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Practical cross-border insights into family law

Family Law 2022

Fifth Edition

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Expert Analysis Chapters

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Preface

Dear Reader,

I am honoured to be the contributing editor to the 2022, fifth edition of *ICLG – Family Law*, and thank all the contributors for setting out so succinctly family law in their respective jurisdictions, particularly at the current time where the pandemic has been challenging for all of us, including in the practice of family law.

Each chapter provides an essential summary of the main areas of family law as well as being a reminder of the need for individuals to take advice in any country where they have a significant connection.

Since the last edition, following the UK's departure from the EU, the transition period ended on 31st December 2020, so the UK is no longer subject to EU legislation, changing for ever their relationship with their European counterparts.

Specialist family lawyers now have a much-improved understanding of international conventions, regulations and other legislation affecting the practice of family law, and the family law organisation, the International Academy of Family Lawyers, continues to do a huge amount to raise knowledge and assist international best practice.

With evolving family law around the world, family practitioners must continue to strive to improve their understanding of international family law; this is essential if they are to properly meet the needs of their clients and their families, and this publication will only assist in that endeavour.

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Divorce Post-Brexit: A New Frontier for Intra-EU/UK Divorces

Kingsley Napley LLP

Stacey Nevin

Introduction

The United Kingdom left the European Union on 30 January 2020. For almost a year, practitioners could continue to apply EU laws and regulations as between the EU and the UK, as the Withdrawal Agreement provided for an 11-month transition period. It had been hoped by many that the time would be used to negotiate a deal as between the EU and the UK. Unfortunately, that proved not to be the case and the transition period ended at 11pm GMT on 31 December 2020, with no deal in place. The no-deal scenario that many practitioners dreaded is now a reality. Since then, all EU law has ceased to apply to the UK and *vice versa*, although there are still some scenarios where practitioners will find themselves applying EU laws to their cases.

Proceedings Started But Not Finished

For any proceedings that were instituted before the end of the transition period, EU laws and regulations will continue to apply where there is a cross-border element with one of the EU27. For example, if a party started divorce and financial remedy proceedings in England before the end of the transition period, the parties to those proceedings will still be able to make use of existing EU relations in the EU27 for enforcement and recognition in the future, if necessary. This is the case even where judgment or final decision had not been made by the end of the transition period. Provided the proceedings were instituted before 11pm on 31 December 2020, parties to those proceedings will be able to use the EU regulations to have that judgment recognised and enforced in the future even though the judgment will be given after the end of the transition period.

Unhelpfully, a definition of "instituted" for this purpose has not been provided. However, it is generally thought to mean issued by the court rather than just submitted to the court.

Cases Instituted After the Transition Period

For any cases instituted in the UK after the end of the transition period, EU laws and regulations are no longer available to the parties and the applicable rules on jurisdiction, enforcement and recognition will depend on the country in question. The UK now treats the EU27 in the same way it treats non-EU countries.

One of the key benefits of the EU regulations was that there was a harmonised set of rules between the Member States; from a lawyer's perspective, this simplified matters as there was a clear road map as to what should happen and what procedure should be followed where there are competing jurisdictions within the EU. The UK is now dealing with potentially 27 different legal systems, plus any differences between the individual legal states within the UK. Non-UK lawyers also need to remember that, within the UK, there are three different legal jurisdictions: England & Wales; Northern Ireland; and Scotland. These jurisdictions do not have uniformed rules.

Post-Brexit, there are some existing instruments that will plug some of the gaps that are left behind, but these will not necessarily apply across all of the EU27. The recognition of divorces provides a good example of where some gaps, but not all, are filled.

The recognition of divorces between EU Member States is provided for by Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Brussels IIa"). The UK now falls outside of Brussels IIa; however, it remains a signatory to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations. The 1970 Hague Convention includes provisions for the recognition of divorces, so will apply between the UK and the signatory states. This is currently applied between the UK and some non-EU countries, so is an instrument with which many family law practitioners are already familiar. Its application is not universal, however, and not all of the EU27 are a signatory to the 1970 Hague Convention. For those countries that are not signatories (for example, France and Spain), the position will depend on their domestic law.

Unlike Brussels IIa, the 1970 Hague Convention does not deal with civil partnerships or nullity. Therefore, even where a second state is a signatory to the 1970 Hague Convention, in those circumstances, it will still be necessary to check the relevant domestic legislation.

The 1970 Hague Convention does not contain provisions regarding jurisdiction; so, where there are competing jurisdictions between the UK and a signatory state, we are solely reliant on the domestic law. The UK approach on jurisdiction is dealt with further below.

The above is just one example of where existing provisions may plug some gaps, but not entirely. Another key point to consider is that signatories to the various Hague Conventions can make reservations or declarations, meaning there may be a slight difference in applicability across the signatories, which must be checked at the outset.

Divorce and Financial Proceedings – A Move to *Forum Non Conveniens*

The jurisdictional grounds to start divorce proceedings in England are similar to those in Brussels IIa, and are set out in section 5(2) of the Domicile and Matrimonial Proceedings Act 1973. The key difference is that the jurisdictional basis for divorce can be met in England on the basis of just one party's domicile. These jurisdictional grounds apply to all cases commenced in England.

It remains entirely possible that a couple could satisfy the jurisdictional requirements for proceedings in multiple countries; this is not a novel concept to family lawyers following Brexit, and is not unique to intra-UK/EU cases.

Prior to Brexit, however, where this happened in two or more EU Member States, there was a clear set of rules to state what should happen, known as *"lis pendens"*. The *lis pendens* rules (colloquially known as "the first past the post") see the state where proceedings were started take first priority. The state second in time is required to stay their proceedings, whilst the first state considers the question of jurisdiction. If that first state concluded they did not have jurisdiction to entertain the proceedings, the proceedings could continue in the second state. Whilst many practitioners lamented the *lis pendens* rule as encouraging a race to court, it did at least provide certainty for practitioners and reduced the risk of parallel proceedings.

In this post-Brexit era, the question of competing jurisdictions from an English perspective is dealt with on the basis of *forum non conveniens* (or *forum conveniens*). The doctrine of *forum non conveniens* conveys discretionary power to courts to decline jurisdiction over a matter on the basis that there is a more suitable and appropriate forum available to the parties elsewhere. This is the approach the courts in England and Wales take when considering jurisdiction disputes with non-EU countries. There is no guarantee that the English courts will stay their proceedings if second in time under the doctrine of *forum non conveniens*. Equally, the approach of the competing state may be entirely different; gone are the days of the uniformed approach provided by Brussels IIa. Obtaining local advice in both jurisdictions is vital.

Obligatory Stays

There are some circumstances where the English courts will be obligated to impose a stay of proceedings here, where there are competing jurisdictions. A stay will be imposed if it appears to the court that proceedings are ongoing in a "related jurisdiction" and both the following apply:

- The parties resided together in the related jurisdiction when proceedings were begun in England or Wales, or, if they did not then reside together, where they last resided together before those proceedings were begun was in that jurisdiction.
- Either party was habitually resident in that jurisdiction throughout the year ending with the date on which they last resided together before the date on which the proceedings in England and Wales were begun.

"Related jurisdictions" for this purpose are Alderney, the Isle of Man, Guernsey, Jersey, Northern Ireland, Sark and Scotland. For jurisdictions further afield, there are no circumstances where the English courts are obliged to stay.

The End of the Race to Court?

Notwithstanding the above, timing can still be of the essence. In disputes before the English courts involving a non-EU state (and following Brexit, involving an EU state), the court has discretion to impose a stay of proceedings if there are proceedings in another country, if it considers it is in the balance of fairness to do so (schedule 1, paragraph 9 of the Domicile and Matrimonial Proceedings Act 1973). It is not necessary for an applicant seeking a stay under the DMPA 1973 to show that the other forum was "clearly" or "distinctly" more appropriate. The applicant only needs to demonstrate to the court that it is more appropriate to some extent (*Butler v Butler* No 2 [1997] 2 FLR 321). The fact another country was first seized is a relevant consideration within this balance when considering an application to stay its proceedings. Timing can still be key, particularly if the domestic law of the competing state will factor in any earlier proceedings started in a competing jurisdiction.

How Does the English Court Determine Jurisdiction Using *Forum Non Conveniens*?

The doctrine of *forum non conveniens* offers little certainty, and each case will turn on its facts. The burden of proof rests on the party applying for the stay (*Mytton v Mytton* (1977) 7 Fam Law 244). The court will consider all relevant factors when seeking to establish which is the most suitable jurisdiction to deal with proceedings. Factors such as the location of the assets, where the parties live and spend their time, the children, the language and the parties' immigration status will all be relevant considerations. The case of *J v U; U v J (No 2) (Domicile)* [2017] EWHC 449 (Fam) offers a good example of the considerations the court will make. In that case, the competing jurisdictions were England and Bosnia. The parties had moved to Sarajevo in Bosnia and this was the place the parties last lived together. The respondent wished for proceedings to proceed there. The English court weighed up a number of factors, including: the fact that the main assets of the marriage were in England; the limited jurisdiction the Bosnian courts had in relation to property located outside of its jurisdiction; that the parties spoke English fluently; the respondent's uncertain immigration status in Bosnia; and the fact that London had been a constant reference point during their marriage. Notwithstanding that the parties last lived together in Bosnia and that the respondent and the children remained living there, the English court considered that the respondent had failed to demonstrate that Bosnia was a more appropriate jurisdiction to hear the case.

The Lugano Convention

It would be remiss not to consider the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Lugano Convention 2007 is an international treaty between the EU Member States, Iceland, Norway and Switzerland, which sets out provisions to determine which national courts have jurisdiction in cross-border civil and commercial disputes and to ensure that judgments taken in such disputes can be enforced across borders. The UK is no longer a signatory, as it is no longer an EU Member State; however, it applied to accede to the Convention as an independent member. This required the agreement of all signatories. Unfortunately, the European Commission has recommended that the EU Member States decline the UK's request to re-join. The Lugano Convention would see a return of *lis pendens* as between the UK states and the Lugano signatories which, importantly, provides that orders made in one signatory country must be recognised and enforced in another signatory country (with a few exceptions). By contrast, the Hague Convention has many more exceptions, and refusal to recognise or enforce orders made in other Convention states is discretionary. The European Commission's recommendation was disappointing, both to many UK family lawyers and family lawyers across the EU. It is hoped that the benefits to families both in the UK and the EU of the UK being permitted to accede to the Lugano Convention will sway opinion, and the UK will be permitted to re-join by the European Council.

Conclusion

For UK practitioners, we are certain to see an increase in *forum non conveniens*, as this approach will now be used for both EU and non-EU forum disputes. For a period, our knowledge of the application of EU rules and regulations will remain relevant, as those cases instituted before the end of the transition period continue to their conclusion (and possibly later, if there is enforcement sometime after judgment). They will of course remain in place between EU Member States, including our close neighbours Ireland (the Republic of Ireland, not Northern Ireland). Even before Brexit, obtaining local advice in cross-border cases was crucial. This remains the case now. The interests of family law clients often rely on cross-border relationships working well, and the UK's decision to leave the EU has not changed that.

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Trans-Parenthood and a Minor's Ability to Consent to Gender-Changing Medical Treatment

Payne Hicks Beach LLP

Sarah Williams

Introduction

Societal and cultural attitudes towards sexuality, family forms and creation have evolved dramatically in recent years. Just 55 years ago, abortion was a criminal act,[1] as were all private and public acts of homosexuality,[2] and contraception was not readily available on the National Health Service.[3] The introduction of the Human Rights Act in 1988 and the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms introduced scope for further dramatic change. Article 8, which protects and demands "respect" for family life has been interpreted with remarkable breadth, especially within surrogacy arrangements. A dramatic example of this is in the Strasbourg decision of *Kroon v The Netherlands*,[4] where even though the man and the woman were not married and did not live together, the fact they had a stable relationship which produced four children was interpreted by the courts as amounting to "family life". Article 14, which prohibits discrimination in relation to rights and freedoms on certain grounds, has also proved to be a powerful judicial tool in preventing discrimination in relation to parenthood.

As medical reproductive techniques have developed to enable state-of-the-art fertility treatments and family creation, the law will always be forced to play catch-up, not least since its role is usually to react to new concepts rather than create them. Indeed, the pace of change is such that the drafting of legislation, if too tightly drawn, may have unforeseen consequences. Judges find themselves tasked with considering the complex medical, social, philosophical and ethical dilemmas that modern family law presents. Examples include considering the right of a trans-man who gives birth to being named "father" on the child's birth certificate and whether a minor has the requisite capacity to consent to puberty-blocking medication.

Although the rise of trans-parents has led to moral and political outrage from some factions, the research of Professor Susan Golombok shows that the children of trans-parents are able to adapt. In her book, "We are Family", she writes:

> "*Families with trans-parents challenge conventional ideas about what it means to be a mother or a father, but our research so far has shown that changing identity does not preclude parents from being protective of, and loving towards their children, and neither does it cause children to develop psychological problems. In spite of the hurdles they face, children seem to adapt to their parent's transition.*"[5]

So as pregnant trans-men challenge the conventional notion of fatherhood and raise fundamental questions regarding the assignment of parentage – how have the courts approached this?

Trans-Parents

McConnell

McConnell was registered as female at birth but had chosen to live as male. He underwent testosterone therapy and a double mastectomy but retained the female reproductive system in the hope of always being able to have a child. His passport and NHS records were amended following his self-identification as male. Upon registering at a licensed fertility clinic for intra-uterine insemination ("IUI"), he was recorded as male. In January 2017, McConnell applied for a Gender Recognition Certificate ("GRC") pursuant to the Gender Recognitions Act 2004 ("GRA"). He produced, with his application, medical evidence confirming his gender dysphoria and a declaration of his permanent intention to live in his acquired gender. In April 2017, he received his GRC stating he had become, pursuant to s.9(1) of GRA "for all purposes the acquired gender".

Following the birth of his son YY, conceived with donor sperm, McConnell was informed by the Registry Office that he could only be registered as YY's mother on his child's birth certificate. McConnell brought a claim for judicial review and sought a declaration that, as a matter of law, he should be regarded as YY's "father", "parent" or "gestational parent". Further, McConnell submitted if the law recognised him as "mother", he should be entitled to a declaration of incompatibility under s.4 Human Rights Act 1998 ("HRA") as the law was not compatible with the right to respect for private and family life and the right to enjoy the rights and freedoms without being discriminated against (under Articles 8 and 14, respectively). An application was also issued under s.55A Family Law Act 1986 on behalf of McConnell's son, seeking a declaration that McConnell was his father.

However, McFarlane P refused the application for judicial review, stating, *inter alia*, parental legal status is derived from the biological process of carrying and giving birth to a child. McFarlane held there was no incompatibility between s.12 GRA[6] (the acquired gender under the Act) and McConnell's rights under the European Convention.

On appeal, the Court of Appeal held that the provisions of the GRA 2004 were such that McConnell could only be registered as YY's mother on the birth certificate. The Court also agreed that there was no incompatibility between the Act and the Convention, and that any infringement of McConnell's rights was justified. Accordingly, there was no recourse to ss3 and 4 of the Human Rights Act 1998 and McConnell's appeal (and that of his son) were dismissed. After the Supreme Court refused to consider his appeal, McConnell is now taking his challenge to Strasbourg.

BGH

A similar trans-parent/parenthood matter has been proceeding through the German courts (BGH). OH, a German trans-man, gave birth to the child GH, conceived using donor sperm, in March 2013.[7] OH has also been assigned the legal status of "mother" for the purposes of birth registration.

Following the recent Court of Appeal[8] (and Supreme Court) and the German Federal Court of Justice decisions, the children of McConnell and OH are left with the confusing narratives of having a father in reality, but a mother under the law. The German and English courts in BGH and McConnell accept that there are tangible difficulties for both applicants arising from the disparity between their legal status and their reality. For McConnell, the implication is that he might be required to produce a full birth certificate to demonstrate his legal motherhood, as opposed to a short form one. The Court of Appeal accepted that a situation whereby a trans-person was obliged to declare in an official document that their gender in not, in fact, their legal gender, but their gender at birth, is a significant interference with an individual's sense of identity. They also accepted that it amounted to an interference with the right to respect for family life (as the relationship is described as mother and son instead of father and son on the long form of the child's birth certificate).

Court opinions

The courts in both cases weighted their decisions in favour of certainty: the need to preserve a coherent recording of the registration of births, where the person who gives birth is consistently registered as "mother" in accordance with the rule *mater semper certa est*.[9]

McFarlane P, in the High Court, and later repeated in the Court of Appeal, stated that "mother" is the individual who "undergoes the physical and biological process of carrying a pregnancy and giving birth"[10] irrespective of the legal gender of that person. This results in the courts attributing parental status on birth-assigned gender, which creates a confusing narrative for any resultant child. However, the prospect of trans-men who give birth being recognised as fathers of their children currently seems remote.

Gender Dysphoria – Minors' Consent to Puberty Blockers and Cross-Sex Hormones

In December 2020, Quincy Bell (aka Kiera) and Mrs A, the mother of an adolescent daughter, brought a claim for judicial review against the Tavistock and Portman NHS Foundation Trust (and two other NHS trusts). The claim was in respect of the treatment and consent to treatment for gender dysphoria. For the purposes of this judgment, the court took it upon themselves to distinguish between minors below 16 and those 16–18 years of age.

Quincy Bell and Mrs A

Quincy Bell was born female (with the name Kiera Bell) but later began to identify as male. She was treated at the Tavistock and Portman's Gender Identity Development Service ("GIDS"). At 15, she commenced puberty blockers ("PBs"), progressing to cross-sex hormones at 16. Aged 20, she underwent a double mastectomy. Following the surgery, the gender transition progressed following the development of a man's build, a man's voice and the adoption of the male name "Quincy". However, Quincy began to realise that becoming male was not fulfilling his expectations:

> *"My biological make-up was still female and it showed, no matter how much testosterone was in my system or how much I would go to the gym. I was being perceived as a man by society, but it was not enough. I started to just see a woman with a beard, which is what I was. I felt like a fraud and I began to feel more lost, isolated and confused than I did when I was pre-transition."*

Quincy wanted to revert to being female, even beginning to consider having children in the future.

The second claimant, Mrs A, was concerned that her 15-year-old daughter, who had been diagnosed with Autism Spectrum Disorder ("ASD") and behavioural problems, would be soon referred to GIDS and start PBs. Both claimants submitted that minors were simply not capable of giving informed consent to treatment for gender reassignment, the implications being outside of their level of understanding. After all, a high level of competence is required for a high-level decision.

Further, the information provided to the minor patients was insufficient and should not be relied upon as a basis for their consent to treatment. A significant concern related to the proven fact that for those who had commenced taking PBs, there was a strong likelihood that they would progress to the next treatment, which involved taking cross-sex hormones ("CSH"). These hormones are particularly problematic in the context of the consent of a minor because they can cause permanent alterations with profound medical and psychological implications. Further, whilst some young people say that puberty blockers have provided short-term relief by delaying the onset of physical characteristics of an unwanted sex, others have complained that blockers did nothing to alleviate feelings of dysphoria, even increasing a sense of alienation in keeping their bodies child-like.

Any treatment without a valid informed consent was an infringement of the minors' rights under Article 8 (the right to respect for private and family life) under the European Convention of Human Rights (1950) ("the Convention").

The defendant Trust, however, stated that their treatment at GIDS met with the requirements on consent and that the information provided to the minors was age-appropriate. In particular, in respect of minors under 16, the Trust argued that they did not need to understand the implications of cross-sex hormones on their fertility, or the sexual pleasure or functioning, as this was not prescribed to them until after the treatment with the PBs.

The court was tasked with examining the role of consent from minors to treatment for gender dysphoria. The claimants submitted that the treatment with PBs was experimental and they had concerns regarding the unknown long-term effects. The Trust, however, defended the administration of PBs, on the basis that without PBs, the patients can suffer a deterioration in their mental health, including an increase in self-harm and even suicide. The Trust acknowledged that there were concerns in respect of memory loss (brain fog), insomnia, weight gain, concentration, bone density, menopausal type-symptoms and possible fertility issues. Further, even if a patient wished to stop the treatment, it could take up to a year for sperm production and ovulation to commence.

Significantly, the Trust accepted that those who commenced PBs were most likely to progress to taking the cross-sex hormones. These cross-sex hormones might lead to a loss of future fertility, sexual pleasure and function. However, the Trust maintained that consent from minors was taken appropriately,[11] and that they were cognisant of the implications of the treatment and that the further consent being obtained by a Trust clinician provided an additional safeguard.

In the event of an objection from a parent, the Trust, however, would not resort to the court, believing this delay and adversarial approach would be harmful to the patient.

Gillick competence

The law in respect of the consent of minors is set out in *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1986] 1 FLR 224. In *Gillick*, the House of Lords outlined the list of matters to consider when determining whether a minor under the age of 16, is "Gillick competent". Such matters to consider included:

- the nature of the treatment proposed and the individual characteristics of the minor;
- where the consent related to a serious life-changing matter, there was a greater duty to ensure that the minor understood and was able to weigh the relevant information;
- the court might draw a distinct line with respect to some decisions to which a minor would never be able to consent;
- efforts should be made to allow minors to give valid consent, if and where possible;
- where the long-term consequences of the treatment were extreme and the benefits unclear, it might not be possible to achieve Gillick competence;
- if finding that a minor can consent, it was important not to set the bar too high; and
- when examining consent, the minor should be able to demonstrate an understanding of the significant facts when explained, including future implications.

The court was first concerned with the fact the first stage of the PB treatment was highly experimental and that some side-effects were unknown. Whist the Trust sought to argue that the administration of PBs and CSH was very much a two-stage process, the court disagreed, finding that once a minor had started on the PBs, most continued to take CSH. The Trust also submitted that it would be an intrusion on a young person's autonomy to restrict access to the drugs. However, the court rejected this: "In principle, a young person's autonomy should be protected and supported. However, it is precisely the role of the court to protect children, and particularly vulnerable children's best interest."

The court heard that 26 of the 161 children referred to the GIDs clinic in 2019/2020 were 13 years old or younger, with 95 of them being under 15. Some had been on PBs from the age of 10.

The court found that to achieve Gillick competence, a minor would have to understand the serious implications of CSH in addition to PBs (because one treatment led to the other, informed consent was required for both). The court, having heard expert evidence from a neuroscientist in respect of a minor's ability to comprehend complex information, found that a child under 13 was highly unlikely to achieve Gillick competence. On the back of this, the court also questioned whether 14- and 15-year-olds could understand the long-term risks and consequences of such experimental treatment.

However, in respect of minors aged 16 and above, there is a statutory presumption that they do have capacity to give valid consent to medical treatment.[12] The court stated:

> "*Given the long-term consequences of the clinical interventions at issue in this case, and given that the treatment is as yet innovative and experimental, we recognise that clinicians may well regard these as cases where the authorisation of the court should be sought prior to commencing the clinical treatment.*"

In January 2021, the Trust was granted permission to appeal against the court's decision to grant the claim for judicial review.

In the meantime, the defendant has paused all GIDs referrals to the Trust for the administration of treatment for those under 15. The NHS released a statement:

> "*The Tavistock have immediately suspended new referrals for puberty blocker and cross-sex hormones for the under 16s, which in future will only be permitted where a court specifically authorises it.*"

This case has brought to the fore the issue of consent in minors, especially when considering potentially experimental treatments with life-long consequences. Those advocating GIDs for minors rely upon the distress that remaining as their birth sex can bring if treatment is withheld or delayed. Further, for years, PBs have been described by trans-rights charities, such as Mermaids or Stonewall, as "a benign and reversible way of giving 'time to think'".[13]

A particular issue for the courts was the lack of empirical evidence concerning the long-term side-effects of the drugs when administered to minors. The Cass Review,[14] formed in Autumn 2020, aims to ensure children and young people who are exploring their gender identity and need support receive a "safe, holistic and effective" standard of care from NHS. Thus, pending the appeal from the Trust, those under 16 seeking PBs and CSH will need to apply to the court first.

Gender Dysphoria – Parental Consent to the Administration of Puberty Blockers to Minors

In *AB v CD & Ors* [2021] EWHC 741, the Court was also concerned about the administration of puberty blockers to a teen with gender dysphoria. The case concerned an application by AB, the mother of the child, XY, for a declaration that she and CD, the child's father, had the requisite legal ability to consent to the administration of puberty blockers. The child, a boy, came out as transgender aged 10, had transitioned socially and had changed name by deed poll. The child was now 15.

This matter swiftly followed the Divisional Court's decision in *Bell v Tavistock and Portman NHS Foundation Trust & Ors* (referred to above) which set out the consideration that a child should understand, be able to retain and have the capacity to weigh up in order to have the necessary capacity in relation to puberty blockers. Although XY had given consent prior to the Division Court's decision in Bell, an updating capacity assessment had not been undertaken. Both parents hoped their consent on their child's consent would suffice.

The Court adopted this approach:

> "*It … cannot be established with certainty whether [XY] is, or is not, Gillick competent. In those circumstances, I am going to consider the matter on two alternative bases: either that [XY] is not Gillick competent, or that [XY] is Gillick competent, but it remains relevant whether [XY's] parents can also give operative consent to the treatment… If the child is Gillick competent, [XY] has not objected to her parent giving consent on her behalf. As such a doctor can rely on the consent given by her parents. Alternatively, the child is not Gillick competent. In that case, her parents can consent on her behalf. It is not necessary for me or a doctor to investigate which route applies to give the parents authority to give consent. Therefore, in my view, whether or not XY is Gillick competent to make the decision about PB's, her parents retain the parental right to consent to that treatment.*"

The Court continued to observe that whilst "*the ratio of Bell is that a child is very unlikely to be in a position to understand and weigh up the [Bell] factors …*", in order to establish the relevant Gillick competence, the evidence in this matter was such that the court found that XY's parents had come to a considered decision and that, as a matter of principle, the factors in Bell "*do not justify removing the parental right to consent*".

Lieven J also addressed the issue of parents succumbing to undue pressure from the child to consent to taking PBs, advising that the process of establishing best practice guidelines and safeguards should fall to the various regulatory bodies, NHS England and the Care Quality Commission:

> "*It may well be that, given the particular issues involved, additional safeguards should be built into the clinical decision making, for example, by a requirement for an independent second opinion. Any such requirement is a matter for the regulatory and oversight bodies and may be a matter considered by the Cass Review. My view is that this is likely to be a better safeguard for the very vulnerable children concerned rather than removing the ability in law of the parents giving consent. The clinical expert who gave the second opinion could then have a role in advising whether or not the particular case should be brought to Court… The pressure on parents to give consent is something that all the clinicians are likely to be fully alive to… [if there is a concern] the parents are being pressured to given consent, then I have no doubt such a case should be brought to Court.*"

Conclusion

The above cases are examples of the remarkable breadth of decisions the family court is tasked with making in this brave new world, and one where the court is always playing catch-up with developments in medicine. Family practitioners await the decisions of McConnell and BGH in Strasbourg with interest. The question of whether only a mother can be deemed to give birth for the purposes of birth registration strikes at the core of family law and will have to be considered alongside the rights and freedoms of the trans-parent as well those of the child (in having an accurate record of their birth narrative). For trans-teens, their parents, the NHS Trusts and the family courts, as Mrs Justice Lieven observed, "*the use of PBs for children with gender dysphoria raises unique and highly controversial ethical issues*". These matters demand not just judicial consideration and intervention, but guidance from the regulatory bodies to ensure adequate safeguards and a consistency of approach.

Endnotes

1. Abortion Act 1967: legalised abortion in October 1967.
2. Sexual Offences Act 1967: decriminalised homosexuality July 1967.
3. National Health Service (Family Planning) Act 1967: enacted June 1967.
4. *Kroon et al. v The Netherlands*: ECHR 27 October 1994, https://www.servat.unibe.ch/dfr/em185359.html.
5. Professor Susan Golombok, "We are Family", Scribe, 2020.
6. Gender Recognition Act 2004. Section 12 Parenthood: The fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.
7. *O.H and G.H v Germany*, Application Nos 53568/18 and 54941/18, communicated on 6 February 2019.
8. *R (McConnell and YY) v Registrar General* [2020] EWCA Civ 559, 29 April 2020. On 9 November 2020, the Supreme Court refused McConnell's application for permission to appeal on the ground there was no "arguable point of law".
9. BGH (n 15) para. 27; R (McConnell and YY) (n 14) paras 64–71.
10. R (McConnell and YY) 9n 140 para. 35.
11. *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1986] 1 FLR 224.
12. Section 8 Family Law Reform Act 1969.
13. Lucy Bannerman, "Landmark High Court ruling restricts puberty blockers for children", *The Times*, 2 December 2020, https://www.thetimes.co.uk/article/landmark-ruling-makes-it-harder-for-children-to-get-sex-change-drugs-8830h3hnc.
14. The Cass Review: an independent review of gender identity services for children and young people: https://cass.independent-review.uk/.

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International Child Law: A New Landscape and Lived Reality


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Introduction

31 December 2020 marked the dawn of a shifting legal chapter for UK or EU member families moving between those borders and who hitherto had benefitted from the protections offered by a well-oiled system in the form of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and parental responsibility ("Brussels IIa").

Following the referendum on Brexit in June 2016, the UK finally left the European Union on 31 January 2020. However, the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 19 October 2019 ("the Withdrawal Agreement") provided that EU laws and regulations would continue to apply within the UK during a transitional period that expired at 11pm on 31 December 2020. Unless proceedings commenced *prior* to that date (see Art. 67 of the Withdrawal Agreement), Brussels IIa does not apply. (A useful analysis of the relevant transitional provisions and their application was provided by Mr David Lock QC in *AB v CD [2021] EWHC 375 (Fam), [63-74].*)

Moving forward, England and Wales will continue to be concerned with the relevant Hague Conference conventions, the provisions of the Family Law Act 1986 (as between parts of the UK and specified overseas territories), a potentially rejuvenated European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children ("the 1980 Luxembourg Convention", which welcomes non-EU member accessions), and in non-Convention states, co-operation as between respective legal systems as best is achievable. In specific instances, of course, the UK has entered bilateral protocols, such as the UK-Pakistan Judicial Protocol on Children's Matters.

In reflecting on the changes, the most important question is the practical effect Brexit will have on families who fell previously within the Brussels IIa regime. Will the change be detrimental to families, and most importantly, of course, their children? What will change in practice in relation to jurisdiction, child abduction and recognition and enforcement of orders relating to a child who has been or it is proposed will move across borders? In reality, assessing the effects of the application of the 1996 Hague Convention and others in substitution of Brussels IIa may be clearest, in due course, from the vantage of retrospective reflection.

COVID-19 and the Movement of Children Across Borders

Until it happened, it was unimaginable that a worldwide pandemic could erupt with such seismic and lasting consequences. The effects of the pandemic have undoubtedly been felt acutely by families whose roots spread across more than one legal border. During the course of 2020 and early 2021, a number of judgments in England and Wales have served to highlight the realities of the COVID-19 pandemic experience for international families. Below, four are summarised briefly by way of example.

PT (A Child) [2020] EWHC 834 (Fam)

This case, in March 2020, was one of the first in which COVID featured expressly as an issue. In proceedings under the 1980 Hague Convention on Civil Aspects of International Child Abduction ("the 1980 Hague Convention"), the judge ordered that the child, "PT", must return to Spain. The judge found PT had been wrongfully removed by mother to England and Wales within the meaning of Art. 3 of the 1980 Hague Convention, remained habitually resident in Spain and that father had neither consented to PT's removal, nor acquiesced.

In a novel twist, mother ran the grave harm defence, arguing that: (1) PT should not be returned to Spain on the basis that the pandemic was more advanced in Spain than England and that PT could be at greater risk of contracting the virus in Spain; and (2) there would be an increased risk of infection posed by international travel. The judge did not hear evidence about this, but commented that in such a fast-moving situation, any finding would in any event most likely be immediately out of date. Overall, neither PT nor her parents were elderly nor had underlying health conditions, though mother was pregnant and was advised to self-isolate. There was no evidence to point to one country posing more of a risk than the other. While it was accepted that international travel could pose some risks, governments were continuing to permit some flights for essential travel. In all the circumstances, the risk of contracting the coronavirus was not sufficient to reach the threshold for grave risk of physical harm required by Art. 13b of the Convention [46–48].

VB v TR [2020] EWHC 877 (Fam)

This judgment was delivered hot on the heels of PT (A Child) by Mostyn J. It concerned a mother who had wrongfully removed the parties' five-year-old son from Bermuda to England, and a return order was made. However, and in contrast to PT (A Child), mother suffered with Crohn's disease (meaning that she fell into a vulnerable category) and travel was not advisable until such time as the government deemed it safe. Given the delay to implementation of the return order, Mostyn J urged the mother to press on and apply remotely for orders in Bermuda, indicating that he would be prepared to set aside his order should the court in Bermuda make an order permitting her and the child to stay [39–40].

JM v RM, [2021] EWHC 315 (Fam)

In this case, another judgment of Mostyn J, father (an Australian cricket player) applied pursuant to the 1980 Hague Convention seeking the return of the parties' two children, aged three and one, from England, where he alleged they were being wrongfully retained, to Australia. In February 2020, just before the pandemic took hold and with father's permission, mother and the children visited England as mother tended to do annually to spend time with family. They could not return, as originally planned, on 23 April 2020. Mother formed an intention in around mid-April not to return to Australia. In early May 2020, she indicated to father that in "some respects" she did not want to return to Australia. In response, father said he would come and try to live with the family in England. In July 2020, father obtained compassionate permission to leave Australia. In response to this, mother told father she did not want the relationship to continue regardless of father coming to England. In considering the facts, Mostyn J concluded that once mother could not return to Australia as originally planned, mother and father operated an uneasy understanding or stand-off whereby no alternative date of return was substituted. Since there was no clearly agreed date of return prior to 1 August 2020 when father first made clear his wish that they return, the children were by that time habitually resident in England and Wales and therefore the Convention was not engaged. Father's application was dismissed.

AC V NC [2021] EWHC 946

In this most recent case heard in April 2021, father brought proceedings under the 1980 Hague Convention seeking the return of the parties' four-year-old son, "K", from England to the USA. As recorded formally in their separation agreement, father had given mother permission to relocate permanently with K from the USA to live with mother in England. This was on the condition that K spent regular and extended holiday periods with father in the USA. Soon after mother and K arrived in the UK, the pandemic ensued. K's planned trip to the USA in April 2020 was cancelled because planes were grounded. During the summer holiday 2020, father would not agree to alternative arrangements that meant there could be some form of a visit and neither would father agree to travel to England over Christmas 2020.

In October 2020, father (in the USA) filed a petition for contempt and a petition to modify custody, now seeking full custody of K. Mostyn J determined that by the time father's petition was filed, K was habitually resident in England and Wales and consequently questioned the jurisdictional foundation of the proceedings father had issued in the USA. Father also applied, under the 1980 Hague Convention, seeking K's return. He contended that, because mother had not complied with the terms of the order, K had either been wrongfully removed by mother or wrongfully retained when she did not visit with him in April 2020. At para. 33, Mostyn J stated that:

> "I am not aware of any authority which states that an agreed relocation, with the concomitant change of habitual residence, can be voided ab initio on the ground of fraud."

