the best interests of children, courts shall consider it a matter of primary, but not of determinative importance, that the parties have agreed to joint legal custody (Indiana Code Section 31-17-2-15). Courts shall also consider:

- the fitness and suitability of each person;
- whether parties are able to communicate and co-operate in advancing the children's welfare;
- the wishes of children (with more consideration given to the wishes of children aged 14 or older);
- whether the children have established a close and beneficial relationship with both parties;
- whether the parties live close to each other and plan to continue to do so; and
- the nature of the physical and emotional environment in each party's home (Indiana Code Section 31-17-2-15).

Indiana Code Section 31-17-2-21 provides that courts may not modify child custody orders unless the modification is in the best interests of the children and there is a substantial change in one or more of the factors set forth in Indiana Code Sections 31-17-2-8 or 8.5. Courts shall not hear evidence on a matter occurring before the last custody proceeding unless that matter relates to a change in the statutory factors relating to the best interests of the children.

The Indiana Supreme Court has established the Indiana Parenting Time Guidelines, which – in the absence of extreme circumstances – serve as a guide for the minimum amount of time a non-custodial parent will have with children. There are age gradations suggesting different frequency and duration for a parent's contact with children depending on the children's ages. There is also a detailed suggested schedule for holidays and extended parenting time, as well as consideration of distance between parents as a factor.

Child Support

The Indiana Supreme Court has adopted the Indiana Child Support Rules and Guidelines that presumptively govern child support, which were dramatically modified effective 1 January 2024, to account for cost-of-living changes and eliminate the complex method of allocating uninsured healthcare expenses. There is an underlying formula that adopts an income shares model, uses gross income, and applies a 21.88% tax factor. There are additional references as to how to address other expenses, such as healthcare, extracurricular activities, and educational expenses. If courts deviate from the presumptive child support amount, they must explain and offer reasons for the deviation. Indiana Code Section 31-16-6-1 provides a non-exhaustive list of factors to be considered for child support payments, but the guidelines calculation usually controls the amount. The duty to support children ends at age 19 unless a child is earlier emancipated or is incapacitated (see Indiana Code Section 31-16-6-6). College expense orders can continue past age 19 for the duration of an undergraduate degree. Child support orders are modifiable upon showing:

- changed circumstances so substantial and continuing as to make the terms of the existing child support order unreasonable; or
- that a party has been ordered to pay an amount in child support that differs by more than 20% from the Indiana Child Support Guidelines' calculation.

Parties may make agreements outside of court for child support and to cover certain children's expenses, but they are informal arrangements and not enforceable in the event of disputes. The most common approach is for courts to make formal child support orders.

Any person entitled to receive child support payments may commence a child support action (see Indiana Code Section 31-16-2-1 et seq).

3.3 Other Matters

Courts have the power to make an order that dictates the upbringing of children when parents have opposing views on specific issues (eg, schooling, medical treatment, religion and holidays), by naming one parent the sole legal custodian, or when there is a dispute between joint legal custodians. See Indiana Code Section 31-17-2-17. However, that does not mean the other parent must, for example, take the children to the sole legal custodian's preferred house of worship on their parenting time. It means that the specification of how a child will be raised is in the sole province of the custodian. If joint legal custodians have a voluminous number of disputes, courts will eventually modify legal custody so one parent makes the decisions after consulting with the other parent.

Parental alienation is considered not independently or as a syndrome but, rather, as part of the assessment of a parent when courts conduct the statutory analysis of a custody situa-

tion. See Indiana Code Sections 31-17-2-8 and 21 (enumerating a non-exhaustive list of factors for courts to consider).

Courts have the discretion to permit a child to speak to the judge in chambers (Indiana Code Section 31-17-2-9) or, for older children, to testify on the witness stand. Those practices are largely discouraged. More often, a child's counsellor, custody evaluator, guardian ad litem, or court-appointed special advocate presents the views of children. See Indiana Code Section 31-17-2-10 and 12 and Indiana Code Section 31-17-6-1 et seq.

3.4 ADR

The Indiana Rules for Alternative Dispute Resolution, adopted by the Indiana Supreme Court, govern ADR. These rules provide for mediation, arbitration, mini-trials, summary jury trials, and private judges to help parties to resolve financial disputes.

While not mandated in all instances, several Indiana counties, by local rule, require mediation before a final hearing. Also, if a party requests mediation, it is likely to be granted. If a party is non-compliant in participating in the mediation process, courts can impose sanctions that include an award of attorney's fees.

Mediated agreements on children's issues are generally enforceable, upon approval by courts, as an order of the court. Mediated agreements on financial issues are generally enforceable upon the parties signing the mediated agreement and are subsequently approved by courts.

There is no statutory requirement for a party to engage in ADR.

3.5 Media Access and Transparency

In Indiana, the media and press are generally permitted to report on financial cases. Courts are open to the public. See Indiana Rule on Access to Court Records ("Ind R Acce Ct Rec")4(A). However, if there are issues that would fall within the confidentiality of Indiana Code Section 5-14-3-1 et seq and the Indiana Rules on Access to Court Records, adopted by the Indiana Supreme Court, courts may restrict access to proceedings and court documents. The statute addresses, among other things, trade secrets and confidential financial information (see Indiana Code Section 5-14-3-4(a)(4) and (5)). The act details mandatory confidentiality, discretionary confidentiality, and the process of maintaining confidentiality. There is a process for filing mandatory confidential information. There is a process for discretionary confidentiality that requires filing a notice and setting a hearing. If information is not determined to be confidential, the media and the press are rarely limited on what they can and cannot report.

There are two primary methods of seeking anonymity of proceedings. Parties may file a proceeding in any county in Indiana (subject to the other party requesting to move the case back to a more appropriate county) to try to limit ease of access. The "preferred venue" is generally the county where the parties reside. If a party files a divorce case in a non-preferred venue, the other party has the right to request that the case be transferred back to a county of preferred venue (see Indiana Trial Rule 75). Additionally, some counties and courts permit filings with initials or partial initials as opposed to full names. That permission is within the discretion of the particular county and court and, with the advent of electronic filing, sometimes within the discretion of the electronic filing service. Certain types of children's cases have limitations on access

to preserve confidentiality (eg, paternity actions created after 1 July 1941, and before 1 July 2014, pursuant to Indiana R Acce Ct Rec 5(A)(6)), but generally not divorce cases involving children, which are mostly open to the public. Personal identifiers such as social security numbers also are excluded from public access.

Trends and Developments

Contributed by:
Drew Soshnick
Faegre Drinker Biddle & Reath, LLP

Faegre Drinker Biddle & Reath, LLP has a team of 12 attorneys – practising in Indiana, Colorado, Minnesota, and New York – who focus on counselling, mediating, and litigating high net worth complex divorce proceedings that involve business and professional practice valuations, private equity and venture capital, professional licences, patents and royalties, alimony and spousal maintenance, and all other financial considerations. The firm combines zealous advocacy with empathetic sensitivity to complicated issues to protect assets. Recent work includes successfully defending the valuations of manufacturing concerns, legal, accounting, medical, and veterinary practices and ambulatory surgery centres; successfully defending tax elements of both businesses and non-business activities; and counselling on international divorce property division aspects.

Author

Drew Soshnick is a partner at Faegre Drinker Biddle & Reath, LLP, concentrating his practice in complex divorce cases involving sophisticated financial issues such as business and professional practice valuations, private equity, venture capital, and stock and stock options. He is a cum laude, Order of the Coif graduate of Northwestern University Pritzker School of Law, a diplomate of the American College of Family Trial Lawyers, a fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers, and a faculty member of the National Family Law Trial Institute.

Faegre Drinker Biddle & Reath, LLP

300 North Meridian Street
Suite 2500
Indianapolis
IN 46204
USA

Tel: +1 317 237 1243
Fax: +1 317 237 1000
Email: drew.soshnick@faegredrinker.com
Web: www.faegredrinker.com

The Impact of Ongoing Socioeconomic, Demographic and Legislative Changes on Family Law in Indiana

Effective 1 January 2024, the Indiana Supreme Court revised its Child Support Rules and Guidelines to incorporate more recent cost and expense data. This revision, the first to the underlying child support formula, leads to a significant increase in child support obligations. The former "6% Rule" related to payment of uninsured health care expenses is eliminated, with each party paying their pro rata share of these costs from the first uninsured dollar incurred rather than after a threshold has been met.In the first year of application, the new child support guidelines have been well received – although many still question whether the presumptive amounts have been updated sufficiently to capture cost-of-living increases.

In this long session year of the Indiana General Assembly, at least two bills are expected to be introduced to committees for reading, seeking presumptive joint legal custody and joint physical custody. This has been a trend in each of the last few legislative sessions. Indiana defines legal custody as making major life decisions (eg, health, education, and religion). Physical custody involves the allocation of parenting time. During the past three years, Indiana legislators have attempted to advance bills for both types of custody to be presumptively equal. Other states have adopted these rules without great success and some states have rescinded these presumptions.

Several legislators have taken on this cause and are presenting various versions of these bills in an effort to garner majority support. So far, those efforts have yet to succeed. However, they have attracted the attention and support of others. With this forward movement, expect legislative efforts to continue on this issue and be at the forefront of family law in the Indiana General Assembly.

Proposed bills to expand spousal maintenance rights

The trend of revisiting Indiana spousal maintenance laws is set to reappear. Indiana family law has long favoured the income spouse. The state's spousal maintenance laws are among the least generous in the United States and sees parties attempt to obtain jurisdiction in Indiana to avoid onerous spousal maintenance issues in other states. When the Indiana Dissolution of Marriage Act was enacted in 1973, the trade-off was to include all property as marital property, regardless of how titled or how or when acquired, and to statutorily presume an equal division of marital estates. That statutory regime remains largely unchanged 50 years later. Since the 1980s, several attempts have been made to expand Indiana's spousal maintenance laws, to no avail. The Indiana General Assembly meets in alternating years in short and long sessions, neither of which is considered long temporally.

While rumblings are heard that the spousal maintenance issue will resurface, that is not anticipated for 2025. The expectation is that, with the changing demographics of the legislature, proposed bills to expand spousal maintenance rights may appear in the near future. If a bill of that nature does gain traction, anticipate that some will call for Indiana to re-evaluate its "one pot" definition of marital property that leaves the state as one of the few that does not have a separate property classification that removes certain property from division at divorce.

Given the more than half-century history of Indiana's divorce laws, there is not a huge appetite to tackle changing the statutory regime of what

is and what is not marital property. While courts, by statute and case law, can deviate from the presumptive equal division of marital estates on the basis of gifted, inherited, and premarital property, the proponent of the deviation bears the burden of proof. That has ruffled the feathers of many who believe that Indiana should have a separate property classification that is non-marital in status. Independently, this issue is not likely in the offing. But, if spousal maintenance reform advances, the entire equitable distribution scheme may be on the table for the legislature.

Prospect of statutory guidance on postnuptial agreements

Another area of potential development relates to postnuptial agreements. Indiana has not adopted a version of the Uniform Marital Property Act that provides for postnuptial agreements. As a result, case law from 1991 to 2017 has left some confusion as to the validity and enforceability of such agreements. Although recent appellate decisions focus on whether this type of contract, if valid and enforceable, will preserve and extend a marriage that otherwise would be dissolved, the application of this standard has proved elusive and undefined.

While only a handful of states have adopted statutes regarding post-marital agreements, conflicting case law in Indiana suggests the appropriateness of the legislature to consider statutory guidance. That effort is unlikely to be made in 2025, but look for it to be raised at some point in the coming years.

Prioritisation of adoption laws

Also, adoption laws are under scrutiny in this session of the Indiana General Assembly. Bills to reduce the time for a party to withdraw consent to an adoption are almost certain to make it to committee and may advance further.

Much litigation has arisen throughout the years in the context of adoption consents, with some difficult outcomes for children. Legislators appear to have taken note and made this topic one of priority in their agenda.

Impact of socioeconomic and demographic changes on divorce law

From a socioeconomic and demographic perspective, Indiana is changing. What was once a largely agrarian and manufacturing economy is now rapidly converting to a service economy. Healthcare, life sciences, and IT have emerged in the Bloomington to West Lafayette corridor, including Indianapolis. Fort Wayne and Evansville are diversifying their economies. Even northwest Indiana, near Chicago, a long-time hub of industrial businesses, is adapting to more service offerings.

The result of this conversion is the emergence of new businesses, venture capital, and private equity that drives sophisticated valuation issues in divorce cases. Gone are the days of only valuing a farm or tool company. Now, the most complex valuation issues arise with some frequency upon divorce. Courts are grappling with new concepts, and experts are learning and developing skills that were once the province of valuation professionals on the US coasts or in more notable emerging markets. The Indiana government solicits these new ventures and, with a low tax rate and business incentives, is drawing new enterprises to the Midwest.

This growing business sector means that complex valuation issues involving venture capital, private equity, an assessment of personal goodwill (not a marital asset under Indiana law)

and enterprise goodwill (a marital asset under Indiana law), discounts for lack of marketability, discounts for lack of control, risk assessments, and capitalisation rates will take on new and greater importance. Accordingly, the opportunities for business litigation between people when relationships are ending has become much more frequent. The need for sophisticated divorce counsel is as never before and will continue to expand as Indiana's economy continues to embrace the digital age.

As with the changes in its economy, Indiana's population is evolving. In particular, more couples are eschewing marriage and are cohabiting. Since the late 1970s, Indiana has addressed the property rights of cohabitants through case law. Only joint property is divided between cohabitants and the laws of divorce do not apply. That can lead to vigorous disputes over what to divide and what is the appropriate division of property.

This topic has not been top of mind for legislators, but some wonder whether there should be more formal rules for property division when cohabitants end their relationship – particularly with the dearth and non-application of spousal maintenance laws. This issue is unlikely to rise to the forefront, but could become of interest on the basis of supply and demand.

Indiana also has enacted some of the strictest laws in the USA in relation to abortion. Those restrictions are solidified by the Dobbs decision from the US Supreme Court but may continue to be challenged by different theories. These laws may attract to or deter certain businesses from Indiana.

At the present time, Indiana's economy is strong and diversified with low taxes. (Indiana consistently is ranked as one of the best states for businesses.) These competing considerations and the ultimate outcome may impact the quantity of high net worth matrimonial actions in Indiana.

Finally, while general statistics suggest that Indiana's population is at the lower end of states in terms of education, those statistics are deceiving. There is a mountain of family wealth that passes from generation to generation through farms, businesses, and personal holdings. That wealth is augmented by the conversion of Indiana's economy and attraction of profitable investments. Indiana's high net worth base continues to expand exponentially and, in times of marital distress, provides one of the most complex and compelling issues for resolution in divorce cases. That trend is likely to continue long into the future.

USA – MASSACHUSETTS

Law and Practice

Contributed by:
Steven E Gurdin, Barbara L Drury, Carlos A Maycotte, Stephen A MacKenzie and Kelly A Schwartz
Fitch Law Partners LLP

Contents

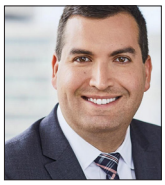
Fitch Law Partners LLP has family law/domestic relations attorneys who skilfully handle complex and often hotly contested cases. They work tirelessly to achieve successful resolution to disputes concerning the division of marital assets, child custody and visitation, alimony, domestic abuse, and permanent removal from the Commonwealth of Massachusetts. The firm excels in representing individuals in divorce cases involving high value assets and complex financial issues, such as those that arise when the marital estate includes privately held corporations, limited partnerships, or trusts. Clients trust Fitch to effectively resolve such issues – whether by comprehensive settlement, mediation, or trial. The firm's lawyers approach child custody disputes with the required sensitivity, but also realise that the stakes are high. They have successfully litigated child custody disputes involving allegations of sexual abuse, domestic violence, substance abuse, alcoholism, and mental illness. Fitch also prepares and negotiates prenuptial and postnuptial agreements to protect accumulated wealth, inheritances, family trust interests, and business interests in the event of divorce or death of a spouse.

Authors

Steven E Gurdin is a partner at Fitch Law Partners and has represented clients in complex family law and probate, will and trust Litigation matters for 30 years. Mr Gurdin's professionalism, skill, advocacy and leadership has been recognised and honoured by the Boston Bar Association, Massachusetts Bar Association, Massachusetts Continuing Legal Education, American Academy for Certified Financial Litigators, various peer reviews and is a Fellow in the American Academy of Matrimonial Lawyers ("AAML"). Mr Gurdin's clients appreciate and recognise that he brings zealous advocacy, exceptional problem-solving skills, thorough knowledge of the substantive law, and sensitivity to the complexities and emotional realities of each client's situation.

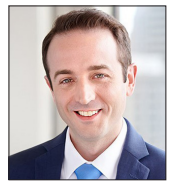
Barbara L Drury focuses on all aspects of domestic relations including divorce, paternity, modification, and contempt actions at Fitch Law Partners. She has extensive experience in matters involving child custody and support, alimony, and high net worth property division issues. She is a member of the American Academy for Certified Financial Litigators and the Massachusetts Bar Association, as well as a contributing author to Massachusetts Continuing Legal Education publications.

Contributed by: Steven E Gurdin, Barbara L Drury, Carlos A Maycotte, Stephen A MacKenzie and Kelly A Schwartz, **Fitch Law Partners LLP**



Carlos A Maycotte concentrates on family law at Fitch Law Partners. He has extensive trial experience representing clients in a wide variety of family law matters, including divorce, paternity, and prenuptial agreements. Mr Maycotte is the former co-chair of the Family Law Section of the Boston Bar Association. He earned his certification as a Certified Financial Litigator from the American Academy of Certified Financial Litigators and is a frequent panelist at family law seminars and discussion groups.

Kelly A Schwartz represents clients in all aspects of family law for Fitch Law Partners, including divorce, modification, child custody, child support, alimony, asset division, and prenuptial agreements. She is a Certified Financial Litigator from the American Academy for Certified Financial Litigators and is highly recognised in her field.



Stephen A MacKenzie focuses on all aspects of Fitch Law Partners' family law practice. He has extensive courtroom and trial experience litigating complex divorce matters involving the division of sophisticated, high net worth estates, and post-divorce modification and contempt actions. Mr MacKenzie has represented clients in numerous contested custody and support matters and is particularly adept in navigating complex financial matters involving multi-faceted compensation structures. He is an active member of the legal community, and has contributed to professional publications and participated in panels related to continuing legal education concerning ongoing developments in family law.

Fitch Law Partners LLP

84 State Street
Boston
MA 02109
USA

Tel: +1 617 542 5542
Fax: +1 617 542 1542
Email: seg@fitchlp.com
Web: www.fitchlp.com

FITCH

1. Divorce

1.1 Grounds, Timeline, Service and Process

When considering the grounds for divorce, Massachusetts first considers whether a person is seeking "fault" or "no fault" grounds for divorce. Either they are seeking to prove that the other party is at fault for ending the marriage ("fault") or, much more commonly, that the marriage has irretrievably broken down with no hope of reconciliation ("no fault"). "Fault" grounds include adultery, desertion, impotency, gross and confirmed habits of intoxication, cruel and abusive treatment, or non-support.

In divorce matters, there is no distinction in the law between same-sex spouses and heterosexual spouses under state and federal law. For unwed partners in Massachusetts, civil partners can be registered as "domestic partnerships". Should the couple seek to separate, they do not need to seek a divorce to terminate their partnership, but will instead need a termination form.

To obtain a divorce in Massachusetts, one or both parties must file the requisite pleadings with the Probate and Family Court. Massachusetts does not require a period of separation prior to filing. There are two tracks for filing for divorce: either both parties jointly seek a divorce (uncontested) or only one party seeks a divorce (contested). Both tracks require the parties to submit court forms that are listed on the Massachusetts Probate and Family Court website as well as payment of a filing fee. For uncontested divorces, parties will need to submit a fully executed separation agreement, and the parties will immediately be given a hearing date to appear before a judge who will make a determination as to whether the agreement is fair and reasonable. Contested divorces are assigned to a 14-month track; however, the length of a divorce varies widely from case to case. During the pendency of a contested divorce, the parties are required to attend what is called a pre-trial conference and at any time may request temporary orders until there is a final resolution, either with the entry of a judgment or with the filing of a duly executed separation agreement.

Once a contested divorce is filed, the filing party will receive a summons from the Probate and Family Court. The filing party then has 90 days from the date on the summons in which to serve a copy of the complaint for divorce and summons on the defendant. Service of the initial complaint for divorce must be made by a constable/sheriff, process server, or other individual authorised by law and must be delivered in hand to the defendant. The rules do permit alternate means of service if the defendant cannot be located.

While religious marriages are recognised by the Commonwealth of Massachusetts (assuming the marriage is conducted by a religious organisation that is licensed to do so through the State), a religious divorce is not.