Ultimately, Mostyn J found that mother had removed K lawfully and was not harbouring a dishonest intent. She had reasonable grounds not to travel to the USA and consequently there was no wrongful retention. By the time father applied under the Convention, K was habitually resident in England and Wales and so the 1980 Hague Convention was not engaged.

Mostyn J observed that father's true complaint appeared to be his denied "rights of access". Art. 21 of the 1980 Hague Convention provides an administrative obligation to afford a domestic remedy to a parent, in this case the right to have heard an application under s.8 Children Act 1989 ("s.8"). Mr Justice Mostyn offered to treat father's application under the 1980 Hague Convention as being made pursuant to Art. 21, which would not result in a return order, but instead would channel father's application into a domestic application under s.8. Father showed no interest in this process. Ultimately, therefore, his application was dismissed.

The Approach to Applications to Relocate Abroad Permanently – A Brief Introduction

In relation to applications by families resident in England and Wales to relocate permanently to another jurisdiction, the approach of the family court has remained consistent for a number of years and was reviewed comprehensively by Williams J in *Re K (A Child) [2020] EWHC 488 (28 February 2020).*

The parents had been engaged in ongoing parallel proceedings in India and England in respect of their son ("K"), who was aged 4. In previous judgments, the court had found that K – a British Citizen and passport holder – remained habitually resident in England and Wales, having been taken to India and stranded there by father. In due course, the English court made an order that K be returned to this jurisdiction, and sought the Indian court's co-operation, which it gave.

Moving forward, mother wished to live permanently with K in England. Father wished to live with K in India, or alternatively to spend time with him in England and in India. K was made a party to the proceedings and was represented by a children's guardian who recommended he should live with mother in England, spend time with father in England – and subject to appropriate protective measures being in place – also spend time with father in India. Having undertaken a holistic evaluation of the merits and competing options proposed by K's parents, the judge preferred mother's proposals and made a live with order in favour of mother, following the guardian's recommendations in respect of father.

The court spelled out the fact that the only authentic principle when considering an application for a child's relocation is the paramount welfare of the child, following the requirements of s.1 Children Act 1989. Detailed guidance was given in the judgment [see paras 44–50], key features of which include:

- That no priority be afforded to the applicant's case to relocate over the respondent's counter position, which most usually is that the subject child remain in their home state. The task required by the judge is a comparative evaluation to weigh up two or conceivably more competing options as to the country in which the child should reside and the parental care framework.
- The most recent authoritative appellate decision on the approach to permanent overseas relocation is *Re F (A Child) (International Relocation Case) [2017] 1 FLR 979* ("Re F"), proceedings in which the writer represented the father. In Re F, the court made clear that, whether under s.8 or s.13 of the Children Act 1989, the approach should be as follows:
  - (i) The only authentic principle is the paramount welfare of the child.
  - (ii) The implementation of s.1(2A) of the Children Act 1989 makes clear the heightened scrutiny required of proposals which interfere with the relationship between a child and his parents.
  - (iii) In assessing paramount welfare in international relocation cases, the court must carry out a holistic and non-linear comparative evaluation of the plans

proposed by each parent, essentially meaning that each individual's proposal should be considered on its merits, weighing up the pros and cons and also as compared to the other options.

(iv) In relation to ECHR Article 8 rights, a judge must factor in the right of the child to maintain personal relations and direct contact with both parents on a regular basis, unless that is contrary to his interests. That is in accordance with Article 9 of the UN Convention on the Rights of the Child. The court must also take into account the competing Article 8 rights of the parents. Usually, the child's rights will take priority over the parents, but that should not cause the court to overlook the Article 8 rights of others affected and the court should balance the competing rights.

Losing Brussels IIa

Without doubt, reliance on the 1996 Hague Convention on Parental Responsibility and Protection of Children ("the 1996 Hague Convention"), rather than Brussels IIa, represents an adjustment to expectations for those seeking protection in relation to matters of jurisdiction, parental responsibility, recognition and enforcement of orders, but we are by no means left high and dry. The 1996 Hague Child Convention was of course conceived and drafted prior to its Brussels IIa counterpart, the latter being modelled on the former. While many of the provisions are similar, there are differences. Although the UK was a signatory to the 1996 Hague Convention in its own right, the government passed the Private International Law Act 2020 to ensure its application as between the UK and the remaining EU Member States following Brexit. As all EU Member States are signatories to the 1996 Hague Convention, there is a clean and uniform substitution that applies seamlessly in replacement of Brussels IIa.

Losing distinguishing and arguably enhanced provisions contained in Brussels IIa requires careful reflection. Some examples are highlighted here, and some further into the chapter. For example:

- Art. 9 reserves jurisdiction to the courts of the left behind state for a period of three months following the making of the order. This enables any teething issues/issues of implementation in respect of an order to be addressed.
- Art. 41 secures automatic recognition of orders (provided the correct Annex II or III certification procedure is adhered to).
- Although accepted ultimately as frequently unobtainable and having as a result been reworked in Brussels Recast (see further below), Brussels IIa requires cases to be determined within six weeks, giving parents reassurance of a swift resolution and importantly ensuring children are not cast adrift for long spells while judicial processes play out at different rates in different Member States. The 1980 Hague Convention of course provides that if a judgment is not given within six weeks of the start of proceedings, the applicant or relevant central authority has the right to request a statement of reasons to explain the delay.
- Brussels IIa also provides that, if adequate protective measures can be offered and put in place, it is not possible to refuse to make a return order.
- The effect of Art. 11, ss (6) to (8), is to confer on applicants a second chance to pursue return proceedings following the conclusion of an application under 1980 Hague proceedings, the underlying purpose of which is to act as a deterrent to those contemplating a wrongful removal.
- Legal aid is available under Brussels IIa for those seeking recognition and enforcement of orders.

Finally, Brussels IIa has been revised by Council Regulation (EU) 2019/1111 of 25 June 2019, known as "Brussels Recast", which comes into effect on 1 August 2022. Revisions include the elimination of exequatur for all decisions in matters of parental responsibility, enhanced measures in relation to the child's voice, as well as provisions to bring uniformity to certain elements of the enforcement procedure. Brussels Recast will of course have no application within the UK.

The Increased Reach of the 1996 Hague Convention – A Short Discussion

In this jurisdiction, we are left with the effect of a greater deal of uniformity for international families caught up in conflicts relating to the movement of children across borders.

In relation to international child abduction cases, the family court continues to be concerned with the 1980 Hague Convention, of which Chapters III and IV address the "Return of Children" and "Rights of Access". The 1980 Hague Convention is supported, where appropriate, by provisions contained in the 1996 Hague Convention, for example in relation to the recognition of protective measures.

Whilst most practitioners are very familiar with the 1980 Hague Convention, the 1996 Hague Convention may be less familiar to many and as such warrants brief discussion, particularly insofar as its provisions differ from its Brussels IIa counterpart.

The objectives of the 1996 Hague Convention are laudable, and include:

- improving the protection of children in international situations;
- avoiding conflicts between contracting states in respect of jurisdiction;
- determining applicable law (usually the state's own);
- facilitating recognition and enforcement of measures for the protection of children;
- achieving international co-operation for the protection of children; and
- that the best interests of the child are to be a primary consideration.

Arguably, the 1996 Hague Convention is a more flexible instrument in terms of working to achieve what is in a child's best interests, rather than being absolutely prescriptive, as is Brussels IIa in certain instances. For example, where protective measures are adequate, Brussels IIa provides that a child *must* be returned to his or her home state.

Under the 1996 Hague Convention, Art. 5 provides that jurisdiction falls to the country in which the child is habitually resident. If the child's habitual residence changes, jurisdiction follows – there is no equivalent Brussels IIa proroguing provision. By Art. 7, specifically in relation to cases of wrongful removal of retention, jurisdiction remains with the state of the child's habitual residence. Where authorities of a contracting state are exercising jurisdiction in connection with divorce, legal separation or an annulment of marriage in relation to the parents of a child habitually resident in another contracting state, that court may – pursuant to the provisions of Art. 10 and if the law of the contracting state provides – take measures to protect the subject child, if:

- one of the parents habitually resides in that state and has parental responsibility for the child;
- the jurisdiction of that contracting state to take such measures has been accepted by the parents; and
- it is in the best interests of the child.

The court's jurisdiction under Art. 10 ends when the proceedings for the divorce or separation come to an end.

Under Arts 8 and 9 of the 1996 Hague Convention, either the court of the contracting state with jurisdiction or the court of another contracting state may request from the other, respectively, the transfer or the assumption of jurisdiction. The criteria for this are set out at Art. 8(2) and include:

- the child is a national of the state;
- the child has property in the state;
- the state is seised of an application for divorce or legal separation or annulment of the parents' marriage; and/or
- the child has a substantial connection to the state.

Substantial connection is not defined, permitting a broad interpretation in accordance with the subject child's best interests. It may include nationality, previous habitual residence, habitual residence of a parent or perhaps another close family member, such as a sibling. Ultimately, if the test under Art. 8(2) is met, the court considering the transfer must determine which jurisdiction is "…better placed…" [Art. 9].

JA v TH (1996 Hague Convention request to exercise jurisdiction) [2016] EWHC 2535 is an example of the court making orders pursuant to Arts 8 and 9 of the 1996 Hague Convention. The subject child, L, lived in Norway with his mother, with whom he had relocated from England in 2015. His brother remained living in England with his father. In proceedings in England, Baker J considered whether the court should request a transfer of jurisdiction in respect of L, which he ultimately decided was appropriate since L had a "substantial connection" with England. Overall, he considered (1) that it was in L's best interests for the court considering his child arrangements to be the same as his brother's, and (2) that it would not be in their best interests to be on the receiving end of conflicting orders in two different contracting states. A persuasive additional fact in weighing up the best course of action was that mother had not made an equivalent request to the Norwegian court.

It is in relation to recognition and enforcement of orders that the difference between Brussels IIa and the 1996 Hague Convention may be felt most. Arts 23 to 28 of the 1996 Hague Convention require a two-stage process, first to recognise an order and then to enforce it.

The 1996 Hague Convention provides that measures taken in one state "shall be recognised" in another, subject to certain safeguards. They include that a child has been given an opportunity to be heard (consistent with Art. 12 United Nations Convention on the Rights of the Child), that each person with parental responsibility has been given the opportunity to be heard, that any measure is not contrary to public policy in the requested state and that the jurisdiction of the court is based on one of the grounds in the Convention. The grounds for refusal are also discretionary: overriding any decision-making is the drive to reach outcomes that are in the best interests of a child. Bear in mind that recognition and enforcement will only be relevant for so long as the child remains habitually resident in the first contracting state, since once the new contracting state assumes jurisdiction, it can make whichever orders it considers appropriate.

One of the perceived pitfalls of recognition and enforcement under the 1996 Hague Convention is that there will be no uniform approach to how each contracting state will recognise and apply home state orders – each will apply its own local rules. Advice will be required in the given contracting state, potentially costing parents in these challenging situations additional expense and delay. That said, Art. 26(2) provides that each contracting state "shall" apply to the declaration of enforceability or registration a simple and rapid procedure. Insofar as England and Wales is concerned, the procedure to be applied to recognition of an order is under Part 31, Family Procedure Rules 2010. In *Re P (recognition and registration of orders under the 1996 Hague Child Protection Convention) [2014] EWHC 2845 (Fam)*, Moylan J criticised the procedure, commenting that:

> "…when what is being sought is what might be termed, somewhat inaptly, a mirror order, it will often not be necessary to have a raft of documents and information as required by the rules."

A potentially concerning and prohibitive challenge is that legal aid is not available for enforcement orders under the 1996 Hague Convention 1996 as it was under Brussels IIa. As yet, this has not been remedied, possibly meaning that children whose parents could otherwise secure assistance will be unable to do so.

On a more positive note, the 1996 Hague Convention offers a mechanism by which parties can seek clarification of recognition in advance of a child moving across borders, per Art. 24. This means that parents contemplating a child's relocation in any guise can ask the contracting state to which the child will travel to comment on recognition or an order before a final order/decision is made. Potentially, this could be very valuable in terms of offering peace of mind to the left behind parent and to aiding a conciliatory and solution-focused approach – key for the subject child at the heart of the proceedings.

To complete the picture, if a child enters the jurisdiction of England and Wales from a non-convention country, the courts are not bound to make a summary decision as they are under either the 1980 Hague Convention or the 1980 Luxembourg Convention, which both provide that the child is best served by summary return to his or her home state such that a full welfare assessment and decision be made there. In non-convention cases, the approach is as set out in *Re J (A Child) (Custody Rights: Jurisdiction) [2005] UKHL 40*. In that case, the Supreme Court (formerly House of Lords) held that the rules and concepts of the conventions are not applicable to non-convention cases. Instead, the paramountcy principle set out in s.1 Children Act 1989 is of general application. This approach may or may not require a summary process – it will turn on the facts of each case and what is in the child's best interests [22–29]. Additional guidance can be found in the subsequent Supreme Court decision of *In the matter of NY (A Child) [2019] UKSC 49*.

Domestic Abuse

In the UK, there is an increasing awareness of all forms of domestic abuse. This has been brought into sharp focus during COVID-19 when it became clear from global reporting that the opportunity to perpetrate domestic abuse behind closed doors was proliferating – some termed it a pandemic within a pandemic.

England and Wales have just passed the Domestic Abuse Act 2021. Not only does this give domestic abuse a statutory footing, it also expressly provides that children who see, hear or experience the effects of domestic abuse are victims in their own right. Within that Act, we see clawed into criminal offences behaviours that the wrongdoer has committed in another jurisdiction. For example, Schedule 3 of the Act sets out an amendment to s.76 Serious Crime Act 2015, relating to controlling and coercive behaviour in an intimate or family relationship, as follows:

> "76A Offences under section 76 committed outside the United Kingdom
> (1) If
> (a) a person's behaviour consists of or includes behaviour in a country outside the United Kingdom,
> (b) the behaviour would constitute an offence under section 76 if it occurred in England and Wales, and
> (c) the person is a United Kingdom national or is habitually resident in England and Wales,
> the person is guilty in England and Wales of that offence."

Practitioners will be aware that the EU Civil Protection Regulation took effect across the EU in 2015. Although regrettably not reciprocated by the EU, the UK remains committed to recognising EU-made civil protection orders within the UK following Brexit, and in order to do so has passed into national law in England and Wales and Northern Ireland "The Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019, No 493 of 6 March 2019". For now, and in connection with any UK-issued civil protection order, separate proceedings will have to be commenced in the relevant EU Member State.

In a very recent judgment in May 2021, *J (A Child : 1980 Hague Child Convention proceedings) [2021] EWHC 1213 (Fam)*, Hayden J upheld the respondent mother's defence of grave harm under Art. 13(b) of the 1980 Hague Convention. In the judgment, he stated that the nature of mother's broader allegation in the case "…is characterised by detail and identifies features of behaviour now recognised in the criminal law as coercive control… The harm contemplated is far beyond what every child may encounter in the "rough and tumble, discomfort and distress… as part of growing up"" [17]. As the understanding of certain behaviours – often historically passed off as innocuous – are increasingly recognised as forming part a more nuanced and abusive pattern, practitioners in this jurisdiction watch with interest to see if there is a slight shift in the parameters within which a respondent is able to reach the threshold for the grave harm defence. The primary author recently acted for one of the respondents in the Court of Appeal's landmark case of *Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448*, which was concerned with these types of patterns of behaviour of a controlling and coercive nature.

Dispute Resolution and Mediation

In all areas of child law, the courts of England and Wales are increasingly encouraging parents to exercise their parental responsibility and make decisions together autonomously and in the best interests of their children. Last year, in *Re B (A Child) (Unnecessary Private Law Applications) [2020] EWFC B44*, HHJ Wildblood made the position very clear:

> "…Do not bring your private law litigation to the Family Court unless it is genuinely necessary for you to do so. You should settle your differences (or those of your clients) away from court, except where that is not possible…" [para. 9]

As is clear from research, the stakes are high for subject children in terms of the prospects of continuing a fully engaged relationship with both parents in an abduction or relocation context in circumstances in which, at the conclusion of any court proceedings, tensions remain high or conflict is left unresolved. For very good reason, therefore, the Family Procedure Rules 2010 Part 3 rule 3.3 (1) obliges judges to consider non-court dispute resolution at every stage. To complement Part 3, the President on 18 March 2018 released a practice guidance entitled "Case Management and Mediation of International Child Abduction Proceedings". Where it is safe and appropriate to do so, mediation is encouraged, and crucially, will not ground a defence of acquiescence, following *Re H (Minors) (Abduction : Acquiescence) [1998] AC 72 at [88–89]*.

Consistent with this approach, the Hague Conference has a strong ethos in respect of dispute resolution, as is clear, for example, within the 1996 Hague Convention. Art. 31 states that:

> "The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to –
> a) …
> b) facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies…"

On a separate note, a recent welcome addition to the national arbitration scheme is the opportunity to arbitrate international relocation disputes. The IFLA Child Arbitration Scheme Rules 2021 now permit arbitrators to adjudicate international relocation applications to jurisdictions which have ratified or acceded to either the 1980 Hague Convention or the 1996 Hague Convention. Arbitration potentially has several advantages for families. With a judiciary stretched to its limits given a combination of limited legal aid availability and most recently chartering the fallout from the pandemic, the opportunity for some families to have a dedicated arbitrator in this context is a welcome development.

Conclusion

So far as family law goes, 2020 was a year marking very significant challenges as the UK reached the end of the transition period. Throw a pandemic into the mix and life for international families continues to be very challenging in many respects. For a while at least, it is going to be hard to decipher how migration is being affected by Brexit, by the pandemic, and/or a combination of the two. Anecdotally, for example, lots of families made the decision to return home to their countries of origin to ride out lockdown, and have since decided to remain settled now that borders are once again easier to cross. It will take even longer to drill into the figures to decipher how children of international families have been affected in their own right.

In 2019, the Migration Observatory at the University of Oxford estimated that:

- An estimated 3.6 million EU-born migrants lived in the UK in 2019, making up 5.5% of the UK population.
- There were an estimated 3.7 million EU citizens living in the UK in 2019, though the accuracy of this estimate has been called into question by the number of applications to the EU settlement scheme.
- In 2019, just under half of EU-born migrants living in the UK were from EU-14 countries.
- Poland was the top country of birth among the EU-born in 2019, followed by Romania and Ireland.
- In 2019, 48% of EU nationals in the UK said they migrated to the country for work-related reasons.
- In 2019, around 8% of all workers in the UK were born in an EU country.
- EU immigration fell substantially after the 2016 Brexit referendum.

The Observatory's next update is not due until October this year, at which point the patterns and fall-out of last year's events may begin to emerge.

Insofar as children moving across borders are concerned, families remain well served by the Hague Conference conventions and the 1980 Luxembourg Convention. Although there are some adjustments to practice that will be required to ensure recognition and enforcement of orders in other contracting states, a good level of protection exists in the absence of Brussels IIa and arguably more uniformity without different tiers or processes dependent on someone's status as an EU national or 1996 Hague Convention country national. With the right legal support, families will continue to be able to obtain protection for an order made by one contracting state in another, with the best interests of the child at the heart of decision-making taken under the umbrella of the 1996 Hague Convention.

Zoë Fleetwood is a partner and head of child law at Mills & Reeve LLP. Her caseload includes child abduction, wardship, domestic violence, forced marriage, surrogacy, special guardianship and adoption including intercountry adoption and Hague intercountry adoptions. Zoë advises on the 1996 Hague Convention in respect of cross-border placements. She is accustomed to dealing with cases which involve very serious aspects, such as non-accidental injury of a child, sexual abuse, trafficking, jurisdictional disputes and placement overseas. Zoë is known for her particular interest and specialism in high conflict cases and for representing children in proceedings directly and through their guardians.
Ranked in *Chambers 2021* and in the elite "Leading Individual" list by *The Legal 500 2021*, Zoë is described as being a name to note, who is accustomed to dealing with very serious cases involving non-accidental injury to a child, sexual abuse, trafficking, jurisdiction disputes and placements overseas. She "is an amazing solicitor. Her preparation is meticulous and she has a good common-sense approach to difficult issues, as well as managing client expectations which allows them to have realistic goals". "She is senior and experienced, and has helped to shape the modern law on relocation."
Zoë has represented parties in numerous reported cases, including:

- *In the matter of F (A child) (International Relocation Cases) [2015] EWCA Civ 882* (the most important case on international relocation in a decade, changing the approach in relation to these cases and widely reported by legal commentators).
- *Re JS (Disposal of Body) [2016] EWHC 2859 (Fam).*

And most recently, in 2021:

- *London NHS Trust v CD & Ors (Withdrawal of Life Sustaining Treatment) [2021] EWCOP 727* (Mr Justice Williams).
- The Court of Appeal's landmark case of *H-N And Others (Children) (Domestic Abuse: Finding of Fact Hearing) (Rev 2) [2021] EWCA Civ 448.*

Zoë is a member of the Law Society Children Panel, Child Party Representative and of the Association of Lawyers for Children. She is a Resolution Accredited Specialist in Children Law, Child Abduction and Adoption and she further qualified as a Solicitor-Advocate (Higher Courts Civil Proceedings) in 2017.
Zoë sits on the National Committee, as well as the London region of Resolution and is active in responding to consultations as part of her commitment to Justice for All. She is a keen advocate and conducts lengthy trials herself, including the cross-examination of expert witnesses. She is a frequent speaker at conferences and has published articles in journals and appeared in the media.

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Amy Starnes is a Senior Associate at Mills & Reeve LLP and a specialist in private children law. She assists clients on a wide range of issues relating to the arrangements for children on separation. Many of her cases have an international element and she has particular interest and experience of cases involving international relocation.
Amy is accustomed to dealing with disputes which have become intractable with highly conflicted parents, issues of parental alienation, sexual abuse, domestic violence, mental health issues and drug and alcohol misuse. Amy has the expertise and the experience to be able to assist clients who find themselves in these situations.
Amy appreciates that resolving disputes about the arrangements for children on separation can be incredibly difficult. Her approach is sensitive, supportive and professional. Amy is committed to working with parents in a way that puts the best interests of children first. She frequently introduces the support of mediators, coaches, therapists, or secures the intervention of experts such as psychologists, psychiatrists and independent social workers. In addition, Amy advises clients on surrogacy, legal parentage and fertility law.
Clients have praised Amy for her "responsive and balanced approach" and "not over-lawyering". Amy has received the following feedback from clients: "your integrity, professionalism and focus on client care can cost little, but count for an enormous amount, and you in my opinion have those in abundance."

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Argentina

Estudio McEwan

Herberto Robinson

1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

Under the Civil and Commercial Code, which came into full force and effect in 2015 (the "**CCC**"), the law of the last marital domicile determines the applicable law and court jurisdiction in cases of divorce and all matters in relation to marriage nullity. Argentina adopted a federal system of government where each of the provinces (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.

Marriage dissolution procedures are governed by the law of the spouses' last marital residence. 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. The intervention of an Argentine judge is needed in receipt of all foreign certified divorce documents.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

After the sanction of the CCC, there are neither grounds for terminating marriage nor a required period of personal separation for filing a divorce.

The 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. 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 in the same way as in a joint procedure as there is no grounds for divorce. For more explanation, please see question 1.4 below.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

In the case of an uncontested divorce, parties may need to attend court in case they have children under 18 years old to accept the communication regime requested and/or to confirm child custody, if petitioned. If no children are involved, a unilateral procedure may start and conclude uncontested with no need to attend court.

Private divorce is not allowed under Argentine law. However, private agreements (private mediation) may be reached between spouses regarding child maintenance, custody, contact, visitation and division of material assets.

1.4 What is the procedure and timescale for a divorce?

The divorce procedure is filed before a court (regarding the last marital domicile principle) by both spouses (joint petition) or by one of them (unilateral). As mentioned above, a divorce petition may be filed after marriage at any time as there is no personal separation time requirement nor any other grounds for filing divorce. In both procedures, if there is mutual agreement between the parties involved, the court may rule the divorce decree in a period of two to three months. The divorce takes effect upon registration of the court ruling in the Civil Registry in the jurisdiction where the marriage was celebrated.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Divorce cannot be finalised without an agreement of child arrangements (communication and maintenance). However, a matrimonial property regime (in case of community property regime) may be assigned by private agreement between former spouses or by separate court procedure once the divorce decree has been declared final and dully registered (accordingly with question 1.4 above).

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

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.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Under the CCC, there is no judicial process under which spouses can obtain a separation sentence, other than liquidation of marital assets. A 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).

A nullity procedure may be alleged when impediments to a valid marriage are present (i.e. marriage between direct blood relatives, marriage between siblings or half siblings, validity of a previous marriage of one or both spouses at the moment of marriage, or one spouse being the author, accomplice or instigator of attempted homicide against the other) and allows the declaration of absolute nullity due to infringement of public order rules (*normas de orden público*, as defined in the CCC).

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Yes, they can. Proceedings are usually stayed until 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 Finances on Divorce

2.1 What financial orders can the court make on divorce?

It is important to mention that the court's role in a divorce procedure 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, as well as financial orders to liquidate and distribute marital assets, can both be made on divorce. 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).

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

Yes, matrimonial regimes exist. Under the CCC, there are only two regimes: the community property and the separate property regimes. As a principle, the community regime acts as the default regime if spouses keep silent on which regime they adopt. Marital regimes do not need to be addressed by the court on a divorce decree; parties can settle privately the specific liquidation of the matrimonial property assets and proceed to distribute between them, or, upon petition, a judicial liquidation and distribution procedure may be filed by either or both parties.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

The choice of orders on divorce is ruled in the CCC and in each of the provinces' Civil and Commercial Procedure Codes on how to obtain them from the courts.

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

Preventive measures on child support or custody may be filed by any spouse before or during the divorce procedure to ensure financial orders.

2.4 Is the position different between capital and maintenance orders? If so, how?

Please see the answer to question 2.6 below.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

Yes, they do. A unilateral or joint procedure must always be filed before a court in order to obtain a divorce decree. Also, when they have children (under 18 years old), the communication regime needs to be settled before a court.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

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 his/her situation and the marital bond and its breakdown 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, in which case they have the right to claim compensation. Compensation may consist of a one-time benefit, an income for a specified time, or, exceptionally, for an indefinite period. Financial compensation claims have a six-month statutory limit after the divorce decree has been issued.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Yes, it is. 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 title of a property and the property 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 and, 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).

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Foreign nationals are not treated differently on divorce because of their nationality. Legal cases that are brought to court are treated as per their facts and under the application of jurisdiction rules.

2.9 How is the matrimonial home treated on divorce?

In general, children, and therefore the parent that holds custody, remain in the matrimonial home. The financial position of the spouses will determine whether a former matrimonial home is needed.

There is also a protection of the family home in regard to selling (i.e. mutual consent is required).

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

Argentine law accepts the concept of a trust. Even though Argentina has not signed the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985, there are court precedents that recognise the existence and enforceability of foreign trusts provided that Argentine public order is not infringed (for example, where there are no infringements to the heirship rules of descendants and spouse). Regulations or by-laws of a trust shall not override the forced heirship rule. Since the forced heirship rule is a public order regime, any provisions or structures (trusts) used by the parties that conflict with the provisions under the regime can be judicially challenged. Argentine law provides for legal remedies in cases where a forced heir has been adversely affected in relation to the forced share that should be allocated to him or her. In this sense, any heir can file a *collatio bonorum* (joining together into a common fund) claim.

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. In *Vogelius, Angelina y otros c/Vogelius, Federico y otros*, the Supreme Court of Argentina ruled that, despite the fact that a trust was constituted in the UK (with assets based in the UK), the succession must be governed by Argentine local civil law. The court resolved, regarding the *collatio bonorum*, that a trust created with a view to gratuitously benefitting a forced heir of the settlor might be deemed a gift to the heir made before the death of the deceased, and so goes into the accounting of the estate, because its content and significance exceeds that permitted under inheritance law. Regarding matters of private international law, 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.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

First, a foreign divorce decree needs to be recognised in Argentina, for which summary information known as an "*exequatur*" must be made in which an Argentine judge, once he has verified that all the requirements are met (i.e. 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 if the defendant's (or paying party's) property is located in Argentina.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

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. There is no arbitration in family law matters.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Under the CCC, marital agreements (conventions) are accepted under Argentine law. For such agreements to be valid, the marriage must be celebrated, and they are required to determine: (a) an inventory of assets of each spouse; (b) donations between spouses before marriage; and (c) the adoption of one of the matrimonial property regimes. Said agreements need to be signed by public deed. Under the CCC, there are only two regimes: the community property and the separate property regimes. 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 after a year since the last change. In case foreign prenuptial agreements have been made, they need to follow CCC rules and be filed before the Civil Registry if the marriage celebrated in another country has also been registered in Argentina.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

For (pre-)marital agreements to be enforceable, they must have been celebrated by public deed and the content must deal with the requirements provided by law (as mentioned in question 3.1 above).

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Marital agreements do not cover financial claims on divorce, maintenance, compensation or financial claims regarding children. Said matters may be settled in previous mediations or private agreements, or during or after the divorce procedure.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

Under the CCC, a cohabitant with no children who suffers a clear imbalance in his/her economic situation (as a result of the end of the cohabitation) may claim economic compensation before the court.

4.2 What financial orders can a cohabitant obtain?

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.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

The CCC recognises certain rights for cohabitants, provided they have been together for at least two years. Through the means of "cohabitation agreements" (*Pacto de Convivencia*), domestic partners shall be able to regulate different aspects of their life 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 of free housing in the home they shared, for a period of two years. The law recognises other partial effects on partners (i.e. 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 his or her wealth to the partner up to the disposable portion (⅓ of the estate).

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Argentine law has recognised marriage between same-sex couples since 2010, so the same marital property 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.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

Pursuant to the *Convención Americana sobre Derechos Humanos* (American Convention on Human Rights), Argentine law does not make a distinction between children within or outside of marriage. The law treats them equally. However, the CCC treats siblings and half-siblings differently (i.e. if a person dies and is survived by a half-brother/sister and a whole brother/sister, the half-brother/sister will take half of what the whole brother/sister will take, and if the survivors are all of half blood, they will take a full share as if they were of whole blood).

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Child maintenance is calculated considering the life standard that the minor led during the family life or similar. With the agreement of the parents, or by judicial decree, maintenance may be modified (increased or decreased as the case may be) according to the needs of the child and the income of the parent responsible for the support.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Financial claims can be filed by any parent against the other on behalf of his/her children up to the age of 21, or between 21 and 25 years old in circumstances where the son or daughter is studying, or does not work and still cohabits with his/her parent.

5.4 Can capital or property orders be made to or for the benefit of a child?

No, they are not allowed in divorce.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

The parent who has custody receives and deals with the alimony payment, legally representing the children, until they reach 18 years old. Between the ages of 18 to 21, when the alimony right terminates, the non-custodial parent may make payment directly to the child as he/she is no longer a minor. If, during an alimony legal filing, a child turns 18, he/she is no longer represented by his/her mother, and is therefore expected to stand in court and to continue proceedings against his/her father for the alimony to which he/she is entitled.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

The CCC refers to parental responsibility exercised by both parents. Whether married or not, it is presumed that the acts carried out by one parent have the agreement of the other, with a few exceptions where express consent needs to be expressly given (i.e. when the child travels or decides to change residence abroad). Also, parental responsibility is not affected by a divorce; however, they need to decide the regime of communication and where the children will live.

If they do not agree, the court must decide which parent the child will live with, without prejudice to the other to have adequate visitation and educational supervision.

6.2 At what age are children considered adults by the court?

Children are considered adults by the court at 18 years old. However, under the CCC, when they turn 13, they can exercise certain acts that are allowed by the legal system, and in situations of conflict of interest with their parents, they can intervene in their own legal assistance.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Children orders can be made until they turn 18 years old. However, the obligation to provide financial maintenance to

children extends to the age of 21, except in situations where the parent is able to prove that the child at 18 has sufficient resources to provide for him/herself.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

The court can make communication regime orders, custody orders, maintenance orders, parental responsibility orders, right of access orders, relocation orders, medical orders, and payment orders of reimbursement of extra costs and expenses made on the child's behalf and not included in the maintenance obligation assumed by a parent.

Upon disagreement between parents, a court will issue an order stating which parent can decide in this specific matter (i.e. religious issues, medical treatment, surgery, choice of school, and vacations).

The court must automatically make a child arrangements order in the event of divorce. The Minority Officer is always heard in judicial proceedings, acting on behalf of the interests of the children and their wellbeing.

6.5 What factors does the court consider when making orders in relation to children?

First, the court considers the child's best interests and all decisions shall try to maintain the original home life of the child.

The Court shall always hear the child needs. As mentioned, a child over the age of 13 years can be heard in court and be assisted by a lawyer, and serious consideration to his/her will must be considered by the judge when making a decision on the subject of custody/parental responsibility.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

In general, all decisions are agreed between parents when filing a divorce. A child can be taken abroad if agreed, and if the parent has a power of attorney given by the other parent.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

Yes, there is a presumption of an equal division of time between separating or divorcing parents.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Yes, unmarried parents are treated equally in relation to parental responsibility and personal care of their children.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

All decisions taken by the judge regarding children must have the approval of the Minority Officer. Also, meetings with children shall be held if needed as well as the provision of welfare reports.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

A Minority Officer always represents the interests of children. However, children over 13 years old can be assisted by lawyers in cases of conflicts of interest with a parent.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Yes, according to previsions set forth in the CCC. Mediation is the only method of dispute resolution permitted by law.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

No, they cannot.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

No, they cannot.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

Factors that are taken into account are:

- The child's best interests, and the "centre of living" (defined by the CCC as "*the place where the child has lived the greatest part of his/her existence*").
- The habitual residence of the child.
- The type of relationship between the non-resident parent and the child, including whether they see each other regularly or sporadically and whether the resident parent is actively involved in the upbringing of the child or is an absent parent.
- The Minority Officer's report.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

Please see the answer to question 7.3.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

It will depend on a case-by-case basis. In general, without mutual agreement of both parents, relocation is more difficult when children are under the age of 12 years old. The nationality of the parents is also considered when filing relocations.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Argentina ratified its participation in the international abduction treaty signed in 1980 and is therefore a party to the Hague Convention. The country firmly supports the principles set forth in the Hague Convention and the judicial system always acts accordingly.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

There have been no major changes to family law in the last two years. The only change was introduced at the end of 2020 in the regime of donations, in particular with regard to the action of reduction in donations to forced heirs. The reform promotes the protection of third-party sub-acquirers of immovable assets who acquired them in good faith and who have had as their antecedent the acquisition of an asset through a donation contract. These include immovable assets that have imperfect titles and are thus restricted for sale.

Major changes in family law in Argentina were introduced with the sanction of the CCC in 2015. In line with global demand, Argentina introduced deep but incomplete reforms to its legislation regulating the legal relationships of persons, families and their estates, both in the civil and commercial fields. The main goal was to adapt and update domestic legislation in light of the cultural, social, economic and technological advances and changes that Argentine society, in particular, was facing, in keeping with the global trends in different jurisdictions.

At the same time, there has been an attempt to reflect, as a governing principle, autonomy of will for matters of private law (civil and contractual), allowing the parties (always in compliance with public order regulations) to enjoy broader freedom, while personal and even contractual relationships were being regulated. Based on these principles (which will surely require revision in the near future), we consider that the current legislation offers much more modern and flexible ways to implement effective estate planning for those persons and families with residence and assets located in different jurisdictions.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

Throughout 2020, local courts have been mainly closed with only urgent cases being attended to. Parents have had to readapt their right of access with the other parent, as well as their child communication regime due to lockdown policies.

Implementation of virtual procedures took longer than expected. However, both the Supreme Court and the Civil National Court of Appeals issued resolutions ordering paperless processes, providing also that all hearings should be held via virtual platforms, and that electronic notifications should replace paper notifications and those served in person. All of these amendments are likely to remain after the COVID-19 crisis has passed. However, the implementation of these changes has been uneven across the different courts; some have implemented the measures quickly and effectively while others have been resistant to change, thus causing unnecessary delays for people seeking justice or resolutions.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

The legal procedure for adoptions should be amended, as the current process is very long and complex and therefore discourages people from pursuing this honourable route.

Finally, Argentina should amend the forced heirship rule in line with the amendments of the CCC.

Herberto Robinson is a civil and corporate law attorney, with more than 15 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 out of the management of wealth during life and after death. He also assists clients in estate planning and family-business succession planning, and has a wealth of experience in family litigation matters.

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Estudio McEwan was a pioneer in the provision of legal and tax services to private clients in Argentina. The firm has extensive experience in the field of UHNWIs and their families, and is highly regarded in the areas of estate and tax planning. Its professionals (lawyers and accountants) assist private clients (individuals and families) as well as banks, private bankers, family offices, trust companies, investment banks, and private equity funds. The team at McEwan practice in all areas related to civil law and tax fields affecting UHNWIs. In addition, they have a wide knowledge of family law and they are recognised for their work on succession and complex tax litigation, with expertise in handling matters involving complex family conflicts.

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Australia

Mills Oakley

Carly Mirza-Price

1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

A party can apply for a divorce in Australia if either of the parties (*Family Law Act 1975* (Cth), Section 39(3)):

1. regard Australia as their home and intend to live in Australia indefinitely;
2. is an Australian citizen by birth, common descent or by grant of Australian citizenship; or
3. ordinarily lives in Australia and has done so for 12 months immediately before filing the divorce application.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

A party need only establish that their marriage has irretrievably broken down, and there is no reasonable likelihood that the parties will resume living together (*Family Law Act 1975* (Cth), Section 48). The reason for the breakdown of the relationship is irrelevant in so far as divorce proceedings are concerned in Australia as there is a "no fault" divorce system.

A party cannot apply for divorce until they have been separated for at least 12 months. If parties have continued living together under one roof post-separation, they can still apply for a divorce on the basis of their date of separation, notwithstanding the ongoing cohabitation. However, in circumstances where the parties have been separated for more than 12 months, but have cohabited within 12 months of filing the divorce application, the Court will ordinarily require evidence, including an affidavit by either or both parties and an independent witness, such as a family member or occupants of the household, to verify that the parties were no longer living as a couple.

For a party who is applying for a divorce within two years of marriage, they are required to file a certificate with the application confirming they have attended upon, or attempted to attend upon, a counsellor in relation to their prospects of reconciliation (*Family Law Act 1975* (Cth), Section 44(1B)).

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

There is no "private" divorce process in Australia. Parties may make a joint or individual application to the Federal Circuit Court of Australia for divorce. Where the divorce is uncontested, the parties are only required to attend Court if there are children of the relationship under the age of 18 years at the time.

1.4 What is the procedure and timescale for a divorce?

The divorce process ordinarily takes three to four months:

1. once the divorce application is filed, it is allocated a hearing date usually about eight to 10 weeks after the date of filing;
2. in case of an individual application, the Applicant is to serve the application upon the Respondent at least 28 days before the divorce hearing if the Respondent is present in Australia, or 42 days if the Respondent is overseas;
3. assuming the divorce can proceed at the hearing date, it will be granted on that occasion – known as *Decree Nisi*; and
4. the divorce will become final – absolute – one calendar month and one day after the *Decree Nisi*; for example, if the divorce is granted on 1 June, it will become final on 2 July.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Divorce proceedings are separate to parenting and financial proceedings in Australia. The divorce can be finalised without resolving those associated matters; however:

1. the divorce application includes information about arrangements for any children under the age of 18. The Court needs to be satisfied that there are satisfactory arrangements in place for the ongoing care of the children in the absence of any pending parenting proceedings (*Family Law Act 1975* (Cth), Section 55A); and
2. once a divorce is granted, if parties have not yet resolved their property settlement, either of the parties is required to file any application for property settlement or spouse maintenance within 12 months of the divorce becoming absolute. It is for this reason parties tend to resolve their financial matters before applying for divorce, to avoid the expiration of that limitation period (*Family Law Act 1975* (Cth), Section 44).

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Australia recognises a foreign divorce if the divorce was granted in accordance with the local laws of the foreign country (*Marriage Act 1961* (Cth), Section 56).

1.7 Does your jurisdiction allow separation or nullity proceedings?

There are no "separation" proceedings in Australia, other than divorce proceedings to determine a married couple is no longer married. However, if there is a dispute as to the date the parties separated, this may impact a number of factors such as whether the 12-month time limit for the filing of the application for divorce has been satisfied or relevant financial matters arising since the date of separation. In such cases, the Court is required to hear and determine the fact in issue being the date of the parties' separation.

Nullity proceedings are available in Australia. The Court may declare a marriage void on the basis that either (*Family Law Act 1975* (Cth), Section 51; *Marriage Act 1961* (Cth), Section 23):

1. one or both the parties were married at the time of the marriage (bigamy being illegal in Australia);
2. one or both of the parties were underage and did not have the necessary consent; or
3. one or both of the parties were under duress and forced into the marriage.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Divorce proceedings can be stayed if there are proceedings in another country in relation to the same subject matter, being the divorce of the couple. There are a number of matters that the Court takes into account when deciding whether to stay divorce proceedings in Australia, in particular determining whether Australia is a "clearly inappropriate forum" having regard to:

1. logistical factors such as the convenience and expense of the proceedings continuing in Australia, having regard to the location of the witness(es), the parties' place of residence, and whether both the parties or either of them can appropriately participate in the proceedings;
2. the timeframe for completion and stages of the proceedings in either jurisdiction;
3. the connection of the parties to other jurisdictions, and the relief available in such jurisdiction(s);
4. whether Australian orders are recognised in the other jurisdiction(s);
5. which jurisdiction will provide a more effective resolution of the issues; and
6. the advantage to the parties or either of them of each forum (*Henry & Henry* [1996] HCA 51; *Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55).

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

Aside from the limitation period referred to in question 1.5 above, the Court can make orders as to adjustment of the parties' property interests or spouse maintenance following separation, regardless of whether the divorce has yet been granted.

The power of the Court is wide – the Court has a broad discretion in determining financial matters arising from the breakdown of relationship, if it is just and equitable to do to so, including (*Family Law Act 1975* (Cth), Section 79):

1. deciding how to divide the parties' assets, liabilities and superannuation;
2. determining what are the assets and liabilities of the parties and their value (subject to the evidence before the Court); and
3. issuing orders that may impact third parties if they have been appropriately notified of the proceedings.

The Court can also make orders in respect of maintenance, including:

1. spouse maintenance payable either on an urgent, interim or final basis, by way of a periodic amount, non-periodic expenses or by way of a lump sum (*Family Law Act 1975* (Cth), Sections 72, 74, 75, 77 and 77A); and
2. child support where the administrative (Government agency-based) regime does not apply in certain limited circumstances, or adult child maintenance (*Family Law Act 1975* (Cth), Part VIII, Division 7).

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

Matrimonial regimes do not exist in Australia.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

As to property settlement, the Court must consider (*Family Law Act 1975* (Cth), Section 79):

1. Is it just and equitable to make an order adjusting the parties' property interests?
2. What are the assets, liabilities, superannuation and financial resources of the parties?
3. What did each party contribute to the pool of property – being financial, non-financial or home-maker parent contributions?
4. Whether either parties' contribution entitlement ought to be adjusted having regard to a host of factors, such as (*Family Law Act 1975* (Cth), Section 75(2)):
    a. the age and state of health of each of the parties;
    b. the income, property and financial resources of each of the parties and their capacity for employment;
    c. if either party has the care of any child of the relationship under the age of 18 years;
    d. commitments necessary to enable a party to support himself or herself or any other person that the party has a duty to maintain;
    e. the standard of living that is reasonable in the circumstances;
    f. the extent to which the earning capacity of a party has been affected by the relationship; and
    g. if either party is living with somebody else, the financial circumstances of their household.

2.4 Is the position different between capital and maintenance orders? If so, how?

Separately to parties' property settlement explained at question 2.3 above, the Court has the power to make orders in respect of spouse maintenance where the evidence establishes that one of the spouses has a need, such that they cannot support themselves adequately, and the other spouse is reasonably able to support them. The key factors are essentially *need* and *capacity* (*Family Law Act 1975* (Cth), Section 72). The Court has regard further to the factors such as those identified at question 2.3(4) above when determining a spouse maintenance application.

The Court can make orders as to urgent spouse maintenance, interim or final maintenance and the maintenance can be payable either by way of periodic amounts, in a lump sum or payment of specific expenses (for example, mortgage repayments, household bills).

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

If parties agree to their financial matters, they can apply to the Court for orders to be made by consent. Parties are not required to attend Court for this process. If the Court requires further information, it can issue a requisition which is then answered by the parties before the orders are made.

Alternatively, parties can enter into a Binding Financial Agreement to deal with the financial matters arising from their separation. That document need not be approved or registered by a Court, though it is implemented in much the same way as a Court order.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

Spouse maintenance is often ordered on an interim basis, that is, pending the final determination of the proceedings. Orders for spouse maintenance may be made on a final basis but it is uncommon for such orders to be for an extended period. There is no definite timeframe prescribed by the legislation – the period is determined by reference to the parties' respective *need* and *capacity*.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

The concept of matrimonial property is not a commonplace term for describing property in Australia in family matters. The term "property" is very broadly defined such that essentially all assets, liabilities, superannuation entitlements and financial resources held in the name of either party, and acquired by either party, jointly or individually, will be treated as property of the relationship/marriage (*Family Law Act 1975* (Cth), Section 4).

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Australian Courts can only apply Australian law. To file an application for divorce, parenting or financial matters in Australia, either party is required to be an Australian citizen, ordinarily resident or present in Australia for at least one year prior to the date of filing the application.

2.9 How is the matrimonial home treated on divorce?

The matrimonial home is taken into account with the balance of assets, liabilities and superannuation of the parties available for division by way of property settlement. There is no presumption as to how the matrimonial home is to be dealt with; however:

1. from time to time a party may, if circumstances warrant, file an application seeking exclusive occupation of the matrimonial home, or another property of the parties, pending the final determination of their family law matter;
2. if one of the parties seeks to retain the matrimonial property, and the other party does not, the Court will assess the adjustment of interests so that one party can "buy out" the other party; and
3. the Court will generally not make an order for the sale of the matrimonial home if one of the parties seeks to retain it, unless neither party can afford to maintain the property – particularly if enforcement action has been commenced by a mortgagee for default of repayment obligations in respect of borrowings against the property.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

The concept of trust is recognised in Australia. A trust may be implied or expressed.

A party's interest in a trust is taken into account, as are all other assets, liabilities, superannuation and financial resources of the parties. If a party has no present entitlement to trust assets (a discretionary beneficiary), that interest can be taken into account by the Court as a *financial resource* rather than *property*.

The Court can "look behind" a trust and consider who is the controller of the trust and the operation of the trust vehicle in the time prior to the parties' separation to determine whether a parties' interest in a trust is *property* or a *financial resource* (*Kennon v Spry* (2008) 238 CLR 366).

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

Financial claims can be made in Australia following a foreign divorce, provided the foreign divorce has been effected in accordance with local laws.

It may, however, be questionable whether Australia is the appropriate forum to deal with the parties' financial claims having regard to the factors listed in question 2.3 above.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

There is a significant focus on alternative dispute resolution in Australia, and a number of options are available to parties, including:

1. an independent mediator funded by the parties;
2. a Court mediation which is conducted by a registrar of the Court (a Conciliation Conference);
3. an independent arbitrator funded by the parties;
4. traditional negotiation via lawyers and parties; and
5. collaborative family law.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Marital agreements, known as Binding Financial Agreements in Australia, are legally binding and enforceable provided the strict requirements as to the form and preparation of the Agreement, and the independent legal advice in respect of the Agreement, are complied with. A Binding Financial Agreement can be entered into before, during or after a marriage or *de facto* relationship (*Family Law Act 1975* (Cth), Part VIIIA).

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

The procedural requirements for a Binding Financial Agreement

to be binding and enforceable are strict (*Family Law Act 1975* (Cth), Section 90G):

1. the Agreement must be signed by all parties; and
2. before signing the Agreement, each party must be provided with independent legal advice from a qualified lawyer about the effect of the Agreement on the right of that party, and the advantages and disadvantages at the time the advice was provided, to that party of making the Agreement, and signed statements of legal advice from each of the parties' lawyers is provided to both parties.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Binding Financial Agreements can deal with property settlement, superannuation or spouse maintenance provided the matters outlined in question 3.2 are addressed. Whilst it is possible for a Financial Agreement to also include child maintenance, it is very uncommon. It is more appropriate to document an agreement as to child support as either a Limited or Binding Child Support Agreement, as different principles apply to those types of Agreement, in particular the setting aside of any such Agreements.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

A claim for property settlement or spouse maintenance by cohabitants – *de facto* couples – is treated the same as such an application by a party to a marriage, provided the *de facto* couple separated after 1 March 2009, and provided any application for property settlement or spouse maintenance is made within two years of separation (*Family Law Act 1975* (Cth), Section 44(5)).

4.2 What financial orders can a cohabitant obtain?

Provided the matters referred to in question 4.1 are addressed, parties to an eligible *de facto* relationship can apply for the same financial orders as to property settlement and spouse maintenance as married couples. A *de facto* relationship is defined as (*Family Law Act 1975* (Cth), Section 4AA):

1. persons not married to each other and not related by family; and
2. couples living together on a genuine domestic basis, having regard to factors including:
    a. the duration of the relationship;
    b. the nature and extent of their common residence;
    c. whether a sexual relationship exists;
    d. the degree of financial dependence/interdependence, and any arrangements for financial support, between them;
    e. the ownership, use and acquisition of their property;
    f. the degree of mutual commitment to a shared life;
    g. the care and support of a child/children;
    h. the reputation and public aspects of the relationship; and
    i. whether the relationship was formally registered as a *de facto* relationship.

A *de facto* relationship can exist between:

1. two persons of different sexes;
2. two persons of the same sex; and
3. even persons that are legally married to, or in a *de facto* relationship with, another person.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

Whilst not widely sought, *de facto* relationships may be registered with the State Government registry.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Same-sex couples were permitted to marry in Australia as and from 9 December 2017 (amendment to Section 5 of the *Marriage Act 1961* (Cth)).

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

Parents can apply to the Government agency known as Services Australia (formerly the Child Support Agency) for an assessment of child support payable by one parent to the other.

The assessment is calculated by Services Australia based on a formula which includes, amongst other matters, the parties' respective incomes and required self-support amount, and the amount of time the child/children spend living with each parent. Where parties reach an agreement about child support matters and wish to formalise that arrangement, they can enter into either a Limited or Binding Child Support Agreement to reflect their agreed arrangements. These Agreements are registered with Services Australia. Different principles as to the termination of both types of Agreement apply (see *Child Support (Assessment) Act 1979* (Cth), Part 6, Division 1A).

In matters where there are pending parenting proceedings on foot before the Court, and there is an existing Services Australia assessment in place, a party may apply to the Court seeking orders by way of a departure from the administrative assessment of child support, subject to the evidence of the parties' financial circumstances (see *Child Support (Assessment) Act 1979* (Cth), Part 7, Division 4).

It is also an option for parties to make an application to the Court for adult child maintenance in respect of expenses for children over the age of 18 as to their health and education (*Family Law Act 1975* (Cth), Section 66L).

5.2 How is child maintenance calculated and is it administered by the court or an agency?

See question 5.1.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Child support continues until either the child has turned 18 years of age or concluded their secondary education (high school – year 12). Child support arrangements will terminate prior to

such time if the child marries (which is not legal in Australia for a child under 18), dies, is no longer an Australian resident or citizen, or is adopted (*Child Support (Assessment) Act 1979* (Cth), Section 12).

If a child is over 18, they can apply for adult child maintenance provided that the child (*Family Law Act 1975* (Cth), Section 66L):

1. is 17 and the order does not commence until after the child's 18th birthday, or alternatively after the child has turned 18;
2. is undertaking high school or tertiary education such as university; or
3. has a serious illness or physical disability.

5.4 Can capital or property orders be made to or for the benefit of a child?

Property settlement or lump sum child support orders (dealt with above) can be made for the benefit of a child, subject to the Court's discretion. In the event of any lump sum child support, it must be an amount more than the amount the Agency will assess the parent to pay for the benefit of that child.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

A child cannot make an application to the Family Court for child maintenance and cannot make an application to Services Australia for an assessment of child support.

A child may apply for adult child maintenance on the basis set out above.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

Parents ordinarily do not have rights *per se* for *custody*. The family law legislation in Australia promotes the best interests of the child such that the child has a right to a meaningful relationship with both parents and has a right to protected from harm (and the latter can take priority where necessary) (*Family Law Act 1975* (Cth), Sections 60CA, 60CC). The term "custody" is no longer referenced in our legislation.

Separately to living/time with parents arrangements, parents (married or unmarried) do have parental responsibility for a child as to any decisions which affect the children's long-term care, welfare and development such as health education and religion.

6.2 At what age are children considered adults by the court?

Children are considered adults at 18 years of age.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Parenting orders cannot continue beyond the child's 18th birthday, or otherwise if they were to marry, enter into a relationship, be adopted or if one of their parents died prior to the child reaching the age of 18 (*Family Law Act 1975* (Cth), Section 65H).

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

Similar to financial matters, the Court has discretion in respect of parenting arrangements. The Court can make orders dealing with the allocation of parental responsibility, the child's living arrangements, travel – whether it be domestic or international – their name, their medical care, their schooling and other matters necessary to maintain the children's wellbeing and safety (*Family Law Act 1975* (Cth), Sections 64B, 65D).

6.5 What factors does the court consider when making orders in relation to children?

The Court does not automatically make orders in relation to child arrangements in the event of a divorce.

There is again an emphasis on alternative dispute resolution and parties reaching agreement in respect of parenting orders. Unless the parties are filing an application for consent orders, parties cannot apply to the Court for contested parenting orders without having first attended (or attempted to attend) mediation with a certified family dispute resolution practitioner, unless there are circumstances of urgency or risk to the child or family violence (*Family Law Act 1975* (Cth), Section 60I).

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

In the absence of orders, both parents ordinarily have joint parental responsibility for their child (*Family Law Act 1975* (Cth), Section 61C).

Where parties have equal shared parental responsibility pursuant to orders, they ought not make decisions unilaterally as to the children's long-term care, welfare and development, such as which school the child attends, or the long-term medical treatment they receive. There is a legislated presumption that parents have equal shared parental responsibility, though that presumption can be rebutted in certain circumstances (*Family Law Act 1975* (Cth), Sections 61D, 61DA, 61DB).

If a party has the benefit of an order for sole parental responsibility, they are at liberty to solely make any decisions regarding the child's long-term care, welfare and development, subject to any restrictions imposed by an order; for example, to consult with the other parent before making a final decision.

In relation to overseas travel, it is an *offence* to take a child outside of Australia if there are current parenting orders in place or if pending proceedings are on foot (*Family Law Act 1975* (Cth), Part VII, Division 6, Subdivision E).

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

There is not a presumption of equal division of time between separating and divorcing parents; however, the legislation does require the Court at the first instance to consider whether the child spending equal time with their parents is both in their best interests and reasonably practical. If not, the Court must then look at whether it is in the child's best interests and reasonably practical for the child to spend substantial and significant time with the other parent. *Substantial and significant* ordinarily means time during the school week, on weekends, and during school holidays. Consideration is also given to the children's *best interests*, as summarised in question 7.3 (*Family Law Act 1975* (Cth), Sections 65DAA, 60CA, 60CC).

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Yes, unmarried and married parents are treated the same.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

The Judge does not meet with the children. The Judge relies on evidence from the parties, or a single expert witness may be appointed such as a counsellor, psychologist or psychiatrist, to report on the child's best interests. If the matter has had the involvement of the child welfare services, then the department will provide information to the Court.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

Independent children's lawyers are appointed in appropriate matters to represent the children's best interests. They are not required to take instructions as such from the child but are to take into account their views which are given weight as determined by the Court, having regard to the child's age, maturity and background (*Family Law Act 1975* (Cth), Part VII Division 10).

An independent children's lawyer may be appointed in matters involving, for example, allegations of child abuse, intractable conflict between the parties and child alienation (*Re: K* (1994) FLC 92-46).

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Any person concerned with the care, welfare or development of a child may apply for parenting orders in relation to that child (*Family Law Act 1975* (Cth), Section 65C). This may include grandparents, aunts, uncles, stepparents or siblings. The same processes as to family dispute resolution apply, as outlined above.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

A parent should not move to another state or country without the other parent's consent, particularly where such relocation will impact the child's ability to have a meaningful relationship with both parents.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

This depends on the location and again practicability – whether it will impact the child's relationship with the other parent (see, for example: *A v A: Relocation Approach* (2000) FLC ¶93-035; *B and B: Family Law Reform Act 1995* (1997) FLC ¶92-755; *AMS v AIF*; *AIF v AMS* (1999) FLC ¶92-852; *U v U* (2002) FLC ¶93-112; and *MRR v GR* (2010) FLC ¶93-424).

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

When considering the concept of *reasonable practicability*, the Court must take into account how far apart the parents live (or propose to live) from each other, their current and future capacity to implement an equal time, or substantial and significant time, arrangement, and the impact of the proposed arrangement upon the child (*Family Law Act 1975* (Cth), Sections 65DAA, 60CA).

The Court is also required to consider the *best interests* of the child, which include (*Family Law Act 1975* (Cth), Section 60CC):

1. the benefit to the child of having a meaningful relationship with both parents;
2. the need to protect the child from harm;
3. the child's views;
4. the nature of the child's relationship with both parents and other relatives;
5. the extent to which each of the parties have participated in decision-making for the child and to spend time with and communicate with the child, and their respective attitude to the child and parenting responsibilities;
6. the likely effect of any changes to the child's circumstances upon the child;
7. the practical difficulty and expense of a child spending time with or communicating with both parents;
8. the capacity of either parent to provide for the child's needs, the maturity and background of the child;
9. the existence of any family violence orders; and
10. the desire to avoid further proceedings between the parties.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

Refer to question 7.3 above.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

As each case is judged on its merits and inherently each family is different, the circumstances of the matter will dictate whether inter/intrastate or international relocation is permitted.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Australia is party to the Hague Convention (*Family Law (Child Abduction Convention) Regulations 1986* (Cth)).

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

Presently, there are two Courts primarily hearing family law cases – the Family Court of Australia and the Federal Circuit Court of Australia. In February 2021, the Australian Government announced the passing of legislation to essentially merge both Courts into the Federal Circuit and Family Court of Australia (FCFCOA), which will have two divisions (Federal Circuit and

Family Court of Australia Act 2020 and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2020). The "merger" means there will be only one point of entry for all family law applications and Division 1 will hear the more complex cases. The "new look" FCFCOA will commence from 2 September 2021.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

The family law Courts in Australia have very swiftly adapted to the online environment following the outbreak of the COVID-19 pandemic. Essentially, all matters, whether being a procedural listing, an interim hearing or a final hearing, were dealt with either by telephone or Microsoft Teams. For the most part, despite technological mishaps from time to time that we all experience, the systems the Court put in place worked well. Whilst the Courts have begun to resume face-to-face hearings, it is anticipated that procedural listings and some interim matters will continue to be dealt with virtually. The Court also introduced the COVID-19 List, a specialised list hearing applications for issues arising specifically due to the pandemic, that are heard and determined very promptly (see Joint Practice Direction 1 of 2021 – The COVID-19 List).

The Court had already in recent years established an online filing system, although this became uniform for Court filings following the onset of the pandemic.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

Whilst there are understandably polarised views about the merger of the two Courts, discussed in question 8.1 above, a benefit of this will hopefully be the harmonising of the rules and procedure in family law matters. Presently, the rules and procedure are different in each of the Courts despite both Courts dealing with the same subject matters, though with different levels of complexity.

Carly Mirza-Price is a Partner in the Mills Oakley Family Law team in Sydney. She has over 12 years of experience working exclusively in family law. Carly has a sound expertise in matters including property settlements involving complex financial and corporate structures and third-party issues, parenting matters (domestic and international), binding financial agreements, child support and collaborative family law.

Expertise

In 2018, 2019 and 2020, Carly was named in the Rising Star Category – Family Law of *Doyle's Guide*.
In 2021, Carly was named in the *Doyle's Guide* Leading Parenting & Children's Matter category.
Carly is dedicated and committed to meeting the needs of her clients. Whilst Carly has extensive experience in litigated matters, she is dedicated to working with clients to resolve their family law matters as quickly and effectively as possible. Carly endeavours to support her clients by providing practical and relevant solutions to their family law issues. She has a genuine interest in striving to achieve outcomes for her clients that provide them with closure following a very difficult stage of their life, individually and for their family.

Professional qualifications

- Specialist Accreditation in Family Law (NSW Law Society) – 2015.
- Bachelor of Laws (University of Wollongong) – 2009.
- Graduate Diploma in Legal Practice (University of Wollongong) – 2009.

Other roles and associations

- Member of the Law Society of New South Wales.
- Member of the Family Law Section, Law Council of Australia.
- Member of the Women Lawyers Association of New South Wales.
- Member of the Central Sydney Collaborative Family Law Practice Group.
- Member of Collaborative Professionals (NSW) Inc.
- Member of the Australian Association of Collaborative Professionals.
- Member of the International Academy of Collaborative Professionals.

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Canada – Ontario


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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

Divorces in Ontario are governed by the federal Divorce Act. An Ontario court has jurisdiction where either spouse has been ordinarily resident in the province for at least one year immediately before commencing the proceeding. The residency requirement is a question of fact. The court considers such factors as whether the spouse resided in the province as a customary mode of life as opposed to merely casually or occasionally, and whether the spouse had the intention of making a home in that province for an indefinite period. This is not dependent on citizenship, domicile or immigration status. The other spouse may argue that another jurisdiction presents a more convenient forum.

If neither spouse resides in Canada at the time of the application and each of the spouses is residing in a foreign jurisdiction that does not recognize the validity of their marriage, the federal Civil Marriages Act provides that a court in the province where the spouses were married may grant a divorce.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

A court may grant a divorce where there has been a breakdown in the marriage. A breakdown in the marriage can be established only in the following circumstances:

- the spouses have lived separately and apart for a period of not less than one year immediately before the divorce is granted;
- the other spouse has committed adultery; or
- the other spouse has been physically or mentally cruel to render a continuation of cohabitation intolerable.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

Parties need not attend court to obtain a divorce. Once the 30 days for a response to the divorce application has lapsed, the spouse applying for the divorce can proceed to file written documentation for a Divorce Order. It is not possible to have a private divorce.

1.4 What is the procedure and timescale for a divorce?

The timeline for obtaining a divorce depends entirely on whether the divorce application is contested and whether other relief aside from a simple divorce is being requested.

The first step to obtaining a divorce is to prepare a divorce application. This document will be relatively straightforward where the only claim is for a divorce. This application can be jointly prepared and submitted by the parties. If other relief is sought (such as property division, support, parenting orders), a more detailed application will be required along with additional documents.

The application must then be issued by the court. The application will be served on the other party, who has 30 days to respond. The other party may make claims for other relief in their answer.

The next steps will depend on whether the other party files responding material and whether claims for additional relief have been made. If they do not file any responding material, and the only claim being made is for a divorce, a divorce may be granted within months. If other claims are made, the next step may be an uncontested trial without an oral hearing, which can occur relatively quickly.

If the other party does file responding material, the next step is for the parties to schedule a case conference with the court, which is a relatively informal court appearance designed to allow both parties to appear before a judge and explore the issues, discuss possible settlement and determine the next steps in the case. If the matter does not resolve at the case conference, either party will be free to bring a motion on any issues in the case and the matter will eventually proceed to trial, following further court conferences.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Before a court will grant a divorce in Canada, it needs to be satisfied that reasonable arrangements have been made for the support of any children.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Canada will recognize a foreign divorce so long as the divorce is valid in the other country and one or both of the spouses was ordinarily resident in the other country for at least a year immediately before applying for a divorce. To remarry in Ontario, the couple must provide a legal opinion from an Ontario lawyer to confirm that the foreign divorce should be recognized and they must jointly sign a statement of sole responsibility that their foreign divorce will be recognized in the province.

1.7 Does your jurisdiction allow separation or nullity proceedings?

A nullity, or annulment of the marriage, can be sought in circumstances where one of the requirements for the validity of the marriage does not exist or where there are allegations of fraud. Some of the requirements for a valid marriage include age, capacity to consent, and solemnization.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

A divorce proceeding commenced in Canada can be stayed where a court determines that the foreign jurisdiction is the more convenient forum. Some of the factors a court will consider in making this determination include:

- the location of the parties;
- the location of the key witnesses and evidence;
- the avoidance of a multiplicity of proceedings;
- contractual provisions that specify applicable law or accord jurisdiction;
- the application law and its weight in comparison to the factual questions to be decided in the case;
- geographical factors suggesting the natural forum; and
- whether declining jurisdiction will deprive the spouse who commenced the proceeding in Canada of a legitimate juridical advantage available in the domestic court.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

The court can make orders in respect of child support, spousal support and property division.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

In Ontario, the Family Law Act deems all marriages to be economic partnerships. At the end of the marriage, whether by separation or death, a spouse may seek an equalization payment from the other. The equalization calculation provides for the parties to share an increase in wealth during the marriage. All forms of property are valued at the date of marriage and the date of separation, with certain assets unrelated to the partnership, such as inheritances during the marriage, being excluded. In rare cases, a court may order unequal division where equalization would be unconscionable.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

A court will consider factors related to the financial circumstances of the parties, including income, assets and liabilities both during the marriage and following separation. The circumstances and actions of the parties around the time of separation may also be relevant depending on the claims being made. In spousal support claims, the length of the marriage, the impact of childcare responsibilities, and the financial consequences of marriage breakdown to the parties are considered.

2.4 Is the position different between capital and maintenance orders? If so, how?

Maintenance orders in Canada are termed spousal support orders. Spousal support orders are distinct from property orders. They are covered by different legislative provisions and are more discretionary in nature. However, a court may consider the amount a party receives by way of an equalization payment when deciding on the issue of support.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

If the parties reach an agreement on the financial issues, they do not need to attend court and obtain a court order. The parties can simply execute a written agreement, which will be recognized and enforced by the courts as long as it complies with formalities of a domestic contract as prescribed by the Family Law Act.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

Spousal support orders are commonplace in Ontario and can be time-limited or indefinite depending on various factors, such as the length of the marriage and the age of the parties at the time of separation.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

In Ontario, there is no special category of matrimonial property. All forms of property are equalized under the Family Law Act.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Foreign nationals are not treated differently assuming jurisdiction is found. In very restricted circumstances, foreign law may apply with respect to property rights if the parties separated while living in another jurisdiction.

2.9 How is the matrimonial home treated on divorce?

In Ontario, any home that the parties ordinarily occupied at the time of separation has special treatment in equalization. The owner of the home may not claim a deduction for the same property at the date of marriage. Moreover, regardless of

legal ownership, both parties have a right of possession to the home until divorce or court order and neither party can sell or encumber the property without the other party's consent.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

Trusts are recognized in Ontario.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

Ontario courts do not have jurisdiction to hear and determine spousal support claims following a valid divorce in another jurisdiction. An Ontario court may have jurisdiction under the Family Law Act to determine child support and family property claims.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Parties may resolve their disputes by negotiation, mediation, arbitration or litigation.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Parties may enter domestic contracts disposing of support and property rights before, during or after a marriage. A foreign contract governing such rights will be enforceable if it meets the formal validity requirements set by the Family Law Act. Domestic contracts concerning parenting will not be enforced if they are not in the child's best interests. Domestic contracts concerning child support that depart from Child Support Guidelines will not be enforced. Domestic contracts may be set aside if the parties did not make comprehensive financial disclosure, did not understand the nature and terms of the contract, or otherwise under the law of contract.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

A marital agreement must be in writing, signed by both parties, and witnessed.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Marital agreements can cover all financial claims for property and support. Agreements concerning child support that depart from the Child Support Guidelines will not be enforced.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

In Ontario, cohabitants have rights to support and may make equitable claims for relief in relation to property but do not have the right to equalization.

Unmarried spouses have spousal support rights if they have cohabited for at least three years. They may make common law property claims or equitable claims for unjust enrichment, other restitutionary claims or resulting trust claims.

4.2 What financial orders can a cohabitant obtain?

Cohabitants may claim child support, spousal support or assert common law or equitable property claims.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

There is no formal partnership status.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Same-sex couples may marry throughout Canada.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

A parent may claim child support on behalf of his or her child following separation where that parent is the child's primary caregiver or there is a shared parenting arrangement.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Child support is determined under the Child Support Guidelines, which calculate monthly child support based on the parenting arrangements, income and the number of children. In addition, a parent may seek contribution to special or extraordinary expenses including childcare, private school or university expenses.

Where the payor spouse earns over $150,000 per year, the court has discretion to order an amount of support that differs from the Guidelines after considering the condition, means, needs and circumstances of the parties and the children.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Parents must pay child support as long as the child is a dependent, even if over the age of majority, if that child is unable to withdraw from parental control because of illness, disability or education.

5.4 Can capital or property orders be made to or for the benefit of a child?

Family property rights are reserved for parents.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

A dependent child, whether a minor or a legal adult, may apply for support from a parent but this is rare.

Child support is determined under the Child Support Guidelines. An adult child will need to demonstrate that he or she is still a dependent and unable to withdraw from parental control because of illness, disability or education.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

All parents, whether married or unmarried, may make claims for parenting orders with respect to decision-making and/or contact with a child. Newly proclaimed legislative amendments at the federal and provincial level have removed the use of the term "custody".