Massachusetts does not have "legal separation" but does permit married parties to file a complaint for separate support under Massachusetts General Law, Chapter 209, Section 32 and requires that there be a "justifiable cause" for living apart. The statute provides parties a remedy to secure spousal support (ie, alimony and health insurance), child support, or child custody while remaining married.

In order to obtain an annulment, the court requires either party to file a complaint for annulment and the plaintiff must specify the basis for

the request, such as incest, consanguinity, affinity, polygamy, or fraud.

1.2 Choice of Jurisdiction

In broad strokes, Massachusetts will have jurisdiction over divorce proceedings if one of the parties has been a Massachusetts resident for one year prior to filing. Alternatively, if one of the parties can provide that they were domiciled in Massachusetts at the commencement of the divorce action and the cause for divorce occurred in Massachusetts, the divorce proceeding may proceed – assuming there is no evidence that the party intentionally moved to Massachusetts for the purposes of obtaining a divorce.

Massachusetts has a residency requirement prior to commencing divorce proceedings. The nationality of the parties is not relevant for purposes of determining jurisdiction; however, if a party is not a resident or domiciliary in the United States and/or Massachusetts, it may be difficult to assert personal jurisdiction or to enforce a judgment or court order.

A party to divorce proceedings who wants to contest jurisdiction can seek to dismiss the case by filing the appropriate pleadings in court. Those pleadings do not constitute admission of the court's jurisdiction over the divorce and/or party.

Assuming a foreign court arguably has jurisdiction over the parties and the cause of the divorce, there could be cause to not proceed with the Massachusetts divorce proceeding.

2. Financial Proceedings

2.1 Choice of Jurisdiction

For divorcing parties, jurisdiction to pursue financial orders (including, when applicable, alimony and child support) is satisfied when the jurisdictional requirements to initiate a divorce action (as outlined in **1.2 Choice of Jurisdiction**) are satisfied. For unwed litigants with a child, jurisdiction to pursue financial orders is available when either an adjudication on an action to establish parentage is entered or voluntary acknowledgment of parentage, pursuant to the Massachusetts Parenting Act, is established. A party can initiate a complaint for separate support pursuant to Massachusetts General Law, Chapter 209C, Sections 4 and 9 and petition the court to establish a child support order for the maintenance, support and education of a child in the county where one of the parents live or, in the event neither parent lives with the child, then in the county where the child lives.

If neither parent remained in Massachusetts, a litigant could potentially challenge Massachusetts' ongoing jurisdiction in support proceedings if the child has a new home state. Specifically, and subject to the Commonwealth of Massachusetts's form of the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), in determining whether Massachusetts is the child's "home state", the court will look to whether the child has resided with one of the parents in Massachusetts for at least six consecutive months prior to the inception of litigation.

The courts can hear financial claims regarding a foreign divorce upon the domestication of the foreign judgment. Domestication of the foreign judgment can be by way of litigation upon the filing of a corresponding verified complaint seeking domestication of a foreign decree or order

or, in the case of child support, by way of registration pursuant to Massachusetts General Law, Chapter 209D, which is Massachusetts' statutory equivalent of the Uniform Interstate Family Support Act (UIFSA).

2.2 Service and Process

In order to properly effectuate service of process in any action commenced in a Massachusetts Probate and Family Court, service of the complaint initiating the action and the summons that is issued by the court upon the filing of said complaint must be made upon the defendant to the action.

Pursuant to Mass R Dom Rel P (4)(a), the plaintiff initiating an action must serve the defendant by delivering the complaint and the summons issued by the court upon the filing of the complaint to a person duly authorised to serve process (ie, a sheriff/constable).

Pursuant to the Probate and Family Court's Standing Order 1-06 regarding the time standard for matters filed in the Probate and Family Court Department, at filing, all Probate and Family Court matters regarding complaints for separate support are assigned to an eight-month track – with the goal of disposition within the aforementioned track designation.

2.3 Division of Assets

Equitable division, not equal division, is the standard in Massachusetts for how marital property is divided between spouses in a divorce. Marital property comprises all assets held by either party at the time of divorce, whether titled jointly or individually, and regardless of when obtained. Unlike some other states, Massachusetts does not automatically designate certain property, such as premarital assets or inheritance, as belonging to one spouse or the other.

To determine an equitable division of marital property, the Massachusetts Probate and Family Court will weigh a variety of factors. Pursuant to statute, Massachusetts General Law, Chapter 208, Section 34, the court is required to consider certain factors when making a determination as to equitable division, including:

- length of the parties' marriage;
- each party's conduct;
- each party's age;
- each party's health;
- each party's station;
- each party's occupation;
- each party's income;
- each party's employability and vocational skills;
- each party's estate;
- each party's liabilities;
- each party's needs;
- each party's opportunity to acquire capital assets and income in the future;
- any alimony award; and
- the needs of the parties' children.

Pursuant to the same statute, courts may, but are not required to, consider each party's contributions to homemaking and their estates.

At the outset of a divorce, each party must make certain financial disclosures. Supplemental Probate and Family Court Rule 410 sets forth numerous documents that must be exchanged between the parties, including income tax returns, pay stubs, bank and brokerage account statements, and loan applications. Supplemental Probate and Family Court Rule 401 also requires the parties to exchange financial statements using a court-prescribed form that sets forth each party's income, assets, debts, and expenses.

The parties to a divorce action are also entitled to engage in discovery to collect relevant documents and information from each other, as well as from third parties or entities. For example, a party may elect to take the other's deposition, request that the other party provide additional documents (eg, credit card statements, life insurance documents, budgets and financial planning data), or subpoena the other party's employer for income records and employment information. The scope and method of discovery must comport with the Massachusetts Domestic Relations Procedure Rules and, if not, the other party – or, in some cases, a third party or entity – can seek protection from the court.

There can be unique considerations when dividing certain types of assets or interests associated with a party in a divorce. For example, whether a party's beneficial trust interest is considered marital property and subject to equitable division will require an extensive analysis of the trust and an assessment of whether the party's interest is "fixed and enforceable" or is instead "too remote or speculative" (see Levitan v Rosen, 95 Mass App Ct 248, 253 (2019)). If a court determines a party's trust interest is more akin to an "expectancy" and not marital property, the party's interest may not be divided but could still be relevant to the court's consideration of a party's opportunity to acquire income and capital assets in the future (see id.)

2.4 Spousal Maintenance

Massachusetts considers requests for spousal maintenance ("alimony") on a case-by-case basis after review of the relevant facts. The overall standard for considering alimony awards is the recipient's need and the parties' financial circumstances (eg, payor's ability to pay). Key factors considered by the court in determining alimony include, without limitation, the length of the marriage, the age of the parties, the health of the parties, both parties' incomes, both parties' contributions to the marriage (both economic and non-economic), and the parties' lifestyle during the marriage.

During the pendency of a divorce action, a party may apply for interim alimony by way of a motion for temporary orders, which will be scheduled for a hearing. Each party is required to submit to the court current, accurate, and complete financial statement forms that identify each party's income, expenses, assets and liabilities, prior to a motion hearing. In the absence of an agreement by the parties, the court has discretion to enter an alimony obligation through a temporary order, which will remain in place through the pendency of the action or until further order of the court.

The court has the authority to order ongoing alimony upon entry of a judgment of divorce. The Massachusetts Alimony Reform Act of 2011 details the types of alimony available to a divorcing spouse and sets specific guidelines for the length and amount of such alimony awards.

2.5 Prenuptial and Postnuptial Agreements

Prenuptial and postnuptial agreements are widely used and recognised in Massachusetts. They are often used to protect premarital wealth, future gifts or inheritances, beneficial interests in family trusts, and family businesses. They also often address issues of alimony and a surviving spouse's right to the decedent's assets if a marriage ends by death. The law in Massachusetts is well settled on the enforceability and process for entering into both prenuptial and postnuptial agreements.

With respect to prenuptial agreements, practitioners generally look to Osborne v Osborne, 384 Mass 591, 428 NE 2d 810 (1981), where the court held that – although such agreements are not per se against public policy – they must be the result of fair disclosure at the time of execution and must be fair and reasonable at the time of divorce. It is important that at the time of execution the parties make fair and accurate financial disclosures that are attached to the agreement as a financial disclosure statement and that both parties enter into the agreement freely, voluntarily, and not subject to any form of coercion, fraud or duress. Generally, both parties have independent counsel – although having counsel is not required to have a valid prenuptial agreement. If only one lawyer is involved in the matter, the lawyer can only represent one of the parties – otherwise it is a conflict of interest.

Practitioners also look to DeMatteo v DeMatteo, 436 Mass 18, 762 NE 2d 797 (2002), which confirmed that a prenuptial agreement must be deemed fair and reasonable at the time of enforcement. However, the definition of fair and reasonable in this context is not what a court would do under Massachusetts divorce law if there was no prenuptial agreement but rather the court concluding that the agreement is not unconscionable. If the agreement strips a spouse of all marital rights, then the agreement could be deemed unconscionable and found invalid at the time of enforcement.

Postnuptial agreements have been recognised as valid contracts in Massachusetts. Practitioners generally look to Ansin v Craven-Ansin, 457 Mass 283 (2010), where the Supreme Judicial Court of Massachusetts articulated the standards to recognise the validity and enforceability of such agreements. In Ansin, the court described the need for a heightened scrutiny when determining the validity of the agreement. The burden of proof is on the party seeking enforcement. For a postnuptial agreement to be found valid and enforceable, the court must find that:

- there was full financial disclosure;
- each party had the opportunity for independent counsel;
- the process was free from duress, coercion or fraud;
- any waivers were knowing and explicit; and
- the agreement is fair and reasonable.

2.6 Cohabitation

Unmarried cohabitants do not acquire any property rights under Massachusetts' matrimonial laws. Rather, upon the breakdown of the relationship, unmarried couples may seek relief through the court's equity powers. To establish a right to property, an unwed party can initiate a complaint in equity in those instances where a party's contribution to property is substantial enough for the court to find that in order to avoid inequity (whether that be by the unjust enrichment of one party at the expense of the other) a situation existed of such trust and confidence that it would be inequitable not to bind one to act in good faith.

Likewise, unmarried parents may appeal to the court's equitable powers in seeking to award a litigant who is facing the loss of a substantial property interest that is so impactful that a child can be immediately and directly left unprotected by the unjust enrichment of one party at the expense of the other. The Supreme Judicial Court in Massachusetts has provided relief to a litigant that was induced by a significant other into such a state of dependency where parties have been involved in essentially a family unit over a significant duration of time such that a

constructive trust was necessary to avoid the unjust enrichment of one party over another.

2.7 Enforcement

The Massachusetts contempt statute, Massachusetts General Law, Chapter 215, Section 34, provides the authority by which financial orders in Massachusetts, including alimony and child support orders, are enforced. Procedurally, if a party defaults on their obligation under a financial order entered during or after a divorce, the aggrieved party may file a complaint for contempt. Available forms of relief against a party found in contempt include specific, further financial orders, which may include sanctions and, in some instances, orders to participate in employment searches or training, and/or or sentencing to jail or community service. A party's failure to comply with a child support order may also be punishable through a criminal contempt.

Provided that jurisdiction requirements are satisfied, the enforcement of a foreign financial order is available in Massachusetts upon the domestication and/or registration of the foreign order/judgment in Massachusetts.

2.8 Media Access and Transparency

In Massachusetts, divorce cases filed in the Probate and Family Court are part of the public record and generally open to the public, including the press. Audio recordings of the hearing are also available by request. A particular judge may, at their discretion, decide to close the courtroom to the public and hold the hearing without anyone but the parties, their counsel, and court personnel present. However, that does not mean that an audio recording of the hearing is not available to the public upon request.

Pleadings in the Probate and Family Court are also considered part of the public record and are available either online or by requesting a case's physical file at the registry in each courthouse. However, it is important to note that certain financial documents are considered confidential and will not be made available to anyone except the parties and their respective counsel of record. Personnel at the registry are expected to extract these documents before providing a member of the public with the file and the documents are not available online. These private documents are the parties' personal financial statements and child support guidelines. One should note, however, that the substantive pleadings themselves may include financial details and those pleadings are not confidential.

Either or both parties may seek that a portion of the file, or the entire file itself, be impounded and, as such, be made unavailable to the public. Generally, these requests are rarely awarded. The judge weighs the countervailing interests – the party or parties' right to privacy against the public interest in an open and transparent judicial system. In order to seek impoundment, a litigant must file a motion to impound along with a sworn affidavit that outlines what they seek to impound and the reasons therefor. It is then up to the discretion of the judge as to whether a file, or portions of it, should be impounded and for how long, as there is typically a limitation on the length of time a file may remain impounded.

2.9 Alternative Dispute Resolution (ADR)

ADR mechanisms are resources that parties and attorneys often look to in order to help resolve disagreements in a divorce. Many litigants look to mediation and conciliation before bringing a contested issue to court. In these forums, a neutral third party trained in dispute resolution will mediate or conciliate the case. These neutral third parties are often retired probate and family court judges or attorneys with experience in

the family law arena. Parties participate in these processes alone or with their attorneys and can expect to spend anywhere between half a day to multiple days caucusing and negotiating in order to reach an agreement.

If an agreement is struck, the parties will often incorporate the terms into a full-fledged separation agreement that eventually is filed with the Probate and Family Court. After that, assuming the proper procedure is met, it becomes a judgment of divorce that is enforceable by the court.

It is important to note that mediation and conciliation processes are confidential and voluntary. Parties are not compelled to reach an agreement and are bound not to disclose offers or settlement postures in court should the conciliation or mediation process fail. This promotes a candid discussion whereby parties are free to negotiate without concern that their settlement posture could later be used against them in a court process.

For parties who are unable to reach an agreement, arbitration may be an option. This is a private process where the parties agree that a neutral third party (again, perhaps a retired judge or seasoned practitioner) will adjudicate the case, essentially replacing the judge, and issue binding decisions that later get incorporated into a court judgment. Arbitration can often be more expeditious than remaining in the court system and can sometimes be less expensive. Parties, however, should consider that an arbitrator's award is much more difficult to appeal than a court judgment, given judicial deference to arbitrators, as enshrined in the common law and in statutory provisions in Massachusetts General Law, Chapter 251, Section 12.

3. Child Law

3.1 Choice of Jurisdiction

All states in the United States except Massachusetts have adopted some form of the UCCJEA. The UCCJEA was enacted in 1997 to replace the Uniform Child Custody Jurisdiction Act (UCCJA). While Massachusetts still applies the UCCJA when determining jurisdiction over child custody matters, as of 10 October 2024, the Massachusetts Senate has approved a bill adopting a form of the UCCJEA and referred the bill for approval by the House of Representatives. Legal concepts such as domicile, residence or nationality are not the determining factor when determining jurisdiction over a child custody case. In Massachusetts, Massachusetts General Law, Chapter 209B (the "Massachusetts Child Custody Jurisdiction Act") is applicable, which adopted the UCCJA.

Generally, for Massachusetts to have jurisdiction to hear a child custody case, the child's "home state" must be Massachusetts. "Home state" is the state where the child lived with a parent or a person acting as a parent for at least six months immediately before the child custody action is filed.

There are a few exceptions to the "home state" requirement where a Massachusetts court can consider exercising jurisdiction in a child custody case if the "home state" requirement is not met.

- Significant connection – if there is a significant connection between Massachusetts, the child and at least one parent, or the child and at least one contestant, then Massachusetts may consider exercising jurisdiction. In this case, there must be substantial evidence in Massachusetts concerning the child's pre-

sent or future care, protection, training, and personal relationships.
- Emergency – in an emergency where the child is physically in Massachusetts and the child has been abandoned or it is necessary in an emergency to protect the child from abuse or mistreatment.
- More appropriate forum – Massachusetts is a more appropriate forum. This situation can arise when no other state has home state status, significant connection or emergency jurisdiction, or when another state declines to exercise jurisdiction because Massachusetts is a more appropriate forum.

3.2 Living/Contact Arrangements and Child Maintenance

In a divorce, the Massachusetts Probate and Family Court will make determinations as to the children's legal and physical custody. Legal custody relates to decisions regarding a child's health, education, and religious upbringing, whereas physical custody is where the child lives day-to-day. If divorcing parties cannot agree on custodial arrangements, including a parenting plan for the children, either party can seek temporary orders from the court related to legal custody or physical custody pending a final adjudication. On a temporary orders basis in a divorce, but not a trial, there is generally a presumption of shared legal custody. Whether on a motion for temporary orders or at a trial, a court's primary consideration for child custody determinations in a divorce is the best interests of the child(ren). In general, the court will seek to support and preserve each parent's relationship with the child(ren) during and following a divorce. The court has significant discretion in making custody determinations.

The Massachusetts Probate and Family Court also has jurisdiction over child support orders. It is the responsibility of the divorcing parties, not the child, to seek a child support order. In general, the court issues child support orders pursuant to the Massachusetts Child Support Guidelines. The Child Support Guidelines calculate child support using a formula based on a combined income of the parties up to USD400,000 and takes into consideration factors such as the parenting plan of the parties, whether a child is over 18 years old, and the cost to each parent for health insurance and childcare. In instances where parties' combined incomes exceed USD400,000, the guidelines provide a presumptive minimum order, and additional child support on income over the combined USD400,000 is within the court's discretion. A self-calculating worksheet is available to assist with the computation of child support pursuant to the Child Support Guidelines. Under certain circumstances, the parties may agree, or the court may order, an amount of child support that deviates from the Child Support Guidelines, but any amount of child support is subject to the court's consideration of the children's best interests.

Child support can be ordered for a child for as long as the child remains unemancipated. Emancipation for child support purposes is effectively determined by statute, Massachusetts General Law, Chapter 208, Section 28. While there are circumstances that constitute emancipation before, it is possible that a child could remain eligible for a child support order until age 23.

3.3 Other Matters

In high-conflict child custody cases, there is often disagreement between parents on issues such as school choice, medical or therapeutic treatment, religious upbringing, and sharing of holidays. When divorcing parents who are joint legal custodians are unable to agree on these matters, the Massachusetts Probate and Fam-

ily Court has jurisdiction to enter court orders addressing these issues after considering the child(ren)'s best interests. When parties are generally unable to agree on these important issues, judges will consider awarding one of the parties sole legal custody, thereby empowering one party to make these decisions on behalf of the child without the other party having any legal input.

High-conflict child custody cases often require children to be more involved in the process and, depending upon the child's age, the child's input can be quite significant to the court when determining the child's best interests. Generally, courts do not favour or look to children testifying in court. It is not technically prohibited but instead of a child testifying in court, a guardian ad litem will generally be appointed by the judge and that person will conduct an investigation (including child interviews and observations) and report back to the court in a comprehensive written report that the court can consider in determining the resolution of the issues at hand.

In high-conflict child custody cases, there are often allegations and concerns of parental alienation or parental marginalisation. Courts are sensitive to these family dynamics and have the authority to:

- order therapeutic interventions (ie, family therapy, supervised parenting time, individual therapy);
- order changes in physical custody; and
- issue monetary sanctions for non-compliance with court orders.

3.4 ADR

ADR mechanisms are resources that parties and attorneys often look to in order to help resolve disagreements in a divorce or a custodial case that involve children.

Recently, all 14 divisions of the Massachusetts Probate and Family Court have implemented the Pathways Case Management Initiative ("Pathways"), a case management process aimed to promote timely and effective resolution of disputes. When filing actions seeking to modify a child support order or provisions of a parenting plan, most litigants, even those who are represented by counsel, should expect their case to be directed to Pathways. In many cases, a litigant will participate in two Pathways "steps" before appearing in front of a judge.

Many litigants look to mediation and conciliation before bringing a contested issue to court. In these forums, a neutral third party trained in dispute resolution will mediate or conciliate the case. These neutrals are often retired Probate and Family Court judges or attorneys with experience in the family law arena. Parties participate in these processes alone or with their attorneys, and can expect to spend anywhere between half a day to multiple days caucusing and negotiating in order to reach an agreement.

If an agreement is struck, the parties will often incorporate the terms into a full-fledged separation agreement that eventually is filed with the Probate and Family Court. After that, assuming the proper procedure is met, it becomes a judgment of divorce that is enforceable by the court.

As noted in **2.9 Alternative Dispute Resolution (ADR)**, it is important to note that mediation and conciliation processes are confidential and voluntary. Parties are not compelled to reach an agreement and are bound not to disclose offers or settlement postures in court should the conciliation or mediation process fail. This promotes a candid discussion where parties are free to negotiate without concern that their settlement

posture later be used against them in a court process.

Unlike financial questions, Massachusetts law generally does not favour the arbitration of child custody issues. Massachusetts law vests the Family and Probate Court system with the responsibility to adjudicate the care and custody of the children by determining what is in their best interests. As such, judges will not blindly accept an arbitrator's determination of custody matters. Parties instead may refer some of their ongoing disputes relating to the care and custody of a child to a parent co-ordinator – a neutral third party trained and certified by the Commonwealth of Massachusetts to help resolve custodial issues. However, the scope of their authority is bound by Massachusetts law – specifically, Probate and Family Court Standing Order 1-17.

3.5 Media Access and Transparency

In Massachusetts, child custody cases filed in the Probate and Family Court are part of the public record and are generally open to the public, including the press. Recordings of the hearing are also available by request. A particular judge may, at their discretion, decide to close the courtroom to the public and hold the hearing without anyone but the parties, their counsel, and court personnel present. Regardless, that does not mean that a recording of the hearing is not available to the public upon request.

Certain types of cases, however, are confidential and not open to public inspection. These include adoptions, cases involving child welfare, guardianship cases at the request of a child, abuse prevention cases involving a minor, and paternity cases where an alleged father is found not to be the father.

Pleadings in the Probate and Family Court are also considered part of the public record and are available either online or by requesting a case's physical file at the registry in each courthouse.

Certain documents, however, are also confidential and will not be made available to anyone except the parties and their counsel of record. Personnel at the registry are expected to extract these documents before providing a member of the public with the file and they are not available online. Besides financial records, records from the Department of Children and Families are also confidential. Reports from guardians ad litem have a heightened degree of confidentiality – the parties themselves are not permitted to have a copy and may only read and review those reports at the courthouse or at their attorney's office and may not make copies or disseminate their contents in any way.

Either or both parties may seek that a portion of the file, or the entire file itself, be impounded and, as such, be made unavailable to the public. Generally, these requests are rarely awarded. The judge weighs the countervailing interests – the party or parties' right to privacy against the public interest in an open and transparent judicial system. In order to seek impoundment, a litigant must file a motion to impound along with a sworn affidavit that outlines what they seek to impound and the reasons therefore. It is then up to the discretion of the judge as to whether a file, or portions of it, should be impounded and for how long, as there is typically a limitation on the length of time a file may remain impounded.

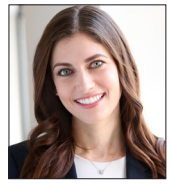
Trends and Developments

Contributed by:
Caterina S Wurman and Madeline R Pelagalli
Fitch Law Partners LLP

Fitch Law Partners LLP has family law/domestic relations attorneys who skilfully handle complex and often hotly contested cases. They work tirelessly to achieve successful resolution to disputes concerning the division of marital assets, child custody and visitation, alimony, domestic abuse, and permanent removal from the Commonwealth of Massachusetts. The firm excels in representing individuals in divorce cases involving high value assets and complex financial issues, such as those that arise when the marital estate includes privately held corporations, limited partnerships, or trusts. Clients trust Fitch to effectively resolve such issues – whether by comprehensive settlement, mediation, or trial. The firm's lawyers approach child custody disputes with the required sensitivity, but also realise that the stakes are high. They have successfully litigated child custody disputes involving allegations of sexual abuse, domestic violence, substance abuse, alcoholism, and mental illness. Fitch also prepares and negotiates prenuptial and postnuptial agreements to protect accumulated wealth, inheritances, family trust interests, and business interests in the event of divorce or death of a spouse.

Authors

Caterina S Wurman concentrates her practice on family law at Fitch Law Partners. Prior to joining Fitch, Ms Wurman was an associate at well-regarded Massachusetts family law boutique firms, representing clients in all aspects of family law including divorce, paternity, and post-divorce actions. She has served as a volunteer attorney for the Women's Bar Foundation Family Law Project, the Attorneys Representing Children (ARC) programme with the Norfolk County Probate and Family Court, and the Judge Abber "We Can Negotiate" Initiative with the Massachusetts Family and Probate American Inn of Court.



Madeline R Pelagalli focuses her practice on family law at Fitch Law Partners. Prior to joining Fitch, Ms Pelagalli was an associate at a boutique family law firm where she represented clients in all aspects of family law, including divorce and post-divorce matters involving custody, child support, parenting time, alimony, and modification of existing judgments. While in law school, Ms Pelagalli was a member of the National Moot Court Team, semi-finalist in the Albers Honors Moot Court Competition, and participant and coach of the BU Law Mock Trial Team. In the Fall of 2020, Ms Pelagalli participated in an externship with the Middlesex Probate and Family Court and assisted two judges with research and drafting.

Fitch Law Partners LLP

84 State Street
Boston
MA 02109
USA

Tel: +1 617 542 5542
Fax: +1 617 542 1542
Email: seg@fitchlp.com
Web: www.fitchlp.com

The Alimony Reform Act and Recent Trends

Effective from 1 March 2012, the Alimony Reform Act of 2011 (Chapter 124 of the Acts of 2011 or MGL c 208, Sections 48—55) (ARA) established substantive and procedural guidelines for alimony practices in the Commonwealth of Massachusetts. As outlined in the ARA, Massachusetts recognises four distinct types of alimony, as follows:

- general term alimony – the periodic payment of support to a spouse who is economically dependent;
- rehabilitative alimony – the periodic payment of support to a spouse who is expected to become economically self-sufficient by a predicted time (such as upon re-employment or the completion of job training);
- reimbursement alimony – the periodic or one-time payment of support to a spouse after a marriage of not more than five years to compensate that spouse for economic or non-economic contribution to the financial resources of the payor spouse (eg, putting a spouse through school); and
- transitional alimony – the periodic or one-time payment of support to a spouse after a marriage of not more than five years to transition the recipient to an adjusted lifestyle or location as a result of the divorce.

Determining which type of alimony to apply in each divorce – or whether alimony should even apply – requires a case-by-case, fact-specific analysis and consideration of several factors, including the length of the parties' marriage, the contribution and roles of each party during the marriage, the age and health of the parties, the income and employability of the parties, marital lifestyle, lost economic opportunity as a result of the marriage, and "such other factors that the court may deem relevant and material".

As provided for in the ARA, Massachusetts also recognises durational time limits to alimony. Alimony awards that were once vague and ambiguous or lifetime entitlements are now subject to specific durational time limits based upon the length of the parties' marriage. Time limits include:

- if the length of marriage is five years or less, general term alimony shall continue for not longer than half the number of months of the marriage;
- if the length of the marriage is ten years or less, but more than five years, general term

alimony shall continue for not longer than 60% of the number of months of the marriage;
- if the length of the marriage is 15 years or less, but more than ten years, general term alimony shall continue for not longer than 70% of the number of months of the marriage; and
- if the length of the marriage is 20 years or less, but more than 15 years, general term alimony shall continue for not longer than 80% of the number of months of the marriage.

In marriages that exceed 20 years, Massachusetts courts maintain their discretion to order alimony for an indefinite period of time.

Massachusetts courts do have discretion to effectively increase the length of the marriage, and thereby length of the durational limit, when there is evidence that the parties lived together and shared an economic partnership prior to the marriage. Likewise, courts may consider a marital separation of significant length prior to divorce to effectively decrease the length of the parties' marriage (and thereby the durational term limit of alimony). If a court were to award alimony to a spouse in excess of the above-mentioned time limits, the court is required to find that the deviation is in the interests of justice.

In addition to the durational time limits applicable to general term alimony awards (as set forth earlier), the ARA also provides that general term alimony awards terminate upon remarriage of the recipient, the death of either spouse, or upon the payor attaining full retirement age – whichever comes first. Full retirement age is defined as the payor's normal retirement age when they are eligible to receive full Social Security retirement benefits. Even if a payor spouse has the ability to work beyond retirement age, that alone is not a reason to extend alimony. Courts retain their discretion, however, to:

- set a different alimony termination date (other than retirement age) when entering an initial court order; or
- extend an existing alimony award beyond retirement age, provided the recipient spouse can demonstrate a material change of circumstances occurred – which must be supported by clear and convincing evidence – after the entry of the alimony judgment.

In either case, courts are required to enter written findings of the reasons for deviation. However, the Massachusetts Supreme Judicial Court has ruled that the retirement provisions of the ARA apply only prospectively, effectively barring modifications due to the retirement provisions under the ARA for those alimony judgments entered prior to the enactment of the ARA.

While remarriage of the recipient spouse will terminate both general term alimony and rehabilitative alimony, it will not cause a termination of reimbursement or transitional alimony. The ARA provides for the suspension, reduction or termination of alimony upon a showing that the recipient spouse is cohabiting with another person (or sharing a common household) for at least three months. It is the payor/supporting spouse's burden to demonstrate that the recipient spouse has maintained a common household with another person for a continuous period of at least three months. It is unclear whether the cohabitation context is limited to romantic partners only.

The ARA also includes guidelines for the amount of alimony awards and provides that, generally speaking, alimony awards (except for reimbursement alimony or deviations of other forms of alimony) should not exceed the recipient's need or

30% to 35% of the difference between the parties' gross incomes at the time the order issues. These guideline percentages were established at a time when the applicable tax laws provided that the payment of alimony be tax deductible to the payor and taxable income to the alimony recipient. Although the language in the ARA remains unchanged, the guideline percentages have, in practice, been reduced as a result of the implementation of the Tax Cuts and Job Act, which provides that alimony is no longer taxable to the recipient or tax deductible to the payor. As a result, practitioners and judges generally operate under the assumption that the percentages to be used in each case are in a lower range than what is provided by the ARA.

Notably, the ARA excludes from income:

- capital gain and dividend/interest income that derives from assets equitably divided in the divorce; and
- gross income that has been considered for setting a child support order.

Again, in the case of general term alimony or rehabilitative alimony, the court retains discretion to deviate from this guideline with written findings that deviation is necessary. Moreover, courts may attribute income to either party who is unemployed or underemployed. If a payor spouse remarries, additional income and assets of the payor's spouse are not considered in adjusting a prior alimony award in a modification action.

While the ARA provides comprehensive guidelines, the ARA "[did] not alter the principle that the central issue relevant to a financial award is the dependent spouse's need for support and maintenance in relationship to the respective financial circumstances of the parties" (Hassey v Hassey, 85 Mass App Ct 518, 524-525, 11 NE 3d 661 (2014), quoting Partridge v Partridge, 14 Mass App Ct 918, 919, 436 NE 2d 447 (1982)). The court can even consider a family's custom of saving when setting an alimony award that allows the dependent spouse to maintain the marital lifestyle (Openshaw v Openshaw, 493 Mass 599 (2024)). It is well settled that the court's discretion in fashioning an alimony award is broad enough that it has been held that a court's decision to excavate even beyond a dependent spouse's stated need is not "plainly wrong [or] excessive" (see Vedensky v Vedensky, 86 Mass App Ct 768, 775, 22 NE 3d 951 (2014), quoting Redding v Redding, 398 Mass 102, 107, 495 NE 2d 297 (1986)).

Additionally, recent case law has amplified the public policy of the Commonwealth as requiring the court to consider varying calculations in all cases where concurrent orders of alimony and child support are at issue (Cavanagh v Cavanagh, 490 Mass 398 (2022)). In essence, the issuing court is tasked with determining an equitable support framework that not only recognises that a child should benefit from all forms of compensation of a payor parent, but also one that maximises what is most equitable for the family considering tax consequences and the statutory factors enumerated in Massachusetts General Law, Chapter 208, Section 53.

In recognising the two distinct purposes of an alimony order and a child support order, respectively, the Cavanagh court has laid out a three-step analysis in determining an equitable award of support, which requires the following calculations:

- a calculation of alimony first to address the need of the recipient spouse and maintenance of the marital lifestyle with a subse-

quent calculation of child support using the parties' income after alimony;
- a calculation of child support first and alimony second; and
- a comparison of the total support award resulting from the first step and the second step, respectively, and the tax consequences of each support option.

Additionally, Cavanagh v Cavanagh has broadened the pool of income and benefits that the court may now consider in the payor spouse's income for purposes of setting support to include not only the payor's contribution to their retirement or health savings account, but also the contribution to benefits made by the payor's employer.

How Trust Interests are Addressed in Divorce Actions

The inclusion – or non-inclusion – of beneficial trust interests in the marital estate for purposes of an asset division incident to a divorce is quite often a hotly contested issue.

Massachusetts courts have defined "property" broadly in the context of a divorce. It is frequently considered to be all property to which a party holds title, however acquired. Therefore, whether trust interests are included in the marital estate involves an assessment of the particularities of each trust.

With a trust, the discretion is often left to the trustees with regard to how the assets and/or related income will be distributed to the beneficiaries. Depending on the level of discretion, the benefit can become too speculative to establish a clear value to the beneficiary. That being said, if a party holds a beneficial interest in a trust that, prospectively, could be considered a significant future "acquisition of capital assets and income", it could affect how the court equitably divides other marital assets.

In many cases, the question about the inclusion of a beneficial trust interest or its value hinges on whether the interest is "fixed and enforceable" or "too remote and speculative". If it is the former, more often than not, the trust (or its value) is likely to be included, in some measure, in the asset division – perhaps even in the support calculation. If it is the latter, the inverse is frequently the case (see, for example, Pfannenstiehl v Pfannenstiehl, 475 Mass 105, 110 (2016)).

In other words, the question still rests on the particular facts and merit on a case-by-case basis. However, a recent decision by the Massachusetts Appeals Court, Jones v Jones (103 Mass App Ct 223 (2023)), suggests that Probate and Family Court judges should be leaning towards including more and more beneficial trust interests in the marital estate when a trust beneficiary is getting a divorce.

In the Jones case, the wife's mother had established a trust, of which the wife (her daughter) and the wife's brother were the sole beneficiaries. Upon the mother's death, the assets held by the trust were to be divided into equal shares that were placed in separate trusts for the benefit of the wife and her brother.

This provision was the apparent tipping point, as the court tried to determine whether the wife's beneficial interest was fixed enough to be considered an enforceable right, or whether it was a mere expectancy and thus too remote and speculative for inclusion in the marital estate. The court determined that the former argument held more sway, even though the wife had never received a distribution from the trust, the trust had a spendthrift provision, the trust was irrev-

ocable, and the trustee had sole and absolute discretion as to whether or not to make distributions in any amounts.

Contrary to prior cases, the class of beneficiaries was closed, the mandatory distribution upon the mother's death was enforceable, and any power that the trustee had to postpone any distributions to the mother was limited by law and the terms of the trust itself. She also had the power of appointment. Due to these factors, the court thus concluded that the trust was includible in the marital estate, assigned the value of the trust in its entirety to the wife, and ordered an offsetting payment to the husband.

Many families establish trusts as estate-planning vehicles. Some of the trusts are designed to "protect" family assets in the event of a divorce. That said, current case trends suggest the court has been putting less weight on protections that estate planners put in place to keep certain assets out of the marital estate, such as spendthrift provisions, irrevocability, trustee discretion, and whether or not the trustees have made distributions. The parties must be prepared for the possibility that the intent of the trust's settlor will be ignored and the value of the trust (if not the trust interest itself) will be included in the marital estate and be subject to division.

What remains true, however, is that the decision-makers are still charged with making judgments on a piecemeal basis, based on the specific facts of the case and the particular attributes of the trusts at issue. If a divorcing spouse has a beneficial interest in a trust, a careful analysis is needed to determine the most equitable result, and the strategy that best aligns with a client's needs.

Prenuptial and Postnuptial Agreements

Prenuptial agreements are widely used in Massachusetts as a protective measure for wealthy and high net worth individuals if a marriage ends in divorce. Often, prenuptial agreements are requested in order to safeguard premarital assets, inherited and gifted wealth, or closely held business interests.

Unlike most other jurisdictions, Massachusetts does not delineate in a divorce what constitutes the marital estate by determining whether a divorcing spouse's property was acquired during – versus before – the marriage. With no prenuptial agreement, a court considers as part of the marital estate and subject to equitable division all property owned by each of the parties, whether held individually or jointly, and regardless of whether the property was obtained before or after the parties got married. Therefore, prenuptial agreements can serve to limit which categories of assets can be equitably divided in the case of divorce, and can also predetermine in what proportion each category of assets is equitably divided (if at all).

In the event of a divorce, prenuptial agreements can also be used to establish whether or under what circumstances one spouse will pay alimony to the other, and how the amount will be calculated or paid.

Prenuptial agreements may also be drafted to support an individual's estate-planning goals by providing for a waiver of certain rights a spouse acquires upon marriage to the other spouse's estate in the event of death, or by ensuring a portion of one spouse's estate is preserved so it can ultimately be left to children of a prior marriage or other family members.

Parties cannot, however, use prenuptial agreements to make any determinations with respect to child custody or child support upon divorce. These issues must be addressed between the parties at the time of the parties' divorce and according to the current applicable laws. This does not mean that parties cannot negotiate and reach a settlement at the time of divorce as to issues involving child custody and child support, but the parties cannot predetermine with a premarital contract anything with respect to the rights of the minor children of the marriage. Rather, any negotiated terms at the time of divorce are subject to a court's assessment of the children's best interests.

While it is the hope going into the marriage that one never has to test the enforceability of a prenuptial agreement, given what is at stake, it is critical to enlist the assistance of skilled counsel for each party in the negotiation and drafting of a prenuptial agreement to ensure it will be upheld by a Massachusetts court. Further, although prenuptial agreements are not adversarial per se, there is often a negotiation component involved in the drafting of an agreement, so it is best to start the process well in advance of the parties' wedding date to avoid heightened stress and tension between the parties or their families leading up to the big day, and also to bolster enforceability of the prenuptial agreement itself.

In Massachusetts, for a court to enforce a prenuptial agreement, "the agreement must be valid at the time of execution and must also be fair and reasonable at the time of divorce" (Austin v Austin, 445 Mass 601, 604 (2005), citing DeMatteo v DeMatteo, 436 Mass 18, 26 (2002)). In other words, the court evaluates the prenuptial agreement at two points in time: when it was executed by the parties and when a party is seeking enforcement.

In determining whether the prenuptial agreement was valid when executed, the court examines if "(1) [the agreement] contains a fair and reasonable provision as measured at the time of its execution for the party contesting the agreement; (2) the contesting party was fully informed of the other party's worth prior to the agreement's execution, or had, or should have had, independent knowledge of the other party's worth; and (3) a waiver by the contesting party is set forth" (Austin, 445 Mass at 604, quoting DeMatteo, 436 Mass at 26). The key consideration as to whether the agreement is fair and reasonable when executed is whether "the contesting party is essentially stripped of substantially all marital interests" (id at 604–05, quoting DeMatteo, 436 Mass at 31).

If a court determines the premarital agreement was valid when executed, the court then moves on to analyse the enforceability of the premarital agreement upon divorce. The standard is effectively whether the premarital agreement's enforcement upon divorce is unconscionable – that is, whether one party is left "without sufficient property, maintenance, or appropriate employment to support [oneself]" (Austin, 445 Mass at 607, quoting DeMatteo, 436 Mass at 37). In a recent case, Rudnick v Rudnick, 102 Mass App Ct 467 (2023), the Massachusetts Appeals Court affirmed a court's determination that a prenuptial agreement at the time of divorce was unconscionable because enforcement would have left the wife without assets, alimony, or any marital interests.

Massachusetts also recognises postnuptial agreements. While certain components of the analysis are similar, the standard for enforceability is higher as compared to prenuptial agreements. An important characteristic of prenuptial agreements versus postnuptial agreements is

that "[b]efore marriage, the parties have greater freedom to reject an unsatisfactory premarital contract", so – given that is not the case where the parties are already married – "careful scrutiny" of postnuptial agreements is needed (Ansin v Ansin, 457 Mass 283, 289, 291 (2010)). To determine whether a postnuptial agreement is enforceable, which must be established by the non-contesting party, the court examines if: "(1) each party has had an opportunity to obtain separate legal counsel of each party's own choosing; (2) there was fraud or coercion in obtaining the agreement; (3) all assets were fully disclosed by both parties before the agreement was executed; (4) each spouse knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of assets and all marital rights in the event of a divorce; and (5) the terms of the agreement are fair and reasonable at the time of execution and at the time of divorce" (Id at 291 (footnotes omitted)).

USA – MISSOURI

Law and Practice

Contributed by:
Aaron Bundy and Hannah Lange
Bundy Law

Contents

Bundy Law is a regional law firm covering Arkansas, Missouri, and Oklahoma, with a primary focus on family law matters in trial and appellate courts. Its attorneys are adept at handling fast-paced, complex cases ranging from jurisdictional contests to business valuation disputes. Known for their expertise and track record of success in high-value divorces and contentious child custody cases, the attorneys excel in negotiation and advocacy work for high-net-worth and ultra-high-net-worth individuals. Bundy Law has a firm culture that promotes consistent, clear communication and responsiveness with clients and co-counsel, and it has implemented a powerful, sophisticated software infrastructure to support its high-touch service model.

Authors

Aaron Bundy is the founding partner at Bundy Law and is a trial lawyer who practises law in Oklahoma, Arkansas and Missouri. A fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers, he represents individuals who are involved in contested family law disputes at private negotiation and trial.