6.2 At what age are children considered adults by the court?

A child is considered an adult at 18 years old.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Parenting orders do not operate once a child reaches the age of 18 years or marries.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

A court can make parenting orders. Contact orders address the time a parent is scheduled to be with a child and the right to make inquiries and be given information concerning the child's health, education and welfare. Decision-making orders address the right to make major decisions for a child in relation to health, education, and welfare. A court can either grant sole or joint decision-making. A court can also make orders about the physical residency of a child. This physical residency can either be granted primarily to one parent, or can involve a sharing of time between parents.

Parents are free to reach their own agreement about the parenting arrangements following separation and this agreement will be respected by the court so long as it accords with the best interests of the child.

6.5 What factors does the court consider when making orders in relation to children?

The primary consideration when making a decision in relation to children is the best interests of the children in the circumstances. In Ontario, a court will consider the love, affection and emotional ties between the child and the parties, the child's views and preferences, and the ability and willingness of the parties to meet the needs of the child. A court will also consider the willingness of a parent to facilitate contact between the child and another parent.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

Without a court order or written agreement in place in respect of decision-making, parents may have difficulty unilaterally registering a child for a school-related program, counselling or medical treatment absent proof of the consent of the other parent. A parent should not remove a child from the jurisdiction without the other parent's consent.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

There is no set presumption in the law for an equal division of time between separating or divorcing parents.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Regardless of whether a claim is being made by a married or unmarried parent, the legal test and the considerations are the same: the best interests of the child.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

A court may order an assessment to report on the needs of the child and the ability and willingness of the parents to meet these needs by a qualified third-party professional. The author of this report must be appointed by the court prior to starting the assessment process and will typically be an independent mental health professional with experience in the area of family disputes. The court will consider the final assessment report prepared by this professional when making a decision about parenting of a child. A court may also obtain the views and preferences of the child by way of a judicial interview or by appointing legal representation for the child.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

An independent branch of the Ontario Government called the Office of the Children's Lawyer provides legal representation to children and youth in child welfare and custody/access matters across the province.

In parenting cases, the court has the discretion to order legal representation for the child under the Children's Law Reform Act. Once this order is made, the Office of the Children's Lawyer will then determine whether to actually appoint a lawyer to act for the child. This decision will be made based on the circumstances of the case and available resources.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Any person including a grandparent or step-parent may apply for parenting orders for a child. The parties may resolve parenting disputes by negotiation, mediation, arbitration or litigation.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

A parent with decision-making authority may move a child to another jurisdiction if the other parent does not object despite notice or with a court order.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

A parent with decision-making authority may move to another part of Ontario or another Canadian jurisdiction if the other parent does not object despite notice or with a court order.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

A court must consider the child's best interests, considering:

- the reasons for the relocation;
- the impact of the relocation on the child;
- the amount of time spent by each parent with the child and level of involvement in the child's life;
- provision of notice of the relocation;
- existence of a court order, arbitral award or agreement with respect to the child's place of residence; and
- reasonableness of the proposal for parenting time following the move and compliance with existing obligations under a court order, arbitral award or agreement.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

The factors are the same whether the proposed move is abroad or within Ontario or Canada.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

These cases are highly fact-driven. It is fairly common for relocation applications to be approved.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Canada is a signatory to the Hague Convention. Ontario has incorporated the terms of the Convention into provincial legislation (the Children's Law Reform Act) and made it clear that these terms override any conflicting provincial legislation.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

The Divorce Act and the provincial Children's Law Reform Act have been amended to modernize parenting provisions, require courts to consider domestic violence in making parenting determinations, and to prescribe the relevant factors for relocation cases.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

In response to the COVID-19 pandemic, the courts implemented electronic filing and remote hearings including conferences, motions, and trials. It seems likely that many of these changes will be permanent as they have enhanced access to justice and reduced costs.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

Under Ontario's current laws, unmarried spouses only have equitable property claims and do not have access to the family property regime that applies to married spouses. This causes confusion and merits review.

Sarah Boulby has practiced family law since 1993. She advises clients located in Ontario and internationally on complex support, property and parenting issues. She negotiates agreements and represents clients in court at the trial and appellate level as well as in mediations and arbitrations. Sarah acts for clients based in Ontario and internationally.

Sarah is listed in *Best Lawyers*. Sarah is ranked by *Lexpert* as one of Toronto's Leading Practitioners of Family Law. She is a Fellow of the International Academy of Family Lawyers, a worldwide organization of family lawyers recognized by their peers as leading lawyers in their countries. Sarah is the past President of the Canadian Chapter of the Academy. Sarah is a member of the Law Alumni Association Council of the University of Toronto Faculty of Law. She also serves as a Director of the Toronto Lawyers Association and is Chair of the Family and Estates Committee of that organization. Sarah speaks and writes frequently on family law issues.

Sarah graduated from Queen's University with an Honours Bachelor of Arts in 1986 and a Master of Arts in 1989. She graduated with an LL.B. from the University of Toronto in 1991. Sarah served as Law Clerk to Mr Justice Peter Cory at the Supreme Court of Canada in 1991–1992 and was called to the Ontario Bar in 1993. She was counsel to the Ontario Law Reform Commission and since 1993 has practiced as a family lawyer.

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Oren graduated from York University with an Honours Bachelor of Arts in 1995. He obtained a Master of Arts in 1997 from the University of Toronto. He graduated from the University of Western Ontario with an LL.B. in 2004. He was called to the Ontario Bar in 2005.

Oren is a member of the Ontario Bar Association and the Advocates' Society. He is a Fellow and Governor of the International Academy of Family Lawyers and is the Treasurer of the Canadian Chapter. Oren is recognized by *Best Lawyers* and is ranked by *Lexpert* as one of Toronto's Leading Practitioners of Family Law.

Oren is a certified specialist in mediation. He was granted the FDRP Med designation by FDRIO – the Family Dispute Resolution Institute of Ontario. Oren also participated in the Program on Negotiation at the Harvard Negotiation Institute where he completed the Mediating Disputes Workshop. As a mediator, Oren focuses on his clients' interests in order to tailor a solution-focused process that promotes the parties' participation in resolving their own differences. Oren also arbitrates and is a Disputes Resolution Officer for the Ontario Superior Court of Justice.

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Kenneth Fishman has practiced family law exclusively since his call to the Bar in 2009. He has extensive experience in all aspects of family law including negotiating and drafting domestic contracts and advocating for clients before all levels of court in Ontario. He also frequently represents clients at both mediations and arbitrations. His significant experience includes assisting clients with issues related to child and spousal support, property division, and parenting. Kenneth acts for clients based in Ontario and internationally.

Kenneth graduated from York University with a Bachelor of Arts in 2001. Kenneth graduated from the University of Ottawa with an LL.B. in 2008.

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Boulby Weinberg LLP is a firm of experienced family law lawyers. Sarah Boulby and Oren Weinberg are both listed in Best Lawyers International. Both Sarah Boulby and Oren Weinberg are Fellows of the International Academy of Family Lawyers, a worldwide organization of family lawyers recognized by their peers as leading lawyers in their countries. Boulby Weinberg LLP regularly deals with all aspects of family law, including support, property division and custody/access for both local clients as well as those abroad. The firm provides a full breadth of services to clients, from the negotiation of agreements to attending at mediation, arbitration or court.

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

The Divorce Act is a Federal act. The Act is applicable to all provinces and territories of Canada, including the province of Québec. In order to apply for a divorce in Québec, one of the spouses must have been residing in the province of Québec for a period of one year prior to filing the application. Note that it is one of the spouses that must have been residing in Québec, not necessarily the applicant spouse. Therefore, the ground for jurisdiction for divorce proceedings is residence.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

The Divorce Act provides, in its section 8, that a spouse may apply for a divorce when there is a breakdown of the marriage. The breakdown of the marriage is established only if:

(a) the spouses have lived separately and apart for at least one year immediately preceding the determination of the divorce proceedings and were living separately and apart at the commencement of the proceedings; and

(b) the spouse against whom the divorce proceedings is brought has, since celebration of the marriage, committed adultery, or has treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

We habitually consider that there are three grounds for divorce: (1) separation for at least one year; (2) adultery; and (3) physical or mental cruelty.

As for uncontested divorces, it is not possible to proceed on this basis alone, since one of the grounds for divorce must be alleged in the proceedings. It is, however, possible for parties who have completely settled all of the consequences of their divorce to file a joint application for divorce.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

If the divorce is uncontested as defined in question 1.2 (meaning, if the parties have filed a joint application), it is possible to obtain a divorce judgment without appearing in court, as long as all the proper documents and forms have been completed and filed at the same time as the joint application.

Alternatively, if the parties have not filed a joint application but have come, nonetheless, to a complete settlement, they can, with the assistance of their attorneys, file all the required documents and forms and obtain a divorce without having to attend court.

In both cases, a judge might require the presence of the parties should he or she need extra information or accuracies with regard to the documents submitted or the allegations they contain.

1.4 What is the procedure and timescale for a divorce?

The procedure is an application for divorce and corollary relief. When the application is served on the other spouse (the defendant), this spouse has 15 days to file a response and then three months to establish a protocol for the different steps of the procedures leading to a hearing. If the served spouse resides outside the jurisdiction of Québec, then the period in which they have to respond is 30 days. A protocol must also be established.

Depending on the nature of the corollary relief and the degree of contestation, it is possible for it to take up to two years before a divorce judgment is rendered. But often, within a year or a year-and-a-half, most cases are resolved.

Before the divorce application is heard, one or both of the parties normally applies for provisional measures in order for the questions of custody, child support and spousal support to be heard on a more timely basis. If there is urgency to be heard on any of these questions, it is possible to file for an order to safeguard. This application can be heard after 10 days' notice. In the case of extreme urgency, the 10-day period can be reduced.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Yes, the Divorce Act provides for the possibility of the court to render a divorce judgment that does not resolve all corollary measures. However, our courts will normally agree to pronounce a divorce judgment without resolving all the associated matters provided that all questions related to the children are heard and resolved. All other matters can be decided or claimed at another time.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Yes, but not all of them. The Divorce Act says that if either

spouse was ordinarily resident in the foreign country or subdivision for at least one year immediately preceding the commencement of proceedings for the divorce, then the foreign divorce judgment can be recognised "for all purposes of determining the marital status in Canada of any person". If the residency criterion is not respected, it will not be recognised.

If there are corollary reliefs attached to the divorce judgment, the foreign judgment must go through the process of recognition and enforcement as provided by our Code of Civil Procedure (C.C.P.) (Art. 507). A certificate from a competent foreign public official stating that the decision is no longer appealable in the State in which it was rendered or that it is final or enforceable must be filed with the application.

This application can be contested on the basis of section 3155 of the Civil Code of Québec (C.C.Q.), which states that:

A decision rendered outside Québec is recognised and, where applicable, declared enforceable by the Québec authority, except in the following cases:

(1) the authority of the State where the decision was rendered had no jurisdiction under the provisions of this Title;
(2) the decision, at the place where it was rendered, is subject to an ordinary remedy or is not final or enforceable;
(3) the decision was rendered in contravention of the fundamental principles of procedure;
(4) a dispute between the same parties, based on the same facts and having the same subject has given rise to a decision rendered in Québec, whether or not it has become final, is pending before a Québec authority, first seized of the dispute, or has been decided in a third State and the decision meets the conditions necessary for it to be recognised in Québec;
(5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations; and
(6) the decision enforces obligations arising from the taxation laws of a foreign State.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Yes. Judgments regarding both separation as to bed and board (Art. 493ss C.C.Q.) and nullity of marriage (Art. 380ss C.C.Q.) can be pronounced.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Yes. However, it is not automatic. The criteria for such requests can be found in Book Ten: Private International Law of the C.C.Q. It is at the discretion of the judge.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

The court can make orders on the partition of the family patrimony (which includes the family residence, secondary residence, movables included in both residences, family vehicles, pension plans whether private or governmental, RRSP (registered retirement savings plan) and RRQ (Régie des rentes du Québec)), partition of the matrimonial regime, child/spousal support, compensatory allowances and provision for costs.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

Yes, they do. The matrimonial regime by default is the partnership of acquests. When applying for a divorce, the dissolution of the matrimonial regime and the division of the assets of the regime forms part of the different corollary reliefs requested.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

The C.C.Q. provides for the rules concerning the division of the family patrimony and the division of the assets of the matrimonial regime that are applied by our courts. As for child support, it is determined according to specific regulations that have established guidelines. The C.C.Q. also establishes rules for child support, arrears and special costs. These rules also indicate when a judge can exercise his discretion not to apply said rules.

2.4 Is the position different between capital and maintenance orders? If so, how?

Even though we could say that everything is codified and regulated, there is always some room for discretion, both in capital and maintenance orders. Child support is the top priority for judges, and they will render orders to make sure children are not deprived.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

If the parties were married and they agree on financial matters, it is still necessary to obtain a court order (although they might not have to attend court) in order to have their divorce finalised.

Moreover, a judgment is necessary in order for third parties to be able to obtain the execution of the parties' agreement.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

The duration of spousal maintenance orders varies on a case-by-case basis. Some judgments will provide a specific duration based on the parties' situation (age, duration of the marriage, financial situation, professional situation, etc.), while others will not specify any. It is also possible for a judge to order that a lump sum be paid as spousal support.

Spousal support used to be a lot more common when it was the norm for women to stay home and men to work. Since then, it has been becoming less common since both spouses usually work and are able to be financially independent.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Refer to question 2.1, where the notion of family patrimony is explained. It does exist.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Everybody is treated equally in divorce procedures and in all other family matters. Since the criterion for the jurisdiction of

the court is residence, nationality has no bearing. Foreign law might be applicable in the case of a divorce to explain and apply the foreign matrimonial regime. The foreign law must then be alleged and brought into evidence, otherwise it will be Québec law that will apply with respect to the matrimonial regime.

2.9 How is the matrimonial home treated on divorce?

Since the matrimonial home is part of the family patrimony, it will be included in the patrimony and the total net value of the patrimony will be divided equally (though one or both of the spouses may benefit from certain deductions provided at Art. 418 C.C.Q.). There is a possibility for an unequal division of the family patrimony, based on: the brevity of the marriage; the dilapidation of certain property by one of the spouses; or the bad faith of one of the spouses.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

Yes, it is. The C.C.Q. has codified the concept of trusts at section 1260 *et seq.* There are three types of trusts: for personal purposes; for private purposes; and for social utility purposes.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

Yes. With regard to child or spousal support, they can be modified if one of the parties can demonstrate a change in circumstances.

A party could also ask for the partition of the assets in Québec if such were not dealt with in the foreign divorce proceedings.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Parties are encouraged to attend mediation sessions (in fact, if the parties have children, they are entitled to five free mediation sessions). It is possible to attend mediation before or during divorce proceedings. There is also the process of collaborative law, in which one can choose to negotiate with the other party and their attorneys. It is also possible to attend a Settlement Conference, which is presided over by a Superior Court judge.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

The notion of marital agreements in Québec is not the same as in other provinces or countries. In fact, they are not the traditional "prenups". Our agreements are called "marriage contracts", and can include a range of clauses, including the chosen matrimonial regime and successoral provisions. However, to be enforceable, these marriage contracts must be notarised and must respect the rules of the partition of the family patrimony as well as those of the chosen matrimonial regime (for example, a couple could not include a clause specifying that the sums they contribute to their personal RRSP following the marriage will not be partitioned).

If the agreement is a foreign agreement, it must respect public order, as well as the rules of Québec law.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

The party who wishes to make a claim based on the marriage contract must include a specific conclusion to this effect in their divorce application and file the marriage contract into evidence. The marriage contract must be notarised.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

No. These claims are dealt with at the time of the divorce and are directly related to the parties' financial situations at that time.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

Cohabitants without children do not have financial claim *per se*. If they do own properties jointly, the general civil rules concerning partition of these properties will apply. There is one exception and it is not related to the civil law rules but to the fiscal rules, which recognise that cohabitants of more than a year are treated like a married couple. This entitles them to the partition of their Québec Pension Plan, which is a pension plan that everyone who works must contribute to. There are also some private pension plans that will apply the same criteria as the fiscal authorities for the partition of their pension plan.

4.2 What financial orders can a cohabitant obtain?

If a cohabitant has enriched the patrimony of the other to his or her own detriment, he or she could make a claim under the notion of unjust enrichment, which is codified at section 1493 of the C.C.Q.: a person who is enriched at the expense of another shall, to the extent of his enrichment, indemnify the other for the latter's correlative impoverishment, if there is no justification for the enrichment or the impoverishment.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

From a legal point of view (*versus* a fiscal point of view), there is no formal partnership status for cohabitants.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Yes. Same-sex couples are permitted to marry or enter into a civil union.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

Parents can request child support, which is calculated according to the provincial or Federal guidelines, depending on whether

or not the parents were married and where they are currently residing. They can also request that the special expenses for their children be shared between the parents. These special expenses can include private education, extracurricular activities, dental and orthodontic fees, etc.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

When both parents live in the province of Québec, whether or not they were married, child support is determined according to the provincial guidelines. The parties must fill out the child support determination form, which calculates the available revenue of both parties in order to determine the amount of child support that is payable. The income of both parents is taken into consideration.

When one parent lives in Québec and the other lives in another province or country and the parties are divorced, then the Federal guidelines are applied.

Finally, if one parent lives in Québec and the other lives in another province of Canada, but the parties were *not* married, then it is the Québec guidelines that are applied.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

A parent must pay child support or provide financial support for their children until they are of full age and considered able to support themselves. Consequently, the parent providing support for their full-aged child can seek support from the other parent while the child attends university. The full-aged child can also seek maintenance from both his/her parents while he/she is attending university.

5.4 Can capital or property orders be made to or for the benefit of a child?

Child support is payable on a monthly basis. In order to secure future child support payments, a parent can register a legal mortgage on the property of the debtor.

The court might also decide that either a part or all of the child support be paid as a lump sum. The court could order that a trust be constituted for managing the lump sum and securing the payments.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

Yes, an adult child can make a financial claim for support if the adult child is still attending university and not residing with his/her parents. The court will consider the child's income and specific situation (for example, third degree or first degree).

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

The parents, whether married or unmarried, have the same rights towards their children, including custody rights. According to the Divorce Act, which was modified on 1 March 2021, custody is now referred to as "parental time".

6.2 At what age are children considered adults by the court?

A child is considered adult (or full-aged) by the court when he/she turns 18 years old.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Children orders last until the child is 18 years old or until they have completed their studies, enabling them to work.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

Most of the time, an application for divorce filed by a parent will include a request for parenting time, decision-making responsibility, contact order (by a person other than a spouse), child support, relocation if need be and other matters. As child support relates to public order, a parent cannot renounce it.

6.5 What factors does the court consider when making orders in relation to children?

The court's main consideration is the best interests of the children. This notion is now defined in section 6.1 (3) of the amended Divorce Act:

> "(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including
>
> (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
>
> (b) 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;
>
> (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
>
> (d) the history of care of the child;
>
> (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
>
> (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
>
> (g) any plans for the child's care;
>
> (h) 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;
>
> (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
>
> (j) any family violence and its impact on, among other things,
>
> (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and

(ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and

(k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child."

The court also considers the impact of family violence when making orders in relation to children. The court will consider:

(a) the nature, seriousness and frequency of the family violence and when it occurred;
(b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;
(c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
(d) the physical, emotional and psychological harm or risk of harm to the child;
(e) any compromise to the safety of the child or other family member;
(f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
(g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and
(h) any other relevant factor.

For financial orders, the court will apply the guidelines and will take into account the financial situation of the parents, if relevant.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

A parent cannot do anything unilaterally concerning their children unless otherwise specified in a court order.

However, according to the amended Divorce Act (section 16.9 (1)), a person who has parenting time or decision-making responsibility with respect to a child can now relocate with the child after notifying their intention to relocate to any other person who has parenting time, decision-making responsibility or contact under a contact order in respect of that child at least 60 days before the expected date of relocation, if the parent receiving the notice does not contest the relocation within 30 days of being notified.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

No. The sole criterion applicable is the best interest of the children, which does not mean that they should share their time equally between their parents.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

With regard to orders related to children, yes.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

A welfare report (or "psychosocial expertise") is not prepared by default. In fact, if a party would like a report to be prepared, they must ask the permission of the court and demonstrate why such a report is necessary.

Children rarely meet the judges, though they can be represented by an attorney who might request that the child meet the judge. Again, the party who would like the child to be represented must present an application to the judge in order for them to authorise the child to be represented.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

Separate representation for children by a lawyer is possible. As explained above, an application must be made to the court in order for a lawyer to be appointed as the child's representative.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

No other adult has a say in relation to the arrangements for the children, though they can testify during the hearing in order to relay to the court their own experience with the children and their parents or extended family. A person other than a parent can, however, request a contact order according to the amended Divorce Act.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

Where divorced parents are concerned, the custodial parent who wishes to move must inform the other parent. If the other parent does not respond to the notice in the prescribed period or does not contest, the custodial parent can relocate with the children.

In all other cases where the amended Divorce Act is not involved, it depends. If a judgment has been rendered and does not include specific orders with regard to relocation or change of residence, the custodial parent can, technically, move with the child without the other parent's consent.

However, if this move interferes with the other parent's access, then such parent can file criminal charges against the parent who has relocated with the child without his/her consent, even though the Hague Convention would not apply.

If the judgment specified that neither parent can change the child's residence without the authorisation of the other parent, then the custodial parent cannot move.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

The same answer as above applies. Once one leaves the province of Québec, it is considered another State or country even though one is still in Canada.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

The amended Divorce Act has somewhat codified the criteria defined in the Supreme Court decision *Gordon v. Goertz*.

Section 16.92 (1) now lists a series of factors that should be taken into consideration, in addition to the factors considered to determine parenting time, when authorising the relocation of a child:

(a) the reasons for the relocation;
(b) the impact of the relocation on the child;
(c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
(d) whether the person who intends to relocate the child complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement;
(e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
(f) the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and
(g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

The Divorce Act also specifies that the court cannot consider the fact that a person requesting to relocate with the child would do so without the child, should the authorisation not be granted.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

The same factors are taken into account for a move to a different city or province.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

In the past, the custodial parent's request to relocate internationally or interstate was almost always granted. With the amended Divorce Act, we will have to wait at least a year to determine if this trend is maintained.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

The province of Québec is party to the Hague Convention and has consolidated the principles and rules set out in the Hague Convention in the "Act respecting the civil aspects of international and interprovincial child abduction".

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

The most significant development in family law in Québec is undoubtedly the amended Divorce Act, which came into effect as of 1 March 2021, and whose amendments include: the vocabulary used in family law; the acknowledgment of family violence (including conjugal violence), its definition and the requirement for it to be considered when rendering a decision; the provision of specific rules for relocation and for change of residence; and the creation of a contact order for persons other than spouses or ex-spouses.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

Virtual hearings have been put in place because of COVID-19. We believe that virtual hearings, when there are no witnesses to testify, will remain. However, when witnesses must testify, including the parties, in-person hearings are much better.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

We believe parenting coordination should be considered and implemented in our jurisdiction.

Sonia Heyeur has been a member of the Québec Bar since 1984, having developed a broad expertise in the prevention and resolution of child abduction and, over the past 20 years, in the field of international family law. For several years, she also worked in immigration law, and acted as an Immigration Judge (*arbitre*) from 1990 to 1992.
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Me Jessop is passionate about international family law and has a particular interest in parental child abduction cases, as well as relocation cases.
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Heyeur Jessop is a boutique firm which focuses on international family law matters revolving around children, notably parental child abduction (Hague Convention and non-Convention cases), relocation and international divorce and custody cases.
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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

At the time of writing, jurisdiction to commence divorce proceedings in England and Wales is established under s5(2) of the Domicile Matrimonial Proceedings Act 1973. The courts of England and Wales will have jurisdiction for divorce proceedings where:

- The spouses are habitually resident in England and Wales.
- The spouses were both last habitually resident in England and Wales and one of them continues to reside there.
- The respondent is habitually resident in England and Wales.
- The applicant is habitually resident in England and Wales and has resided there for at least one year immediately before the application was made.
- The applicant is domiciled* and habitually resident in England and Wales and has resided there for at least six months immediately before the application was made.
- Both spouses are domiciled in England and Wales.
- Either spouse is domiciled in England and Wales.

*Note that domicile is a UK concept and does not mean residence.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

There is one ground for divorce in England and Wales: the irretrievable breakdown of the marriage.

At the time of writing, this ground is then proven with reference to one of five facts:

- the respondent's adultery (with a person of the opposite sex);
- the respondent's unreasonable behaviour;
- the parties' separation for two years or more, with the respondent's consent;
- the parties' separation for five years or more (no consent required); or
- the respondent's desertion of the applicant for a period of at least two years.

The existing law also applies for the dissolution of civil partnerships, save that the fact of adultery is not available. Under the current system, divorces can proceed uncontested and usually do.

Family law practitioners have campaigned for no fault divorce for many years, without the need for a lengthy period of separation, and a change to the law, introducing no fault divorce, was introduced last year, when the Divorce, Dissolution and Separation Act 2020 received Royal Assent on 25 June 2020. Although this has not yet taken effect, the government has recently committed to introducing the Divorce, Dissolution and Separation Act by 6 April 2022. Under this new law, one party will be able to cite in a statement that the marriage has broken down, without having to provide evidence of bad behaviour. Parties will also be able to make a joint application for divorce. A statement of irretrievable breakdown will be conclusive evidence that the marriage has irretrievably broken down and the court must then make a divorce order. The new law will also apply to the dissolution of civil partnerships.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

No. The first decree of divorce (decree nisi) is pronounced in open court but the parties do not need to attend. The second and final decree of divorce (decree absolute) is sent out to both parties on paper. The Divorce, Dissolution and Separation Act will not change this, and parties will not be required to attend court. The terminology will change, however, from decree nisi and decree absolute to "conditional order" and "final order".

1.4 What is the procedure and timescale for a divorce?

A divorce petition/application is issued and served on the respondent. The respondent completes an acknowledgment of service which is returned to the court. The applicant can then apply for the first decree of divorce (decree nisi). Six weeks and one day after decree nisi, the applicant can apply for the second and final decree of divorce (decree absolute). The respondent can apply a further six months later, if the applicant has not done so.

In an uncontested divorce, subject to court delays, the process takes approximately four months.

If there are court delays or the respondent delays in returning the acknowledgment of service, the timescale will be longer.

The online divorce procedure is generally quicker than submitting petitions directly to the court, with less scope for court delays. The mandatory time scale of no less than six weeks and one day between decree nisi and decree absolute still applies, however.

When the Divorce, Dissolution and Separation Act comes into force, the period between the conditional order and the final

order (previously decree nisi and decree absolute, respectively) will be extended from six weeks and one day to six months and it will impose a minimum six-month period between the lodging of a petition to the divorce being made final.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Yes. Children and financial issues are addressed separately to the divorce in England and Wales and there is no requirement for the court to be involved in either aspect before the decree absolute/conditional order (the final step in the divorce) can be granted.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Yes, in certain circumstances. The rules are set out in the Family Law Act 1986.

As between non-EU countries, the Family Law Act 1986 distinguishes between "proceedings" and "non-proceedings" divorces.

An overseas divorce obtained by proceedings is recognised if the divorce is effective under the law of the country where it was obtained and either party to the marriage was habitually resident, domiciled or a national of the country of divorce.

If the divorce was not obtained by proceedings, it is recognised if:

- the divorce is effective under the law of the country in which it was obtained;
- at the relevant date, each party was domiciled in that country or either party was domiciled in that country and the other party was domiciled in a country under whose law the divorce is recognised as valid; and
- neither party to the marriage was habitually resident in the UK for the period of one year before the date of the divorce.

The UK is a signatory to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations (the 1970 Hague Convention). In respect of signatories to the 1970 Hague Convention (subject to any reservations or extensions), England and Wales will recognise divorces and legal separations in all other contracting States if, at the date of the institution of the proceedings in the State of the divorce or legal separation, one of the following apply:

(1) the respondent had his habitual residence there;
(2) the petitioner had his habitual residence there and one of the following further conditions was fulfilled:
  (a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings; or
  (b) the spouses last habitually resided there together;
(3) both spouses were nationals of that State;
(4) the petitioner was a national of that State and one of the following further conditions was fulfilled:
  (a) the petitioner had his habitual residence there; or
  (b) he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings; or
(5) the petitioner for divorce was a national of that State and both the following further conditions were fulfilled:
  (a) the petitioner was present in that State at the date of institution of the proceedings; and
  (b) the spouses last habitually resided together in a State whose law, at the date of institution of the proceedings, did not provide for divorce.

Now the UK is now longer part of the European Union, the UK treats EU countries in the same manner it treats non-EU countries. However, in respect of any judgments (i.e. a divorce in a Member State) made on or before 31 December 2020, these are recognised without a special procedure as Brussels II continued to apply as between the UK and the EU Member States (save for Denmark) until the end of the Brexit transition period (11pm GMT on 31 December 2020).

1.7 Does your jurisdiction allow separation or nullity proceedings?

Yes, England and Wales has processes for both Judicial Separation and Nullity, although they are rarely used in practice.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Yes, they can. The Domicile and Matrimonial Proceedings Act 1973 provides for a mandatory stay when there are proceedings elsewhere in the British Isles. It also provides for discretionary stays when there are proceedings in another jurisdiction.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

The court's powers are set out in ss22–24 of the Matrimonial Causes Act 1973. The court can make the following financial orders:

- Maintenance pending suit (interim maintenance).
- Payment in respect of legal services (costs of proceedings).
- Periodical payments (maintenance/alimony).
- Lump sum(s).
- Periodical payments for the benefit of a child of the family (child maintenance).
- Secured periodical payments.
- Property adjustment (transfer of property).
- Sale of property.
- Settlement of property.
- Varying an ante-nuptial or post-nuptial settlement.
- Pension sharing and pension adjustment.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

There is no concept of matrimonial regimes under the law of England and Wales and there is, therefore, no default regime. Other countries believe that we have a "separation of property" regime as spouses are treated separately during the marriage, i.e. they are not automatically responsible for the other's debts, but we do not have property regimes.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

The court has regard to the following factors set out in s25 of the Matrimonial Causes Act 1973:

- all the circumstances of the case and first consideration will be given to the welfare of a minor child;
- the parties' income, earning capacity, property and other financial resources (now or in the foreseeable future), including any increase in earning capacity, which it would 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 in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
- 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; and
- the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

The court has regard, in particular, to the principles set out in case law, namely needs, sharing (and equality of assets built up during the marriage) and compensation.

2.4 Is the position different between capital and maintenance orders? If so, how?

The same factors set out in question 2.3 above are considered when making both capital and maintenance orders.

However, case law confirms that capital and maintenance orders are very different (although they interplay) and, whilst matrimonial capital may be divided equally on divorce (the sharing principle), future income is not shared equally and maintenance orders are generally calculated by reference to "needs". The court has a duty to consider whether a party can adjust to a termination of maintenance without undue hardship, and whether a clean break (i.e. no ongoing maintenance claims) is appropriate.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

It is not obligatory to have a court order but it is advisable to ensure the parties' agreement is recorded and that financial claims are dismissed to avoid either party applying for financial provision in the future (which they can do even though they are divorced). The parties do not usually need to attend court for their agreement to be approved by the court. A "Consent Order" recording their agreement is lodged at court for approval by a judge who will consider the fairness of the order and the parties' financial circumstances.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

Spousal maintenance orders are commonplace, particularly where there are children of the family and/or there is a disparity in earnings as between the parties. The court has a duty to consider capitalising spousal maintenance and will do so if the parties have sufficient capital.

Spousal maintenance orders can be for any duration including for the parties' joint lives (i.e. until the death of either party). A common term of spousal maintenance is until the children reach maturity or cease full-time education. Spousal maintenance orders automatically come to an end when the recipient remarries. Cohabitation is a relevant factor but will not automatically bring an end to spousal maintenance orders. England and Wales is considered generous in terms of their approach on maintenance but the court's approach to whether a term order or joint lives order should be made can vary across the country.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Yes, even though we do not have formal property regimes, the court deals with concepts of matrimonial and non-matrimonial property (property brought into the marriage or inherited from third parties) and can treat them differently when deciding what orders to make. Generally non-matrimonial property is brought into account only if it is required to meet both parties' needs.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

No. In family law, England and Wales operates on the basis of *lex fori* (law of the forum) and will not apply foreign law. Only English law will be applied by the English court.

2.9 How is the matrimonial home treated on divorce?

The English court will consider all financial resources, whether they are in joint or sole names. In English law we have concepts of "matrimonial" and "non-matrimonial" property. The matrimonial home is treated differently to other assets and will often be treated as matrimonial property whatever its origins (although that does not necessarily mean an equal division of the property). In the case of *Miller/McFarlane* [2006] UKHL 24; [2006] 2 A.C. 618 Lord Nicholls said:

> "*The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.*"

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

Yes. English law recognises Trusts (where property is held by one party for the benefit of another) and they regularly appear in divorce proceedings. The English court can take into account available resources from a Trust (interest in a Trust and distributions/income from a Trust). The English court has power to vary a Trust insofar as it is a nuptial settlement capable of variation s24(c) of the Matrimonial Causes Act 1973. The court can also join Trustees to financial proceedings on divorce.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

Yes. Following a foreign (proceedings) divorce, either party has a potential claim in England and Wales if he/she can come within the provisions under the Matrimonial and Family Proceedings Act 1984. Remarriage prevents a claim by that party. Permission of the court is required to make a claim. The court has jurisdiction in the following circumstances:

- if either party was domiciled in England and Wales on the date of application or date of divorce;
- if either party was habitually resident in England and Wales for the period of one year before the application or the date of divorce; and
- if either or both parties had at the date of application a beneficial interest in possession in a property in England which was at some time during the marriage a matrimonial home.

The court will consider whether it is appropriate to make an order in England and Wales with regard to:

- the connection that the parties have to England and Wales;
- the connection with the country of divorce and any other country;
- any financial benefit already received/likely to be received as a consequence of the divorce;
- the extent to which any foreign order has been complied with;
- any right that the applicant has to apply for financial relief outside of England and Wales;
- the availability of property in England and Wales and the extent to which any order is likely to be enforceable; and
- the length of time that has elapsed since the divorce.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

The parties can agree a financial settlement themselves, engage in a court process, or use other dispute resolution methods of mediation, collaborative law, private judging or arbitration.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Marital agreements are not automatically enforceable in England and Wales and there is no provision in our statute to provide for the enforceability of such agreement. The jurisdiction of the court of England and Wales to order financial provision on divorce cannot be ousted by the parties' agreement. However, our case law has developed rapidly over the last six years and as a result of the UK Supreme Court case of *Radmacher v Granatino* [2010] UKSC 42, the case law now says that the court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless, in the circumstances prevailing, it would not be fair to hold the parties to their agreement.