Hannah Lange is based in Bundy Law's Bentonville office and practises family law in Arkansas, Oklahoma, and Missouri. She has a strong foundation in family law, having received training at the National Family Law Trial Institute and the National Criminal Defense College. Hannah has experience working across the full range of divorce and child custody cases, from defending parental rights in state-prosecuted juvenile deprived cases and private adoptions to spousal support claims and business valuation disputes. She also has a proven ability to quickly grasp complex legal issues and identify what matters for optimal case resolution.

Bundy Law

240 South Main Street
Suite 280
Bentonville
AR 72712
USA

Tel: +1 479 579 2121
Fax: +1 918 512 4998
Email: info@bundy.law
Web: www.bundylawoffice.com

1. Divorce

1.1 Grounds, Timeline, Service and Process

A petition for dissolution of marriage must allege that the marriage is irretrievably broken and that, as such, there remains no reasonable likelihood that the marriage can be preserved (Section 452.310 of the Revised Statutes of Missouri). The grounds for divorce apply equally to same-sex spouses. Civil unions are not officially recognised in Missouri; however, some cities recognise domestic partnerships and confer some of the rights of a marital relationship.

A divorce action is only initiated through the commencement of a court proceeding by way of filing a petition. Missouri has a minimum residency requirement of 90 days prior to filing a petition for dissolution of marriage. The 90-day requirement also applies to members of the armed forces stationed in but not residents of Missouri.

A dissolution petition must be served upon the respondent with a summons. The respondent's response to the petition is called an "answer" and is due within 30 days of service of the petition and summons. A divorce may not be granted unless 30 days have elapsed from the date of filing of the petition (Section 452.305 of the Revised Statutes of Missouri).

Missouri law provides for legal separation. A petition for legal separation must allege that the marriage is not irretrievably broken and that thus there remains a reasonable likelihood that the marriage can be preserved (Section 452.310 of the Revised Statutes of Missouri). The residency and waiting period requirements for legal separation are the same as those for divorce.

1.2 Choice of Jurisdiction

Residency is a jurisdictional fact that must be pled and proven. The terms "residence" and "domicile" may be used interchangeably in Missouri. Residence is a matter of intent to be determined by statements, actions, and all other facts and circumstances. To establish residence in Missouri, a petitioner must show actual personal presence and an intention to remain either permanently or for an indefinite time, with no purpose to return to a former residence. The respondent to a dissolution action may contest jurisdiction based on lack of residency. Missouri trial courts have the discretionary authority to stay proceedings if it determines that another action is pending. The granting or refusing of a stay is purely discretionary. A stay of proceedings in Missouri is possible in divorce matters involving child custody if the Missouri court finds that it is an inconvenient forum and a court of another state is a more appropriate forum (Section 452.770 of the Revised Statutes of Missouri).

2. Financial Proceedings

2.1 Choice of Jurisdiction

Either spouse may request maintenance in an action for dissolution or legal separation. Maintenance may be requested after the dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse (Section 452.335 of the Revised Statutes of Missouri). The 90-day minimum residency requirement prior to filing applies to requests for maintenance.

2.2 Service and Process

The requirements for service in financial proceedings are the same as in other civil cases. A spouse seeking maintenance must demonstrate a need due to lack of property and an inability to support oneself. Each spouse has an affirmative

duty to seek employment, but this requirement may be negated if the spouse seeking maintenance is the custodian of a child whose condition or circumstances make it appropriate for the custodian not to be required to seek employment outside the home. Once the spouse seeking maintenance meets the threshold showing of need, the court must consider a number of factors to determine the amount and duration for support (Section 452.335 of the Revised Statutes of Missouri).

2.3 Division of Assets

In a proceeding for dissolution of marriage or legal separation, the court is required to set aside to each spouse that spouse's non-marital (separate) property and divide marital property and debts in a manner that the court deems just after considering all relevant factors (Section 452.330 of the Revised Statutes of Missouri). The statute provides a list of factors for the court to consider:

- the economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse with custody of any children;
- the contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
- the value of the non-marital property set apart to each spouse;
- the conduct of the parties during the marriage; and
- custodial arrangements for minor children.

Spouses are entitled to perform liberal discovery in divorce and legal separation proceedings to ascertain the nature and value of assets and debts. Discovery may include enforceable requests to third parties for the production of information. Missouri courts are vested with broad discretion in administering the rules of discovery.

Missouri family courts recognise trusts. The name on the trust does not necessarily impact the classification of the property in the trust. Property in a trust in one spouse's name can be marital property subject to division in divorce.

2.4 Spousal Maintenance

Trial courts have broad discretion when dealing with maintenance requests. Owing to this discretion, there may be variations and differences between courts based on the individual worldview and philosophy of each individual judge. During a divorce proceeding, before the case is finalised, either party may request temporary maintenance pending the final outcome. Maintenance requests are gender-neutral and courts receive guidance for assessing maintenance claims from a number of statutory factors.

2.5 Prenuptial and Postnuptial Agreements

Missouri recognises both prenuptial agreements and postnuptial agreements. The state's public policy does not oppose enforcing agreements regarding the division of property made in contemplation of marriage and in contemplation of the possible dissolution of the marriage. Both prenuptial and postnuptial agreements share the same standard, as they will not be enforced unless they are entered into "freely, fairly, knowingly, understandingly, and in good faith and with full disclosure" (Ferry v Ferry, 586 SW 2d 782, 787 (Mo App 1979); Miles v Werle, 977 SW 2d 297, 301 (Mo App 1998)).

Valid prenuptial agreements are enforceable and routinely upheld by Missouri courts.

2.6 Cohabitation

In the absence of a contractual arrangement between the parties, Missouri law does not provide for asset division between unmarried persons. Unmarried cohabitants do not acquire any property rights by virtue of cohabitation for any period of time or by sharing children with one another.

2.7 Enforcement

When a party is non-compliant with a financial order, Missouri law offers a variety of enforcement and collection options. Missouri has adopted the Uniform Interstate Family Support Act and provides for co-ordination with other jurisdictions for the enforcement and collection of support orders.

2.8 Media Access and Transparency

Generally, Missouri courts are open to the public. However, there are guidelines and limitations for family law cases. Missouri Supreme Court Operating Rule 16 prohibits a "blanket prohibition" of all media coverage by local rule and provides for media coverage of judicial proceedings on a case-by-case basis if expressly authorised by the judge under specific conditions.

2.9 Alternative Dispute Resolution (ADR)

Missouri has strong policy favouring mediation of family law disputes. Missouri Supreme Court Rule 88.04 provides that the court may order mediation of any contested family law issue. The rule goes on to encourage circuits to adopt local rules to accommodate and provide procedures for the use of mediation. Attendance at court-ordered mediation is mandatory, and failure to attend a court-ordered session could lead to a finding of contempt of court. However, there is no obligation to reach an agreement through the mediation process. An agreement reached at mediation is a legally binding agreement (Section 162.959 of the Revised Statutes of Missouri). A settlement agreement requires approval of the court before it will become enforceable as a court order.

3. Child Law

3.1 Choice of Jurisdiction

Missouri has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Section 452.700 of the Revised Statutes of Missouri). The UCCJEA uses the "home state" definition established by federal law in the Parental Kidnapping Prevention Act. "Home state" means the state in which a child has lived with a parent or a person acting as a parent for at least six consecutive months immediately prior to the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child has lived from birth with any of the persons mentioned. The nature of this definition implicates the concepts of domicile and residence in the event of a jurisdictional inquiry or challenge.

3.2 Living/Contact Arrangements and Child Maintenance

In the event of a dispute about the care and upbringing of their child, either parent may apply to the court for resolution. The court is obligated to determine custody in accordance with the best interests of the child. Missouri has a shared parenting presumption for the award of equal or approximately equal time to each parent. When the court makes a child custody decision, it is required under Section 452.375 of the Revised Statutes of Missouri to enter written findings of fact and conclusions of law, including the following non-exclusive list of factors:

- the wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties;
- the needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child;
- the interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests;
- which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent;
- the child's adjustment to the child's home, school and community – the fact that a parent sends their child or children to a home school or FPE (family-paced education) school shall not be the sole factor that a court considers in determining custody of such child or children;
- the mental and physical health of all individuals involved, including any history of abuse of any individuals involved – if the court finds that a pattern of domestic violence as defined in Section 455.010 of the Revised Statutes of Missouri has occurred and if the court also finds that awarding custody to the abusive parent is in the best interest of the child, then the court must:
  (a) enter written findings of fact and conclusions of law; and
  (b) order custody and visitation rights in a manner that best protects the child and any other child or children for whom the parent has custodial or visitation rights, as well as the parent or other family or household member who is the victim of domestic violence, from any further harm;
- the intention of either parent to relocate the principal residence of the child; and
- the unobstructed input of a child, free from coercion and manipulation, as to the child's custodial arrangement.

Missouri has a separate statute concerning modification of custody after an initial custody determination (Section 452.410 of the Revised Statutes of Missouri). The appellate standard of review of child custody decisions by trial courts is abuse of discretion, which speaks to the broad oversight and decision-making authority enjoyed by trial courts when making child custody decisions.

Child support is based on established guidelines that are presumptive. Deviation from the application of the child support guidelines requires judicial approval and specific findings detailing the factors warranting the deviation. Child support obligations terminate as a matter of law when the child:

- dies;
- marries;
- enters active duty in the military;
- becomes self-supporting, provided that the custodial parent has relinquished the child from parental control by express or implied consent;
- reaches the age of 18, unless the provisions of subsection 4 or 5 of Section 452.340 of the Revised Statutes of Missouri apply; or
- reaches the age of 21, unless the provisions of the child support order specifically extend the parental support order past the child's 21st birthday for reasons provided by subsection 4 of Section 452.340 of the Revised Statutes of Missouri.

If the child is physically or mentally incapable of supporting themselves and insolvent and unmarried, the court may extend the parental

support obligation past the child's 18th birthday. If – when a child reaches the age of 18 – the child is enrolled in and attending a secondary school programme of instruction, the support obligation shall continue if the child continues to attend and progresses towards completion of said programme, until the child completes such programme or reaches the age of 21 (whichever occurs first). A custodian of a minor child may apply for child support. A minor child may not apply for child support themselves.

3.3 Other Matters

Missouri courts have the power to issue orders concerning the welfare and upbringing of a child if the parents do not agree. Courts have recognised parental alienation as a factor in making child custody orders. An attempt by a parent to alienate a child from the other parent is a changed condition and can form the basis for a modification of custody (Eatherton v Eatherton, 725 SW 2d 125, 128 (Mo App 1987)).

As the mandatory factors for a child custody decision include the child's input, the court may hear from a child in a variety of formats. The judge may interview the child in chambers ((Section 452.385 of the Revised Statutes of Missouri). If the judge determines that the child is a competent witness, a parent may call a child as a witness to testify in the courtroom. A guardian ad litem may also be appointed in cases involving child custody and will interview all persons with knowledge about the child's preference(s), including the child.

3.4 ADR

See **2.9 Alternative Dispute Resolution (ADR)**.

3.5 Media Access and Transparency

See **2.8 Media Access and Transparency**.

USA – NEW YORK

Law and Practice

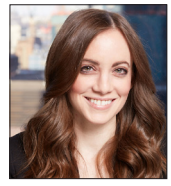
Contributed by:
Gretchen Beall Schumann and Lindsay R Pfeffer
Rabin Schumann and Partners LLP

Contents

Rabin Schumann and Partners LLP is one of New York's premier matrimonial and family law firms, known for matrimonial and family law landmark decisions and skilled courtroom advocacy. Its legal team is dedicated and solution-oriented, with a focus on high net worth and complex family law matters, including international matters. With decades of family law experience and proven results, its attorneys are committed to guiding clients through difficult life transitions and meeting their clients' individual needs and objectives with sensitivity, sophistication and discretion, while striving to maintain the highest ethical and legal practice standards.

Authors

Gretchen Beall Schumann is a founding partner of Rabin Schumann and Partners LLP, and has extensive experience in matters involving complex domestic and international family law. A former President of the New York Women's Bar Association Foundation, Inc., she is also past President of the New York Women's Bar Association, and a fellow of the International Academy of Family Lawyers. Ms Schumann earned her BA from Columbia University and her JD from Cornell Law School.



Lindsay R Pfeffer is a partner of Rabin Schumann and Partners LLP, and represents clients in divorce, custody and parenting access, equitable distribution, parentage and spousal and child support matters, and with respect to pre- and postnuptial agreements. Ms Pfeffer has litigated cases presenting landmark issues impacting parents in the LGBTQ community, habeas corpus and international child abduction proceedings and works with counsel in various jurisdictions on custody and prenuptial agreement matters. Ms Pfeffer earned her BA, cum laude, from Brandeis University and her JD from Benjamin N. Cardozo School of Law.

Rabin Schumann and Partners LLP

11 Times Square
10th Floor
New York
NY 10036
USA

Tel: +1 212 512 0814
Fax: +1 212 202 6100
Email: gschumann@rsaplaw.com
Web: www.rsaplaw.com

1. Divorce

1.1 Grounds, Timeline, Service and Process

Grounds

Grounds for divorce are set forth in the New York Domestic Relations Law (NY DRL) §170(1)-(7), as follows.

- Cruel and inhuman treatment (the conduct of the defendant must endanger the physical or mental well-being of the plaintiff as to render it unsafe or improper for the plaintiff to cohabit with the defendant).
- Abandonment (actual or constructive, for a period of one or more years).
- Imprisonment (defendant incarcerated for three or more consecutive years after the marriage).
- Adultery.
- Living separate and apart for one or more years pursuant to a written separation agreement that was subscribed by the parties and acknowledged or proved in the form required for a deed to be recorded or pursuant to a decree/judgment of separation; the plaintiff must have substantially performed all the terms and conditions of the agreement or decree/judgment.
- Irretrievable breakdown of the marriage for a period of at least six months, provided that one party states so under oath. (The court will not issue a Judgment of Divorce until the ancillary custodial and economic issues have been resolved.)

These grounds apply to same-sex spouses, but they do not apply to civil partners. It is possible to enter into a domestic partnership; however, domestic partnerships provide limited rights and can be terminated by either partner at any time by filing a termination statement in person at the city or county office in which the couple registered their partnership. Domestic partnerships are not dissolved by divorce courts.

Process and Timeline

There is no mandatory timeline for divorce and courts maintain discretion with respect to the length of individual proceedings.

The parties do not need to attend court, provided that the necessary submissions have been filed with the Supreme Court of the State of New York, in the county where the parties are divorcing. It is not possible to procure a divorce without the Supreme Court's entry of a Judgment of Divorce, even if the matter is resolved without court intervention.

There is no period of separation required before commencing a divorce action in New York State.

Rules for Service

New York State law requires that the defendant in a divorce action be personally served with the summons with notice or summons and verified complaint. To have your spouse served in any other way, you must get permission from the court, or, if your spouse has legal representation, that attorney may agree to accept service of the summons with notice or summons and verified complaint on behalf of the defendant.

Religious Marriages and Divorces

In certain cases, New York courts may recognise a marriage as valid even if no marriage licence or marriage certificate was issued. If the couple has a religious ceremony and genuinely intends to enter into a legal marriage, their marriage may be recognised under New York law. DRL §25 provides that a properly solemnised marriage ceremony will not be void based on the failure to obtain a marriage licence. DRL §12 requires

that the parties to the marriage solemnly declare each other as husband and wife (or other spousal arrangement) in the presence of an officiant or clergyman and a witness. In the absence of a licence, the court will balance various factors to determine whether the marriage is legitimate and enforceable. These cases are rare and highly fact-specific.

As for divorces in cases where the spouses were married in a religious ceremony but with a legitimate marriage certificate, once a divorce is finalised, the Supreme Court issues a decree, and then either party is free to remarry. Some consideration given to the fact that spouses may be bound under religious marriages unless certain steps are taken to release that spouse from marriage under religious law.

Other Processes in Relation to Ending a Marriage

New York Domestic Relations Law provides for other actions to void a marriage, for annulment or separation (NY DRL §§5, 6 and 7, 140 and 200, respectively). While a married couple may enter into a separation agreement, which is intended to be enforceable on its own, and which may be So Ordered by a court, thus making it enforceable as a court order, that agreement must be incorporated into (but not merged with) a judgment of divorce in order to formally dissolve a marriage.

1.2 Choice of Jurisdiction

Jurisdictional Grounds

The parties must meet jurisdictional requirements, found in NY DRL §230, as follows.

- The marriage occurred in New York, one party has resided in New York continuously for at least one year immediately prior to the commencement of the action ("commencement") and that party remains a resident as of commencement.
- The parties have resided in New York as husband and wife and one party has resided in New York continuously for at least one year immediately prior to commencement.
- The cause of action has arisen in New York and both parties are residents at commencement or one party has resided in New York continuously for at least one year immediately prior to commencement. (However, see Stancil v Stancil, 47 Misc.3d 873 [Sup. Ct., N.Y. Co. 2016], where the trial court found under the facts presented that a party could not accelerate the two-year residency requirement by alleging one year of residency coupled with no fault grounds.)
- Either party has resided in New York for a continuous period of two years prior to commencement.

The foregoing apply to same-sex spouses but not civil partners.

Domicile, Residence and Nationality

Domicile and nationality are not relevant for jurisdictional purposes where the residency requirements above are met.

A person is a "resident" of New York State when they have a significant connection with some locality in the state as the result of living there for some length of time during the course of a year. Deazle v Miles, 77 A.D.3d 660,908 N.Y.S.2d 716 (2d Dep't 2010).

Contesting Jurisdiction

A party to divorce proceedings can contest jurisdiction.

Stay of Proceedings

A party can apply to stay proceedings in order to pursue divorce proceedings in a foreign jurisdiction. See jurisdiction discussion above.

2. Financial Proceedings

2.1 Choice of Jurisdiction

Grounds

See response to **1.2 Choice of Jurisdiction**.

If a separate child or spousal support action is commenced under the Family Court Act, then the following provisions may apply.

- With respect to child support proceedings, the court must have personal jurisdiction over the respondent.
- In cases where the respondent is not a resident of New York State:
  - (a) the individual is personally served with a summons and petition within this state;
  - (b) the individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document or other action having the effect of waiving any contest to personal jurisdiction;
  - (c) the individual resided with the child in this state;
  - (d) the individual resided in this state and provided prenatal expenses or support for the child;
  - (e) the child resides in this state as a result of the acts or directives of the individual;
  - (f) the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;
  - (g) the individual asserted parentage of a child in the putative father registry maintained in this state by the office of children and family services; or
  - (h) there is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

Contesting Jurisdiction

A party to financial proceedings can contest jurisdiction.

Stay of Proceedings

A party is able to apply to stay proceedings in order to pursue financial proceedings in a foreign jurisdiction.

Some factors that the court may consider are which party files first in time, whether there is ongoing litigation in another forum, whether New York is an inconvenient forum, and whether the parties have contacts in a particular jurisdiction.

Hearing Financial Claims After a Foreign Divorce

Financial claims can be made following a foreign divorce, to the extent that issues are left open by the foreign judgment for enforcement and/or modification by another jurisdiction or where the laws of the State of New York allow for enforcement and/or modification of the foreign judgment.

New York's Civil Procedure Law and Rules provide for the enforcement of foreign money judgments in New York, pursuant to the Uniform Foreign Country Money Judgments Act (2021), provided certain due process standards have been met in the obtaining of the foreign judgment.

Other provisions of the NY Domestic Relations Law (DRL §§75 and 236) and Family Court Act

(FCA § 115 and Article 5-B) provide for the recognition and enforcement/modification of foreign divorce judgments, child custody and child support orders.

2.2 Service and Process

Service Requirements

The Family Court Act §427 lays out the manner of service of process for support proceedings in New York Family Courts.

If the financial requests for relief are part of a divorce action in Supreme Court, then the summons with notice/summons with verified complaint are to be served personally on the defendant spouse unless there is permission from the court to serve that spouse using an alternative method, or if the defendant spouse agrees to have an attorney accept service on their behalf. (Note: There may be alternative methods of service available where a NY action is being served in a foreign jurisdiction.)

Process and Timeline

There is no mandatory timeline and courts maintain discretion as to the length of individual proceedings, as well as the process, from the initial appearance, status and compliance conferences, and through and after trial.

2.3 Division of Assets

New York law applies the principles of equitable distribution, which does not necessarily mean an equal distribution of marital assets. The court will take into account 16 factors, including but not limited to:

- the income and property at the time of marriage, and at the time of the commencement of the action;
- the duration of the parties' marriage and the age and health of both parties;
- the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
- the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
- the loss of health insurance benefits upon dissolution of the marriage;
- any award of maintenance under subdivision 6 of DRL § 236(B);
- any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wager earner and homemaker, and to the career potential of the other party;
- the liquid or non-liquid character of all marital property;
- the probable future financial circumstances of each party;
- the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;
- the tax consequences to each party;
- the wasteful dissipation of assets by either spouse;
- any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- whether either party has committed an act or acts of domestic violence against the other party and the nature, extent, duration and impact of such act or acts;
- in awarding the possession of a companion animal, the court shall consider the best interest of such animal. "Companion animal", as used in this subparagraph, shall have the

same meaning as in subdivision 5 of Section 350 of the Agriculture and Markets Law; and
- any other factors which the court expressly finds to be just and proper.

Financial Orders to Regulate or Reallocate Assets or Resources

The court will typically determine whether a division of property occurs on an in-kind basis or whether it is appraised and a credit is given to the spouse who is not retaining the property post-divorce. The court considers the factors set forth in the response above.

Identifying the Assets

There is a financial discovery process whereby each spouse prepares a net worth statement identifying all assets and liabilities, as well as broad exchange of financial documentation in discovery, including income tax returns, bank account statements, brokerage and investment account statements, real property records, business records and so on. Parties may also engage in depositions, exchange interrogatories and serve discovery subpoenas for information and/or deposition testimony.

A court may make orders for disclosure against third parties.

Property Regimes

New York is an equitable distribution state, meaning the division of assets upon divorce is not necessarily equal. Rather, a court will look to the 16 factors provided by statute to determine a fair and equitable division of assets.

Trusts

New York courts recognise trusts.

The court may consider distributions from a trust in determining a party's income. To the extent that marital assets have been utilised to acquire property held by a trust, that property might, in certain circumstances, be deemed marital property or result in distribution credits.

The treatment of a trust depends largely on the circumstances surrounding the creation of the trust as well as the terms of the trust.

The case law is varied with regard to how trust assets are treated in the context of equitable distribution. For example, to the extent that a trust was created by a non-party for the benefit of one party as an estate planning mechanism, or both parties consented to and purposefully created a trust for the benefit of each other and/or their children, the trust assets are more likely to be considered outside of the marital estate, while the trust terms remain intact. See Oppenheim v Oppenheim, 168 A.D.3d 1085 (2nd Dept. 2019).

However, factors may be present which warrant piercing the trust or providing for an equitable distribution credit for marital assets that are contributed to a trust. This is especially so where marital assets have been placed into trust without one party's consent, where marital assets are placed into a trust so as to defeat a spouse's rights to access martial assets, or where the trust itself is invalid. See Riechers v Riechers, 267 A.D.2d 445 (2nd Dept. 1999); Surasi v Surasi, 2001 NY Slip Op 40408(U) (Supreme Court of Richmond County 2001).

2.4 Spousal Maintenance

Spousal maintenance is authorised by statute. It is regularly awarded in divorce actions and the parties may agree upon payment of spousal maintenance in written settlement agreements. There has been a shift to a more formulaic approach in recent years, especially as to duration.

Domestic Relations Law Section 236 (B) provides two methods for determining temporary and post-divorce maintenance, with a list of factors to be considered by a court for each.

New York courts are empowered by statute (DRL § 236 (B)) to award post-divorce maintenance. There are also durational guidelines for maintenance provided by statute, as follows:

- in marriages lasting 0 to 15 years, payments should last 15% to 30% of the marriage's length;
- in marriages lasting 15 to 20 years, payments should last 30% to 40% of the marriage's length; and
- in marriages lasting over 20 years, payments should last 35% to 50% of the marriage's length.

2.5 Prenuptial and Postnuptial Agreements

Prenuptial and postnuptial agreements are recognised in New York State. New York Domestic Relations Law Section 236 (B) (3) explicitly provides: "An agreement of the parties made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties and acknowledged or proven in the manner required to entitle a deed to be recorded." Foreign agreements are largely enforced, provided that the necessary formalities are met for the agreement to be valid and enforceable. An agreement's terms must not violate New York's public policy; there are limited other bases that might render an agreement, or certain of its terms, unenforceable (eg, the agreement was procured by fraud, duress, coercion or contains unconscionable provisions).

New York courts will enforce the terms of prenuptial and postnuptial agreements so long as they are made in conformance with standards for contracts, meaning that the agreement cannot be the product of fraud, duress, or coercion, and cannot be unconscionable or violate public policy.

A New York marital agreement must be executed by the parties and acknowledged (as is required for a deed to be recorded, per the New York Real Property Law). Otherwise, a court will not be authorised to enforce the agreement. Child support and child custody terms are usually not included in prenuptial and postnuptial agreements.

2.6 Cohabitation

There are no financial rights that arise solely from cohabitation. Certain civil claims may be possible if the couple owns jointly titled property, or they have entered into a cohabitation agreement. A couple may also enter into a domestic partnership, but the financial rights associated with a domestic partnership are limited.

In New York State cohabitants do not acquire any rights by virtue of length of cohabitation or children, etc. New York State does not recognise common law marriages, and the length of cohabitation does not generate rights between the couple, regardless of whether there are children. The laws regarding child custody apply to both children of a married couple and children of unmarried couples.

2.7 Enforcement

A party may seek an order for numerous remedies, including, but not limited to, specific performance, contempt and a money judgment for unpaid distribution. Additionally, the court

may award counsel fees and costs to the non-defaulting party.

Financial claims can be made following a foreign divorce, to the extent that issues are left open by the foreign judgment for enforcement and/or modification by another jurisdiction or where the laws of the State of New York allow for enforcement and/or modification of the foreign judgment.

2.8 Media Access and Transparency

The media and press may report on financial cases if there is an open courtroom for that matter. In rare instances, the court may close the courtroom, primarily where there are sensitive issues affecting children, or the court may issue a "gag" order, preventing the parties from disseminating certain information.

The court records for divorce and family matters in the New York Supreme and Family courts are sealed by default, and not made available to the public. Only the parties and their attorneys have access.

A party must make a motion for the use of an anonymous case caption. It is within the discretion of the court as to whether to grant such motion. There is a high burden of proof.

2.9 Alternative Dispute Resolution (ADR)

There are private options for alternative dispute resolution, including mediation, arbitration and/or collaborative law.

Some courts have established county-specific mediation and neutral evaluation programmes. Some mandate party participation and some are voluntary. The courts may also directly facilitate settlement conferences.

There are no material penalties for non-compliance, as most programmes are voluntary.

Status of Agreement Reached via a Non-Court Process

Such agreements are enforceable. However, they may not be enforced using remedies applicable to court orders unless the agreement is So Ordered and/or incorporated into a judgment of divorce signed by a judge.

3. Child Law

3.1 Choice of Jurisdiction

Jurisdictional Grounds

The Uniform Child Custody Jurisdiction Enforcement Act (DRL Article 5-A; §75 et seq. (UCCJEA)) sets forth four available jurisdictional grounds: (i) the child's home state; (ii) significant connection, which exists when a state has substantial evidence about a child as a result of the child's significant connections to that state; (iii) emergency (abandonment or abuse); or (iv) a vacuum (when no other jurisdictional basis exists). Except in emergency cases, the UCCJEA eliminated a child's physical presence in a state as grounds for exercising jurisdiction. DRL §76 (3).

If the proceeding concerns a child abduction, domestically, the Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction and Enforcement Act would apply; internationally, the United States is a treaty partner to the Hague Convention on the Civil Aspects of International Child Abduction.

Domicile, Residence and Nationality

See **1.2 Choice of Jurisdiction**.

3.2 Living/Contact Arrangements and Child Maintenance

Application to Court

Either parent can file an application seeking a court order regarding the child's residence and parenting access time, including the implementation of a parenting access schedule. There is no automatic right to primary custody in either parent. The courts' determination of such applications is dictated by the "best interests of the child" standard.

The "best interest of the child" test means that the courts are required to balance the ability of each parent to meet the needs of the child or children.

The court will determine child custody based on the "best interest of the child" test by evaluating a number of factors. Courts will make a finding on custody based on the totality of the factors. These factors can include whether one of the parents has been the primary caretaker of the child, stability, the existence of any substance abuse issues, domestic violence, physical health of each parent, any history of abuse or neglect, and any interference with the parenting rights of the other parent. In matters where one parent has primary custody rather than joint custody with the other parent, the custodial parent is expected to encourage and foster the child's relationship with the non-custodial parent.

A child's preference may also be taken into consideration, depending on the age of the child.

Legal Approach to Custody and Parental Responsibility

New York courts make custody decisions based upon the "best interest of the child" standard. If there is no court order, then both parents are deemed to have equal rights to physical and legal custody of the child. A New York court can make orders concerning custody until the child is 18 years old.

Restrictions on the Court

There are no restrictions on the court's ability to make an order as to a child's living and contact arrangements with regard to parents, but there are restrictions with regard to making orders relating to extended family and non-relatives seeking custody and/or guardianship.

Child Maintenance

Known as "child support" in New York State, it is defined by statute as "a sum to be paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties for care, maintenance and education of any unemancipated child under the age of twenty-one years". New York Family Court Act Section 413 (1) (b) (2); New York Domestic Relations Law Section 236 (B) (4).

The Child Support Standards Act statute (Domestic Relations Law Section 240 (1-b) and the Family Court Act Section 413 (1)) provides a formula for calculation of child support. The formula takes into account the income of both parents and the number of children being supported. The combined income is multiplied by a percentage based on the number of children: 17% for one child; 25% for two children; 29% for three children; 31% for four children; and no less than 35% for five or more children. The amount of support to be paid by a parent is determined based on that parent's pro rata percentage of the total combined parental income.

There is a statutory "cap" on income which is adjusted each year based upon inflation. When the combined parental income amount exceeds the then current cap, a court is not required to

consider the total parental income for child support purposes; however, the court may use its discretion to increase the total parental income to be used for the child support calculation, which is referred to as "deviating", by considering a number of factors set forth in the statute.

Parties can come to an agreement on child support outside of court by entering into a written agreement signed by the parties and acknowledged by notaries public. Such an agreement may be enforceable on its own but it may also be incorporated into a judgment of divorce or it may be So Ordered by a court such that additional legal remedies would be available for enforcement.

Both Family and Supreme Courts in New York State are empowered to make child support orders. Those made during the course of a pending proceeding are known as "pendente lite" orders. Those that concern "permanent" child support are applicable through the child/children reaching age 21.

A child who is not emancipated (meaning under the age of 21) may file a petition against their parents asking for an order of child support. However, applications brought by children are highly atypical.

3.3 Other Matters

Courts' Power in Case of Disagreement

The New York courts are empowered to rule on applications filed by a party seeking an award of decision-making authority with respect to a decision concerning a child, and to issue decisions after trial concerning these issues.

Parental Alienation

New York State is cognisant of the significance of maintaining a healthy relationship between a child and both parents. New York courts can make modifications to custody and parenting access orders (or even issue contempt of court orders) in cases where a parent interferes with/frustrates the other parent's relationship with the child/reasonable right of access to a child.

In these cases, sometimes a court-appointed attorney for the child, who will meet with the child and with each parent and/or a forensic evaluator who then issues a report following evaluation of both parents and collateral sources may shed light on a potential parental alienation situation.

There are no enumerated factors to consider per se. These matters are handed on a case-by-case basis.

A custodial parent's interference with the relationship between a child and a noncustodial parent has been said to be "an act so inconsistent with the best interests of the child as to per se raise a strong probability that the offending party is unfit to act as a custodial parent". Young v Young, 212 A.D.2d 114, 628 N.Y.S.2d 957 (1995) (quoting Maloney v Maloney, 208 A.D.2d 603, 617 N.Y.S.2d 190, 191 (1994)).

Children's Evidence

New York judges do not generally call children to the witness stand. Rather, they hold what is known as in camera "Lincoln hearings" where the children speak without the presence of the parties or counsel to the judge (only the attorney for the child(ren) is present), and what is said during these "Lincoln hearings" may weigh upon the judge's ultimate determination of custody. The transcript of the Lincoln hearing is sealed, such that the parties do not have access to the child's testimony.

3.4 ADR

Mechanisms Outside the Court Process

There are private options for alternative dispute resolution, including mediation, arbitration and/or collaborative law.

ADR Methods Mandated by Court

Some courts have established county-specific mediation and neutral evaluation programmes. Some mandate party participation and some are voluntary. The courts may also directly facilitate settlement conferences.

There are no material penalties for non-compliance, as most programmes are voluntary.

Status of Agreement Reached via a Non-Court Process

Such agreements are enforceable. However, they may not be enforced using remedies applicable to court orders unless the agreement is So Ordered and/or incorporated into a judgment of divorce signed by a judge.

Requirements Imposed by Statute

There are no requirements imposed by statute for parties to engage in alternative dispute resolution.

3.5 Media Access and Transparency

Media and Press Reporting

The media and press are able to report on child cases, however, the records of divorce and family matters in the New York Supreme and Family courts are sealed by default, and not made available to the public. Only the parties and their attorneys have access.

Anonymising the Child

A child's initials are used in court decisions regarding custody and child support.

USA – OHIO

Law and Practice

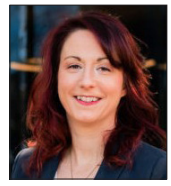
Contributed by:
Andrew A Zashin, Amy M Keating, Kyleigh A Weinfurtner and Christopher R Reynolds
Zashin Law

Contents

Zashin Law is a Cleveland, Ohio-based family law firm that handles cases across Ohio, the United States and the world. The firm has established itself as a leader in family law by continuing to expand and adapt to its clients' changing needs. Led by Andrew A Zashin, the firm's attorneys have more than a century of collective experience and boast an impressive array of credentials from representing celebrities, athletes, high net worth individuals and ordinary people in their family law matters. Zashin Law regularly handles international family law matters, including those pertaining to the Hague Convention, international child abduction, relocation, divorce and parenting issues specific to particular religious faiths (both local and international). These cases include two of the seminal international family law matters before the Supreme Court of the United States.

Authors

Andrew A Zashin is the founder of Zashin Law. Regarded regionally, nationally and internationally for his expertise in family law and international family law, Andrew represents celebrities, athletes, high net worth individuals and ordinary people with respect to their family law situations. Andrew works extensively in all facets of domestic relations law including divorce, dissolution, child custody, support issues, marital settlement agreements, and equitable property divisions. Andrew has received numerous accolades for his effective representation of his clients, is sought after as a speaker and commentator, and has lectured locally, nationally and internationally.



Amy M Keating is a partner at Zashin Law who successfully navigates clients through a variety of family law matters. An American Academy of Matrimonial Lawyers fellow and Ohio State Bar Association Certified Specialist in Family Relations Law, Amy frequently lectures to lawyers and financial professionals. She focuses her practice on complex marital estates, representing clients in both litigation and alternative dispute resolution processes in matters including divorce, dissolution, child custody, child and spousal support, prenuptial and postnuptial agreements, and international issues. Amy is also an adjunct professor at Case Western Reserve University School of Law.

Contributed by: Andrew A Zashin, Amy M Keating, Kyleigh A Weinfurtner and Christopher R Reynolds,
Zashin Law

Kyleigh A Weinfurtner is the managing partner of Zashin Law. Her practice is focused on strategically navigating clients through family law matters. Kyleigh has a particular strength in handling matters involving complex financials, such as executive compensation, business valuations, diversified investments, compensation and estates of professional athletes, and tracing premarital assets. In addition to her sophisticated financial knowledge, Kyleigh also focuses her practice on challenging parenting matters. Kyleigh is a frequently sought after lecturer at continuing education seminars on various topics. She was appointed as an adjunct professor at Case Western Reserve University School of Law in 2020.

Christopher R Reynolds is a partner at Zashin Law whose practice encompasses all aspects of divorce, dissolution, support, property division, and parental rights and responsibilities. Chris has significant experience representing parents in international custody matters, including international child-abduction cases. An American Academy of Matrimonial Lawyers fellow and Ohio State Bar Association Certified Specialist in Family Relations Law, Chris has served as an adjunct professor at Case Western Reserve University School of Law since 2010. Prior to practising law, Chris worked for over seven years in inpatient psychiatry and is a Licensed Master's Social Worker in the State of Michigan.

Zashin Law, LLC

5900 Landerbrook Drive
Suite 280
Landerbrook Corporate Center 1
Cleveland,
Ohio 44124
USA

Tel: +1 216 480 3001
Fax: +1 216 480 3002
Email: info@zashinlaw.com
Web: www.zashinlaw.com

ZASHIN LAW

Contributed by: Andrew A Zashin, Amy M Keating, Kyleigh A Weinfurtner and Christopher R Reynolds,
Zashin Law

1. Divorce

1.1 Grounds, Timeline, Service and Process

There are two primary ways for Ohio parties to terminate their marriage: dissolution and divorce. Under both methods, one of the parties must have been a resident of Ohio for at least six months immediately preceding the commencement of the action.

Dissolution

In dissolution proceedings, parties reach out-of-court agreements regarding all issues pertaining to property division, support, and children, if any. The parties then jointly petition the court to adopt these agreements and terminate the marriage. The court will then take testimony from the parties at a final hearing on the dissolution, which will be set no less than 30 days but not more than 90 days after the filing of the petition.

Divorce

Any individual over the age of 18 who has been an Ohio resident for more than six months may file a complaint for divorce. This applies to all marriages, including same-sex marriages. Ohio no longer recognises common law marriage.

Grounds for Divorce

Ohio law provides both no-fault and fault-based grounds for divorce. Parties can obtain a no-fault divorce if they have lived separate and apart from their spouse for at least one year, without cohabitation, or by agreeing they are incompatible. Ohio law also permits a divorce under any of the following fault-based grounds:

- either party had a husband or wife at the time of the marriage;
- wilful absence of the adverse party for more than one year;
- adultery;
- extreme cruelty;
- fraudulent contract;
- gross neglect of duty;
- habitual drunkenness;
- imprisonment of the adverse party in a state or federal correctional institution at the time of filing the complaint; or,
- either husband or wife procured a divorce outside of the state of Ohio.

Divorce Process

A party initiates divorce proceedings by filing a complaint for divorce. In the Rules of Superintendence, the Supreme Court of Ohio sets forth guidelines for trial courts to dispose of divorce cases with children in 18 months, and divorce cases without children in 12 months of the date of filing. Further timelines for actions pertaining to divorce proceedings are set forth in scheduling orders issued by the court, local rules of court, and the Ohio Rules of Civil Procedure. At minimum, a divorce cannot be granted until at least 42 days have passed from service of the divorce complaint or 28 days after service of a counterclaim.

A complaint for divorce must be served upon the non-filing spouse in accordance with the Ohio Rules of Civil Procedure before a court can grant the divorce. Generally, parties are served via certified mail, commercial carrier, or personal service. If the filing spouse is unable to locate the non-filing spouse, they can also perfect service by publication in a newspaper or posting of the notice of the action in a conspicuous place in the courthouse. A divorce cannot be granted sooner than 28 days after the date of the last publication.

Alternatives Methods to Terminate a Marriage in Ohio

Annulment

In certain circumstances, Ohio parties can obtain an annulment to terminate their marriage. The various grounds for obtaining an annulment fall into two categories, namely grounds when the marriage is void and grounds when the marriage is voidable.

"Void" marriages are marriages that were not valid at the time of marriage. Because of this, there is no conduct that either party can perform to subsequently make the marriage valid. A void marriage occurs when one of the spouses already was legally married to someone else at the time of marriage or if the spouses were close relatives, which could amount to incest.

"Voidable" marriages can be declared void by the court under certain circumstances. Ohio law recognises several voidable grounds for annulment:

- the party seeking the annulment was under the age of 18, unless after attaining that age such party cohabited with the other as husband and wife;
- either party has been adjudicated to be mentally incompetent, unless that party, after being restored to competency, cohabited with the other as husband or wife;
- the consent to the marriage by either spouse was obtained by fraud, unless the party afterwards, with full knowledge of the facts constituting the fraud, cohabited with the other as husband or wife;
- the consent to the marriage of either party was obtained by force, unless the party afterwards cohabited with the other as husband or wife; or
- the marriage between the parties was never consummated although the marriage is otherwise valid.

Like a divorce complaint, the party seeking the annulment must file a complaint with the court, asserting the grounds under which they seek the annulment. The filing party must have been an Ohio resident for six months before filing the action. The statute of limitations for commencing this action depends on the grounds the party is asserting but is generally two years for all grounds except mental incompetency or if the marriage is void.

Legal separation

Another option for Ohio parties is to seek a legal separation from their spouse. Unlike divorce, dissolution, or annulment actions, however, a legal separation does not terminate the parties' marriage. In a legal separation action, however, the court can issue orders dividing the parties' property, issuing support (child and spousal), and allocating parental rights and responsibilities.

The process for initiating a legal separation complaint is similar to the process for initiating a complaint for divorce. A party commencing a legal separation action, however, does not need to have been an Ohio resident for six months to initiate the complaint. Instead, in legal separation proceedings, Ohio law only requires that the complaint be filed in the county where the filing party has resided for 90 days prior to filing. For the marriage to be terminated, either one party must file a complaint for divorce or the parties' jointly petition the court for a dissolution of their marriage in the future.