When deciding whether it is fair to hold the parties to a pre-nuptial agreement at the time of the divorce, the burden is now on the person seeking to set aside the agreement and a number of factors have been identified as relevant. For example, the parties must enter into the agreement of their own free will. Duress or undue pressure could reduce the weight that is given to the agreement and could even negate it completely. The court will look at the parties' circumstances at the time the agreement was entered into (age, maturity and emotional state) in considering whether the parties understood the implications of the agreement and whether they intended it to be effective. Whether the parties obtained independent legal advice and the level of financial disclosure will also be relevant.

Any children of the marriage remain an overriding consideration and the terms of the agreement (with particular attention on needs) should still result in a "fair" outcome. The closer the effect of an agreement to an outcome that the court would find to be fair, with needs met, the more likely it is to be upheld in the future but the agreement does not need to mirror what the court would award if there had been no agreement.

The position in relation to a foreign agreement will depend on the circumstances of the case but all of the above considerations will be relevant and, in particular, the court will look at the parties' intentions at the time of the agreement. For example, was the foreign agreement a full agreement dealing with future claims in the event of a divorce or a simple contract to choose the couple's property regime which does not mention a future separation?

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

There are no procedural requirements because the agreement is not automatically enforceable, but the Law Commission and case law guidance confirms that certain safeguards should be in place to assist with the enforceability of such an agreement:

- each party should have independent legal advice on the terms and effect of the agreement;
- the agreement should be entered into 28 days before the wedding; and
- each party should give material disclosure of their financial circumstances.

As these guidelines are not yet in statute, an agreement can still be upheld without those safeguards.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

A marital agreement can deal with capital or income claims, or both. As we do not have matrimonial property regimes in our jurisdiction, an English pre- or post-nuptial agreement would not elect a matrimonial property regime.

It is not possible for parties to contract out of child maintenance. Marital agreements, however, can set out how parties wish child maintenance to be calculated, including whether it should be payable until the child is 18 years old or completion of tertiary education. If, at the time of the divorce, jurisdiction for child maintenance lies with the Child Maintenance Service (CMS), the court will not be in a position to make an order in accordance with the terms of the marital agreement, unless the parties agree. If jurisdiction for child maintenance lies with the court, the court is not bound by the terms of the marital agreement but will consider them as a factor in the case. Please see section 5 below for further information.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

Cohabitants, especially without children, have very limited financial claims in England and Wales. Their financial claims are limited to claims in relation to an interest in property which they can make under the Trusts of Land and Appointment of Trustees Act 1996.

4.2 What financial orders can a cohabitant obtain?

Under the Trusts of Land and Appointment of Trustees Act, a cohabitee can apply for:

- a declaration in relation to the extent of a person's interest in property; and
- an order for sale in relation to the property.

If there is a child, the cohabitant can make claims for the benefit of the child under Schedule 1 of the Children Act 1989 (see section 5 below).

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

In England and Wales, we now allow civil partnerships for heterosexual couples as well as homosexual couples. Civil partners are entitled to the same financial protection as married spouses in divorce.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Yes. The Marriage (Same Sex Couples) Act 2013 was passed on 17 July 2013 and the first marriages of same-sex couples took place on 29 March 2014. Same-sex couples can also enter into formal civil partnerships under the Civil Partnership Act 2004, which came into force on 5 December 2005. To register a civil partnership, the parties must sign a civil partnership document in front of two witnesses and a registrar.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

Parents can make income/maintenance and capital claims on behalf of children under s15 and Schedule 1 to the Children Act 1989 (known as Schedule 1 claims). Capital claims are limited to housing/settlement of property claims (returned to the payer when the child reaches majority) and lump sum claims to cover capital expenditure for the child. Claims for legal costs can also be made.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Child maintenance will be determined either by the CMS or by the court. If the CMS has jurisdiction to deal with an application for child maintenance, the court will not interfere unless the parties agree to an order of the court. The CMS will not have jurisdiction if one parent is abroad and the court will also have jurisdiction if the payer earns in excess of the maximum assessment.

The rates of child maintenance are determined under the 2012 child maintenance scheme (nil rate, flat rate, reduced rate, basic rate and default rate) depending on gross income. Child maintenance is calculated on a percentage of gross salary basis. The calculations are complicated and depend on various scenarios but there is an online calculator at: https://www.gov.uk/calculate-child-maintenance.

The maximum amount of gross weekly income that can be taken into account when the CMS calculates maintenance is £3,000.

If the court makes an award of child maintenance under Schedule 1 it will consider the CMS calculation but can make a top-up award over and above the CMS rates with regard to a number of factors far wider than the CMS formula. It can take into account the carer's own expenditure when making the child maintenance order. As such, in high-net-worth cases where the parties are not married, child maintenance awards can be significant.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Normally, until the age of 18/end of secondary education but the court can specify a later date, usually when the child has completed a first degree at university.

A child can apply for child maintenance for him/herself in certain circumstances (e.g. for university education).

5.4 Can capital or property orders be made to or for the benefit of a child?

Yes, as set out above, the court can order capital and housing for the benefit of a child. Property orders will only last for the child's dependence and will then revert to the payer. The court does not consider that children are entitled to capital themselves unless there are exceptional circumstances (e.g. severe disability requiring long life care).

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

Yes, in limited circumstances. A child who has reached the age of 16 may apply for an order for periodical payments or a lump sum if he or she is, will be or (if an order were made) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation of if there are special circumstances that justify the making of an order. If the applicant is a child over 18, he or she can apply against either or both parents as long as they do not live together and no order was in force with respect to him prior to reaching the age of 16. Where an applicant is seeking periodical payments (maintenance), the CMS must have provided a maximum assessment of the potential payer's income. The court will consider all of the circumstances of the case, the financial means of the parties, the needs of the applicant child and the reasons for the application.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

The birth mother and a married father will always have parental responsibility for a child and retain it after divorce. Parental responsibility means all the rights, duties, powers, responsibilities and authority that, by law, a parent has in relation to the child and his/her property. This means that both parents need to agree on the important decisions in the child's life (e.g. education) and one parent needs the other's agreement to take them out of the jurisdiction, even for a holiday.

An unmarried father will have parental responsibility:

- if he is registered on the birth certificate (after 1 December 2003);

- if he and the mother make a parental responsibility agreement;
- if the court orders that he should have parental responsibility; or
- following fertility treatment under the provisions of the Human Fertilisation and Embryology Act 2008.

6.2 At what age are children considered adults by the court?

Children are considered adults by the court at age 18.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Normally, until a child reaches age 16 but in exceptional cases until the age of 18.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

The court can make Child Arrangements Orders in relation to the following:

- where the child is to live (previously called residence) including shared residence;
- where and when the child will spend time with another parent (previously called contact);
- specific issues, e.g. religion, schooling, change of name; and
- prohibited steps, for example, prohibiting travel.

The court can also make parental responsibility orders and declarations of parentage in relation to a child, as well as parental orders (in surrogacy cases) and adoption orders.

The court does not automatically make orders in relation to a child following divorce proceedings. We have a "no order principle" whereby the court will only make an order in relation to a child/children where necessary. Both parents retain parental responsibility following a divorce.

6.5 What factors does the court consider when making orders in relation to children?

The child's welfare is the court's paramount consideration. A court has regard, in particular, to:

- the ascertainable wishes and feelings of the child concerned (considered in the light of his/her age and understanding);
- his/her physical, emotional and educational needs;
- the likely effect on him/her, of any change in his/her circumstances;
- his/her age, sex, background and any characteristics of his/hers that the court considers relevant;
- any harm that he/she has suffered or is at risk of suffering;
- how capable each of his/her parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his/her needs; and
- the range of powers available to the court under the Children Act 1989 in the proceedings in question.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

Without a court order, a parent cannot take a child abroad without the consent of the other parent with parental responsibility. Any significant decisions in relation to the child's upbringing will need to be taken by both parents together, or in default of agreement, by the court.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

There is no presumption of an equal division of time, but there is a presumption that the child will spend time with both parents.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Yes, assuming the parents both have parental responsibility.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

A welfare report is prepared, if ordered by the court, by a court-appointed social worker (usually from the Children and Family Court Advisory and Support Service, CAFCASS). The CAFCASS officer (or independent social worker) will meet the child and report to the court. A child can meet a judge, but it is rare.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

Yes, it is available, but not in most cases.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Court, mediation, arbitration and non-legal routes such as family therapy are available to help parties resolve disputes. The courts encourage mediation in children cases.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

No, the custodial parent cannot remove a child from the jurisdiction without either the prior written consent of each person with parental responsibility or a court order granting permission (s13(1)(b) Children Act 1989).

However, the custodial parent (i.e. the person named in a Child Arrangements Order as the person with whom the child lives) can remove the child from the jurisdiction for a period of less than one month without the other parent's consent (s13(2) Children Act 1989).

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

Unlike the position if one parent with parental responsibility moves abroad without the other parent's consent, it is not a

criminal offence to move to a different part of the UK. Consent of the other parent should be sought first, however, or, in the absence of consent, permission of the court. If the custodial parent moves the child without consent, the other parent could seek an order requiring the return of the child. Each case will turn on its own facts.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

Relocation applications (or "leave to remove" applications) are subject to the welfare principle (s1(1) Children Act 1989), which dictates that the child's welfare is the court's paramount consideration.

Until recently, the leading authority on relocation was the case of *Payne* [2001] EWCA Civ 166. Under this precedent the court considered the following:

- the welfare of the child;
- whether the application was genuine; and
- the impact on the applicant of a refusal.

The court in *Re TC and JC (Children: Relocation)* [2013] EWHC 292 (Fam) took the opportunity to consolidate the guidance on the court's approach to relocation applications:

- the only principle to be applied when determining a relocation application is that the welfare of the child is paramount and outweighs all other considerations;
- the guidance given in previous case law is valuable and helps the judge to identify which factors are likely to be most important;
- the guidance is not confined to an application from the primary carer and can be applied in all relocation cases should the judge deem it appropriate; and
- the following key questions should be asked:
  (1) Is the application genuine and not motivated by a desire to exclude the "left behind" parent from the child's life?
  (2) Is the application realistically founded on practical proposals that are both well-researched and investigated?
  (3) What would be the impact on the applicant of a refusal of their realistic proposal?
  (4) Is the "left behind" parent's opposition motivated by genuine concern for the child's welfare or is it driven by an ulterior motive?
  (5) If the application is granted, what is the extent of the detriment to the "left behind" parent and their future relationship with the child?
  (6) To what extent would that detriment be offset by the development of the child's relationship with their extended family or homeland upon relocation?

Three recent Court of Appeal cases, *Re K* [2011] EWCA Civ 79, *F* [2012] EWCA Civ 1364 and *Re F* [2015] EWCA Civ 882, have clarified the court's approach. The focus must be on the child's best interests having regard to court guidance (i.e. the guidance set by *Payne*) but such guidance and the factors set out are not presumptions but part of the overall welfare analysis. The second *Re F* [2012] held that there is a need for the court to carry out (1) a holistic comparative balancing exercise of the realistic options before the court including the plans of both parents, and (2) a proportionality evaluation in respect of the interference with the established family life the children had with the other parent (so taking into account that the effect of an international relocation is such that the Article 8 rights of a child are likely to be infringed).

In England and Wales, particularly in cases where there is a shared residence arrangement, the courts are therefore increasingly looking closely at the impact on the child of the reduced time with the left behind parent. As such, it is now more difficult than in previous years for applicants to be successful in relocation applications.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

Please see the answer to question 7.3. The law as to relocating within the country has become more in line with applications to relocate outside England and Wales, in that the plans need to be well thought out and reasonable with proper consideration as to the future contact with the "left behind parent".

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

A study in 2012 by Dr. Rob George found that applications for international relocation had a success rate of 66.7% (where 95% of the applications in the study were brought by mothers who, in the majority of the cases, were fairly clearly the child's primary carer).

The research also demonstrated the following:

- the extent to which the child spends overnight time with both parents was important, with applications less likely to succeed where the child spends frequent overnight time with both parents;
- where the applicant was in a new long-term relationship, they had a higher chance of succeeding; and
- the greater the proposed distance of the relocation, the less likely it was that the application would succeed.

However, as decisions on relocation are made on a case-by-case basis through analysis of the welfare checklist, the guidance (see question 7.2) should not be applied rigidly and the likelihood of success depends on the individual facts of each case.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

England and Wales is a party to the Hague Convention on the Civil Aspects of International Child Abduction which is incorporated into domestic law by the Child Abduction and Custody Act 1985. The same act gives the court the jurisdiction to:

- order that a welfare report be prepared by the CAFCASS or a local authority (s6);
- declare that a child's removal from the UK was wrongful (s8);
- recognise and enforce the custody decisions of other countries (Part II); and
- make wide-ranging interim orders against any person who the court has reason to believe may have relevant information, to disclose this information in an attempt to find out the whereabouts of a child (s24A).

The Hague Convention is used between England and Wales and other countries who have signed up to the Convention.

The Child Abduction Act 1984 created the criminal offence of child abduction where a person connected with a child removes or sends that child out of the jurisdiction without the appropriate consent. If convicted, the offending party is liable for a fine and/or imprisonment for a term not exceeding six months (summary conviction) or imprisonment for a term not exceeding seven years (conviction on indictment).

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

No fault divorce should finally become law by 6 April 2022, which not only gives individuals a route to petitioning without having to cite examples of poor behaviour of the other party, but also gives parties the option of filing joint petitions. This is hugely symbolic for many people, including family lawyers who have campaigned for "no fault" divorce for many years, and it is hoped it will make the process of divorce a little easier and less confrontational for many.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

On a practical level, there has been a vast increase in remote hearings, and the family courts and practitioners have had to quickly get used to new online platforms by which hearings are conducted. The family courts were quick to adapt, with consultations organised to improve remote systems, and regular updates from the President of the Family Division, Sir Andrew McFarlane. Equally, many practitioners were quick to adapt; paperless working with electronic bundles is now the norm for many, and many practitioners have invested in suitable platforms such as Zoom, Skype for Business, Microsoft Teams, etc., to ensure they can continue to conduct client meetings, without needing to meet in person.

As COVID-19 restrictions begin to ease, it is hoped that there will be a return to in-person hearings, where appropriate. However, many practitioners consider that remote hearings continue to offer benefit, and should be used for shorter, case management hearings. On 10 June 2021, Sir Andrew McFarlane announced the launch of a two-week rapid consultation on remote, hybrid and in-person hearings in the family justice system and the Court of Protection, with the aim of identifying good practice from remote and hybrid hearings and providing an evidence base to assist with the decisions regarding future ways of working, as we return to court. It is therefore possible that remote hearings will continue to have a place in family court proceedings in England and Wales.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

The law for cohabitants is in dire need of reform, as cohabitees have very few rights when they separate from their partner – many cohabitees believe incorrectly that they automatically obtain rights by living with someone for many years.

Pre-nuptial agreements is another area that many practitioners believe needs reform – there is nothing in our statute that means that pre-nuptial agreements are automatically enforceable and the courts retain a significant discretion as to whether the terms will be enforced on divorce. Like other areas of finance on divorce, and, with an increasing number of self-represented persons due to the withdrawal of legal aid, there are increasing calls for a reform of the approach to finances on divorce to make it simpler and less discretionary. The Divorce (Financial Provision) Bill 2019–20 proposes to make pre- and post-nuptial agreements binding. The Bill is not limited to pre-nuptial agreements, and some provisions remain controversial amongst some practitioners. The fate of the Bill remains to be seen.

Increasingly, many family law professionals, including judges, are calling for a change in the way children disputes are resolved, to no longer make lawyers or the court the first port of call for parents when they decide to separate and resolve the arrangements for the children, but also there is a wish for the voice of the child to be given greater weight by parents when making the arrangements. The report, *What about me?: Reframing Support for Families following Parental Separation* by the Family Solutions Group (a multi-disciplinary group of which Charlotte Bradley was a member), has had widespread support and has helped extend the debate to improve families' experience following separation and to reduce long-term damage for children caused by ongoing parental conflict.

Charlotte Bradley is head of the Family team at Kingsley Napley, where she has been a partner since 2001. Charlotte specialises in all aspects of family law, including international issues, both in relation to finance (particularly cases of Schedule 1 provision for unmarried parents) and children (particularly relocation). She is also an accredited mediator and collaborative lawyer. She writes regular articles and has co-authored a number of books on family issues. She is the Contributing Editor for *ICLG – Family Law* and fellow of the International Academy of Family Lawyers.

In the recent published legal directories, *Chambers UK* and *The Legal 500*, she has been described as "*a complete delight*", "*fantastic – she has all the attributes you want from an international family lawyer, and has warmth in abundance*", being "*absolutely brilliant at jurisdictional elements of work*", "*universally respected*", "*an absolute star with a relaxed and authoritative style*" and "*a wonderful person with an excellent mind and exceptional client care skills*".

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

The French court first applies the rules of Regulation (EC) 2201/2003 ("Brussels II *bis*") which determines the jurisdiction of an EU Member State in matters relating to divorce on the following alternative grounds:

- habitual residence of the spouses;
- last habitual residence of the spouses, insofar as one of them still resides there;
- habitual residence of the respondent;
- in the event of a joint application, habitual residence of one spouse;
- habitual residence of the applicant who resided there for at least a year immediately preceding the application;
- habitual residence of the applicant who resided there for at least six months immediately preceding the application and is either a national of the Member State in question; or
- nationality of both spouses or, in the case of the United Kingdom and Ireland, domicile of both spouses.

Case law defines habitual residence as the country where a party has fixed his permanent or habitual centre of his interests. This is a question of facts.

If no EU jurisdiction is designated by the Brussels II *bis* Regulation, the French court shall have jurisdiction according to French internal rules, which are mainly based on the French citizenship of petitioner or defendant (sections 14 and 15 of the Civil Code). These rules aiming to designate French jurisdiction based on French international rules may only apply against a defendant who does not have his habitual residence in an EU Member State, nor an EU citizenship.

Even though the French court has jurisdiction to pronounce the divorce, its jurisdiction regarding ancillary matters is not automatic. In relation to:

- parental responsibility: the Brussels II *bis* Regulation is applied (articles 8 to 15);
- maintenance obligations: Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation is applied (articles 4 to 7); and
- the division of assets: for marriages celebrated before January 29, 2019, French jurisdiction is determined on the ground of the residence in France of the family or the defendant, or on the ground of the French nationality of one spouse; and for marriages celebrated afterwards, article 5-1 of Council Regulation 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property sets that the court of a Member State seized to rule on divorce, legal separation or marriage annulment has jurisdiction on matters of the matrimonial property of the spouses.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

Divorce may be pronounced on the grounds of:

- mutual consent (uncontested divorce). This divorce needs an agreement of both parties on the principle of divorce and all its consequences;
- acceptance of the principle of the breakdown of the marriage. The spouses agree on the principle of the divorce but disagree on matters related to children and ancillary relief, which are dealt with by the family judge;
- definitive alteration of the bond of marriage. For divorce requests entered into before January 1, 2021, it is automatically pronounced by the court if one spouse establishes two years of separation without reconciliation at the time of lodging the petition for divorce. For divorce petitions entered into after January 1, 2021, the requirement is lowered to one year of separation (*cf.* question 1.4 below); and
- fault, which is pronounced when a party establishes facts which constitute a serious or renewed violation of the duties of marriage which makes marital life unbearable (for instance, adultery, domestic violence, desertion of the marital home, etc.).

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

As of January 1, 2017, except in cases where a child asks to be heard by the judge or where a spouse is under guardianship measures, the divorce agreement is no longer subject to judicial homologation. Parties no longer need to attend court. Mutual consent divorce is a conventional process. Each spouse must be represented by an attorney. Once the parties reach an agreement on a draft, the final contract is sent to the parties by certified mail, which they can sign only after a 15-day delay upon receipt. The contract is then countersigned by the parties and attorneys and handed over to the *notaire* who lodges the deed and annexes at the rank of his minutes. The role of the *notaire* is essential as he/she ensures legal formal compliance of the agreement and confers its enforceability.

Where there is an international element (foreign nationality, foreign residency, etc.), practitioners must be very cautious about resorting to this extrajudicial process. Indeed, other countries might not recognise this type of private agreement as a valid divorce.

Within the European union, judicial divorces are recognised by operation of the EU "Brussels II *bis*" Regulation. However, the Court of Justice of the European Union ruled in 2017 that, as French divorces by private agreement may not be equated to judicial orders, they do not fall within the scope of the EU Regulations, hence the recognition of those being left to rely on each EU State's good will, as it is for all other foreign, non-EU states. Moreover, even though the deed is registered by a *notaire*, it is not considered an authentic instrument according to EU law, which also hampers its circulation within the EU.

To solve this issue, the EU drew up the new Council Regulation (EU) 2019/1111 of June 25, 2019 ("Brussels II *ter*"). Its article 65 provides that agreements on divorces have binding legal effect in the Member State of origin, thus they shall be recognised in other Member States without any special procedure. As a consequence, under Regulation "Brussels II *ter*", which enters into force on August 1, 2022, the European circulation of the conventional French divorce will be ensured automatically between Member States.

However, practitioners will have to remain cautious when dealing with countries outside the European Union, including regarding the enforcement of such an agreement as to the consequences of the divorce (financial and children) outside French borders.

1.4 What is the procedure and timescale for a divorce?

In the case of a divorce by mutual consent, which is conventional, the procedure has been outlined above (*cf.* question 1.3). The timescale for these divorces depends on the time it takes for the parties and their lawyers to reach an agreement and on the time taken to draw up said agreement.

With regard to contentious divorces, as of January 1, 2021, there is a new divorce procedure, as follows:

- Divorce proceedings are instituted by a single divorce petition, which shall contain the claims on all the ancillaries, including a proposal for the division of the assets. Interim measures are not mandatory anymore. If a party seeks such measures, they must be contained in an independent section of the divorce petition or be the subject of a separate submission. In that case, the pre-trial judge may grant interim measures, regarding custody and visitation rights over the children during the procedure, temporary maintenance for the impoverished spouse and the children, and authorise one spouse to remain in the matrimonial home.
- The preliminary hearing (called an "orientation hearing") aims at an exchange between the parties, their lawyers and the judge to decide on the next steps of the procedure, by redirecting to a mediation or setting a timetable for proceedings. The aim is to facilitate agreements, but also to condense it in order to speed it up.

In litigations with international elements, this new procedure has two major interests:

- the parties can be represented by their lawyers and no longer systematically have to be present in person, as was previously the case; and
- the unification of the previous two-stage divorce process might allow a decrease of the required servicing, which, in the case of service abroad, leads to costs and longer delays.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

In regard to uncontested divorce, the divorce agreement must settle all matters at stake deriving from the divorce itself (i.e. the use of marital name, child custody, maintenance obligations, division of assets).

In the case of contested divorces, unless the French court has no jurisdiction on one of these issues, the final divorce judgment rules on all others matters (e.g. the French court might have jurisdiction to rule on the divorce, because both spouses are French citizens, but no jurisdiction to rule on parental responsibility, because the children do not reside in France but in another Member State and one of the parents denies the prorogation of jurisdiction).

It is also important to note that the liquidation of the matrimonial regime is not always decided by the judge at the same time as the divorce is granted. This is only the case if a deed of liquidation is already drawn up by a *notaire* at that time and if the parties do not disagree. Otherwise, the judge will rule on this question later.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

For a foreign divorce to be recognised in France, the interested party must seek its transcription on the French civil registers of the city of the marriage. On this occasion, if the registrar denies the transcription, the party is left with no other alternative than applying for an *exequatur* before the court.

In any case, requirements for the recognition of foreign divorces will depend on the country from which the decision comes.

If a divorce is granted in EU Member States (except for Denmark), Brussels II *bis* Regulation provides that judgments given in Member States shall be recognised in the other Member States without any special procedure being required, with some exceptions (articles 21 and 22).

If a divorce is granted in a non-EU Member State: in the absence of a specific bilateral or multilateral international convention regarding the recognition of foreign judgments, foreign divorces are recognised in France through a specific proceeding:

- the jurisdiction of the foreign court: there shall be strong connection factors of the case with the foreign jurisdiction, and the French court must not have exclusive jurisdiction over the case;
- the compatibility of the foreign judgment with French "public policy": the foreign order must ascertain that a fair process was followed (procedural public policy) and must not strike the essential values which underpin the French legal system (substantial public policy); and
- the absence of fraud: the French court must ensure that the petitioner did not fraudulently evade another law.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Both exist.

(a) An application for a decree of judicial separation ("*séparation de corps*") can be lodged if one of the grounds for divorce exists. Most of its provisions are similar to the divorce provisions. This procedure authorises spouses to live separately. All other duties of the marriage remain.

The reform of family procedure previously mentioned (*cf.* question 1.4 above) allows the parties to settle the separation through a private agreement countersigned by the spouses' lawyers and registered by the French *notaire*.

(b) The annulment of the marriage shall be obtained: if the essential requirements for the formation are not met (an error as to the identity of the person or her/his substantial characteristics, duress); in the case of absence of authorisation on the part of the legal representative of one spouse (for example, if one of them is a minor); in the case of non-respect of the minimum age to marry; in the case of bigamy; or in the case of incest.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

The process of staying the French divorce procedure depends on the foreign jurisdiction in which proceedings were first started:

- If the applicant first started proceedings in a European Union country: The French judge informed of this other petition is obliged to stay its proceedings until such time as the jurisdiction of the first jurisdiction where proceedings were first started is established, and once established, is obliged to decline jurisdiction in favour of that court (article 19, Brussels II *bis* Regulation).
- If the applicant first started proceedings in a non-European Union country and no international convention is applied, the defendant is entitled to apply to stay proceedings before the French court until either jurisdiction orders its decision (international *lis pendens*). The French family judge has no obligation to stay proceedings or deny its jurisdiction and will scrutinise all the connecting factors of the case with France and the other country and will check that the foreign order can be recognised in France once it has been rendered.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

A distinction should be made between interim measures and definitive ones. As of January 1, 2021, interim measures are not mandatory anymore (*cf.* question 1.4 above). When appropriate, an interim order can set interim monthly maintenance for the impoverished spouse and the children.

As concerns the final decree of divorce, it:

- determines the compensatory allowance to be paid for the impoverished spouse ("*prestation compensatoire*"), if needed. This allowance aims to compensate, as far as possible, the disparity that the breakdown of the marriage creates in the respective standards of living; and
- orders the division of assets in accordance with the property regime of the parties and appoints a *notaire* to divide the properties.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

As in many countries of continental Europe, France uses the concept of the matrimonial property regime, which is indeed addressed by the family judge upon divorce.

To determine which law rules the matrimonial regime of the spouses, three conflict of law systems coexist in France, depending on the date of marriage:

- *if the spouses married before September 1, 1992*: French case law states that the judge has to seek the will of the spouses on circumstantial evidence. The preponderant factor was the country where they established their first residence right after the union;
- *if the spouses married after September 1, 1992*: the 1978 Hague Convention concerning the law applicable to the matrimonial property regime applies. Therefore, the French court applies the law designated under the Convention (French or other). In the case that the parties make no positive choice of marriage regime upon marriage contract and do not elect a marriage regime at a later date, there is a default rule which applies the law of first place of marriage (article 4), which can be superseded either by later positive election of regime, or through a substantial period of time of residence (10 years) or shared residence in a new country (article 7); and
- *if the spouses married after January 29, 2019* or signed/or modified a post-nuptial agreement after this date: Council Regulation 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, shall apply. The applicable law shall be the same for both immoveable and moveable property: article 22 authorised spouses to designate or change the law applicable on this matter; and article 26 determines the applicable law in the absence of choice by the parties between the spouses' first common habitual residence after the marriage or common nationality.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

(a) Regarding interim maintenance: article 208 of the Civil Code contains a general rule on maintenance obligations stating that they are granted in proportion of the needs of the claimant and the income of the defendant. The idea is to achieve a balance between the budgetary needs and the income available to the parties, knowing that two households have a greater cost than one. The court will take into account both spouses' income and compulsory expenses (taxes, mortgage, rent, etc.) and also the standard of living of the impoverished spouse.

(b) Regarding compensatory allowance: article 271 of the Civil Code sets out the factors which the judge must take into account:

- duration of the marriage;
- age and state of health of each spouse;
- professional qualifications and occupations;
- consequences of the professional choices made by one spouse during their living together for educating the children and the time which must still be devoted to this education, or for favouring his or her spouse's career at the expense of his or her own;
- estimated or foreseeable assets of the spouses, both in capital and income, after liquidation of the property matrimonial regime; and
- respective situations as to retirement pensions.

The compensatory allowance generally consists in a lump sum (the idea is to make a clean break). However, it can also take the form of the allocation of an asset in ownership, usufruct or the right to use an asset or its usufruct.

Where the debtor cannot afford the payment of a lump sum, the judge shall allow him/her to pay the capital in instalments, which should not exceed eight years. Very exceptionally, it can take the form of a lifetime rent when the age or state of health of the creditor does not allow him or her to attend to his or her own needs.

Article 270 of the Civil Code allows judges to deny a compensatory allowance to the spouse on the basis of equity (especially in the case of divorces on the ground of fault with particularly serious circumstances).

(c) Regarding the division of assets, it is ordered on the basis of the matrimonial property regime of the spouse.

2.4 Is the position different between capital and maintenance orders? If so, how?

Yes. The philosophy of these two mechanisms is different. Interim maintenance aims to maintain the standard of living of the impoverished spouse throughout the duration of the divorce proceedings, whereas the compensatory allowance is a lump sum meant to counterbalance the gap created by the divorce between spouses' respective ways of life.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

If the spouses agree on all issues of divorce, they no longer need to attend court (*cf.* question 1.3 above). All the financial issues are included in the agreement lodged at the rank of the minutes of a *notaire*.

In cases where there are still pending issues to be dealt by the court (for example, children), they only need to exchange an affidavit on their point of agreement, and do not need to attend court. An order will be rendered by the court.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

Monthly maintenance awarded by interim order lasts until the divorce is finally granted; the maintenance order may be varied at any time in the course of the procedure if there is a significant change in the income and needs of one spouse.

A compensatory allowance is generally a lump sum, but where the debtor is unable to afford this, it is commonplace that the judge allows this capital to be paid in monthly instalments, the duration of which should not exceed eight years. This amount cannot be increased or decreased, even in the case of a substantial change of the financial situation of the debtor. In this case, the debtor shall nevertheless obtain judicial permission to vary the mode of payment (beyond the standard eight years). It is due even after the debtor's death by and charged over the deceased's estate.

It can happen, although very infrequently, that the judge grants a lifetime maintenance. It may be decreased (never increased), suspended or suppressed in the case of an important change in the resources or needs of either.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

The matrimonial property regime determines the rules regarding the powers and ownership of each spouse on assets, acquired before or after the marriage.

When the marriage breaks down, the treatment of property acquired before or built up during the marriage depends on the matrimonial property regime of the couple:

- in a separation of the property regime, each spouse remains the exclusive owner of his property and income, whether acquired before or during the marriage;
- in the community of property regime (the default regime), assets acquired during the marriage ("*acquêts*") are shared 50/50 and assets acquired by one spouse through inheritance or legacy during the marriage or any assets acquired before the marriage ("*biens propres*") belong exclusively to this spouse; and
- in the universal community regime, all assets acquired before or during the marriage are common assets, whatever their origin.

It is worth noting that, unlike in *common law* countries, the "needs" of the spouses are not considered in this field, notwithstanding the disparity induced by the divorce between them. The resulting potential disparity might be offset by a compensatory allowance, but not through the division of assets, in which equity is not taken into account by the judge.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

They are not treated differently as the foreign citizenship of a spouse is not a relevant factor for applicable law.

French law is not automatically applied by the French judge. The judge shall apply a foreign law, depending on the international factors of the case (mainly habitual residence of the parties but also even if subsidiary, common citizenship of the parties). The following regulations determine the applicable law:

- cause of divorce or legal separation: Regulation (EU) n°1259/2010 ("Rome III") (in case the couple did not agree in advance on the applicable law, the judge applies article 8 which designates firstly the law of the habitual residence of the couple at the time the court is seized);
- parental responsibility: 1996 Hague Convention on Parental Responsibility matters (article 15 mainly designates forum law, i.e. French law, with some exceptions);
- maintenance issues: 2007 Hague Protocol on the Law Applicable to Maintenance Obligations mainly designates the law of the habitual residence of the creditor (article 3); and
- division of assets: one of the three systems described (*cf.* question 2.2 above).

2.9 How is the matrimonial home treated on divorce?

Interim orders may authorise one spouse to stay in the matrimonial home. Mostly, it is awarded to the spouse with custodial rights in order to maintain the children there. In case the matrimonial home is a jointly owned property or the property of the other parent, the interim order specifies whether this occupation is gratuitous or not.

In the divorce decree, in cases where the spouse did not settle the treatment of the matrimonial home in advance, the court may grant compensatory allowance by the allocation of the matrimonial home in ownership or of a right of use, dwelling or usufruct, temporary or for life. If it is the personal property of one spouse only, the judge shall also give the matrimonial home on lease to the custodial parent. These solutions are limited to cases where the debtor owns sufficient assets.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

Even though France did not ratify the 1985 Hague Trust Convention, the concept is recognised in France and foreign trusts shall be recognised by French courts providing that its provisions: comply with the law of the country of its creation; are in agreement with French public policy; and do not violate the reserve portion of an estate.

Moreover, on the one hand, the French law has acknowledged "*la fiducie*", an institution that is similar to the trust and also allows French lawyers to act as trust protectors for foreign trusts.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

If a French judge has jurisdiction as per Regulation (EC) 4/2009 on maintenance issues, he/she could decide on financial claims in the following circumstances:

- a foreign court has jurisdiction on a divorce case but not on maintenance issues;
- a foreign divorce decree is recognised in France except on the financial orders because it is contrary to French international public policy (*exequatur partiel*); and
- a foreign financial order needs to be varied due to a change of circumstances.

If no division of properties was ordered in the foreign divorce decree, a petition to divide assets shall be lodged in France if the defendant is habitually resident in France or one of the spouses is a French citizen.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Parties are allowed to settle their divorce through mediation or collaborative law. The solution of this process can be subject to ratification by the court.

Two arbitration courts on family issues have recently been created. Although articles 2059 and 2060 of the Civil Code prohibit internal arbitration on extra-patrimonial issues (name, ground of divorce, parental responsibility, parenthood, principle of compensatory allowance), patrimonial issues may be subject to arbitration as for division of matrimonial assets, the amount of the compensatory allowance (only after the introduction of divorce proceedings) or the damages for the prejudiced spouse. The parties need to introduce an arbitration clause in their contract of marriage, or in an agreement.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Strictly speaking, there is no equivalent in France to pre- and post-nuptial agreements where parties can, in advance, organise in a contract all the financial consequences of their divorce, compensatory allowance and division of their assets.

Under French case law, compensatory maintenance cannot be decided in advance and a French court would not enforce an agreement on that matter if French law on maintenance issues is applied.