1.2 Choice of Jurisdiction

Subject Matter and Personal Jurisdiction

For a divorce action to proceed in Ohio, a court must have subject matter jurisdiction over the action. Ohio courts have subject matter jurisdiction over divorce proceedings so long as the plaintiff has been a resident of the state of Ohio for more than six months preceding the filing of the complaint. To qualify as an Ohio resident, the plaintiff must have lived in Ohio with an intent to remain in the state.

For a court to order a defendant-spouse to divide property or pay spousal support, it must also have personal jurisdiction over the defendant-spouse. While an Ohio court has personal jurisdiction over a defendant-spouse who also lives in Ohio, the defendant-spouse need not be an Ohio resident for an Ohio court to exercise personal jurisdiction over them. If the defendant-spouse resides elsewhere, an Ohio court may exercise personal jurisdiction over the defendant-spouse as long as it does not deprive him or her of their due process rights. Ohio courts have found it appropriate to exercise personal jurisdiction over a non-resident defendant-spouse where the defendant-spouse lived in Ohio during the marital relationship, even if that spouse subsequently left the state.

An Ohio court can issue an order terminating the marriage even if it lacks personal jurisdiction over the defendant-spouse (what is known as an "in rem" divorce). If it lacks personal jurisdiction over the defendant-spouse, however, it cannot issue any orders that obligate, impose a duty on, or otherwise terminate a right of that spouse. These orders only affect the marital status of the parties.

Contesting Jurisdiction

If the non-filing spouse believes that Ohio lacks subject matter jurisdiction or personal jurisdiction over them, that spouse can file a motion to dismiss the complaint. If a divorce proceeding is already pending in another jurisdiction, whether in a different state or different country, a party may seek to stay the Ohio action to avoid inconsistent decisions with respect to the same issues, but any such decision to stay proceedings is discretionary.

2. Financial Proceedings

2.1 Choice of Jurisdiction

A party commencing or contesting financial proceedings incident to a divorce may do so in accordance with the procedures outlined in **1.2 Choice of Jurisdiction**.

2.2 Service and Process

The service requirements for financial proceedings incident to divorce, or in post-decree actions regarding the same, are the same as those for divorce outlined in **1.1 Grounds, Timeline, Service and Process**.

2.3 Division of Assets

Dividing Assets in Divorce

Ohio domestic relations courts are "courts of equity". This means that Ohio courts are tasked with equitably dividing the parties' assets in connection with the divorce. To do so, Ohio domestic relations courts must first determine whether assets are "marital" in nature or are the "separate property" of either spouse before allocating the same. In making this determination, Ohio courts presume that all assets owned or acquired by the parties from the date of marriage through to the date of the final hearing are marital property.

Separate property includes property that was:

- inherited by only one spouse during the course of the marriage;
- acquired by one spouse prior to the date of the marriage;
- acquired from passive income and appreciation on separate property owned by one spouse during the marriage;
- acquired by one spouse after a decree of legal separation;
- excluded from being considered as marital property by a valid prenuptial or postnuptial agreement;
- compensation to a spouse for the spouse's pain and suffering related to a personal injury; or,
- gifted after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse.

The burden of proof is on the party claiming a separate property interest in any asset to prove such interest by a preponderance of the evidence (a civil evidentiary standard that means something is more likely than not). Parties seeking to assert claims to separate property interests can demonstrate such claims through records that reflect premarital account balances or amounts received as gifts or an inheritance, or other documents evidencing their separate property interests. Ohio law is clear that the commingling of separate property with marital property does not destroy the nature of the separate property, so long as it is traceable. To meet their burden of proof for commingled assets – particularly financial accounts – a party may need to engage an expert witness to utilise an appropriate methodology. This is especially true when proving passive appreciation on separate property in a commingled financial account.

After determining whether property is marital or separate, Ohio courts must then divide the property between the spouses. Unless it would be inequitable to do so, Ohio courts generally award a spouse's separate property to that spouse. Ohio law further creates a presumption that the courts will divide marital property equally, unless it would be inequitable to do so. Financial misconduct or other factors might impact a court's decision to fashion an unequal, but equitable, property division. The court must make an equitable division of marital property prior to making any award of spousal support as any income received from the assets being retained by either party can be considered when the court determines the appropriateness of a spousal support award. This is especially true when dealing with income-producing assets.

Trusts in Divorce

Sometimes one or more of the parties in a divorce proceeding will have created revocable or irrevocable trusts prior to or during their marriage. Assets held in revocable trusts are divided like any other property, because revocable trusts can be altered pursuant to the terms of the trust, typically during the lifetime of the spouse who created the trust. Irrevocable trusts, conversely, cannot normally be divided. In fact, assets held in irrevocable trusts are often not treated as marital or separate property, due to the fact that the parties have restricted, if any, direct ownership rights to the property held in the trust.

2.4 Spousal Maintenance

Determination of Spousal Support

Ohio courts have broad discretion to award spousal support in divorce cases. Tasked with determining whether spousal support is "reasonable or appropriate" in a divorce case, judges are required to consider all factors they find to be relevant and equitable in determining the

amount and duration of spousal support, including the following:

- the income of the parties from all sources, including income that a party receives from assets divided in the divorce proceeding;
- the relative earning abilities of the parties;
- the ages of the parties and any physical, mental or emotional conditions;
- the retirement benefits of the parties;
- the length of the marriage;
- the extent to which it would be inappropriate for the custodial parent of a minor child to seek employment outside the home;
- the standard of living the parties established during the marriage;
- the relative extent of the parties' education;
- the relative assets and liabilities of the parties, including court-ordered payments;
- the contribution either party has made to the education, training or earning ability of the other party, including a party's contribution to the acquisition of a professional degree by the other party;
- the time and expense necessary for the spouse seeking spousal support to acquire education, training or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training or job experience, and employment is, in fact, sought;
- the tax consequences, for each party, of an award of spousal support; and,
- whether a party has lost income-production capacity because of that party's marital responsibilities.

While practitioners often employ maxims when discussing the potential amount and duration of support, such as "one year of support for every three years of marriage", in practice, if spousal support is not resolved through the agreement of the parties, it will be addressed by the courts on a case-by-case basis. During the pendency of divorce actions, Ohio courts can also order the payment of temporary spousal or child support as necessary to maintain the "status quo" for the duration of the matter.

Modification and Termination of Spousal Support

Ohio domestic relations courts can only modify spousal support obligations if the divorce decree specifically retains jurisdiction for the court to do so. The decree needs to be specific as to whether the court can modify the amount of support, duration of support, or both, in order for the court to have subject matter jurisdiction to modify the same. If a divorce decree is silent with respect to modification of support, an Ohio court cannot modify the amount or duration of spousal support.

Under Ohio law, spousal support awards terminate upon the death of either party, unless the order specifically indicates otherwise. Spousal support can also terminate or be modified upon the remarriage or cohabitation of the party receiving support if the order specifies the same.

A party seeking a modification of spousal support has the burden of proof to show that there has been a substantial change of circumstances since the last court order that: 1) makes the existing award no longer appropriate and reasonable; and 2) was not taken into account by the parties or the court as a basis for the existing award.

2.5 Prenuptial and Postnuptial Agreements

Ohio has long recognised the validity of prenuptial agreements and, as of March 2023, has joined 48 other states in recognising the validity of postnuptial agreements.

Prenuptial Agreements

Prenuptial agreements have been determined to be valid and enforceable under Ohio law since 1984. While there is no statute governing prenuptial agreements, Ohio courts have held prenuptial agreements to be binding and enforceable if:

- the agreement was entered into freely and voluntarily, without fraud, duress, coercion or overreaching;
- there is full financial disclosure by each of the parties of the nature, value and extent of their assets; and,
- the terms of the agreement do not encourage divorce or profiteering by divorce.

Prenuptial agreements cannot include provisions regarding future custody or child support. Similarly, if a prenuptial agreement contains provisions about spousal support in the event of a divorce, the court can evaluate the spousal support award set forth in the agreement at the time of the parties' divorce based on a different legal standard; if the spousal support provision in the agreement is "unconscionable" at the time of the parties' divorce, Ohio courts have discretion to award a different spousal support award from the one outlined in the parties' prenuptial agreement.

Postnuptial Agreements

A postnuptial agreement is a contract entered into between spouses after the date of marriage. Until this year, Ohio law prohibited postnuptial agreements. This meant that married couples could not enter into contracts regarding their obligations to one another unless they also agreed to immediately separate pursuant to the terms of a separation agreement incident to terminating the marriage or obtaining a legal separation. Now, married couples can enter into agreements with one another regarding issues such as property division and spousal support without having to agree to an immediate separation.

Parties may want to enter into postnuptial agreements for various reasons. Some may want to correct an error in a prenuptial agreement or update that agreement based on changed circumstances. Others may want to clarify the separate property of each spouse, to establish which spouse is responsible for paying off certain debts incurred prior to or during the marriage, and others may want to clarify who retains ownership of pets in the event of a divorce. Postnuptial agreements cannot be used, however, to make decisions related to child custody or child support. Child custody issues are based on the best interests of the child or children, as the court determines them, pursuant to Ohio's relevant legal codes at the time of divorce.

For postnuptial agreements to be valid and enforceable, parties must ensure that they comply with certain formalities outlined in R.C. 3103.061 and functionally track the requirements for valid prenuptial agreements. Namely, a postnuptial agreement must be: (i) in writing; (ii) signed by both spouses; (iii) entered into freely without fraud, duress, coercion or overreaching; and, (iv) made with full disclosure or with full knowledge and understanding of the nature, value and extent of the other spouse's property. Like a prenuptial agreement, a postnuptial agreement must also not promote or encourage divorce.

2.6 Cohabitation

Ohio stopped recognising common law marriage in October 1991 (unless the facts giving rise to a common law marriage occurred entirely prior to October 1991). Because of this, Ohio domes-

tic relations courts lack jurisdiction to divide an unmarried couple's assets or to issue support orders for unmarried couples. If an unmarried couple jointly owns assets, the couple will need to commence any relevant actions for the division of those assets in the general division of the court of common pleas, or other appropriate court. The court would then divide the assets pursuant to the relevant Ohio law. Similarly, if the unmarried parties entered into a cohabitation agreement outlining the division of assets or other terms in the event of the breakdown of their relationship, the party seeking enforcement of that agreement would need to commence the action in the general division of the court of common pleas in the appropriate county.

As a limited exception to the above, Ohio domestic relations courts can issue civil protection orders for victims of domestic violence cohabiting with an aggressor. As a part of such an order, the court can grant the petitioner-victim exclusive access to property, vehicles, and pets. These orders would not change ownership of the assets, however, and can only be issued for a maximum of five years, unless renewed. Further, unmarried couples with children can seek orders regarding parental rights and responsibilities, as well as child support, from the appropriate court of the county where the child resides.

2.7 Enforcement

Enforcing Terms of a Divorce Decree

If a party does not comply with the terms of a divorce decree, or subsequent modification thereof, the injured party may enforce those terms by initiating contempt proceedings against the non-complying party. In such an event, the injured party commences the contempt action by filing a "motion to show cause", asking the non-complying party to come forth and show why they should not be held in contempt of court for failing to comply with its order. This motion must be properly served on the non-complying party in accordance with the Ohio Rules of Civil Procedure in the same way as an original complaint.

After the non-complying party is served, the court will set a hearing to determine whether the party has complied with the terms of the divorce decree or not. If the party has not complied, that party may assert a defence explaining why they failed to comply with the court's order. If the court determines that the non-complying party lacks a valid defence for their failure to comply with the court's order, the court may order the non-complying party to "purge" their contempt by complying with the court order, or performing other acts (usually paying the aggrieved party's attorney fees), within a certain period of time. If the non-complying party fails to timely comply with the purge terms, the court may issue a fine or jail sentence for failure to comply with the court's order. The court may also, in its discretion, award reasonable attorney fees and costs to the party that had to seek the court's assistance in enforcing the terms of its order. In some instances, these awards of attorney fees and costs is mandatory.

International Enforcement of Child Support Orders

Among the various international treaties that the United States is a party to is the Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance. As a result, Ohio child-support orders may be enforced in other countries that are also parties to the Convention. Ohio courts may also enforce child-support orders issued by other countries. Ohio courts may review the foreign order, however, before ordering its terms into effect and can

modify the same if it determines that the foreign order is not in the best interest of the child.

2.8 Media Access and Transparency

Public Access to Divorce Records

Under Ohio's open records law, court proceedings and records are generally accessible to the public. While this also applies to domestic relations matters, many Ohio courts take efforts to limit ease of public access to sensitive documents filed in domestic relations matters. Some courts do not allow documents filed in domestic relations matters to be accessible via the public internet docket or restrict access to counsel of record. Other courts have specific case-based files to maintain information regarding the parties' financials, children, or other sensitive information. Dockets pertaining to domestic violence civil protection orders are not available online per federal law.

Additionally, various rules require parties to redact personal identifiers such as social security numbers and other private information, like bank account numbers and children's names and dates of birth, from public filings. In an effort to further protect children, some courts require minors to only be referred to by their initials in public filings.

Sealing Court Records

Ultimately, however, despite the court's efforts to protect a litigant's privacy, the records remain available to the media and the public at large. Many individuals – particularly public figures – want to "seal" their records to prevent them from being publicly available. Simply being a public figure in Ohio, however, is not enough to permit a court to restrict the records. Upon the filing of a motion by either party, a court can seal records that contain trade secrets, proprietary information, or confidential business records. Parties can similarly agree to confidentiality agreements or protective orders that endeavour to limit public access to documents containing the above-referenced information, or other sensitive information regarding the parties, but whether those records are sealed is ultimately in the court's discretion. The public nature of divorce proceedings often prompts public figures, and other privacy-conscious individuals, to utilise alternative dispute resolution methods such as mediation or arbitration in lieu of contested, public litigation proceedings.

2.9 Alternative Dispute Resolution (ADR)

ADR Processes in Domestic Relations Matters

There exist various ADR models for parties looking to resolve issues pertaining to the termination of their marriage without litigation, including mediation, arbitration, and the collaborative law process.

Mediation

Mediation involves a third-party neutral who assists the parties in attempting to reach an agreement to resolve some or all of the issues related to the termination of their marriage, including property division, spousal support, child support, and provisions pertaining to custody and parenting time schedules with any minor children. Mediation can be court-ordered or pursuant to a private agreement of the parties. Some court-ordered mediation programmes only address issues pertaining to children. Others will address financial issues as well. Court-ordered mediation can occur with a court-employed mediator or with a mediator selected by the parties.

Arbitration

Arbitration is another form of ADR. In arbitration, the parties submit disputed issues to an

arbitrator, an impartial third party, chosen by the parties to hear the case and issue a decision. While the arbitration process takes place outside of court, it is similar to a court hearing in that both parties are able to present evidence, including witness testimony. Issues pertaining to child custody and parenting time cannot be arbitrated in Ohio. While arbitration can be costly, many parties prefer arbitration due to the confidential nature of the proceedings and due to the fact that they can generally receive a conclusive decision much more quickly than they could in traditional litigation.

Collaborative law process

The collaborative law process is another ADR model that endeavours to resolve disputes in a manner that aligns with the parties' interests and goals. Collaborative law advocates often believe that better results can be obtained by seeking mutually beneficial outcomes in a process that focuses upon the interests of the parties and their children rather than by focusing on the way a judge might rule on a case or particular issue. In the event the parties do not reach resolution through the collaborative process, the attorneys representing each spouse must withdraw and the parties must retain new attorneys to litigate the unresolved issues. The mandatory withdrawal provision endeavours to incentivise the parties and counsel to resolve all outstanding issues pertaining to their matter.

Other ADR options

Ohio offers a variety of other ADR options in addition to those listed above, including, but not limited to, the following.

- Evaluative mediation: the parties empower their mediator to be evaluative in assessing the disputed issues.
- Facilitation/Special Master: the parties empower their mediator to have control over the process, often controlling discovery exchanges and setting deadlines.
- Mediation/Arbitration Agreements, sometimes referred to as a Cooperative Divorce Process: the parties choose a multi-phase process that combines a negotiating model with a dispute resolution mechanism to use if negotiations are not successful on one or more issues.
- Early Neutral Evaluation: the parties empower an evaluator(s) to make recommendations about case outcomes early in the process.
- Private Judging: the parties engage a private (retired) judge to conduct a process similar to arbitration (above).

Enforcement of agreements

If an ADR process results in the settlement of one or more issues in a case, the terms of the agreement are reduced to writing in a parenting plan, separation agreement, or other relevant document. The parties can then petition the court to adopt complete agreements in connection with a petition for dissolution or partial agreements in connection with divorce proceedings. Once these agreements are adopted as orders of the court, a party can seek enforcement of the terms of the order in accordance with the procedures outlined in **2.7 Enforcement**.

3. Child Law

3.1 Choice of Jurisdiction

Jurisdiction in Parenting Proceedings

Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Ohio courts generally only have jurisdiction to issue orders pertaining to custody or parenting time for a child if Ohio is the child's "home state", meaning that the child lived in Ohio for six months imme-

diately preceding the filing of the complaint. If the child does not have a "home state", the state where the child has the most substantial connection shall have initial custody jurisdiction. If the "home state" has declined to exercise jurisdiction because Ohio is the more appropriate forum, Ohio would then have jurisdiction over the child.

In the event of a dispute over which state has jurisdiction to issue an order pertaining to custody and parenting time, the court will conduct a fact-based analysis, considering factors such as the amount of time the child spent in each state, where the child's school and doctors are located, and where the children participate in extracurricular activities and social events. "Home state" does not need to be a state of the United States. A foreign country can be a child's home state under the UCCJEA.

3.2 Living/Contact Arrangements and Child Maintenance

Allocating Parental Rights and Responsibilities

In the event that the parents are unable to reach an agreement regarding parental rights and responsibilities pertaining to a child, the parties will submit the issue to the court. The court that will hear the matter depends on the marital status of the parties. A domestic relations court will decide the parenting time schedule and living arrangements for parents terminating their marriage. Typically, a juvenile court will decide the parenting time schedule and living arrangements for parents who have never been married.

In issuing an order allocating parental rights and responsibilities, and setting forth a parenting time schedule, the court must conduct a "best interest" analysis, considering factors such as:

- the wishes of the parents;
- how well the child interacts with the parents, siblings, and others;
- how well the child adjusts to each parent's home, community and school;
- the mental and physical health of the child and parents;
- which parent is more likely to honour and facilitate court-approved parenting time;
- whether a parent failed to make all the child-support payments they were required to make pursuant to a court order;
- whether a parent or household member has been convicted of abuse or neglect;
- whether a parent has wilfully denied the other parent's visitation rights pursuant to a court order; and
- whether a parent is planning to establish a residence outside the state.

The court will then issue an order regarding who has the ability to make decisions on behalf of the child with respect to issues of education, religion, medical treatment and extracurricular activities, as well as a parenting time schedule. "Shared parenting" means that the parties can jointly make custodial decisions; "sole custody" means that one party has decision-making authority with respect to the above-referenced issues. The court will also have to select a parent to be "residential parent for purposes of public-school enrollment", if the parties are otherwise unable to agree. This is the parent in whose public school district the child will attend school. The court will also have to issue a parenting time schedule that is in the child's best interest. The custodial decision-making authority and parenting time schedule can mirror one another, but do not have to. For example, a court can order an equal parenting schedule, such as week-on/week-off, even if one parent has sole custody.

Child Support

For parties with a combined gross income below USD336,000 per year, Ohio law requires child support calculated under the child-support guidelines. These guidelines are basic support schedules that arrive at a support obligation based on the number of children and the combined gross income of the parents, as well as other factors, including costs of healthcare insurance, childcare costs, and number of overnights the child spends with each parent. Support calculated under the guidelines is rebuttably presumed to be correct. Ohio provides multiple "deviation factors" that can be used to adjust the calculated amount, including deviations for more parenting time.

For parties with combined gross incomes in excess of USD336,000 per year, Ohio courts are tasked with determining a child-support obligation on a "case-by-case" basis considering "the needs and standard of living of the children who are the subject of the child-support order and the parents". "Gross income" under the statute is quite broad and means "income from all sources", with some limited exceptions.

Duration of Child Support

Parents are required to support their children until a child turns 18, or graduates from high school, but no later than the child turning 19. A court can extend parents' obligations to support their child until after the age of 19 if the child is mentally or physically disabled and is incapable of supporting or maintaining themself.

Modification of Child Support

A party can seek to modify child support if there has been a substantial change in circumstances in the income or circumstances of one or both of the parties or the subject children. For instance, if one party obtains a new job with significantly higher compensation, or conversely loses their job as a result of a disability, they can move the court to modify their support obligation.

3.3 Other Matters

Orders Regarding Custodial Decision-Making

When parties are unable to agree about decisions of importance regarding their child's upbringing, the court will decide which parent can make decisions on behalf of the child with respect to the child's schooling, medical treatment, religion, and participation in extracurricular activities. The court can decide that it is in the best interest of the child for both parents to be involved in this decision-making. Conversely, the court can award decision-making authority regarding these issues to one parent or can split the authority to make the decisions regarding the above-referenced issues between the parents.