The agreement existing in France is the marriage contract which is entered into before the marriage and can be changed during the course of marriage. It is enforced during the marriage and also when the marriage breaks down and sets out rules regarding the matrimonial property regime and the division of the assets only (*cf.* question 2.2 above for the applicable law to division of assets under the Hague Convention and the law applicable to the Matrimonial Property Regime 1978 and the Council Regulation June 24, 2016).

The position of a French court could be different in the case of a foreign marriage agreement which has designated a foreign applicable law to maintenance obligations, and which authorises agreements covering maintenance claims.

There is a doctrinal discussion on whether a pre-nuptial or post-nuptial agreement could be recognised by a French judge on the ground of maintenance obligations.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

A marriage contract shall be entered into by a *notaire* before the marriage. Parties hire the same *notaire* and do not need to be assisted by counsels. The *notaire* confers authentic form to the contract, which becomes indisputable until an "inscription of forgery".

It is now possible to change the contract post-marriage without any time limit, whenever both spouses agree to it.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

As previously mentioned, French marriage contracts only cover the matrimonial property regime.

If the parties elect a foreign applicable law (under the Hague Protocol on the law applicable to maintenance obligation), and the foreign law chosen allows them to sign a contract in advance on the compensatory allowance, case law is uncertain on the validity of the contract (French judges are reluctant to accept a contract's validity, especially if said contract states that there shall be no compensatory allowance). The *Cour de Cassation* prohibited, in 2015, a German contract suppressing compensatory allowance considering that it was against French public policy. There is a real uncertainty that the solution would be the same in a contract with a predetermined amount of maintenance.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

No maintenance or compensatory allowance is due in the case of a separation of cohabitants, unlike in the case of a married couple. There is no support and assistance duty for the other in cohabitation. Cohabitants are only entitled to palliative civil mechanisms such as the *de in rem verso* action. In rare cases, compensation can be paid to the cohabitee who has helped and participated in the evolution of a common business or asset (he will benefit from the increase in value).

Cohabitants are also entitled to seize the family judge to order the division of the properties owned jointly, in case no agreement is reached by parties.

According to article 373-2-9-1 of the Civil Code, the judge is able to grant the use of the family house to one of the parents when he is seized of such request.

4.2 What financial orders can a cohabitant obtain?

With some exceptions, a cohabitant can only obtain financial orders relating to children issues and the use of the family house (*cf.* section 5).

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

Cohabitants can decide whether to remain under the cohabitants' regime (which is an informal regime with few duties) or conclude a formal partnership: a civil pact of solidarity (PACS) (article 515-1, CC). As a consequence, partners are legally bound by a duty of assistance and commit to a common life. The European Enhanced Cooperation Regulation dated June 24, 2016 has contributed to the recognition of formal partnership status among participant states.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Same-sex couples are allowed to enter:

- a civil pact of solidarity (PACS); or
- marriage: the right for same-sex couples to marry has been recognised in France since May 2013, and is governed by sections 74, 202-1 and 202-2 of the Civil Code. The law offers a *favor matrimonii* since same-sex couples can enter into marriage if two conditions are met: the personal or residence law of one of them authorises such union (section 202-1); and the French public officer is competent (section 74). The latter is indeed competent to celebrate such union if a minimal link to France is satisfied; for example, if a spouse's parent has a secondary house in France. As a consequence, an Italian and a Brazilian living in Belgium can marry in France if their parents have a secondary house in France.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

Each parent, married or unmarried, has a duty to participate in the needs of their children proportionally to his/her resources.

In the case of a separation, any parent with custodial right is allowed to obtain, in court, child maintenance. Mostly, the claim consists of a monthly allowance or the direct payment by the other parent, in whole or in part, of the children's expenses (school, sport activities, health insurance, etc.).

It may also take the form of: the payment of a sum of money to an accredited agency in charge of maintaining, on behalf of the child, an index-linked annuity; a surrender of assets in usufruct; or an allocation of assets yielding income.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Maintenance is calculated on the needs of the children and the respective resources of the parents (the "available" income, which is the difference between income and compulsory expenses as income/taxes, rent, loans, mortgage, etc.). In the case of a change in the resources of the parents or the needs of the children, it can be varied.

Child maintenance is ordered by the family judge. In the case of an unmarried couple, judicial action is an option. Unmarried parents are not obliged to proceed through court, even though it is highly recommended.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Article 371-2 of the Civil Code expressly states that the financial support of parents does not end once the child becomes an adult (at 18 years old in France). A parent is required to provide financial support until the day the child is in a stable situation. Therefore, parents' financial support covers university expenses.

5.4 Can capital or property orders be made to or for the benefit of a child?

As previously mentioned (*cf.* question 5.1 above), a capital or property order can be made, where the situation of the debtor allows it, but it is less common.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

There is a difference between a maintenance obligation and alimony obligation.

A maintenance obligation aims at feeding and raising a child: according to article 203 of the Civil Code, any child who is still studying and is not in a stable situation is entitled to make a financial claim against their parents even if he is an adult (above 18), under the conditions described above in question 5.3.

An alimony obligation rests on family solidarity: according to articles 205 and 206 of the Civil Code, any adult who has finished studies is able to claim alimony against any of his/her parents (father/mother/grandparents/great-grandparents/spouse's parents) in order to contribute to maintain a minimum standard of living (essential expenses for his living). The plaintiff needs to demonstrate his needs and that the debtor have sufficient income to support his/her family and contribute to this claim.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

Parental responsibility ("*autorité parentale*") and custody ("*fixation de la résidence*") are two different concepts. Parental responsibility covers the rights and duties of each parent towards their child regarding essential matters such as residence, education, health, religion and so on, whilst custody covers the sole question of the residence of the child (i.e. at which parent's residence the child shall live).

Separation of parents, married or unmarried, does not, in principle, affect the joint parental responsibility. It is only in rare cases, where the best interests of the child require it, that the judge will order unilateral parental responsibility.

If separated parents do not reach an agreement regarding custody, the court awards custody to one or the other parent, and access/visitation rights to the non-custodial parent. Courts also allow alternate/shared residence, depending on the many factors mentioned in question 6.5 below.

In certain cases, courts shall order the supervised access of one parent under the supervision of a trusted third party or in a designated meeting place.

6.2 At what age are children considered adults by the court?

They are considered adults at the age of 18 years old. However, when a child reaches the age of "*discernement*" i.e., he has a sufficient degree of understanding, he can be heard by the judge (this age depends on the judge's discretion). The child's voice grows gradually with his age until it is decisive.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Child-related decisions (parental responsibility, custody, visitation rights) last until they are 18 years old. However, for teenagers above 15, it is difficult to impose the respect of custodial rights if he/she is reluctant.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

The court makes orders regarding parental responsibility, custody, visitation rights and child maintenance. The court shall also ratify any arrangement of parents as long as it protects the best interests of the child.

The court automatically makes orders in relation to child arrangements in the event of a divorce knowing that the principle is that separation has no consequences on the parental responsibility, as mentioned above at question 6.1.

6.5 What factors does the court consider when making orders in relation to children?

The court's decision as to custody is based on the paramount criterion of the child's best interests.

The following factors stated in articles 373-2 and 373-2-11 of the Civil Code are taken into consideration: the practice previously followed by the parents; the feelings expressed by the child; the ability of each parent to assume their duties and to respect the rights of the other; eventually, the results of a court-ordered medical psychological expert assessment or social investigation (conducted by social workers); and any duress or violence, physical or psychological, carried out by one parents upon the other.

Alternate/shared custody often requires that the following conditions be met: the age of the child; the proximity of the parents' residence; the availability of each parent; the ability of the parents to discuss; and so on.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

Any issue concerning parental responsibility (relocation of the child, especially in another country, changing of schools, major health decisions to be made and so on) shall be decided jointly.

In the case of disagreement, one parent should seek a court order. However, a parent is presumed to act with the other's agreement for usual acts.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

There is no such presumption written in French law. The welfare of the child remains the paramount criterion. Nevertheless, alternate residence remains the principle, whenever its implementation is materially possible.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Yes, they are.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

It depends on the case. The judge can take his/her decision alone.

The hearing of a child is not mandatory and, in any case, must be requested by the child himself and authorised by the judge, provided that the child has a sufficient degree of understanding.

In cases where the judge has no sufficient element, or there is an allegation that a child presents disorders, the judge shall order a social investigation (by social workers or specialised association in family issues), or designate an expert (either a psychiatrist or a psychologist) who is an independent professional.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

Yes. In cases where children are heard by the judge, they are assisted by a lawyer appointed by the lawyer's bar, independently from the parents' counsels. There is no cost for such assistance.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Any person is able to testify in the judicial process, including step-parents or grandparents or siblings.

There is also a specific claim for step-parents or grandparents who are entitled to ask the judge for visitation rights towards the child according to article 371-4 of the Civil Code. The European Court of Justice has recently ordered that the visitation right mentioned in Brussels II *bis* includes grandparents (ECJ, May 31, 2018, n°C-335/17). A step-parent who has resided with the child and his/her parent, who participated in his/her education, maintenance and has formed an affectional bond, is also entitled to ask for visitation rights.

Mediation or collaborative law can be used to resolve disputes relating to children.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

A custodial parent cannot decide to relocate without the consent of the other parent or the leave of the court, unless the court had previously awarded unilateral parental responsibility (which is extremely rare as previously mentioned).

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

Please see the answer to question 7.1.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

There are no specific rules about relocation abroad in the Civil Code or any other text. The welfare of the child remains the paramount consideration. Family courts will scrutinise the factors mentioned in question 6.5 and other factors such as the previous information of the other parent of the relocation project, reasons for relocation, the good faith of the relocating parent, the need for stability and the age of the child, the continuity/offer of education, the length of the relocation, the distance to the relation country, the ability of the relocating parent to respect the rights of the other, the separation of siblings, and so on.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

Please see the answer to question 7.3.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

Even though each case is unique, and every factor should be investigated, it is difficult to obtain a positive decision of relocation as family courts often consider that the loss of relationship with the non-relocating parent is contrary to the welfare of the child.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

France ratified the Hague Child Abduction Convention. French case law is in accordance with the guide of good practice of The Hague Convention.

The "*bureau du droit de l'Union, du droit international privé et de l'entraide civile*" of the Ministry of Justice has been designated as the Central Authority.

Once checked, the request received by the Central Authority is forwarded to the general prosecutor of the Court of Appeal where the abducting parent resides. The parties are encouraged by the Central Authority to reach an agreement. If mediation fails, the prosecutor requests an emergency petition for return to be heard before the family judge. It is recommended that the parent hires a lawyer, even if not mandatory, especially if the abducting parent raises exception for defence. Prosecutors often think that the case is the parents' business and do not strongly fight these exceptions.

Alternatively, the "left-behind" parent may choose to bypass the Central Authority and proceed directly to the court, using an emergency procedure.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

There have been two significant developments in family law in France in the last two years.

First, the Justice Reform of March 23, 2019, which entered into force on January 1, 2021, changed the divorce procedure: it expedites the timescale, by unifying the prior two stages, and offers the possibility to judge international cases even if the parties cannot travel to France. *NB*: with the previous divorce law, parties had to be present for the case to be pleaded (*cf.* question 1.4 above).

Second, it is now possible to ask the judge for financial intermediation when a party is reluctant to pay maintenance to the other or when it could be used to exercise violence towards the other party. In such cases, the family judge can order that payment of child or spouse maintenance is secured by the family allowance fund, which acts as an intermediary to avoid direct payments between the two parties.

Next year, a new bioethical law could enter into force and widen access to Assisted Reproductive Technology ("ART") to both women couples and single women, which has thus far been prohibited. It would create a specific way of establishing filiation of children born of ART: the two members of the couple would each be designated as a mother of the child. The text is currently under discussion in Parliament.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

As a result of the COVID-19 pandemic, the French government imposed a national lockdown in 2020. In consequence, courts have been closed for a few months and all processes have been suspended, except for "essential litigations", which mainly concern cases where urgent actions are to be undertaken (domestic violence, and illegal abduction of a child, etc.).

Virtual hearings have not been settled in family law litigations. In Paris, the Head of the Court of Appeal ruled on March 25, 2020 that until June 25, 2020, non-criminal cases where the assistance of an attorney is mandatory can be exempted from oral presentation of arguments by counsels. If all parties consented to it, written pleadings could be filed at the court and the judge rendered his or her decision based on the written closing arguments of each of the parties.

However, these measures no longer apply, and virtual hearings have even this year not yet been settled.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

As previously mentioned, the issue of the international recognition in the EU of the conventional mutual consent divorce, which is a private divorce, should be looked into as the Regulation Brussels II *ter* will enter into effect by August 1, 2022.

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

Jurisdiction is primarily based on the grounds of Council Regulation (EC) No. 2201/2003 of 27 November 2003, the so-called "Brussels II *bis* Regulation". According to article 3 of this Regulation, Germany, as a Member State, has jurisdiction for divorce proceedings if:

- the spouses are habitually resident in Germany;
- the spouses were last habitually resident in Germany, if one of them still resides there;
- the respondent is habitually resident in Germany;
- in the event of a joint application, either of the spouses is habitually resident in Germany;
- the applicant is habitually resident in Germany and resided there for at least one year immediately before the application was made;
- the applicant is habitually resident in Germany for at least six months immediately before the application was made and is a German national; or
- both spouses are of German nationality.

If no court of a Member State has jurisdiction according to the Brussels II *bis* Regulation, German law determines jurisdiction. Conforming to section 98 of the Family Procedure Act (FamFG), a German court has jurisdiction if one of the spouses is of German nationality.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

Apart from hardship cases (e.g. severe domestic violence), divorce is granted if the marriage has failed. The breakdown of marriage is presumed unchallengeable if the parties are separated for more than a year and the divorce is uncontested. In case of a separation longer than three years, consent between the parties is not required.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

Parties need to attend a court hearing and have to make a statement regarding the grounds for the divorce. However, it is not necessary that both parties attend the court hearing at the same time. If one party lives abroad or far away from the court having jurisdiction, this party can be heard in front of another court, in written form or sometimes even by phone. German law also provides the possibility to attend the hearing via video call. However, even with the COVID-19 pandemic, courts are only slowly starting to make use of this.

In Germany, there is no private divorce. A marriage can only be divorced by a family court.

1.4 What is the procedure and timescale for a divorce?

Divorce has to be filed by a lawyer to the family court. In case of an uncontested divorce, the other party is not required to be presented by a lawyer. There is no foreseeable timeframe for a contested divorce. If the parties reach a comprehensive divorce settlement beforehand, including the equalisation of pension rights, an uncontested divorce can be finalised within weeks. Otherwise it will take at least six months.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Ex officio, the family court adjusts the pension rights of both parties on divorce, which basically means that the court transfers half of the gained pension rights during marriage to the other party. However, the parties are entitled to conclude the pension rights in a divorce settlement. Other associated matters such as maintenance, matrimonial property and child-related matters are only resolved within the divorce procedures, if one of the parties files a corresponding motion.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

According to article 21 of the Brussels II *bis* Regulation, divorces of another Member State are recognised without any special procedure. Other foreign divorces need to be recognised by the state administration, conforming to section 107 of the FamFG.

1.7 Does your jurisdiction allow separation or nullity proceedings?

There are no separation proceedings in Germany. Nullity proceedings are possible on the grounds of section 1313 of the German Civil Code (BGB), but the chances are very low.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Yes, according to article 19 of the Brussels II *bis* Regulation, a German family court shall stay the proceedings if divorce proceedings were brought before the court of a Member State first.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

Besides the pension right adjustment *ex officio*, the family court can give a ruling on the following matters:

- Spousal maintenance.
- Child maintenance.
- Equalisation of accrued gains during the marriage ("*Zugewinnausgleich*").
- Separation of household items and the matrimonial home.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

German law recognises four different matrimonial regimes. By default, spouses obtain the community of accrued gains ("*Zugewinngemeinschaft*"). In a (pre-)marital agreement, the spouses can choose a separate property ("*Gütertrennung*"), a community of property ("*Gütergemeinschaft*") or a special community of accrued gains between Germany and France ("*Wahl-Zugewinngemeinschaft*").

The family court will not address the matrimonial regime upon divorce unless one of the spouses files a motion. In this case, the court needs to decide within the divorce proceedings.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

The family court only gives a ruling if one party files a specific motion, e.g. claims concerning the matrimonial regime, maintenance or other financial claims.

2.4 Is the position different between capital and maintenance orders? If so, how?

Court orders on capital are based on the matrimonial regime and follow a different procedure than maintenance payments. Capital orders only concern the development during the time of the marriage. Maintenance payments, however, also include the behaviour of the parties during the marriage and a prospect for the future.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

If the agreement meets the required form (in most cases notarisation), the parties do not need a court order or to attend court.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

Spousal maintenance orders are commonplace, in case of an income disparity of the spouses. The duration depends on the individual case (e.g. duration of the marriage, child education). Usually spousal maintenance orders are temporary. In some cases, spousal maintenance is ordered for a lifetime; however, this is only in rare exceptions.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Matrimonial property does not exist under German law if the spouses have the statutory property regime of the community of accrued gains ("*Zugewinngemeinschaft*"). Each spouse remains the owner of his/her property if bought during the marriage. Co-ownership emerges only if the spouses acquire property jointly. This joint property will not be dissolved by divorce. If they, e.g. buy a house together during their marriage, they will stay co-owners after their divorce unless they sell the house or one spouse takes over or buys the other half from the other.

The spouses will only have joint/matrimonial property if they choose community of property "*Gütergemeinschaft*" as their matrimonial regime, which is not very common.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

In case of foreign relations, the court having jurisdiction applies the law the spouses agreed upon on the grounds of article 5 of Council Regulation (EU) No. 1259/2010 of 20 December 2010 (Rome III). In the absence of a choice, the applicable law is determined on the grounds of article 8 of the Regulation. In general, German law is applicable if the spouses are or were last habitually resident in Germany or are both German nationals. Failing that, German law is applicable if a German family court has jurisdiction for the divorce.

Foreign nationals are not treated differently on divorce. German family courts used to apply foreign law quite regularly before the Rome III Regulation became effective. Further, courts now apply foreign law if chosen by the parties or it is applicable for other reasons.

2.9 How is the matrimonial home treated on divorce?

If the parties do not agree, the family court can assign the matrimonial home to one party if one of the spouses files a motion. The decisive factor taken into account by the court is the best interest of the children, if there are any, and the ownership. However, the court ruling does not affect the ownership.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

In general, yes, but not between spouses.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

Yes, if the jurisdiction lies with a German family court. If, e.g. the marriage was dissolved in another country but one of the spouses and the children have their habitual residence in Germany, they can claim for spousal and child maintenance in

Germany. Furthermore, the equalisation of the accrued gains may be claimed in Germany if the family court has jurisdiction. Often, the equalisation of German pension rights must be claimed in front of a German court separately if the divorce was proclaimed in a foreign country.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Spouses can seek mediation from a specially trained lawyer or even a judge during court proceedings. The competent court also tries to reach a settlement prior to giving a ruling. Arbitration is not recognised in case of divorce.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Pre- and post-nuptial agreements are legally binding in Germany if they comply with the formalities and are not unjust or immoral. An agreement is enforceable if these requirements are fulfilled.

Foreign pre- or post-nuptial agreements are generally upheld. Depending on the subject of the agreement and where it was concluded, the agreement will not only be examined in its morality and unfairness but will also be reviewed on its consistency with the public policy clause (*ordre public*).

If it does not comply, the rules of German family law will be applied without regard to the foreign agreement.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

In order to give effect to the agreement, a notary must record pre-nuptial agreements with both parties being present according to section 1410 of the BGB. Post-nuptial agreements must either be notarised or recorded by the court in order to give effect to the agreement if it is concluded while divorce proceedings are pending. If the agreement is concluded after the divorce is legally binding, e.g. concerning post-marital maintenance, a notarisation or recording by the court is no longer necessary.

The choice of a matrimonial property regime always needs to be notarised.

Since 29 January 2019, the Matrimonial Property Regulation (No. 2016/1103), as well as the Registered Partnership Property Regulation (No. 2016/1103), require that an agreement shall be expressed in writing, dated and signed by both spouses. Additionally, the formal requirements of the Member State in which the spouses have their habitual residence shall apply (article 23).

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Yes, marital agreements can cover financial claims on divorce additional to the choice of the matrimonial property regime. It is also possible to cover financial claims regarding children.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

The applicable law concerning spouses does not extend to cohabitants. Only on the general grounds of German civil law can claims be made against each other. There are no specific rules for cohabitants.

4.2 What financial orders can a cohabitant obtain?

Cohabitants may agree on a special relationship agreement (so-called "*Partnerschaftsvertrag*"). Otherwise, financial orders are subject to the German civil law.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

No. A registered partnership is only possible for same-sex couples.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Since 1 October 2017, same-sex marriage has been legal under German law. Before that time, same-sex couples were only able to register their partnership ("*Eingetragene Lebenspartnerschaft*").

As of 30 September 2017, same-sex couples cannot enter into a registered partnership. Registered partnerships originating from before 30 September 2017 can be transferred into a marriage, but do not need to be.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

In cases of joint custody (married or unmarried parents), both parents have to enforce financial claims on behalf of the child. In case of a separation of the parents, the primary caregiving parent can make claims (e.g. child maintenance or child benefit ("*Kindergeld*")) against the other parent according to section 1629 of the BGB. If one of the parents has sole custody, this parent must make financial claims on behalf of the child.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Generally, both parents are obligated to pay child maintenance, especially if the child is of age. If the child is underage, the primary caregiver fulfils his maintenance obligation by taking care of the child. The other parent has to pay child maintenance.

Child maintenance can be ordered by court or be administrated by the child welfare office ("*Jugendamt*").

The amount of child maintenance is calculated on the basis of the parent's income after taking certain liabilities into account. Under consideration of the child benefit ("*Kindergeld*"), the amount is based on the guidelines of the courts of appeal. The "Düsseldorfer Tabelle" is widely used in Germany, though it is not enshrined in law. Higher or special demands of the child can be awarded additionally by the court having jurisdiction.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Child maintenance has to be paid until the end of professional education, for instance until the end of university or education in general. This principle is restricted if the child is able to meet its demands on its own income. At the same time, the child is not required to take a job during his/her education.

5.4 Can capital or property orders be made to or for the benefit of a child?

In general, child maintenance has to be paid monthly. The family court cannot make a capital order.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

The primary caregiver represents a child on financial claims. Once the child has reached the age of 18, he/she must make a claim directly against both parents in his/her own name. The family court may take into account existing credits, financial burden, the number of children or if the child has forfeited her/his claim. However, any factor has to be named by the sued parent. The family court will not examine the factors *ex officio*.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

(a) Married parents automatically have joint custody.
(b) Unmarried parents need to agree on joint custody in front of the youth welfare office ("*Jugendamt*") or joint custody can be ordered by family court. Otherwise, the mother has sole custody.

6.2 At what age are children considered adults by the court?

Children are considered adults at the age of 18.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

If the court order does not contain a different duration, court orders are valid until the child is of age.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

The family court can make diverse orders in relation to children. The most common orders concern visitation rights and custody. Court orders on children are only included in the divorce if one party files a special motion. In general, the court makes an order separately from the divorce.

6.5 What factors does the court consider when making orders in relation to children?

First of all, the family court takes the wellbeing and the best interests of the children into account.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

In case of joint custody, both parents need to agree on major life decisions of the child, such as religious education, schooling, habitual residence and medical treatments. Decisions regarding everyday life can be made by the primary caretaking parent. In case of equally shared residence, both parents can make decisions regarding everyday life. Parents can generally take a child abroad if there is no warning for the specific country. Only if the other parent can prove that there is a serious risk of child abduction will the court forbid a trip abroad.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

No. A specific agreement or court order is needed.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Yes. Concerning visitation rights and custody, a preceding court order granting joint custody might be necessary.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

A welfare report is prepared by the youth welfare office ("*Jugendamt*"). Additionally, the court appoints a guardian ad litem, who investigates what solutions are in the best interests of the child. Furthermore, experts on special topics can be consulted. Finally, the Judge has to hear the child before deciding. An exception can only be made if the child is too young.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

The family court usually assigns a guardian ad litem ("*Verfahrensbeistand*"). Only in exceptional cases or because of severe time pressure is a guardian ad litem not assigned.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Other adults (e.g. grandparents) do not have a say in front of the family court. However, they can testify as a witness and they have an own visitation right they can claim if they have or had a good relationship with the child prior to the separation of the parents.

The family court encourages the parents to reach a mutual agreement. Furthermore, parents can seek mediation or consultation from the youth welfare office ("*Jugendamt*").

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

If a parent has sole custody ("*Sorgerecht*") for the child, this parent also has the right to determine the habitual residence ("*Aufenthaltsbestimmungsrecht*") of the child. This means this parent can move anywhere in the world and relocate the child without the other parent's consent. If the parents have joint custody, the consent of both parents is necessary. If the parents cannot agree, a court order is necessary.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

German jurisdiction does not differentiate between moving abroad or moving to a different part of the country.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

Under German law, family court does not decide on relocation of the child. If one of the parents wants to relocate (no matter if abroad or within the country), the court will have to decide whether it is in the best interest of the child to move with this parent or stay with the other parent. As mentioned in question 7.1, the court will transfer the right to determine the habitual residence ("*Aufenthaltsbestimmungsrecht*") of the child. Factors taken into account are continuity (personal and geographical), parenting skills, tolerance regarding a good relationship between the child and the other parent, the ability to promote the child's personal skills and the child's will.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

Please see the answer to question 7.3.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

In Germany it is fairly common to allow a parent to relocate with the child. There is no possibility to forbid a parent to relocate, even if this would be in the best interest of the child. A decision can only be made concerning the child.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Germany has been a party to the Hague Convention on the civil aspects of international child abduction of 25 October 1980 since 1 December 1990. Return orders under article 8 of this Convention are easier to obtain than a return order if the child was abducted within the borders of Germany.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

Germany has been discussing a reform of the law of parentage since 2017 because the current law no longer adequately reflects the multitude of family forms. Unlike in other countries, for example, German law does not recognise common parenthood for same-sex couples. Only the woman who gave birth to the child is recognised as the mother. Currently, there is no assignment of the mother's female partner as a so-called co-mother. The partner can only adopt the child. With the legalisation of same-sex marriages, the German legislature has put different- and same-sex couples on an equal footing, but has not made any steps toward equality with regard to the right of parentage.

Since 2020, Germany has also been discussing a reform of the law relating to the use of names because practice has shown that this is necessary. Name changes should be made easier and the options for choosing a name should be expanded. So far, naming regulations can be found in various laws. Responsibility for legal issues relating to names is shared between the registry office and administrative authorities. Since the number of mixed-national marriages and families is increasing, the problem of how to deal with names that have been legally acquired abroad but cannot be recognised in Germany has been arising more and more frequently in practice. It is confusing and can cause problems if a person has different names in different countries, and so this issue should be solved as comprehensively as possible.

The current government has not decided on the reforms in advance of the federal elections in September 2021. It can be assumed, however, that the reforms will continue to move forward with the new government after the elections have been held.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

Family courts did not adapt significantly to the current situation, though new hygiene concepts were put into place and, if possible, written procedures were arranged. Due to the lack of infrastructure at many courts throughout Germany, very few video conferences or remote hearings were performed. However, virtual hearings are admissible under German law. It would be desirable for family courts to continue their efforts to expand video conferences or remote hearings for the period after the COVID-19 crisis is over, but as yet this cannot be assumed. Many Judges act cautiously and prefer hearings with both spouses/parents being present in person.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

The question of parentage or to whom a child can be legally assigned is becoming more and more difficult due to the diversity of family constellations. Not every child is born into a marriage because there are more and more single individuals and same-sex couples who wish to have children. The use of reproductive medicine abroad is common, and surrogacy is still prohibited; with this in mind, it is time to modernise the law of parentage. In this context, it should be noted that the ban on surrogacy in Germany continues to cause difficulties, as many people have their children delivered by surrogate mothers abroad, and the legal handling of such cases is still very complicated.

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

Every party to a divorce in Hong Kong must satisfy the basic jurisdictional requirements under Section 3 of the Matrimonial Causes Ordinance Cap 179 (MCO), which states that the court shall have jurisdiction in proceedings for divorce if:

(a) either of the parties to the marriage are domiciled in Hong Kong at the date of the petition or application;
(b) either of the parties to the marriage are habitually resident in Hong Kong throughout the period of three years immediately preceding the date of the petition or application; or
(c) either of the parties to the marriage had a substantial connection with Hong Kong at the date of the petition or application.

In Hong Kong, it is irrelevant where the parties married or their nationality. So long as they can satisfy one of the above, they are entitled to petition for a divorce or apply for a joint application.

Domicile and habitual residence are well-recognised concepts but unique to Hong Kong is the ability for a party to claim a substantial connection to Hong Kong by demonstrating to the court that either party had a sufficient degree of settlement there. A list of factors was helpfully given by the Court of Appeal in the case of *RI v SSH* [2011] HKFLR 318 which included the past pattern of the parties' lives and whether they regard Hong Kong as home for the time being, even if their lifestyle may indicate that they may not take root in one place for too long. The court would look at the place of work of the parties, the location of their assets, if they had a home here, and whether the children of the family were schooled in Hong Kong. A simple business interest is not sufficient (*Z v Z* [2012] HKFLR 346), nor is an ID card or the place of marriage; however, in *B v A* [2007] HKFLR 138 the wife was deemed to have a substantial connection with Hong Kong although she had only been there for six months because she had arrived fully intending to make it her home for the foreseeable future and the children's schools were applied for and a deposit paid on an apartment.

More recently, the Court of Appeal in *ZC v CN* [2014] HKFLR 469 set out a comprehensive and in-depth review of the meaning of substantial connection and the authorities. Here, substantial connection was not found. The courts have made it clear that it is not their intention to create a convenient offshore divorce jurisdiction, although substantial connection does allow some flexibility in Hong Kong's uniquely cosmopolitan population.

In addition, it is possible to have a substantial connection with more than one jurisdiction. This can mean that, even if the court agrees that a party has a substantial connection with Hong Kong, it may not be the most appropriate forum if there is another choice. Then the parties become embroiled in a forum dispute.

In *Z,SN (aka K,SN) v K,VSF (Domicile and substantial connection)* [2019] HKFLR; [2019] HKCA 840 the Court of Appeal held that there was no substantial connection on all the facts, including the "matrimonial connecting factors".

Issues as to substantial connection and *forum non conveniens* regularly come before the court in Hong Kong and the principles were further confirmed in the Court of Final Appeal case of *SPH v SA (Forum and marital agreements)* [2014] HKFLR 286.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

Under MCO s11, the only ground for divorce in Hong Kong is irretrievable breakdown of the marriage. Pursuant to s11A, the divorce can only be proven by at least one of the following five factors:

(a) the respondent's adultery;
(b) the unreasonable behaviour of the respondent;
(c) the parties have lived apart for a continuous period of one year and the respondent consents to the divorce on this basis;
(d) the parties have lived apart for a continuous period of two years, regardless of whether the respondent consents or not; or
(e) the respondent's desertion.

There is also an option to jointly apply for divorce in Hong Kong. The sole ground is irretrievable breakdown of the marriage and the sole fact is one year's separation by consent. Both parties must sign the petition, and all relevant documents.

Under MCO s12, a party to a marriage is unable to petition for divorce until they have been married for one year.

The parties can have an uncontested divorce if the respondent files an Acknowledgment of Service (Form 4) with the court indicating that he/she has no intention to defend the divorce. Also, if the respondent does not file his/her acknowledgment of service within eight days of service (including the day of service), the petition can proceed undefended, so long as proper service can be proved.

There are a number of alternatives in respect of service should it prove difficult to serve, including deemed service, substituted service or application for an order dispensing with service.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

If the parties agree that they will not contest the divorce, then neither party need attend court. The matter is placed in the Special Procedure list and fast-tracked.

The *decree nisi* is pronounced in open court and a note of the order made is provided to the petitioner who then draws up both the *decree nisi* and the order made.

It is not possible to have a "private" divorce in Hong Kong. A petition or joint application must be filed and a decree obtained from the court.

1.4 What is the procedure and timescale for a divorce?

Once the respondent has filed his/her Form 4 and indicates that he/she does not intend to defend the divorce (or is out of time), the petitioner can file an application for directions for trial supported by an affidavit in support of petition (Form 21) to get a date for *decree nisi*.

The *decree nisi* will be pronounced in open court, and if there are outstanding matters yet to be agreed, such as a dispute over finances or children, these will be adjourned to a later date (see Practice Direction 15.4 Special Procedure). The decree will record the place and date of the marriage, the names of the parties, the ground of irretrievable breakdown and the fact on which it was based. The draft order will set out the order for costs and whether the matter has been adjourned. If the parties have settled, the order will reflect their settlement and the matter can proceed in due course to *decree absolute*.

The *decree absolute* can be applied for within six weeks of the *decree nisi* by the petitioner.

If the respondent indicates in his/her Form 4 that he/she wishes to dispute the petition, he/she has 29 days from the receipt of the notice of proceedings (in Form 3), inclusive of the date of receipt, to file an answer. If outside the jurisdiction, the time for filing the acknowledgment of service is extended to 21 days and the time for filing the answer to 42 days, inclusive of the day of receipt.

The respondent can file a cross-petition if he/she wishes to allege that the marriage has broken down due to other facts.

The petitioner has 14 days in which to reply to the answer and cross-petition. No further pleadings may be filed without leave of the court.

Disputed divorces are rare in Hong Kong. Where they do occur, they inevitably increase the timescale for the divorce significantly. Should the matter go to trial, directions will be given and a date set. The usual procedure for trial will then be followed with cross-examination, etc. Costs orders may be made against parties who unreasonably defend a petition or where the matter could have proceeded on a non-fault basis.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Although the *decree absolute* can be applied for within six weeks of the *decree nisi*, this is generally not done until all matters are resolved.

In respect of children, a *decree absolute* will not be granted without an s18 declaration (s18 Matrimonial Proceedings and Property Ordinance Cap 192 (MPPO)) that "arrangements for the welfare of every child have been made and are satisfactory or are the best which can be devised in the circumstances".

A *decree absolute* will not be made if there are applications or appeals pending, or if issues relating to an application under s17A MCO have not been resolved. S17A MCO relates to the duty of the court to consider the financial position of the respondent following a divorce based on either one or two years' separation.

If there is an emergency, the petitioner can apply to expedite the *decree absolute*. The usual reason for such a request is an imminent birth or the remarriage of the petitioner. If it is the respondent who would like to expedite, he/she must ask the petitioner to make this application. If the request is before the *decree nisi*, the court will consider the application then. If it is requested after *decree nisi*, there must be an application by summons (see *LPK v SH and HSH (expedition of decree absolute)* [2012] HKFLR 257).

See Court of Appeal case *JAH v VH* [2013] HKEC 2017, [2013] HKFLR 664 for a summary of the law on *decree absolute*.

If the petitioner fails to make the application for *decree absolute*, the respondent may apply three months after the date of the expiration of the time limit, namely six weeks plus three months. The application must be made *inter partes* and supported by an affidavit.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Foreign divorces (and legal separations) are recognised in Hong Kong under Part IX MCO if they have been obtained by means of judicial or other proceedings and are effective under the law of that place. The spouse must have been habitually resident (and/or domiciled) and/or was a national of that place.

Exceptions are contained in s61 and include instances where the divorce was obtained without one of the spouses being given sufficient notice or an opportunity to take part in the proceedings or where it would be manifestly contrary to public policy.

The leading case, which changed the law in respect of enabling a party to make an application for ancillary relief despite a foreign decree, is the Court of Final Appeal case of *ML v YJ* [2011] 1 HKC 447.

There are no specific procedural requirements to recognise a foreign decree but the fact of the legal separation of decree must be proved. See section 58 MCO.

There have been some changes to the law in respect of recognising divorce certificates from the PRC (see question 8.1).

1.7 Does your jurisdiction allow separation or nullity proceedings?

Yes, Hong Kong has provision for both judicial separation and nullity applications.

With an application for judicial separation, the party must plead one or more of the five facts but must not plead that the marriage has broken down irretrievably. The jurisdictional requirements are the same as for divorce. There is no two-stage process of *decrees nisi* and *absolute* and the judicial separation degree is the final decree. The same orders can be made in respect of children and the finances. See s24 MCO Part V.

With nullity, there is a choice between pleading that the marriage is either void from the start due to the status of the parties or voidable because of circumstances surrounding the marriage which would cause it to have no legal effect. See s19 MCO Part IV. The parties are not required to have been married for a year with nullity proceedings and the jurisdictional requirements are broader; as well as the three requirements outlined

above for divorce, a party can apply for nullity if the marriage was celebrated in Hong Kong or if the respondent at the time of the petition was resident in Hong Kong, or both parties were resident in Hong Kong at the date of the petition.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Yes, and they regularly are if the other country is deemed to be the more appropriate jurisdiction. Hong Kong follows England and Wales and the principles in cases such as *Spiliada Maritime Corp v Consulex Ltd* [1987] AC 460 (see Court of Appeal cases *DGC v SLC (nee C)* [2005] 3 HKC 293 and *LN v SCCM (Forum non conveniens)* [2013] HKFLR 358).

The leading case on *forum non conveniens* is the Court of Final Appeal case of *SPH v SA* [2014] HKFLR 286. Here, the Court of Final Appeal found overwhelmingly that the wife had jurisdiction as of right and therefore there was no need to advance further in the *Spiliada* test. Having found that the wife could pursue her petition, the burden shifted to the husband in his stay application to show that Germany was distinctly more appropriate, which he failed to do. It was material in this case that the wife had lived and worked in Hong Kong for many years, and the marriage, although relatively short, was conducted in Hong Kong.

Since the Court of Final Appeal case of *ML v YJ* mentioned above at question 1.6, the Hong Kong government passed an amendment to the MPPO "to empower the courts in Hong Kong to order financial relief for a former spouse whose marriage has been dissolved or annulled, or who has been legally separated … in a place outside Hong Kong". This provision came into force in March 2011 as Part IIA of the MPPO.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

Financial orders the court can make are found in the MPPO s4, 5, 6 and 6A.

On granting a decree of divorce, the court may make orders for periodical payments, secured periodical payments and lump sums (s4).

Under s5(2) MPPO, the court can order similar financial provision for the child of the family, although the court is able to make such an order before *decree nisi* on behalf of children (s5(1)).

The court can make the following property adjustment orders under s6:

(a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;

(b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;

(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage;

(d) an order extinguishing or reducing the interests of either of the parties to the marriage under any such settlement; and

(e) an order for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale of which, either or both of the parties to the marriage have a beneficial interest, either in possession or reversion, and for the use of the proceeds of such sale.

The court has the power to sell property which has been the subject of an order under s4, 5 or 6 (s6A).

Orders for Maintenance Pending Suit can be made prior to the *decree nisi* (s3 MPPO).

Orders for variation can be made under s11 MPPO.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

No, Hong Kong is a common law jurisdiction very similar to England and Wales.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

The court is obliged to consider the factors set out in s7(1) MPPO as follows:

It shall be the duty of the court in deciding whether to exercise its powers under s4, 6 or 6A in relation to a party to the marriage and, if so, in what manner, to have regard to the conduct of the parties and all the circumstances of the case including the following matters, that is to say:

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage have or are likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage have or are likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family; and

(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

The court must bear these factors in mind at all times and case law has developed interpreting these laws. The leading case in Hong Kong for the determination of marital financial claims is the Court of Final Appeal case of *LKW v DD* [2010] 13 HKCFAR 582; [2011] HKFLR 106.

This case laid down four guidelines and five steps to assist the judiciary, practitioners and lay people alike.

The four guidelines are as follows:

(i) the objective is to achieve a fair outcome;

(ii) a rejection of discrimination;

(iii) there should be a yardstick of equality against which judges can check their tentative views which should be departed from only with "good, articulated reasons"; and

(iv) a rejection of minute retrospective investigations.

The Court of Final Appeal set out the following five steps:

(1) Identify the assets.
(2) Assess the parties' financial needs. If there are insufficient assets, an assessment will be made at this point.
(3) If there are assets surplus to needs, the court must consider the "sharing principle".
(4) Considering whether there should be a departure from equality, the court may consider a list of potential and common "material factors" which include a consideration of the facts including the source of the asset, conduct, length of marriage, contributions to the family – both financial and non-financial – and any claims for compensation.
(5) Deciding the outcome weighing up all the considerations, particularly in Step 4.

As the Hong Kong Ordinance is so similar to that of England and Wales, in particular s7 MPPO with s25 Matrimonial Causes Act 1973, the case law is also very similar and practitioners in England will be familiar with the cases cited in Hong Kong judgments.

2.4 Is the position different between capital and maintenance orders? If so, how?

No, the same factors apply to both capital and maintenance orders. However, capital will be subject to the sharing principle, if needs are covered, but it is less clear in respect of equal sharing of future income. It will depend on the facts as to whether future income can be taken into account (*A v B* [2016] HKFLR 332), although it is anticipated that the Hong Kong courts will follow the guidance in *Waggott v Waggott* (*SSLT v SMFC (Ancillary relief; non-matrimonial assets)* [2019] HKFLR 458; [2019] HKFC 250).

There is no statutory duty in Hong Kong to consider a clean break.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

If there is agreement between the parties, they must submit their settlement in the form of a consent summons to court for a court order. Even if there are no assets and no children, it is advisable to finalise all matters and dismiss all claims in a consent order sealed by the court.

If the parties have been able to agree on all matters before they issue the divorce petition, or if they are able to agree before the First Appointment, they will never have to attend court. If there is any dispute as to children or finances, the chances are that they will have to attend either the First Appointment which is the initial hearing in respect of disputed finances, or the Children's Appointment if there is disagreement in respect of the children, or both.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

Spousal maintenance orders are commonplace in Hong Kong.

The order for spousal maintenance cannot begin before making an application for an order and cannot take effect until after *decree absolute*. Orders for maintenance pending suit can be made for a spouse prior to *decree absolute*. The order will last until the death of either of the parties or remarriage, whichever is earlier, unless there is an agreement between the parties that the order should cease at a certain date or on a certain occurrence (such as permanent cohabitation with another partner). If the periodical payments are to cease on a specified date, this is more commonly known as a deferred clean break.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Yes, in Hong Kong, many cases go before the courts arguing whether or not a property is matrimonial.

Often the cases involve pre-marital or post-marital property which one party is seeking to take out of the marital pool on this basis. Also, in Hong Kong, many cases come before the court to determine whether an asset which is beneficially owned by one of the parties, does in fact belong to that party. It is common for family members to put property in the names of their children or parents without the intention of transferring ownership. Such applications are dealt with in advance of the ancillary relief hearing as a preliminary issue.

Leading cases on this topic include the Court of Final Appeal decisions in *KLK v PLTO* Court of Final Appeal 21 of 2013; [2014] HKFLR 329 and Court of Appeal *PW v PPTW (Ancillary relief; non-matrimonial property)* [2015] HKFLR; No. 224 of 2013.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

No, the courts in Hong Kong do not treat foreign nationals differently. So long as a party can meet the jurisdictional requirements set out under s3 MCO (see question 1.1 above), they can bring an action here.

The courts can only apply foreign laws if an application is made to register a foreign order or for a mirror order in Hong Kong; *Lexi Fori* applies in Hong Kong as in England and Wales.

2.9 How is the matrimonial home treated on divorce?

The matrimonial home is treated in the same way as any other marital asset in Hong Kong and will form part of the marital asset pool.

The majority of the population in Hong Kong are housed in rented accommodation. There is also a Home Ownership Scheme which relates to housing for low-income families which have been sold to them for less than the market value. Any order for the transfer of such properties requires the consent of the Housing Authority and is subject to the sale restrictions of the Housing Ordinance Cap 283.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

The concept of "trusts" is recognised in Hong Kong. The development of trusts originated in the need for tax planning to mitigate Estate Duty but this was abolished in 2006 with the passing of the Revenue (Abolition of Estate Duty) Ordinance. The law in relation to trusts in Hong Kong was revised in April 2014 with the Trustee Ordinance Cap 29.

There are a number of ways in which trusts can become involved in divorce proceedings, including where there is a claim under s6 MPPO for a variation of settlement or where the trust is a resource of the family (s7(1)(a)MPPO). In Hong Kong, all assets, wherever situated, will be subject to scrutiny, including trusts. The leading case in Hong Kong where the trust funds were found to be a resource of the marriage is *KLK v PLTO* Court of Final Appeal 21 of 2013; [2014] HKFLR 329.

Hong Kong often looks to English case law in respect of trusts in divorce.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

Since the passing of the Matrimonial Proceedings and Property (Amendment) Ordinance 2010, Hong Kong courts have had the power to make orders in respect of financial claims following a foreign divorce.

The grounds for making such an application are set out in Part IIA MPPO ss29AA–29AL. They are very similar to the English Part III Matrimonial and Family Proceedings Act 1984.

An applicant must first ensure that he/she has jurisdiction to make the application. He/she will be excluded if he/she has remarried but applications can be made so long as the divorce is recognised as valid according to the laws in Hong Kong (s29AB).

The applicant must first obtain leave to make the application and similar jurisdictional hurdles must be cleared as with divorce in respect of domicile, habitual residence and substantial connection.

Under s29AF(2), the considerations which the court must take into account are as follows:

(a) the connection that the parties to the marriage have with Hong Kong;
(b) the connection that those parties have with the place where the marriage was dissolved or annulled or where they were legally separated;
(c) the connection that those parties have with any other place outside Hong Kong;
(d) any financial benefit that the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a place outside Hong Kong;
(e) if an order has been made by a competent authority outside Hong Kong requiring the other party to the marriage to make any payment or transfer any property to, or for the benefit of, the applicant or a child of the family:
    (i) the financial relief given by the order; and
    (ii) the extent to which the order has been complied with or is likely to be complied with;
(f) any right that the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any place outside Hong Kong and, if the applicant has not exercised that right, the reason for that;
(g) the availability of any property in Hong Kong in respect of which an order for financial relief in favour of the applicant may be made;
(h) the extent to which any order for financial relief is likely to be enforceable; and
(i) the length of time that has elapsed since the date of the divorce, annulment or legal separation.

Once leave has been granted, the court has power to make the usual financial orders under ss4–6A MPPO set out above.

The leading case in Hong Kong for Part IIA applications is *C v H (Foreign Decree: Part IIA)* [2012] HKFLR 199.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

At present, dispute resolution in Hong Kong comprises court litigation, mediation and collaborative practice.

Hong Kong does not have a system in place yet for family arbitration although from January 2016 there has been a pilot scheme for private adjudication. For the time being, private adjudication can only be for financial disputes, not matters involving children or the divorce itself. The scheme is consensual and parties agree to be bound by the decision of the private adjudicator. Hong Kong saw the first such private adjudication in 2020.

Mediation is well-established in Hong Kong, both privately and as part of the court procedure. All parties who are in dispute over finances and children must go through the Financial Dispute Resolution procedure and Children's Dispute Resolution procedure, respectively. This procedure is designed to promote court-assisted settlement.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

The Court of Final Appeal in *SPH v SA (Forum and marital agreements)* [2014] HKFLR 286 held that the principles enunciated in the English Supreme Court case of *Radmacher v Granatino* [2011] 1 AC 534 represents the law on marital agreements in Hong Kong. The court also held that there would be no need to distinguish between pre- and post-marital agreements.

It was further held in *SPH v SA* that foreign elements may be relevant to the question whether the parties intended their agreement to be effective, citing the case in *Radmacher* where the issues were governed by English law and the relevance of the German law and choice of law clause was that it demonstrated that the intention of the parties was that they were to be bound by their agreement. Therefore, it would appear that the position is the same if the agreement is foreign or not but there may be evidence in respect of intention which may be relevant as to the weight which should be given to such agreements.

Hong Kong, therefore, follows English law as it develops in this area. In *LCYP v JEK (Ancillary relief, section 17, prenuptial agreements & trusts)* [2019] HKFLR 238; [2019] HKCFI 1588 the Court of First Instance considered whether the wife should be held to an unvitiated pre-nuptial agreement. In that case the judge held that the circumstances had changed to such a degree over a long marriage that the parties could not have anticipated their situation at divorce at the time of the signing of the pre-nuptial agreement. The court would, however, have regard to the agreement where it was not unfair to do so.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

The facts surrounding the finalisation of the agreement will be material as to how much weight can be placed on the agreement. There must be both procedural and substantive fairness. An agreement will only carry full weight:

> "if each party had entered into it of his or her own free will, without undue influence or pressure, having all the information material to his or her decision to enter into the agreement and intending that it should be effective to govern the financial consequences of the marriage coming to an end … Enforcement of the agreement could be rendered unfair by the occurrence of contingencies unforeseen at the time of the agreement or where, in the circumstances prevailing at the time of separation, one partner would be left in a predicament of real need while the other enjoyed a sufficiency." (Para. 34 *SPH v SA*.)

The parties should finalise the agreement within 28 days before the marriage. This is not a rule but an indication that both parties had sufficient time to consider their positions

before the wedding. The parties should also both sign the document as a deed and if there is a language element, a translator should be present. There should be independent legal advice on both sides.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance)?

Such agreements can cover a spouse's financial claims on divorce, including maintenance and compensation. The parties cannot oust the jurisdiction of the court and every agreement which a party seeks to enforce will be scrutinised by the Hong Kong courts.

There is no matrimonial property regime in Hong Kong.

Pre-marital agreements in Hong Kong do not deal with child maintenance or other claims relating to the financial maintenance of children. Post-marital agreements may contain such provisions, particularly if the agreement is a separation agreement aimed at settling all financial and custody arrangements prior to issuing a petition for divorce.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

There is no right under matrimonial legislation for a cohabitee to make a financial claim in Hong Kong if they separate. The party must fall back on the remedies available to those arising out of the general laws of, e.g., contract (if any contract has been entered into to govern the parties' rights), or property, e.g., contribution to the purchase price or loan repayments on a property may give rise to a beneficial interest and/or a right to live in the property, as may a common intention by the parties in that regard, even if the property is registered in the other party's name.

4.2 What financial orders can a cohabitant obtain?

A cohabitee in Hong Kong does not have a right to apply for financial orders other than as an applicant in the civil courts mentioned above.

The position is different if there are children of the relationship. In that case, in addition to the financial provision set out in question 5.1 below, the parent who has the care and control of the children can apply for a carer's allowance. This is a monthly sum which is payable to compensate the carer for any restriction in employment as a result of looking after the children. The courts in Hong Kong have made it clear that such an allowance cannot be as generous to a cohabitee as to a spouse. The leading case is *WGL v ASB (Child maintenance under the GMO)* [2013] HKFLR 391.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

No, there is not.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

No, they are not.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

The children of parents within and outside of marriage are treated differently, albeit the overarching consideration for the courts is the welfare and best interests of the child irrespective of the marital status of his/her parent.

The law in respect of children of married parents is found in MPPO. The law in respect of children of unmarried parents is found in the Guardianship of Minors Ordinance Cap 13 (GMO).

The court can make financial provision orders for children of married parents under s5 MPPO for periodical payments, secured periodical payments and lump sum, which can be payable in instalments. Under s6 MPPO, the court can order a property adjustment order in favour of a child and the jurisdiction of the court is the same as that relating to an order in favour of a spouse.

The court can make financial provision orders for the children of unmarried parents under s10(2) GMO as follows:

(a) an order requiring payment to the applicant by the parent or either of the parents of the minor of such lump sum (whether in one amount or by instalments) for the immediate and non-recurring needs of the minor or for the purpose of enabling any liabilities or expenses reasonably incurred in maintaining the minor before the making of the order to be met, or for both, as the court thinks reasonable having regard to the means of that parent;

(b) an order requiring payment to the applicant by such parent or either of such parents of such periodical sum towards the maintenance of the minor as the court thinks reasonable having regard to the means of that parent;

(c) an order requiring the securing to the applicant by such parent or either of such parents, to the satisfaction of the court, of such periodical sum towards the maintenance of the minor as the court thinks reasonable having regard to the means of that parent;

(d) an order requiring the transfer to the applicant for the benefit of the minor, or to the minor, by such parent or either of such parents, of such property, being property to which the parent is entitled (either in possession or reversion), as the court thinks reasonable having regard to the means of that parent; and

(e) an order requiring the settlement for the benefit of the minor, to the satisfaction of the court, of such property, being property to which such parent or either of such parents is so entitled, as the court thinks reasonable having regard to the means of that parent.

See the Court of Appeal case of *IDC v SSA (Lump sum for children of unmarried parents)* [2014] HKFLR 267.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

There is no agency in Hong Kong and child maintenance is assessed by the court bearing in mind the factors set out in s7(2) MPPO as follows:

(a) the financial needs of the child;

(b) the income, earning capacity (if any), property and other financial resources of the child;

(c) any physical or mental disability of the child;
(d) the standard of living enjoyed by the family before the breakdown of the marriage; and
(e) the manner in which he/she was being and in which the parties to the marriage expected him/her to be educated,

"and so to exercise those powers as to place the child, so far as it is practicable … in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him".

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

The usual order in respect of children's maintenance is that the order should continue until the child reaches 18, or completes his/her full-time education, whichever is later.

Under s10(1) MPPO, the court cannot make an order in favour of a child who has reached 18, but under s10(3)(b) an order can be made if: (a) that child is, or will be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he/she is also, or will also be, in gainful employment; or (b) there are special circumstances which justify the making of the order or provisions (for example, if the child is suffering from a disability).

There are similar provisions for children of unmarried parents under the GMO s12A(3).

5.4 Can capital or property orders be made to or for the benefit of a child?

Yes, please see question 5.1 above.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

Yes, it is possible for a child to make a claim against his/her parents if he/she has a guardian *ad litem* to make the application on his/her behalf. An individual who has attained 18 years but who is still in full-time education or undergoing training for a trade, profession or vocation can make an application against a parent.

The factors which a court must take into account with any application for child maintenance, if such maintenance is payable pursuant to s10(3)(b) MPPO, would be the same as those set out at question 5.2 above.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

(a) Both parents in a marriage have equal rights of custody.
(b) Under s3(1)(c) GMO, only the mother has rights of custody where the parents are unmarried. For the father to gain equal rights, he must make an application to the court pursuant to s3(1)(d).

6.2 At what age are children considered adults by the court?

Under s3 of the Interpretation and General Clauses Ordinance Cap 1, a child is defined as a person who has not yet attained 18 years of age.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Under s19(1) MPPO, the court can make an order for custody for a child of the family who is under the age of 18. There is no specific mention in the GMO and therefore the definition under Cap 1 is adopted.

Unfortunately there is some inconsistency in the MPPO, as s18(5)(a) (which requires the court to be satisfied that the arrangements for the child are the best that can be achieved under the circumstances) defines a child of the family to whom the section applies as being a minor child who is below the age of 16 years or who is receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation. This legislation is currently under review.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

The court can make orders for joint or sole custody, care and control and access. "Custody" in Hong Kong means the right to make important decisions on behalf of the child, for example in respect of education, health and religion. The non-custodial parent can always be heard on these issues on his/her application to the court. "Care and control" is the day-to-day care of the children and "access" comprises the arrangements which ensure the children's right to contact with the non-custodial parent. The leading case is the Court of Appeal case of *PD v KWW (Child: Joint Custody, care and control)* [2010] HKFLR 184. The courts can also make an order for shared care.

The court will make an order in respect of children. There is currently no provision for "no order" to be made in the Hong Kong courts. The court must also make a s18 declaration (see question 1.5), whether there are children of the family or not.

6.5 What factors does the court consider when making orders in relation to children?

The court must regard the best interests of the child as the first and paramount consideration (s3 GMO and s48 MCO). With this in mind, the court must take into account the views of the child, having regard to his/her age and understanding, and "any material information" including any social welfare report.

In Hong Kong, there is no list of factors to which the courts must have regard, but in practice the courts do look at a list of factors recommended by the Law Reform Commission which is based on the English Children Act 1989, and which includes some elements of the Australian Family Law Act. Such factors include the child's physical, emotional and educational needs, the likely effect on him/her of any change in circumstances, his/her age, maturity, sex, social and cultural background, any harm which he/she has suffered or is at the risk of suffering, the capability of his/her parents to meet his/her needs, the nature of his/her relationship with each parent and the attitude to the child and the responsibilities of parenthood demonstrated by each of the parents.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

If there are no proceedings before the court, the parents can move freely with their children. Upon the commencement of proceedings, however, all children of the family fall within the jurisdiction of the court and if one parent wishes to remove the child from Hong Kong, consent of the other party is required. Once a custody order has been made, there will be a restriction on the removal of the child from Hong Kong without leave of the court, unless the parent removing the child files a written undertaking to return the child to the jurisdiction and the other parent consents in writing to the removal.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

There is no presumption of an equal division of time, although the courts recognise that children normally benefit from access to both parents. The court will look at all the factors and decide what is in the children's best interests given their education and commitments.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Similar provisions apply under the GMO and the MPPO in respect of custody although, as noted above, the father of an illegitimate child will have to make an application under s3(1)(d) to be recognised as having equal legal rights to the mother.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

Normally, the judge will be guided by the social welfare report prepared by an officer of the Director of Social Welfare as the "eyes and ears" of the court. However, such a report is only to assist the judge and there is no presumption that any recommendation in the report will be followed by the judge. The judge can meet the child and in 2012, the Chief Justice produced a helpful guidance note to assist judges should there be a judicial meeting. This note covers whether there should be a meeting, the factors a judge should bear in mind and the procedure to follow.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

A child may have his/her own separate legal representation or be represented by the Official Solicitor. Guidance has been given by the Court of First Instance in *C v S (On separate representation)* [2018] HKFLR 159 ([2018] HKCFI 390). Guidance has also been given by the Chief Justice in Practice Direction SL6 in 2012, which provides a list of circumstances in which the judge could consider making an order that the child be separately represented.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

At present, there is very little that adults, other than the parents, can do unless they apply under the laws of guardianship. The law in this area is currently under review.

In addition to litigation through the courts in respect of custody and access, disputes relating to children are often dealt with through private mediation.

There is also a scheme in the Family Court for Children's Dispute Resolution which aims to support "mothers and fathers, so that they are able to effectively parent their children post separation or divorce. The intention is to ensure that whilst the best interests of children remain the court's paramount concern, that lasting agreements concerning children are obtained quickly and in a less adversarial atmosphere. The focus is therefore on the children's best interests together with the duties and responsibilities of their parents". Please see Practice Direction 15.13.

Collaborative practice is also available for the resolution of children's disputes.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

No, if one parent wants to move permanently from the jurisdiction of Hong Kong, consent of the other parent is required. There is also a requirement to obtain an order for leave for a child to be permanently removed, or, in the event that the child has already left, that leave be given allowing him/her to remain permanently outside the jurisdiction, whether or not by consent.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

As Hong Kong is a relatively small country, this does not apply.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

The court must make a decision based on the best interests of the child. There are no statutory guidelines in respect of factors a court should take into account, although courts do regularly refer to a "welfare checklist" which includes: the ascertainable views of the child; his physical, emotional and educational needs; the likely effect on him of any change in his circumstances; his age, maturity, sex, social and cultural background; any harm which he has suffered or is at risk of suffering; the nature of the relationship of the child with each of the child's parents and with other relevant persons; and the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents.

The court will also consider the reasonable proposals of the parent wishing to leave, scrutinising whether there is a genuine motivation for the move and not to bring contact with the other parent to an end. The arrangements for the child must be practical and set out well. The effect on the primary carer is important, although not paramount, in Hong Kong as part of the welfare of the child principle. The effect on the parent left behind is also important and the court will carefully consider continuing contact.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

See the answer to question 7.2.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

In practice, primary carers can normally leave Hong Kong if the arrangements are suitable for the child. The Hong Kong courts see a number of such applications each year involving expatriates seeking to go "home". Increasingly, however, if the parenting is deemed to be shared, the courts may not allow the child to permanently relocate if the children were benefitting from the shared care.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Hong Kong is a signatory to the Hague Convention and the provisions of the convention were given effect by the enactment of the Child Abduction and Custody Ordinance Cap 512 in 1997. Habitual residence in respect of Hague applications and issues as to removal of children from Hong Kong were considered in the Court of Appeal cases of *JEK v LCYP* CACV 125 of 2015; [2015] HKFLR 425; [2015] 5 HKC 293 and *BMC v BGC (Hague)* [2020] HKCA 317.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

A significant development in Hong Kong was the signing of the Proposed Arrangements with the Mainland on Reciprocal Recognition and Enforcement of Judgements on Matrimonial and Related Matters in June 2017. Some of the provisions have now been approved by the Hong Kong Legislative Council in the form of the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill, which was published in the Gazette on 14 May 2021. Under the provisions of the Bill, Mainland judgments relating to children, finances and divorce can be enforced in Hong Kong and also Mainland marriage certificates will be recognised. There has been a consequent amendment to the MCO in respect of a decree from the Mainland (reference made at question 1.6 above). This will have a significant impact on cross-border disputes between Hong Kong and the Mainland.

It is anticipated that further information will be released in respect of the recognition and enforcement of Hong Kong orders on the Mainland. Work continues in Hong Kong in respect of the proposed Family Law Procedure Rules.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

In light of the General Adjournment Period (GAP) in Hong Kong where the courts were closed from Chinese New Year in January until May 2020 and then periodically affected thereafter, the family courts have had to be creative about how they deal with applications, many of which are emergencies. Prior to the pandemic, the use of the Technology Court was limited but with the international nature of Hong Kong, many parties to proceedings were caught outside the jurisdiction and the courts had to accommodate evidence given remotely.

The decision concerning how the proceedings are to be held is a case management decision, normally taken by the judge. A guidance note for remote hearings for civil business in the civil courts, promoting the use of the courts' existing video conferencing facilities (VCF), came out in April 2020 and was extended to the District and Family Courts in June 2020. The judge, in deciding whether to allow a remote hearing, must consider: the views of the parties; the availability of VCF equipment; the subject matter of the proceedings or relevant part of the proceedings; whether the proposed use of VCF is likely to promote the fair and efficient disposal of and whether costs will be saved.

Hong Kong courts have increasingly used video conferencing following a judgment by the Court of Appeal, *CSFK v HWH (Appeal against an FDR order)* [2020] HKCA 207, in April 2020 where the court confirmed that it was permissible to conduct a hearing using VCF so long as the judges were sitting in the High Court. There was no specific provision restricting the mode of receiving submissions and evidence of the parties. It was important to keep a record and the VCF would be linked to the DARTS system. Where VCR has been unavailable, the court has also heard evidence from one of the parties over SKYPE, on the undertaking that no recording of the hearing was made by him or his solicitors.

In the case of *Cyberworks Audio Video Technology Ltd v MEI AH (HK) Company Ltd and Ors*, Mr Justice Coleman ordered that directions could be given by him by telephone. He did this in his courtroom, using a speakerphone so that all participants in the telephone hearing could be recorded using the DARTS system. The judge noted that the current crisis was an opportunity for the courts and parties to litigation to reassess how cases can best be actively managed in furtherance of the underlying objectives of the court. He went further to suggest that there was a strong argument for moving matters in a similar way beyond the end of the crisis. In addition, family judges regularly dispose of appropriate applications on paper. It seems likely therefore that the use of technology, as well as telephone and paper disposal, is in Hong Kong courts to stay.

Concerning other dispute resolution methods, there has been some advancement with the pilot scheme for Private Financial Adjudication (PFA) which, with its greater degree of flexibility, would incorporate innovative techniques such as remote hearings, on paper disposal and control over the timing of the hearing. The first PFA was held in July 2020.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

Family lawyers are waiting patiently for two important pieces of legislation to be passed by the government. The first is a Proposed Children's Proceedings (Parental Responsibility) Bill which will consolidate the many different ordinances dealing with children, clarify and modernise the law in respect of custody, care and control and set out clear guidelines as to when parental consent is required, and importantly dispense with the differentiation between children of married and unmarried parents.

The second piece of legislation is a proposed set of family procedure rules which will provide practitioners with clear guidance of procedure and in one place. At the moment, Hong Kong family procedures can be found in statute, subsidiary legislation and in the rules of civil procedure. The aim is to have a set similar to the Family Procedure Rules in England and Wales.

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

In Indonesia, there are two court jurisdictions over divorce proceedings, which differ according to the religion of the parties. For those who are Muslim (Moslem), divorce should be carried out in the Religious Court and for non-Moslems through the District Court, which in Indonesian law is known as "absolute competence".

With regard to location, the divorce petition/divorce accusation must be filed at the court where the parties are domiciled. There are several conditions that then affect the location of the court (known in Indonesian law as "relative competence"). The conditions are as follows:

Condition	Moslem	Non-Moslem
General.	At the court where the wife is domiciled, whether the petition is filed by the husband or the accusation is filed by the wife.	At the court in the location of the defendant's domicile.
The defendant's domicile is unknown.	At the court where the plaintiff is domiciled.	
The defendant's domicile is overseas.	At the court where the plaintiff is domiciled.	
Both parties are domiciled overseas.	At the court where their marriage took place or at the Central Jakarta Religious Court.	

The divorce of Indonesians who marry abroad (either with foreigners or Indonesians) can be conducted in Indonesia as long as their marriage is reported to the Civil Registry Office in Indonesia no later than 30 days after their return to Indonesia (the overseas marriage itself should be registered in the relevant agency in said country and/or with an Indonesian representative in said country).

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

There are specific grounds for divorce stipulated by the law, i.e.:

a) One of the parties commits adultery or becomes an incurable drunkard, addict, gambler, etc.
b) One of the parties leaves the other party for two consecutive years without the permission of the other party and without a valid reason or for any other reason beyond their control.
c) One of the parties incurs a prison sentence of five years or a heavier sentence after the marriage takes place.
d) One of the parties commits atrocities or crimes that endanger the other party.
e) One of the parties contracts an illness or becomes disabled, which results in not being able to carry out their obligations as husband and wife.
f) Constant disputes and quarrels between husband and wife result in the impossibility of living in harmony in the future.

Two additional grounds for divorce exist for Moslems:

g) The husband violates the marriage vows (*taklik talak*).
h) A change of religion (or *murtad*) results in problems and disharmony in the household.

It should be noted that Indonesia does not recognise uncontested divorces; however, if the grounds for divorce are covered by point c) above, then the plaintiff only needs to submit the final binding court judgment *in lieu* of said imprisonment as evidence in his/her divorce proceeding. This is slightly different from other grounds; point f) for instance, where the court (a panel of judges) must hear the reasons for the dispute from people close to the parties. Point f) is considered the most common ground used to file a divorce accusation/divorce petition.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

Indonesian law strictly states that "the divorce proceeding can only be carried out before the court"; therefore, a "private" divorce, without court involvement, cannot be conducted in Indonesia.

However, divorce proceedings can be shortened if the defendant is not present from the beginning of the trial until the end of the trial. In this case, the defendant is deemed to accept all the demands of the plaintiff and relinquishes their right to defend himself or to contest the accusations.

1.4 What is the procedure and timescale for a divorce?

To start divorce proceedings, an accusation/petition should be lodged with the appropriate court by the plaintiff via e-court – an online service for litigation in court in Indonesia.

The first hearing will be held at least two weeks after the registration if the parties are domiciled in Indonesia, three to six months if the defendant is domiciled overseas, and five months if the defendant's domicile is unknown.

At least 10–15 court hearings at the District Court or Religious Court will be held within a four-to-six-month period of time with the following agenda:

a) First Hearing – Summoning the Parties:
   - If the defendant does not appear before the court, then the court will summon him or her again. If the defendant still does not appear the second time, then the court will examine the case without her/his presence and the hearing will jump to points g), i), k), and l).
   - If the plaintiff does not appear before the court then the court will drop the case.
   - If both parties attend, they should then undergo a mediation process before attending the hearing.

   Note: In this process, it is important to make sure that the summoning process is carried out in accordance with the law, where the summons should be received by the defendant or his/her family (parents or child).

   If the defendant cannot be found at their address, then the summons letter should be sent to the chief of the local area who will forward the summons to the defendant.

   If the chief of the village indicates that the defendant is not resident there, the summons will not be valid/not properly carried out. If it is impossible to ascertain the address, it should be indicated as unknown.
b) Mediation (30 days): it is mandatory for the parties to attend the mediation in person. If the parties can reach settlement (in divorce, meaning that they reconcile their marriage) then the judges will make a judgment regarding the settlement.

   Note: If a married couple reaches reconciliation of their marriage in this mediation, then neither of them can in the future file another accusation/petition for divorce for the same reason.
c) Accusation reading: the judges will ask whether the plaintiff wishes to adhere to his/her accusation/petition or wishes to amend it.
d) Reply (and counter claim, if any) from the defendant.
e) Counter reply from plaintiff.
f) Rejoinder from defendant.
g) Document evidence examination – evidence from plaintiff.
h) Document evidence examination – evidence from defendant.
i) Witnesses examination – witnesses from plaintiff, sometimes held more than once.
j) Witnesses examination– witnesses from defendant, sometimes held more than once.
k) Conclusion: both sides submit their conclusions for the judges.
l) Judgment.

The parties have 14 days to appeal the judgment to the High Court (in the capital of the province). If not, the judgment will become final and binding. The process in the High Court can last between approximately six months and one year.

If one of the parties is still not satisfied with the judgment from the High Court, they have 14 days from the receipt of the judgment to appeal to the Supreme Court (Court of Cassation) in Jakarta (Indonesia's capital). It is mandatory to submit an Appeal Brief within 14 days from the statement of appeal or the judgment will become final and binding. The process in the Supreme Court can take approximately one to two years.