Court's Treatment of Parental Alienation

The court must conduct an evaluation of the child's best interests in making any determination regarding custody or parenting time. As part of this best-interest determination, the court will consider a parent's compliance with parenting-time orders issued by the court and a parent's willingness to facilitate the relationship and parenting time of the other parent. While awareness of parental alienation continues to spread across the state, the courts widely vary in their treatment of cases where there are allegations of parental alienation.

Children Providing Evidence

As part of its best-interest determination in any matter regarding custody or parenting time, the court must consider the wishes and concerns of the child if the court finds the child has sufficient reasoning ability. The court is not required, however, to issue an order that reflects the child's

wishes if the court determines that such wishes are not in the child's best interest.

While it is very rare for children to testify in open court in Ohio, there are various ways a child's wishes and concerns are presented to the court. At the request of either party, or in the court's discretion, the court can order an in-camera interview or appoint a guardian ad litem. If a court wishes to hear directly from a child, it typically does so through an in-camera interview, a private interview between the judge and child outside of the courtroom. The court may also appoint a guardian ad litem to make a recommendation regarding a child's best interests. As a part of the guardian's investigation, they are required to, at minimum, conduct interviews with the child, the parents, and other relevant individuals, observe the child at each parent's residence, and review school and health records. A guardian ad litem's investigation can pertain to all matters pertaining to custody and parenting time or can be limited to a specific topic.

3.4 ADR

Information regarding ADR in child-related proceedings is outlined in **2.9 Alternative Dispute Resolution (ADR)**. Ohio also allows for a parent coordinator to be appointed by a court to assist parents post-divorce with ongoing parenting disputes. Parents may also elect to utilise parent coaches to enhance their co-parenting and communication skills.

3.5 Media Access and Transparency

Information regarding media access and anonymity in child-related proceedings is outlined in **2.8 Media Access and Transparency**.

Trends and Developments

Contributed by:
Andrew A Zashin, Amy M Keating, Kyleigh A Weinfurtner and Christopher R Reynolds
Zashin Law

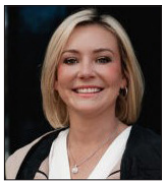
Zashin Law is a Cleveland, Ohio-based family law firm that handles cases across Ohio, the United States and the world. The firm has established itself as a leader in family law by continuing to expand and adapt to its clients' changing needs. Led by Andrew A Zashin, the firm's attorneys have more than a century of collective experience and boast an impressive array of credentials from representing celebrities, athletes, high net worth individuals and ordinary people in their family law matters. Zashin Law regularly handles international family law matters, including those pertaining to the Hague Convention, international child abduction, relocation, divorce and parenting issues specific to particular religious faiths (both local and international). These cases include two of the seminal international family law matters before the Supreme Court of the United States.

Authors

Andrew A Zashin is the founder of Zashin Law. Regarded regionally, nationally and internationally for his expertise in family law and international family law, Andrew represents celebrities, athletes, high net worth individuals and ordinary people with respect to their family law situations. Andrew works extensively in all facets of domestic relations law including divorce, dissolution, child custody, support issues, marital settlement agreements, and equitable property divisions. Andrew has received numerous accolades for his effective representation of his clients, is sought after as a speaker and commentator, and has lectured locally, nationally and internationally.

Amy M Keating is a partner at Zashin Law who successfully navigates clients through a variety of family law matters. An American Academy of Matrimonial Lawyers fellow and Ohio State Bar Association Certified Specialist in Family Relations Law, Amy frequently lectures to lawyers and financial professionals. She focuses her practice on complex marital estates, representing clients in both litigation and alternative dispute resolution processes in matters including divorce, dissolution, child custody, child and spousal support, prenuptial and postnuptial agreements, and international issues. Amy is also an adjunct professor at Case Western Reserve University School of Law.

Contributed by: Andrew A Zashin, Amy M Keating, Kyleigh A Weinfurtner and Christopher R Reynolds, **Zashin Law**



Kyleigh A Weinfurtner is the managing partner of Zashin Law. Her practice is focused on strategically navigating clients through family law matters. Kyleigh has a particular strength in handling matters involving complex financials, such as executive compensation, business valuations, diversified investments, compensation and estates of professional athletes, and tracing premarital assets. In addition to her sophisticated financial knowledge, Kyleigh also focuses her practice on challenging parenting matters. Kyleigh is a frequently sought after lecturer at continuing education seminars on various topics. She was appointed as an adjunct professor at Case Western Reserve University School of Law in 2020.

Christopher R Reynolds is a partner at Zashin Law whose practice encompasses all aspects of divorce, dissolution, support, property division, and parental rights and responsibilities. Chris has significant experience representing parents in international custody matters, including international child-abduction cases. An American Academy of Matrimonial Lawyers fellow and Ohio State Bar Association Certified Specialist in Family Relations Law, Chris has served as an adjunct professor at Case Western Reserve University School of Law since 2010. Prior to practising law, Chris worked for over seven years in inpatient psychiatry and is a Licensed Master's Social Worker in the State of Michigan.

Zashin Law, LLC

5900 Landerbrook Drive
Suite 280
Landerbrook Corporate Center 1
Cleveland,
Ohio 44124

Tel: +1 216 480 3001
Fax: +1 216 480 3002
Email: info@zashinlaw.com
Web: www.zashinlaw.com

ZASHIN LAW

While Ohio did not experience any significant legal changes in 2024, high-net-worth family law practice continues to evolve in more nuanced ways. Additionally, some appellate court cases signal potential guidance for lower courts on otherwise discretionary issues.

Continued Interest in Alternative Dispute Resolution Mechanisms

Ohio continues to see an interest in alternative dispute resolution ("ADR") mechanisms from both clients and courts. In December 2024, the Ohio Supreme Court published a Neutral Evaluation Toolkit as a resource for courts, promoting the ADR "neutral evaluation" model, sometimes known as "early neutral evaluation." A number of family law courts around the state are implementing early neutral evaluation programmes in which parties can either agree to participate or can be ordered to participate.

Early neutral evaluation ("ENE") is a dispute resolution process by which the early neutral evaluators provide an evaluation of the probable outcome of any dispute. ENE is not mediation; instead, the evaluators provide feedback to the parties after submissions from the parties and argument. The parties can use that feedback to determine if a settlement can be reached; however, the parties are not required to accept the evaluation provided and can proceed with litigation.

Other dispute resolution processes are also attracting more attention, including arbitration and parenting coordination for parenting issues. Private judging is also available.

Ohio has an arbitration statute to govern proceedings, though it is not specific to family law arbitration as in other states. Arbitration offers the parties a private and streamlined forum to have their dispute resolved; the arbitrator(s) commits to issuing an award with a set timeframe. While not always the case, arbitration is generally more cost-effective than traditional litigation. Absent unique circumstances, arbitration awards are not appealable and offer finality. Arbitration is attractive to high-net-worth clients who may require certain disputes to be resolved by a third party but also appreciate the privacy and efficiency of the proceedings.

Ohio does not allow arbitration of parenting issues, though child support may be arbitrated. However, Ohio does specifically recognise parenting coordination. A parenting coordinator is a neutral third party who is appointed by the court to help divorced or separated parents resolve disputes and, if these cannot be resolved, to make certain decisions about their children. The court appointment provides the parenting coordinator with his/her authority to implement the court order and to make decisions within the scope of their authority; while a parenting coordinator cannot radically change the parenting time schedule, for example, the coordinator can make decisions about participation in extracurricular activities or about coordinating vacation parenting time. Parenting coordinators are typically licensed mental health professionals or family law attorneys how have specific training.

Courts are more frequently appointing parenting coordinators for high-conflict parents in either post-divorce conflicts or for parents finalising contentious custody litigation. Courts hope that parenting coordinators can minimise post-divorce litigation by resolving discrete issues outside of the court and without need for court resources. Additionally, parenting coordinators can respond to time-sensitive disputes more quickly than courts can – being able to address

and resolve disputes within the scope of their authority timely.

In addition to dispute resolution ADR options, Ohio also continues to see an uptick in ADR negotiating models. ADR negotiation models can include the following:

- mediation;
- evaluative mediation;
- facilitation; and
- parenting coaches.

ADR negotiating models provide an out-of-court venue for the parties to negotiate a resolution, often with the assistance of a third-party neutral facilitating the conversation using an interest-based approach.

Ohio primarily has two more formal ADR processes available as well, the Collaborative Divorce process and the Cooperative Divorce Process (a two-phase process that combines a negotiation model with a dispute resolution mechanism(s)).

ADR mechanisms continue to enjoy popularity in Ohio. Courts are increasingly encouraging litigants to participate in these processes – and, in some instances, ordering participation. Ohio is also increasing its exploration of early neutral evaluation as a court-ordered process in addition to private options. This ADR trend looks to continue in 2025 and beyond.

Security for Property Division Payments Over Time

In Oakes v Oakes & Leadwise, Inc., an Ohio appellate court determined that the trial court abused its discretion in failing to provide security for a husband's USD28 million property division payment to his wife to be paid over seven years. Ohio law provides that a trial court has discretion whether to order security for a payment obligation arising from a marital property division. The appellate court found that there was no sound reasoning why the trial court rejected the wife's requests for some sort of security, including, potentially, a promissory note, security agreement, liens, guarantees, stock-transfer restrictions or immediate payment if the husband sold stock in the business.

The appellate court determined that, because of the size of the award, the seven-year duration of the payment obligation, and the husband's control over the business, the trial court was obligated to order some form of security for the debt. However, the appellate court left the nature of the security up to the trial court on remand.

Oakes highlights the challenge inherent in cases where a privately held business entity is a significant portion of the marital estate: what security can and should be implemented for a long-term property division payment structure for the spouse who does not retain the business interest? While Ohio law still encourages parties to reach agreements to ensure appropriate security mechanisms, Oakes provides guidance for Ohio courts that security is required in cases where large awards are paid over a significant period, especially when the retaining spouse has control over the business interest.

In Berger v Berger, another appellate court in 2015 was confronted with a similar issue, albeit for a smaller lump sum property division payment. In Berger, a different appellate court determined that a stock pledge was not sufficient security for the husband's USD1.9 million property division payment over a 12-year term when the business already had significant debt. However, the Berger court did not provide more

direction on when the courts should determine that security is necessary or how the courts should evaluate whether proposed security is sufficient.

Oakes provides some additional contours for the courts – and attorneys – to consider when determining whether security for required for a property division payment made over time. While it does not fully answer all the questions presented – and while the issue of security remains at the court's discretion – it does suggest that security can be required in certain circumstances.

Controversy Over Treatment of Frozen Embryos in Divorce

In E.B. v R.N., one appellate court reversed a trial court decision and ordered that the wife was entitled to use all fourteen of the parties' frozen embryos from in vitro fertilisation for implantation if she so chose. The trial court had determined that the frozen embryos were marital property and used a contractual approach to address their disposition. This particular appellate court stated that all three main approaches to the disposition of frozen embryos in Ohio (contractual, method, contemporaneous-mutual-consent method, and balance method) are "inadequate in one way or another", requesting that this problem "must be rectified by action by the legislature."

The appellate court goes on to reject the view that the frozen embryos are property at all, but that they are "life or the potential for life." The opinion emphasises that Ohio's public policy prefers the preservation and continuation of life whenever constitutionally permissible. It advocates that, until there is better "statutory guidance" on this issue to further direct the court, courts should determine these matters "upon their unique facts taking into account the fact that the frozen embryos are not property, but life or the potential for life." The court remanded the case only for the husband to be given an opportunity to set forth his wishes "with respect to the potential offspring" which could be incorporated into the amended decree.

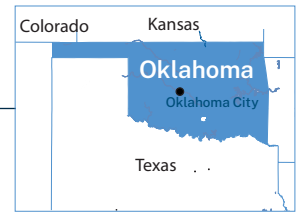
By rejecting all three of the primary approaches/methods to disposition of frozen embryos, this appellate court creates a difference ("split") between this appellate district and others in Ohio on this important issue. In October 2024, the Ohio Supreme Court declined to accept jurisdiction to address this case. Only time will determine whether other Ohio appellate courts follow the E.B. court or whether it becomes an outlier appellate jurisdiction on this issue. Additionally, Ohio waits to see if the legislature will accept this court's call for legislative action and statutory guidance.

As in vitro fertilization and other artificial reproductive technology become increasingly more common, Ohio family law attorneys will continue to encounter this issue in divorce cases. As a result, Ohio attorneys will be closely following this issue so that they can advise their clients – particularly those in this appellate district – and understand additional developments in this area of law.

2025 and Beyond

While 2024 did not bring Ohio any significant legal changes, developments continue in family law that impact attorney advice as well as client (or potential client) decisions.

USA – OKLAHOMA



Law and Practice

Contributed by:
Danya Bundy and Aaron Bundy
Bundy Law

Contents

Bundy Law is a regional law firm covering Arkansas, Missouri and Oklahoma, with a primary focus on family law matters in trial and appellate courts. Its attorneys are adept at handling fast-paced, complex cases, ranging from jurisdictional contests to business valuation disputes. Known for their expertise and track record of success in high-value divorces and contentious child custody cases, the attorneys excel in negotiation and advocacy work for high net worth and ultra-high net worth individuals. Bundy Law has a firm culture that promotes consistent, clear communication and responsiveness with clients and co-counsel, and it has implemented a powerful, sophisticated software infrastructure to support its high-touch service model.

Authors

Danya Bundy is a partner at Bundy Law and is an experienced trial lawyer who practises law in Oklahoma and Arkansas. Danya's training includes the American Academy of Matrimonial Lawyers (AAML)'s Institute for Family Law Associates, the National Criminal Defense College, and the AAML/Harvard Law Negotiation Seminar for Family Law Lawyers. She presently serves in leadership on the Trial Practice and Techniques Committee of the American Bar Association's family law section. Fluent in Arabic and German, Danya is frequently consulted by foreign nationals and their attorneys for assistance in her jurisdictions.

Aaron Bundy is the founding partner at Bundy Law and is a trial lawyer who practises law in Oklahoma, Arkansas and Missouri. A fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers, he represents individuals who are involved in contested family law disputes at private negotiation and trial.

Bundy Law

2200 South Utica Place
Suite 222
Tulsa
OK 74114
USA

Tel: +1 918 208 0129
Fax: +1 918 512 4998
Email: info@bundy.law
Web: www.bundylawoffice.com

1. Divorce

1.1 Grounds, Timeline, Service and Process

Oklahoma is a divorce "fault" state. There are 12 statutory grounds for divorce:

- abandonment for one year;
- adultery;
- impotency;
- when the wife at the time of her marriage was pregnant by another than her husband;
- extreme cruelty;
- fraudulent contract;
- incompatibility;
- habitual drunkenness;
- gross neglect of duty;
- imprisonment of the other party in a state or federal penal institution under sentence thereto for the commission of a felony at the time the petition is filed;
- the procurement of a final divorce decree outside the State of Olkahoma by a husband or wife, which does not in the State of Olkahoma release the other party from the obligations of the marriage;
- insanity for a period of five years – the insane person having been:
  - (a) an inmate of a state institution for the insane in the State of Oklahoma for such period; or
  - (b) an inmate of a state institution for the insane in some other state for such period; or
  - (c) an in-patient in a private sanitarium; and
  - (d) affected with a type of insanity with a poor prognosis for recovery.

The most common, least controversial ground for divorce is incompatibility. Incompatibility has been determined by Oklahoma's appellate courts to be a "mutual" fault concept that describes the state of relations between both spouses.

To obtain a divorce, a court proceeding must be commenced by petition, setting forth the statutory grounds and reason for the divorce. In cases where there are no minor children involved and there is a complete agreement memorialised in a divorce decree, there is no minimum separation period. The divorce may be granted promptly once the petition has been filed. In cases involving minor children, there is a waiting period of 90 days. Courts have the power to waive the 90-day waiting period in special circumstances, but such a waiver is unusual.

Divorce proceedings must be served in the same manner as other civil lawsuits. The divorce petition must be accompanied by a summons and a notice of the automatic temporary injunction and served upon the respondent by certified mail (with return receipt requested and delivery restricted to the addressee), by commercial courier, by a sheriff, or by personal service using a licensed process server who serves the papers upon the respondent or a person residing with the respondent who is over 15 years old. Service may be made by publication if the petitioner first demonstrates that, with due diligence, service could not be made by any other method. Service of process must be made within 180 days after the filing of the petition.

Generally, each person must be at least 18 years old to marry. However, courts have the authority to permit minors to marry in certain circumstances, including in the event of pregnancy or with parental consent. Oklahoma recognises common law marriage, which – broadly defined – means that both parties are competent to marry and agree to be married to one another. There is no ceremonial or licence requirement for com-

mon law marriage. Divorce is viewed as part of the authority of the state government and may be granted even when one spouse objects to a divorce on religious or moral grounds.

The residency requirement for divorce also applies to actions for annulment. There is no residency requirement for legal separation. The law applicable to legal separation is the same as in divorce; however, unlike divorce, in an action for legal separation, the marriage is not dissolved. Likewise, in the case of an annulment where the court determines that the marriage was void, the court retains the authority to make an equitable division of property jointly accumulated during the period of time that the parties lived as husband and wife, as well as to determine child custody matters.

1.2 Choice of Jurisdiction

To commence a divorce or annulment proceeding in Oklahoma, at least one spouse must have been "an actual resident, in good faith, of the State of Oklahoma" for the six months immediately preceding the filing of the petition. If neither spouse meets this requirement, an Oklahoma court will not have jurisdiction to grant a divorce. In cases where there is a dispute about jurisdiction, the analysis becomes extremely fact-sensitive.

Appellate law addressing the residency requirement tends to use the terms "residence" and "domicile" interchangeably, even though the words may have legally significant, independent definitions for other purposes. By itself, nationality is not a factor for determining residency; however, in the event of a robust inquiry following a jurisdictional challenge, nationality could be relevant, depending on the circumstances.

Domicile has been described by an appellate court as "the inherent element upon which the jurisdiction must rest". As the question of jurisdiction is fundamental in every matter, jurisdiction may be challenged by either party or by the court. When a jurisdictional challenge is made while a divorce proceeding is pending in a foreign jurisdiction, a stay of Oklahoma proceedings may be requested. When a stay has been requested, the court must consider:

- whether there is an alternate forum (such as a court in a foreign jurisdiction) where the case may be tried;
- whether the alternate forum provides an adequate remedy;
- whether maintaining the case would cause a substantial injustice to the party requesting a stay;
- whether the alternate forum can exercise jurisdiction over the parties;
- whether the balance between the private interests of the parties and the public interests of the State predominates in favour of the action being brought in the alternate forum; and
- whether the stay would prevent unreasonable duplication or proliferation of litigation.

2. Financial Proceedings

2.1 Choice of Jurisdiction

Oklahoma case law says: "The question of jurisdiction is primary and fundamental in every case and cannot be conferred by the consent of the parties, waived by the parties, or overlooked by the Court." Domicile in the state where a divorce is sought is an inherent element in and prerequisite for jurisdiction for divorce.

Oklahoma has adopted the Uniform Interstate Family Support Act, which was created with the principle that there should only be one court order for child support at a time. The definition of "support" in the Uniform Interstate Family Support Act includes orders for spousal support. In a proceeding to establish or enforce a support order, a court may exercise jurisdiction over a non-resident person if:

- the individual is personally served with summons within the state;
- the individual submits to the jurisdiction of this state by consent in a record, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
- the individual resided with the child in this state;
- the individual resided in this state and provided prenatal expenses or support for the child;
- the child resides in this state as a result of the acts or directives of the individual;
- the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;
- the individual asserted parentage of a child in the putative father registry maintained in this state by the Oklahoma Department of Human Services; or
- there is any other basis consistent with the constitutions of this state and the USA for the exercise of personal jurisdiction.

In the event of simultaneous proceedings in multiple jurisdictions, a contesting party may request a stay if there is a pending challenge to the exercise of jurisdiction. Factors considered for a stay request include the timeliness of the jurisdictional challenge together with the facts pertaining to jurisdiction, including which state is the home state of the child in a child support case.

Oklahoma courts may hear financial claims after a foreign divorce; however, Oklahoma does not have the ability to modify a spousal support order issued by a foreign court so long as the foreign court has continuing, exclusive jurisdiction over the order under that jurisdiction's laws. Oklahoma may modify foreign child support orders in certain circumstances in accordance with the Uniform Interstate Family Support Act.

2.2 Service and Process

Service in financial proceedings must be made in the same manner as other civil lawsuits: a petition and summons must be served by certified mail (with return receipt requested and delivery restricted to the addressee), by commercial courier, by a sheriff, or by personal service using a licensed process server. There is no statutory timeframe or waiting period for a financial proceeding, so each case must be prosecuted and defended like any civil lawsuit.

2.3 Division of Assets

In a divorce or annulment proceeding, the court has a statutory duty to determine what is each party's separate, non-marital property and to make a just and reasonable division of all property acquired by the parties jointly during the marriage. The "just and reasonable" standard is also characterised as fair and equitable, and it does not necessarily mean an equal, 50/50 division. The sole exception to the just and reasonable standard is where there is a valid prenuptial agreement that provides for an alternative method of division of jointly acquired property.

Appellate case law says that trial courts should also divide any enhancement in value of otherwise separate property if the value increase

was the result of efforts, funds or skills of either spouse during the marriage. Spousal contributions are distinguished from economic factors or market forces unrelated to efforts of labour. The burden of proof is on the non-owning spouse claiming a share of an in-marriage increase in separate property value to show the value of the property at the time of the marriage, the value at the time of trial, and that the enhancement was the result of effort by either spouse as opposed to economic conditions or circumstances beyond the parties' control.

Courts have broad discretion to divide and allocate marital assets and funds. Property may be divided in kind or require payments necessary to effect a fair division. Even when property has been determined to be one spouse's separate, non-marital property, the court may invade that separate property for alimony or child support payments.

While there are some disclosure obligations early in a divorce or annulment case, the disclosure requirements generally pertain to income and debt. Each spouse is entitled to engage in the full range of discovery permitted by the rules of civil procedure, including written discovery requests to the other party, depositions of witnesses, and subpoenas. The court can enforce discovery requests and subpoenas, but it will rarely involve itself in the discovery process in the absence of a request by one of the parties.

Divorce courts recognise the concept of trusts. Oklahoma statutes provide that provisions in favour of a spouse in an express trust are revoked in the event of a divorce.

2.4 Spousal Maintenance

Courts have broad authority to award spousal support (alimony) in divorce proceedings. Oklahoma does not have a fixed mathematical formula for calculating spousal support. Broadly, alimony may be awarded on a temporary or final basis when one spouse demonstrates both a financial need for support and that the other spouse has the ability to pay the needed support. Spousal support claims are highly fact-sensitive. Appellate courts have recognised the following factors:

- demonstrated need during the post-matrimonial economic readjustment period;
- the parties' station in life;
- the length of the marriage and the ages of the parties;
- the earning capacity of each spouse;
- the parties' physical condition and financial means;
- the mode of living to which each spouse has become accustomed during the marriage; and
- evidence of a spouse's own income-producing capacity and the time necessary to make the transition for self-support.

When substantial marital property is awarded, the accompanying claim for spousal support must be supported by proof of excess monetary need to cushion the economic impact of transition and readjustment to gainful employment. Oklahoma has a "fixed sum" rule, meaning that the court must determine the total amount of spousal support awarded, and there is no indefinite or permanent spousal support. Owing to the variety of factors involved in and the vague nature of both "need" and "ability to pay", spousal support awards are sometimes viewed as products of the subjective whims and philosophies of the individual trial judge.

Either spouse may apply for temporary spousal support when a legal separation or dissolution

of marriage proceeding is underway. The factors to be considered by the court may be truncated at an interlocutory hearing simply owing to the limitations of time at such a hearing and because discovery may be incomplete.

2.5 Prenuptial and Postnuptial Agreements

Prenuptial agreements are briefly referred to in Oklahoma's statutes as "valid antenuptial contract[s] in writing". That reference has led to a body of case law upholding prenuptial agreements in a variety of circumstances. Antenuptial agreements are characterised as "favoured by the law" by Oklahoma's appellate courts. Antenuptial agreements remain the most effective way to deviate from the subjective nature of spousal support awards and the uncertainty of the "just and equitable" property division standard.

Oklahoma law is not clear concerning the validity of postnuptial agreements, as there is a split in authority. Appellate courts have confirmed that spouses may contract with one another, transfer property to one another, and even modify a prenuptial agreement after the marriage. However, at least one appellate decision has held that there is no legal basis for a postnuptial agreement.

2.6 Cohabitation

Unmarried couples with assets must look to property law and contract law to determine and enforce their rights. An unmarried individual does not acquire a legal or equitable interest in the property of their romantic partner or significant other simply by virtue of cohabitation. Unmarried cohabitants do not acquire any property rights simply by virtue of length of cohabitation, shared children, or otherwise.

2.7 Enforcement

Compliance with a financial order for child or spousal support may be enforced through the applicable provisions of the Uniform Interstate Family Support Act. The Act specifically recognises the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance and the Hague Conference on Private International Law. It also provides for the registration and enforcement of foreign orders, including support orders issued by international courts.

2.8 Media Access and Transparency

Except for cases heard by an arbitrator, divorce proceedings are open to the public. As a result, the media may be present in the courtroom. Local newspapers routinely publish the names of parties when marriage licences are issued and when divorces are granted. The scope of media reporting may be limited for sensitive matters, including the identity of minor children, domestic violence victims, and the presentation of medical records.

There are a few ways to remove matters from the public eye. Most courts permit the use of abbreviating first names to limit public searches. Venue may be waived by agreement, so filing a proceeding in a remote venue by agreement may be a strategy. Following a settlement, the decree may incorporate a settlement agreement by reference that is not filed in the publicly accessible court file. Properly done, unfiled settlement agreements may remove most of the details of a settlement from the public record, while retaining all the enforceability and weight of a court order.

2.9 Alternative Dispute Resolution (ADR)

Oklahoma's civil statutes include a Dispute Resolution Act and a Uniform Arbitration Act. Parties to a dispute, including a divorce, may agree for

their matter to be heard by an arbitrator. The rules governing arbitration include the right to counsel and the right to conduct discovery. Arbitration can be a powerful tool to ensure privacy and to provide scheduling flexibility and controls to both sides and their counsel. In many cases, an arbitrator may hear and decide a contested matter months before a public judicial officer would be able to hear it. Once an arbitration decision is issued, either party may apply for a court to confirm the award and make it an enforceable order of the court. Parties to an arbitration also have the right to appeal.

Oklahoma family law statutes give family courts the ability to require parties to attend mediation. Penalties for non-compliance could range from financial sanctions, an award of attorney fees to the compliant party, or even contempt of court.

Agreements reached by parties privately, whether through mediation or simply between themselves, are enforceable. Appellate courts have developed the law and provided trial courts with guidance and an analysis for determining the propriety of enforcing a settlement agreement when one side wishes to renege after making the deal. A settlement agreement should not be approved unless it is fair, just and reasonable. In considering whether a divorce settlement agreement is fair and reasonable, the trial court must look beyond the terms of the agreement and consider the relationship between the parties at the time of trial, their ages, health, financial conditions, opportunities, and contribution of each to the joint estate.

3. Child Law

3.1 Choice of Jurisdiction

Oklahoma has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which applies to all matters involving minor children. The UCCJEA gives Oklahoma the authority to make an initial child custody determination only in specific circumstances, as follows:

- "[t]his state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state, but a parent or person acting as a parent continues to live in this state;
- [a] court of another state does not have jurisdiction under paragraph 1 of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 19 or 20 of this Act[,] and:
  - (a) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and
  - (b) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;
- [a]ll courts having jurisdiction under paragraph 1 or 2 of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 19 or 20 of this Act; or
- no court of any other state would have jurisdiction under the criteria specified in paragraph 1, 2, or 3 of this subsection".

As the UCCJEA has been adopted by 49 US states, the District of Columbia, Guam, Puerto Rico and the US Virgin Islands, it provides a consistent basis for courts to assess and determine whether jurisdiction over any minor is proper.

When jurisdiction over a minor child is in dispute, the concepts of domicile and residence may be relevant to a factual inquiry about what constitutes the child's "home state" as defined by the UCCJEA and a federal law known as the Parental Kidnapping Prevention Act.

3.2 Living/Contact Arrangements and Child Maintenance

Each party has a right to ask the appropriate court to make decisions concerning custody and parenting time. If no prior proceeding exists, a request is made by petition; otherwise, either parent may file a motion for the court to address a child-related dispute or to modify a prior order concerning child custody. Parents in a divorce have equal rights to their minor children, pending a judicial decision, and unmarried parents may also have equal rights if the biological father has been appropriately recognised in legal documents. Courts have broad discretion to make decisions concerning the welfare of minor children – discretion and authority that continue even while an appeal of a contested decision is pending.

Child support is calculated as a percentage of the combined gross income of both parents pursuant to a formula. Although in most cases child support is determined by a statutory schedule that is presumptively the appropriate amount, courts have broad discretion in matters related to child support. The statutory child support schedule's top income is USD15,000, which may be inadequate in cases where one or both parents are high net worth individuals. In matters where the parents' combined incomes exceed the amounts anticipated by the child support guidelines, the court may consider other factors – including the child's reasonable expenses and lifestyle – in setting child support.

A child is entitled to support by both parents until the child reaches the age of 18. The law provides for additional support until the age of 20, so long as the child is enrolled in and attending high school. There is no authority for child support beyond high school and the age of 20 years unless the child has a qualifying disability that would trigger the application of other laws for support.

Parents have some ability to deviate from the child support guidelines and may sometimes agree to a deviation from the presumptive child support guidelines. However, deviations draw scrutiny, particularly when one parent proposes paying less than the formula would require. Downward departures (reductions in the payor's monthly obligation) require specific findings by a court for approval.

3.3 Other Matters

Courts have broad discretion over all child-related matters and may make orders addressing the full range of issues that arise concerning their upbringing. In high-conflict cases, courts may delegate decision-making authority to a custodial parent, entrusting them with the decision-making authority necessary to raise and parent the child. Courts may also appoint other professionals, including parenting co-ordinators, to assist parents with communication and decision-making. When parents cannot agree on specific issues, such as education or medical treatment, courts may defer to the opinion of professionals involved with the child.

Oklahoma law requires courts hearing child custody disputes to consider which parent will foster a relationship between the child and the other parent. Parental alienation findings by trial courts have been upheld as a basis for a child custody determination. Allegations of alienation are fact-sensitive inquiries concerning the behaviour of each parent, as it relates to encouraging or discouraging a relationship between a child and the other parent. Factors include interference with court orders, denial of visitation, denial of communication, and statements made or information provided by a parent to a child to influence the child's views of the other parent.

Children may give preference testimony and other information to a court. There are detailed procedures for judicial interviews of minor children set out both in a statute and in case law. Even with express procedures, judicial philosophies and attitudes towards interviewing children vary widely. Some judges will readily interview children in their office, whereas others will always require the appointment of a guardian ad litem or a counsellor for the child to relay the child preference information to the court.

3.4 ADR

See **2.9 Alternative Dispute Resolution (ADR)**.

3.5 Media Access and Transparency

See **2.8 Media Access and Transparency**.

Trends and Developments

Contributed by:
Aaron Bundy and Danya Bundy
Bundy Law

Bundy Law is a regional law firm covering Arkansas, Missouri and Oklahoma, with a primary focus on family law matters in trial and appellate courts. Its attorneys are adept at handling fast-paced, complex cases, ranging from jurisdictional contests to business valuation disputes. Known for their expertise and track record of success in high-value divorces and contentious child custody cases, the attorneys excel in negotiation and advocacy work for high net worth and ultra-high net worth individuals. Bundy Law has a firm culture that promotes consistent, clear communication and responsiveness with clients and co-counsel, and it has implemented a powerful, sophisticated software infrastructure to support its high-touch service model.

Authors

Aaron Bundy is the founding partner at Bundy Law and is a trial lawyer who practises law in Oklahoma, Arkansas and Missouri. A fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers, he represents individuals who are involved in contested family law disputes at private negotiation and trial.

Danya Bundy is a partner at Bundy Law and is an experienced trial lawyer who practises law in Oklahoma and Arkansas. Danya's training includes the American Academy of Matrimonial Lawyers (AAML)'s Institute for Family Law Associates, the National Criminal Defense College, and the AAML/Harvard Law Negotiation Seminar for Family Law Lawyers. She presently serves in leadership on the Trial Practice and Techniques Committee of the American Bar Association's family law section. Fluent in Arabic and German, Danya is frequently consulted by foreign nationals and their attorneys for assistance in her jurisdictions.

Bundy Law

2200 South Utica Place
Suite 222
Tulsa
OK 74114
USA

Tel: +1 918 208 0129
Fax: +1 918 512 4998
Email: info@bundy.law
Web: www.bundylawoffice.com

In Spouse v Out Spouse: Dividing Property in Oklahoma Divorce Cases

There are two terms of art in respect of divorcing spouses: the "in spouse" and the "out spouse". Broadly, an in spouse is a spouse possessing more knowledge of the parties' financial picture. The in spouse is often the primary earner who takes care of the bills and has the most relationships with financial professionals used during the marriage. The in spouse may have more income, more separate property and greater access to assets titled in their name. An out spouse has significantly less knowledge of the parties' finances, less financial education overall, and often less access to liquidity during a divorce. The out spouse is typically viewed as extremely disadvantaged during the divorce process.

Two property regimes: separate and marital

In the contexts of marriage and divorce, there are two classifications of property: separate property and marital (or jointly acquired) property. Separate property includes property owned by a spouse before the marriage, property designated as separate in an antenuptial (prenuptial) agreement, personal injury proceeds to compensate for pain and suffering, and property received by a spouse by way of gift or inheritance. Jointly acquired property is property that is accumulated by the joint industry of the husband and wife during the marriage, regardless of how the property is titled.

In other words, property purchased during a marriage by a spouse using marital funds (such as that spouse's income earned during the marriage), titled only in the acquiring spouse's name, is still presumed to be marital. Although title alone does not determine the marital nature of property, there is a legal presumption that property titled jointly is marital in nature, regardless of the source of funds used to acquire the property. Income earned by either spouse during a marriage is considered marital property. Property that would otherwise be a spouse's separate property may be converted to joint property by naming the other spouse as a joint tenant or by commingling (mixing) joint funds with separate funds.

These concepts – in spouse, out spouse, separate, marital, and commingling – are fundamental, well known, and fairly easily explained. Often, high net worth individuals having inherited property or a successful enterprise that was established prior to marriage make the assump-

tion that their separate property is untouchable. Unfortunately for them, that is not the case. There are at least three ways that separate property is vulnerable to attack in dissolution of marriage cases and there is a growing trend for use of the following three strategies.

Claiming everything is marital until proven otherwise

In the event of divorce, the out spouse may not readily concede the separate nature of any of the other spouse's property. Even in clear cases involving well-designed premarital family trusts, the out spouse will put the in spouse through their paces to demonstrate the separate nature of all assets and sources of income. Depending on the circumstances, including the length of the marriage and the quality of preservation of records, proving the premarital, separate nature of property can be a laborious and expensive process. Although property acquired during a marriage may be separate if it was acquired using separate funds, the out spouse will likely invoke the marital presumption to suggest that the property is marital simply because it was acquired during the marriage. It will then be incumbent upon the in spouse to produce sufficient historical transaction records to satisfy a judge that the property remained separate. Even when the separate nature of the property is unquestionable, the out spouse then turns to a second tactic.

Claiming separate property was enhanced by either spouse during marriage

Divorce courts are required by state statute to divide property acquired by the parties jointly during their marriage. Case law (appellate decisions) says that courts should also divide any enhancement in the value of what is otherwise separate property if the increase in value was the result of efforts, funds, or skills of either spouse during the marriage. An increase in value due to spousal effort is called active appreciation. Spousal contributions are distinguished from economic factors or market forces unrelated to efforts of labour (or passive appreciation). This means that separate property may have a divisible component if it increased in value owing to the effort of either spouse during the marriage.

Suppose that, prior to marriage, a spouse owned a tract of land. If the land increased during the marriage owing to inflationary or economic factors, such as a general increase in property values, that increase would not be subject to division in a divorce. However, if either spouse made improvements on the land during the marriage that increased the land's value, that increase in value during the marriage is divisible in the event of a divorce. If it is proven that either spouse increased the value, the trial court must equitably divide the enhanced value.

The non-owning spouse claiming a share of an in-marriage increase in separate property value bears the legal burden of proof to show:

- the value of the property at the time of the marriage;
- the value at the time of trial; and
- that the enhancement was the result of effort by either spouse as opposed to economic conditions or circumstances beyond the parties' control.

As the non-owning spouse is the out spouse with limited access to information, extensive, expensive discovery may be necessary to assess the viability of an enhancement claim. The in spouse, who may have already gone to great lengths to show that the property at issue is separate property, faces a compounding obligation to produce more records and information.

Appraisers and other experts are often necessary to distinguish between increases in value due to economic factors versus enhancements resulting from efforts of either spouse. If the owning (in) spouse is successful in defending an enhancement claim against their separate property, the inquiry does not necessarily end here.

Seeking alimony from separate property

The out spouse has yet another option to extract value from separate assets. When assessing spousal support (alimony) claims, state statutes permit the trial court to award financial support to one spouse from the other's estate, regardless of whether the separate property is marital, separate, liquid, illiquid, and income-generating or not. Appellate courts have confirmed that even separate, inherited property is subject to consideration for determining an alimony award.

Even after losing claims of marital ownership and marital enhancement of separate property, the out spouse may still make a request for spousal support against that property based on a number of factors, including the lifestyle they became accustomed to during the marriage. Non-marital assets that are untouched in property division may be severely diminished by a spousal support judgment.

The out spouse has multiple ways to wield their ignorance as a powerful force in the divorce litigation and discovery process. Even though the out spouse has the legal burden of proof for all the factors involved in in-marriage enhancement of separate property, by claiming little to no knowledge of financial activities, they can practically shift the burden of proof to the in spouse to prove up the separate or marital character of every asset.

In cases of extreme financial disparity, the trial court has the power to award temporary attorney's fees and suit money from one spouse to the other. Effectively, the in spouse may be required to finance most or all of the out spouse's exploration of asset characteristics. Even when those efforts fail, alimony claims are fluid and fact-sensitive, giving the out spouse a fallback claim against the in spouse's separate estate that may not be disposed of through summary judgment or other non-evidentiary procedures.

Protecting separate interests

The ideal method for preserving and protecting separate property is by way of an prenuptial agreement. If no prenuptial agreement was executed prior to marriage, it is then too late, as Oklahoma does not recognise postnuptial agreements. With or without a premarital agreement, proper record-keeping and preservation are critical for tax and estate-planning purposes. When marriage is contemplated, even if there will be no prenuptial agreement, obtaining professional appraisals of all assets owned prior to the marriage can establish a baseline for future value determinations. High net worth individuals should conduct regular financial reviews with their advisers to ensure their estate plan remains aligned with their goals and that assets are properly titled and documented.

High net worth individuals with separate estates must recognise that individual, in-house assessment and determination that their property is non-marital is only the very beginning of the analysis required for a divorce. Too often, the in spouse assumes that their separate property is unreachable and they do not perform proper due diligence before or during a divorce to adequately defend their interests. While the in spouse sits idly by, the out spouse may expend enough time and energy to make a sufficient case for a

trial court to determine that separate property became joint through a transaction during the marriage or that an increase in value of separate property was due to the efforts of one or both spouses. When a spouse owns separate property, they must take strong, proactive measures to defend their interests and push back against allegations that are not truly supported by fact.

A danger for high net worth individuals with separate interests lies in their approach to information disclosure and co-operation in discovery. Traditional fault-based grounds for divorce (adultery) are less common in the modern era. However, when determining property division and spousal support, courts may consider behaviour such as hiding assets, dissipating marital funds, or intentionally devaluing assets to deprive the other spouse. Each party to a lawsuit is legally required to preserve evidence. Concealment or destruction of evidence may lead to adverse inferences and findings that would not have been supported by the information had it been properly preserved and produced by the concealing party.

Although it may seem distasteful to disclose otherwise private, confidential, and even proprietary information about separate interests, transparency can help pre-empt and mitigate claims against the separate estate. A spouse who pleaded ignorance as a basis for claiming everything is marital may be dissuaded in negotiations by information production. When settlement talks fail, compliance with pre-trial disclosure and discovery requirements can lead to successful trial outcomes.

If a divorce is imminent or underway, an in spouse will benefit from a team of experienced, qualified professionals who can help identify records and witnesses to establish a timeline and supporting transaction history. Sophisticated legal counsel should be engaged as early in the process as possible in order to develop a comprehensive discovery plan and ensure proper preservation of evidence. The need for highly skilled, competent counsel cannot be overstated. Oklahoma's trial courts are suffering from a lack of resources – for example, there is an ongoing shortage of court reporters (stenographers). All testimony, judicial comments and decisions made in evidentiary hearings and trials should be transcribed for proper record-keeping and future reference. Seasoned counsel also understand the need to submit typewritten proposed orders with detailed terminology that will aid in future interpretation of property awards.

Taking shortcuts by not ensuring the presence of a stenographer and by relying on vague, sometimes handwritten court orders leads to ambiguities and challenges in interpretation and enforcement months and years after a divorce. Attention to detail is essential, as is incorporating those details into evidentiary presentation and subsequent court orders. Along with trial lawyers, business valuators, economists, property appraisers and forensic accountants are all critical to the defence of claims against separate property.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com