All the appeal processes are handled by the District Court. This means that the parties will only need to submit paperwork through the District Court without going to the higher court themselves.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Divorce for non-Moslems in Indonesia cannot be combined with other associated matters. The divorce must be finalised before proceedings to child custody and/or joint assets cases.

For Moslems, divorce can be combined with other matters. However, since the cases might proceed to the higher court (Supreme Court), the outcome and final judgment might not be reached until much later and therefore a change to the marriage status will be delayed. The recommendation is for the cases to be handled separately.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

A few different scenarios might apply as follows:

- If the divorced couple previously married overseas and had registered their marriage with the Indonesia representative in that country (for example, the Embassy or Consulate) and have not returned to Indonesia (which means they have not registered their marriage at the Civil Registry Office), then they only need to register their foreign divorce with an Indonesia representative and register it at the Civil Registry Office in Indonesia (where they are domiciled) upon returning to Indonesia.
- If the divorced couple previously married in Indonesia but live overseas, then their divorce judgment overseas will not have any power in Indonesia, which means that they have to file another divorce accusation/petition in Indonesia and the foreign divorce judgment/divorce certificate can be used as evidence.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Indonesian law does not recognise separation due to Law No.1 of 1974. Nullifying proceedings are available in case the parties do not comply with the terms of the marriage, i.e. age, cognation, a remarried couple, and second marriage (polygamy).

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

If there is any legal basis, the court may issue an interim decision to hold the proceedings. However, it is most likely impossible, especially for an Indonesian spouse (married to an Indonesian or foreign citizen) that married in Indonesia. This is because the Indonesian court has absolute competence over the Indonesian marriage that took place in Indonesia even if the couple live overseas.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

As the result of the divorce, the father is fully responsible for the payment of child support, unless he is unable to fulfil that obligation, in which case the court can determine the mother to share the child support.

In non-Moslem divorces, courts may require the ex-husband to pay alimony to his ex-wife.

In an Islamic divorce, the ex-wife is entitled to three months' alimony (as long as the divorce was not based on her fault) and also to a gift (known as *Mut'ah* in Islamic Law), which can be in the form of money or property.

In addition to financial orders on divorce, courts can also make financial orders during the court proceedings (before the divorce occurs). Based on the parties' petition, during the proceedings, the court may determine:

- the means of support that should be borne by the husband;
- the necessary things to ensure the children's support and education; and
- the necessary things to ensure that the parties' assets are well maintained.

A joint property arrangement is also expected to be regulated by prevailing law after the divorce occurs.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

Indonesian law stipulates that all assets acquired during marriage become joint assets, except gifts or inheritance unless otherwise specified. In case of divorce, the joint assets will be divided equally between the two.

Spouses can separate or even combine all of their assets using a prenuptial agreement. If a prenuptial agreement has not been made prior to the marriage, the couple can still enter into a post-nuptial agreement but it will only apply to assets acquired after the agreement is made.

If the couple have a pre- or postnuptial agreement, then the court does not need to be involved in the management of assets, except for assets obtained before the post-marital agreement or if there is a property dispute.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

Family law in Indonesia, according to civil law, adheres to the principle of judicial passivity. This means that the judge cannot decide on more than what is demanded by the parties. Therefore, to get a financial order, one has to file a claim and state exactly what one is asking for. Mentioning the details of all assets is very important to making the valuation executable.

The same applies for child support payments where details of needs are essential. Evidence that the father is able to fulfil the necessity also influences the court to grant the child support payment.

2.4 Is the position different between capital and maintenance orders? If so, how?

Capital orders of the distribution of marital property only regulate the assets obtained during the marriage where the parties have equal rights over the assets, whereas maintenance orders require the court to consider the parties' ability to comply.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

Yes, it is essential to get the details of the agreement to be included in the decision so that the decision can be used as a basis for the next step, such as transferring land rights, for instance.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

Please see question 2.1 regarding spousal maintenance of Moslem women.

Stipulations regarding spousal maintenance for non-Moslem women are very few. Law No.1 of 1974 concerning marriage only provides that the court can oblige the ex-husband to provide support to his ex-wife without specifying the time period. The Indonesian Civil Code stipulates in Article 227 that the obligation to provide spousal maintenance ends when one of the parties dies.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Yes, all property acquired during the marriage is considered joint property except for property acquired through inheritance or gifts, which are considered separate property. Property acquired before marriage is also separate property.

Spouses can omit the matrimonial property from the prenuptial agreement by affirming property ownership based on the party who obtained it in said agreement.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

No, Indonesian law treats foreign nationals equally to Indonesian citizens on divorce. Indonesian courts will only use prevailing Indonesian law to make a court order.

2.9 How is the matrimonial home treated on divorce?

Indonesia does not recognise the term "matrimonial home". The court will only determine whether the house is a joint property or separate property of the parties.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

There is no "trusts" concept recognised in Indonesia.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

A financial claim in Indonesia can be made following a foreign divorce as long as the assets, including joint assets, are located in Indonesia. The ground is the decision from abroad, which will be used as evidence.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Alternative dispute resolution can be used to complete a financial settlement if the parties so wish, but to make it enforceable (transfer the title of the land, for instance), a court decision will be required.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Yes, as long as the prenuptial agreement is notarised by a public notary and registered at the Civil Registry Office or the Religious Affairs Office (for Moslems) before the couple gets married.

For postnuptial agreements, due to their recent implementation in 2015, there are not many laws that specifically regulate them. In common practice, several steps are taken to make postnuptial agreements enforceable, namely making a notarised agreement, followed by making an announcement through a newspaper to fulfil the publicity element, and finally registering it at the Civil Registry Office or Religious Affairs Office (for Moslems).

The same procedure applies to agreements made overseas.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

If the property has been separated by a marital agreement, then there is no need for procedural requirements to enforce it.

Unless there is a dispute regarding it, then the same procedure as mentioned in question 1.4 applies.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Generally, marital agreements contain everything that is desired by the parties as long as it involves wealth, assets, and/or acquisitions during the marriage by honouring morals, ethics, and prevailing law.

Since the law generally stipulates that the agreement must not reduce the rights in the prevailing law, if we look at the provisions regarding the father's (sole) responsibility in regard to child support payment, it is most likely impossible to regulate financial claims regarding the child in the marital agreement beyond its original stipulation in the prevailing law.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

Indonesia does not allow or recognise the practice of cohabitation. If the "spouse" has contractual rights, then they will be treated as an ordinary partnership.

4.2 What financial orders can a cohabitant obtain?

There is no financial order that can be obtained by a cohabitant.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

There is no formal partnership status for cohabitants.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

No, they are not.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

The financial claim available to parents on behalf of children within a marriage is child support payments.

A child born out of wedlock only has a civil relationship with his/her mother and his/her mother's family, which means that there is no financial claim available for the mother unless the father of the child acknowledges or legalises his paternity. This act of acknowledging and/or legalising paternity can only be done if the mother and the father of the child get married.

The difference between acknowledging and legalising a paternity lies in the legality of the marriage between the parents. If the marriage (which is obviously carried out based on religion) is not legally registered at the Civil Registry Office or the Religious Affairs Office, then the father only acknowledges his paternity. However, if the marriage is legally registered, the father's paternity is legalised.

In the event that the paternity has been acknowledged, then the mother is not entitled to financial claims if they divorce. Divorce conditions in this practice do not require the spouse to go to court.

In the event that the paternity has been legalised, then the mother will have the right to financial claims if they divorce.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

The child's upbringing will be accounted for by the party who pursues it, most likely the mother, and considered by the court according to the ability of the father. Once the decision on the children support payment has been made, its implementation will depend only on the father's will.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Parents, especially fathers, are required to pay child support until the child reaches the age of 21 years or is married or is able to be independent and fulfil their own needs.

5.4 Can capital or property orders be made to or for the benefit of a child?

There is no specific provision enabling capital or property orders to be made for the benefit of a child. The law only states that the parents have an obligation to take care of the children, and the father has responsibility over all childcare and child education expenses.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

There are no specific provisions governing this matter, but Indonesian civil law embraces the principle that the court is not

permitted to refuse any case presented to them. Furthermore, in the case of lack of legal rules, the court is obliged to seek and find the law to govern the case.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

Married parents who later divorce have equal responsibility and control over their children unless the parents cannot reach an agreement, in which case the court will intervene. There are no regulations in Indonesian civil law that regulate specific forms of rights, i.e. visitation, communication, etc.

Unmarried parents, especially fathers, are not entitled to child custody because the child only has a civil relationship with the mother.

6.2 At what age are children considered adults by the court?

In civil law, children are considered adults at the age of 21 years as stated in Article 330 of the Indonesian Civil Code and Article 98 of the Islamic Law.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Children orders are valid until children are considered adults, either by their age, i.e. 21 years old, or when they are capable of being independent and can fulfil their own needs.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

According to the law, the court will only decide if there is a child custody dispute (Article 41 of the Marriage Law) and determine whether the mother must also bear the child support when the father is unable to bear it himself.

An order will only be given by the court if the concerned party makes a claim for it.

6.5 What factors does the court consider when making orders in relation to children?

Factors that are considered by the court when making orders in relation to children are age and the best interests of the child.

Islamic law stipulates that custody of a child under 12 is held by the mother of the child. Once children reach the age of 12, they can choose who will be their custodian.

Indonesian civil law does not specifically regulate the age, but jurisprudence of 1974 and 2001 state that in the event of a divorce, custody of the minor is given to the closest person of the child, i.e. the mother.

The mother's custody can be given to the father as long as the granting of these rights has a positive impact on the child.

However, these factors are likely to be waived in some areas with a strong culture.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

There are many cases in Indonesia where non-custodial parents take their children in their possession and forbid the custodial parent from seeing the children. This is possible as long as the non-custodial parent does not take the children overseas. The only reason non-custodial parents cannot take their children overseas is because the authorised agency will check the custody of the children by obtaining the relevant documents (passport, visa, etc.).

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

Indonesian civil law does not recognise the concept of separated parents.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Taking into account the following factors:

- a child born out of wedlock only has a civil relationship with his/her mother and his/her mother's family; and
- the father of a child born out of wedlock can acknowledge/legalise his paternity after marrying the child's mother.

So, it is clear that unmarried parents are not treated in the same way as married parents when the court makes orders on divorce because they do not have the legal standing for it.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

In court decision making, the decision will only be taken by the judge. Welfare reports are not mandatory but can support the party's position if submitted as evidence.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

Separate representation for children in civil law is not recognised. All interests of children are represented by their parents or guardian.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

All adults can be heard as a witness in child arrangement case. There is only one way to resolve disputes related to children, i.e. by filing a lawsuit in court.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

Yes, unless there is a court order stipulating otherwise.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

Yes, unless there is a court order stipulating otherwise.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

The child's best interests is a key factor that must be taken into account, alongside equal rights for non-custodial parents to have access to their child.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

Please see response to question 7.3 above.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

If the custodial parent wants to move abroad and take the children, they are allowed to do so.

If the non-custodial parent objects to this and files an accusation, then perhaps the court might decide whether the custodial parent is allowed to do so or not. However, this case is very rare.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Indonesia is not a party to the Hague Convention. There are no abduction terms if one parent takes care of the child even if it is against the custody decision.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

A significant development (or perhaps the term "transformation" is more suitable) in family law in the last two years is regarding child recognition: where previously there was no compulsion for fathers to marry mothers, in 2018, marriage between parents (only religious marriage) became mandatory for recognising children out of wedlock.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

In the past three years, electronic court proceedings have been introduced to the public. The whole process was initially very slow, but it seems that everything was sped up due to the COVID-19 pandemic. Now, not only can filing of accusations be done online, but some hearings held for the submission of documents can also be done online. As it is a national movement to facilitate court proceedings, this e-court will become common practice for civil proceedings in Indonesia.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

Child custody, child support payment, and spousal maintenance are areas of family law that need to be taken more seriously by the courts.

In child custody, we easily find judgments that override the best interests of the child, and several situations may occur:

- The decision to decide joint custody of the children without special arrangements, which will only lead to another dispute between the parents.
- Judgment only relies on patriarchal culture; for example, without considering other factors (age, father's attitude, etc.).
- An incomplete decision where the decision only states that the custody of the child belongs to a parent without determining the other parent who possess the child to hand over the child to the entitled parent.

The absence of regulations related to the procedure for implementing custody rights adds to disorganised judgment enforcement.

In child support payments and spousal maintenance, there is no mechanism to ensure payments are made in a timely manner. Child support payments and spousal maintenance are difficult to implement practically because they rely on the goodwill of the ex-husband/father.

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Isle of Man

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

The Court has jurisdiction on the ground that the applicant and/or the respondent at the date of the application for divorce are domiciled in the Isle of Man or have been habitually resident in the Isle of Man throughout the period of one year ending with the date of the application.

One does not need to have been married in the Isle of Man to get divorced here, but one must meet the above criteria.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

There is one ultimate ground for divorce and that is that the marriage has broken down irretrievably. There are five different facts on which the applicant can apply:

(a) that the other party has committed adultery;
(b) that the other party has behaved in a way that the applicant finds to be intolerable;
(c) that the parties have been separated for a period of two years and both parties consent to the divorce being made;
(d) that the other party has deserted the applicant and a period of two years has lapsed; and
(e) that the parties have been separated for a period of five years and the other does not need to consent to this.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

The application process for divorce under any of the above grounds can be done without the need for a hearing or a Court appointment requiring the parties' attendance. The Court will administratively deal with the divorce paperwork. It is not possible in this jurisdiction to have a private divorce without the Court's involvement. The Court is needed to legally dissolve the marriage. It is important this is achieved through the Court process.

1.4 What is the procedure and timescale for a divorce?

The procedure for the divorce starts with a divorce application, which needs to be fully completed by the applicant. This asks primary questions about the parties and the marriage. The marriage certificate or a certified copy of the marriage certificate is required to be provided with the application (this is returned by the Court at a later stage). The most important part of the divorce application is the details about the ground for divorce. If the application is based on the other party's unreasonable behaviour, it is important this is clear, accurate and true.

If the parties fully engage in a timely manner with the Court and in such a way as to facilitate the divorce application by returning the forms served on them in the required manner, i.e. fully completed, dated and signed, and without challenge, we can usually reach the provisional stage of divorce (more commonly referred to as the *decree nisi* in the UK) within three months from the initial application being submitted. If all matters regarding children and finances are agreed upon it would not be unreasonable for the divorce to be fully completed within six to nine months.

If matters are contested, this can take much longer. In cases where the parties do not agree about the financial aspects of the divorce, this timescale can range from 12–24 months.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

In principle, yes, the applicant can apply for the final order of divorce six weeks after the pronouncement of the provisional order. The respondent, however, needs to wait three months after the pronouncement of the provisional order in order to apply for the same.

There are some risks in applying for the final order of divorce before the financial aspects have been resolved. For example, if there are various different assets or complex assets then if the parties are divorced the other party might lose a benefit of the asset should they no longer be treated as the spouse of a party. Care needs to be taken with this.

However, the legal principle is that the final order should be pronounced unless there are special circumstances that are case specific.

There is nothing preventing the final order of divorce being applied for if there are outstanding issues regarding contact arrangements.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Yes – Section 78 of the Matrimonial Proceedings Act 2003 ("MPA 2003") provides applications for financial relief after

foreign divorce where (a) a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of judicial or other proceedings in a foreign country, and (b) the divorce, annulment or legal separation is entitled to be recognised as valid in the Island, either party to the marriage may apply to the High Court for an order for financial relief. Section 90 provides that "foreign country" means a country or territory outside the British Islands.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Section 11 of the MPA 2003 makes provision for an application to be made for the annulment of marriage where the marriage can be shown not to be a valid marriage: where it is evidenced to be void; where either party is under 16; or in other circumstances such as intermarriage, other current marriage existing or polygamous marriage.

Section 17 provides for (a rarely used) application for a separation order and, when made, it shall no longer be obligatory for the applicant to reside with the respondent. The grounds for such an application are the same as that used to ground an application for divorce.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Yes; Section 21(6), Schedule 1 of the MPA 2003 has effect in respect of cases in which matrimonial proceedings in the Island are to be, or may be, stayed by the Court where there are concurrent proceedings elsewhere (generally and subject to being listed) in respect of the same marriage.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

Part 2, Section 26 of the MPA 2003 makes provision for certain financial orders. The following indicates the kinds of orders that may be made:

(1) Provision for a Periodical Payments Order for a child or spouse.
(2) Secured Periodical Payments Order for a spouse or a child.
(3) Order for payment of a lump sum.
(4) Order for Provision of Transfer of Property.
(5) Order for a settlement, or variation of a settlement of property or property interests.
(6) Order for the Sale of Property.
(7) Order for Pension Sharing.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

The Isle of Man does not have a matrimonial property regime as such; there is no community of property and thus marriage in principle does not have a proprietary effect. However, upon divorce the Courts are given a very wide discretion to make a wide range of orders (referred to as "ancillary relief") including a reallocation or even sale of property, putting assets on trust, lump-sum payments, periodical payments, orders regarding pensions, etc. (Part 2 and Section 26 Matrimonial Proceedings Act 1973).

2.3 How does the court decide what financial orders to make? What factors are taken into account?

Section 32 of the MPA 2003 lists the factors the Court is required to take into consideration when assisting to make any financial orders:

(1) All the circumstances of the case, the first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18.
(2) As regards the exercise of its powers, the Court will consider:
  (a) the income, earning capacity, property and other financial resources the parties have or are likely to have in the foreseeable future, including, in the case of earning capacity, any increase in that capacity;
  (b) the financial needs, obligations and responsibilities which each of the parties has or is likely to have in the foreseeable future;
  (c) the standard of living enjoyed by the family before the breakdown of the marriage;
  (d) the age of each party to the marriage and the duration of the marriage;
  (e) any physical or mental disability of either of the parties to the marriage;
  (f) the contributions which each of the parties have made or are likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family; and
  (g) 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.

2.4 Is the position different between capital and maintenance orders? If so, how?

The provisions as set out in Section 32 as above are taken into account by the Court. Capital and Maintenance Orders implement what is termed as the sharing principle, whilst maintenance is assessed mainly as to the evaluation of needs. The Court will also consider, as to the effect of the termination of a Maintenance Order, if it is or is not appropriate to order that no maintenance is the correct outcome, i.e. called a "clean break".

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

If parties agree on financial matters, they can administratively agree the financial details in a proposed Consent Order for the Court's consideration. This is a drafted order that is submitted to the Court, without the need for appearances. The agreement is then, when agreed by the Court, sealed as a Court Order and is fully binding on both parties. Even where parties agree matters between themselves, they ought to be advised to have that agreement reflected in a Court Order so that it is clearly binding and enforceable by reference to it being a Court Order.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

Orders for spousal maintenance are often made especially where there are children of the family and/or there is a material difference in the parties' incomes and earnings. Such orders can be made for any duration including the joint lives of the parties. These orders cease upon remarriage, unlike cohabitation which does not trigger cessation but is, and can be, a relevant factor.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Whilst there is no statutory or other prescribed concept, the Courts, when considering applications concerning property, can treat marital and non-marital property, or indeed inherited property, differently and make orders when viewed from such perspective. Non-marital property can sometimes be excluded from consideration in certain circumstances, particularly where the needs of the parties do not require recourse to be made to and of it.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

No; in the Isle of Man, foreign law is not applied in the family Courts.

2.9 How is the matrimonial home treated on divorce?

Whilst all financial resources will be taken into account, whether in joint names or otherwise, usually the matrimonial home is treated as matrimonial property irrespective of the route to it being acquired, i.e. bought by one party only.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

The Isle of Man Courts do recognise trusts in principle and a number of matrimonial cases have had to deal with trusts and make orders that take the resources from trusts into account.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

Yes, Part 4, Section 78 of the MPA 2003 provides for such claims where the criteria are met for such and are subject to the leave of the Court being obtained in the Isle of Man. No application may be made if either party has remarried, but generally, if a foreign divorce has been made, relief may be applied for.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

By negotiation between the parties or mediation which is readily available, the parties may agree a settlement or make an application to Court.

Mediation is readily available and is actively encouraged by the Courts as a method of dispute resolution in which to agree a financial settlement.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Whilst such agreements are not automatically enforceable, the Courts can and will give regard to such. The parties cannot oust the Court's jurisdiction by agreement.

The Courts will scrutinise issues such as bargaining power, duress, full financial disclosure, the provision and timing of legal advice and other factors. Children remain of primary focus as to their needs being fully considered and being appropriately provided for. Overall, the outcome will need to be assessed as being fair.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

No formal requirements currently exist and the agreement is not automatically enforceable and will be considered by the Courts as to its enforceability.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Yes, agreements can expressly deal with income and capital aspects and they can also deal with financial claims regarding children. However, see questions 3.1 and 3.2. The needs and the welfare of any child of the family (who has not yet attained the age of 18) shall remain the Court's first consideration.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

Cohabitants generally do not have any specific rights to make a statutory or other claim against the other, except for maintenance for children. Any other claims would normally have to establish some interest in property.

4.2 What financial orders can a cohabitant obtain?

There are very limited provisions currently in existence and such may be dependent upon a co-ownership of real estate under the Partition Act 1931 or by making a chancery claim for a declaration of an interest.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

Cohabitants can either be civil partners as a same-sex couple or a heterosexual couple and as such are afforded the same protection in law as married couples.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Yes, the Marriage and Civil Partnership Amendment Act that took effect from 22 July 2016 gave effect to this.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

Financial claims can be made both in terms of capital and maintenance. Schedule 1 of the Children and Young Persons Act

(2001) ("CYPA 2001") provides for the financial provision for children. The orders which the Court may make under this paragraph are as follows:

(a) an order requiring either or both parents of a child to make to the applicant for the benefit of the child, or to the child himself, such periodical payments, for such term, as may be specified in the order;
(b) an order requiring either or both parents of a child to secure to the applicant for the benefit of the child, or to the child himself, such periodical payments, for such term, as may be so specified;
(c) an order requiring either or both parents of a child to pay to the applicant for the benefit of the child, or to the child himself, such lump sum, as may be so specified;
(d) an order requiring a settlement to be made for the benefit of the child, and to the satisfaction of the Court, of property to which either parent is entitled (either in possession or in reversion) and which is specified in the order; and
(e) an order requiring either or both parents of a child to transfer to the applicant for the benefit of the child, or to the child himself, property to which the parent is, or the parents are, entitled (either in possession or reversion) and which is specified in the order.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

There is no formal mechanism for such in the Isle of Man. The Court has a wide discretion to make financial orders and will consider all the available resources and consider any current recommendations issued by the Department of Health and Social Care.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Usually until the child reaches 18 or concludes secondary education but it may be longer and generally be referable to a first degree.

5.4 Can capital or property orders be made to or for the benefit of a child?

Yes, it is possible, so as to provide, in particular, housing for a child and for the period when the child is a dependant.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

Potentially, yes, in limited circumstances where a child is over 16 and in education full time.

Section 2 of Schedule 1 of the CYPA 2001 provides that the Court may make an order if, on an application by a person who has reached the age of 18, it appears to the Court:

(a) that the applicant is, will be or would be receiving instruction at any educational establishment or undergoing instruction for a trade, profession or vocation, whether or not while in gainful employment; or
(b) that there are special circumstances which justify the making of such an order.

In deciding whether or not to make an order, the Court shall have regard to all the circumstances, including the income, earning capacity, property and other financial resources which the child's father and mother or the applicant for the order has or is likely to have in the foreseeable future; and the financial needs, obligations and responsibilities which each of those persons has or is likely to have in the foreseeable future.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

From November 2013, where an unmarried birth father is named on a birth certificate, he is vested with parental responsibility. Similarly, the birth parents can enter an agreement to give effect to parental responsibility or a Court can order it. Married parents always have parental responsibility and this remains following any divorce.

6.2 At what age are children considered adults by the court?

Children are considered adults by the Court from 18 years of age.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Usually until the age of 16 but they can last until the child is 18 years of age.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

The Court can make Residence or Shared Residence Orders, Contact Orders, make specific directions/orders for, say, schooling or change of name, or make Orders to seek to prevent certain steps happening, i.e. prohibiting travel.

6.5 What factors does the court consider when making orders in relation to children?

Welfare is the statutory consideration which is paramount. The Court will in particular have regard to a number of listed factors, including the wishes and feelings of the child, where ascertainable, education needs, the effect of the change of any circumstances, the child's age and sex or other characteristics, the capability of parents to meet the child's needs and the available orders of the Court.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

Unless the parents with parental responsibility agree it, a parent with a Residence Order cannot take a child away for a period in excess of one month.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

There is no prescribed division of time, but it is expected that a child shall spend time with both parents.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Where both parents have parental responsibility, yes this is the case.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

Often, a Court Welfare Report is requested and provided to the Court. The Court/judge can see a child but this rarely happens.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

Yes, this can happen, but rarely so in private law proceedings.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Other relevant adults, such as grandparents, can be spoken to by the Court Welfare Officer as to their views, but the recommendations are ultimately those of the Welfare Officer. The welfare office will attempt to see if an agreement can be reached at a separate mediation.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

If both parents have parental responsibility for the children, then one cannot make a unilateral decision to relocate with the children to another jurisdiction without the other parent's express consent. If it is suspected that the other parent is going to move with the children then it is important that an application is made to the Courts for an emergency prohibited steps application, often on a without-notice basis.

Such Orders are then served upon various people, including the police, the airport, the sea terminal and the passport offices here in the Isle of Man, and also in the UK.

If the other parent then attempts to remove the children, then the aforementioned parties will be able to easily identify the children and prevent them from being taken away.

If the other parent has already taken the children to another jurisdiction with this intending to be permanent, then an application for the child to be returned pursuant to the Hague Convention, to which the Isle of Man is a party, will be made.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

The Isle of Man is not a very big jurisdiction in comparison to the UK, so a parent is not required to obtain the consent of the other parent before moving to a new house. However, if the moving parent intends to change the children's school or doctors, etc. because of the house move, then the permission of both parents who have parental responsibility is required.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

The primary factors relate to contact, both direct and indirect, with the "to be absent" parent in light of all of the past and envisaged circumstances and the child's interests as a whole.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

In the Isle of Man, this is not chiefly in issue, but sometimes schooling or location comes into consideration and will be assessed in the light of all circumstances then prevailing and the interests of the child.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

It is not particularly rare and may be ordered by the Court in appropriate circumstances.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?w

The Isle of Man can apply the Hague Convention on the civil aspects of International Child Abduction.

The Attorney General of the Isle of Man is the designated Central Authority and is responsible for administering Hague Convention issues. The Attorney General's Chambers process applications and provide advice to parents, advocates and others on steps they may take to recover children who have been wrongfully removed to and from the Isle of Man.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

Two significant developments are: the Divorce, Dissolution and Separation (Isle of Man) Act 2020, which is going to amend existing laws to allow for no-fault divorce in the Isle of Man by removing the requirement to establish facts; and the Domestic Abuse Act 2020, which is going to provide more protection for the victims of domestic abuse and bring the perpetrators of domestic abuse to justice.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

The increased use of technology was encouraged where possible, including appeals.

At the date of writing this chapter, the Isle of Man is no longer in lockdown. Except for restrictions for those travelling to the Island (or those experiencing COVID-related symptoms), normal business has resumed.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

Law for co-habiting parties, particularly in relation to property, and grandparents' access rights to their grandchildren following the breakdown of a relationship.

James Quinn is head of the Family Team at Quinn Legal. His main practice areas concern advising in respect of divorce, finance and children's issues, usually in disputes arising out of a divorce or relationship breakup. James was called to the Manx Bar in 1998 and has acted in a number of major civil and other trials throughout the last 20+ years. He has worked on particularly complex, high-net-worth financial relief divorce cases, and has considerable experience of appearing at all levels.

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Amy Crellin joined the Family Team at Quinn Legal in May 2020. She was called to the Manx Bar in 2019 and handles all areas of family litigation. This includes assisting on complex divorce applications surrounding issues of jurisdiction, sensitive contact and residence applications regarding children, and child maintenance matters.
Amy also has expertise in making emergency court applications which have included domestic violence injunctions and prohibited steps applications to prevent the removal of children from the jurisdiction of the Isle of Man.

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Quinn Legal is one of the leading Isle of Man law firms, with a highly regarded expert Family Team. Headed by James Quinn, one of our most experienced advocates with over 20 years of experience in all areas of litigation including family law, the team covers all areas of family work, from pre- and post-nuptial agreements, divorce, adoption, contact and residence applications, to child maintenance and cross-jurisdictional issues.
We stand out as approachable, proactive and empathetic lawyers who are committed to and care for our clients, priding ourselves on our service. Driven by a set of core values, we are clear in our identity and passionate about making a difference for people.

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Japan

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

Under Article 3-2 of the Personal Status Litigation Law ("PSLL"), if:

(1) the domicile of the defendant is in Japan;
(2) the nationalities of both parties to the divorce are Japanese;
(3) the last common residence of the parties to the divorce was located in Japan and the plaintiff of the litigation is a resident of Japan; or
(4) the plaintiff is a resident of Japan and the location of the defendant is unknown.

Please note that litigation not meeting one of the above categories may be accepted if there is a special circumstance under which the judgment by the family court of Japan leads to a fair trial or a "due and speedy" trial under Article 3-2-7 of the PSLL as amended.

The above revision is based on the famous Supreme Court judgment below.

The judgment of the Supreme Court of March 25, 1964 set an exception to the general jurisdictional requirement if the plaintiff is located in Japan and one of the following requirements is met:

(i) the plaintiff was abandoned by the defendant;
(ii) the whereabouts of the defendant are unknown; or
(iii) in case of other situations equivalent to the above.

By applying this rule, the Supreme Court affirmed the jurisdiction over the divorce case filed by a Korean wife residing in Japan against her Korean husband who had never been to Japan and whose whereabouts were not known.

Another judgment of the Supreme Court of June 24, 1996 set another exception to the general jurisdictional requirement: if the plaintiff is located in Japan and the plaintiff has difficulty in filing a divorce lawsuit, *de jure* or *de facto*, against the defendant in the location of the defendant.

By applying this rule, the Supreme Court affirmed that it has jurisdiction over a divorce case filed by a Japanese husband residing in Japan against his German wife located in Germany. In this case, the German court rendered a divorce judgment and, therefore, the Japanese husband is not allowed to file a divorce lawsuit again in Germany. The Japanese husband did not need to file a lawsuit in Japan in order to divorce his wife.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

Under Japanese law, a husband and wife can get divorced by mutual agreement in accordance with Article 763 of the Civil Code ("CC").

The elements of the judgment divorce under Article 770(1) of the CC are as follows:

(i) a spouse has committed an unchaste act;
(ii) a spouse was abandoned by another spouse in bad faith;
(iii) it has not been clear whether a spouse is dead or alive for at least three years;
(iv) a spouse is suffering from severe mental illness and there is no prospect of recovery; or
(v) there is any other grave cause making it difficult to continue the marriage.

The last element is interpreted to mean the same as "irrecoverable breakup of the marriage". The factors to determine the existence of this ground are domestic violence, serious insult, failure to work despite the ability to work, wasteful habits, crime, conflict with the spousal family and difference in personal characteristics.

The length of the period of separation is considered one of the most important factors in establishing the last ground. However, separation is not an indispensable factor of divorce.

There was an argument whether the wife or husband who is responsible for the irrecoverable breakup of the marriage could file a divorce lawsuit against his/her spouse.

The judgment of the Supreme Court dated September 2, 1987 held that he/she could file a divorce if:

(i) the duration of separation is particularly long, considering the ages of the parties and compared with the duration of cohabitation;
(ii) there are no dependent children; and
(iii) there are no outstanding circumstances, particularly against social justice or in situations where the spouse, in objecting to the divorce, will be placed into extremely severe mental, social or economic conditions upon divorce.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

No, they do not if both parties are Japanese. The Japanese parties only have to submit the application for divorce to the municipal office.

Under Japanese law, Japanese couples may divorce by agreement (Article 763 of the Civil Code). Divorce by agreement can

be concluded as far as both parties agree on divorce, whether or not there is a ground for judicial divorce.

The uncontested divorce of foreign couples in Japan is complicated. If both couples come from a common law jurisdiction and mutual consent divorce without judgment is not accepted, the parties at least have to apply for mediation. Although one member of the mediation panel is a judge, the mediation is essentially a divorce by mutual consent without a judgment. A ruling instead of mediation rendered by the judge in accordance with Article 284(1) of the Domestic Relations Case Procedure Act ("DRCPA") is one of the practical solutions for this complexity.

The ruling will be fixed two weeks after the delivery of the certified copy of the ruling to both parties in accordance with Articles 285 and 279 of the DRCPA.

The parties to the divorce may file the certified copy of the ruling and the certificate of the fixture of the ruling at the municipal office.

Most municipal offices will issue a receipt of the divorce to the parties to the divorce upon receiving the above documents.

Most foreign embassies in Japan would accept the receipt by the municipal office as evidence of the divorce if the party is a foreigner.

1.4 What is the procedure and timescale for a divorce?

With regard to the procedure of divorce by mutual agreement, the parties shall submit the divorce papers with the signatures of the parties to the municipal office.

With regard to judicial divorce, a party has to file for mediation before the divorce litigation in accordance with Article 257(1) of the DRCPA ("Mediation First Principle"). If the parties reach an agreement for divorce in the mediation procedure, the parties are granted a divorce by mediation, but if not, the parties cannot get divorced by mediation.

In this case, a party who wants to get divorced can file a lawsuit for divorce. In this procedure, if the court recognises the existence of one of the grounds for divorce mentioned above, the parties get divorced by judgment. In cases where there is a serious dispute regarding divorce between parties, it often takes more than one year for the court to render the judgment.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

If the parties have a child who is still a minor, the person who has parental authority must be determined in both cases whether the parties get divorced by agreement or judgment (Articles 819(1) and (2) of the CC). If parties agree on that point, the person who has custody shall be decided based on the agreement; if not, the court has to decide on the person.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Foreign divorce is recognised where a foreign divorce judgment is final and meets the following conditions provided by Article 118 of the Code of Civil Procedure:

(i) The jurisdiction of the foreign court is recognised under laws or regulations or conventions or treaties.
In determining if the foreign court has jurisdiction over the case, the same jurisdiction rule adopted by the court of Japan shall apply. For example, the judgment of the Tokyo Family Court of September 11, 2007 refused to recognise a divorce order of the Australian court as both parties had domicile in Japan.

(ii) The defeated defendant has received a service (excluding a service by publication or any other service similar thereto) of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service. To meet this condition, the international service from the foreign country to the defendant in Japan shall meet the requirements in compliance with the treaty on the service if both Japan and the foreign country are Member States of the treaty.

(iii) The content of the judgment and the court proceedings are not contrary to public policy in Japan.
The above Tokyo Family Court judgment also refused to recognise a divorce order of the Australian court as the judgment is contrary to public policy in Japan. In this case, both the husband and wife had domicile in Japan and the plaintiff (husband) was solely responsible for the irrecoverable breakup of the marriage and could not file a divorce in Japan.

(iv) A mutual guarantee exists.
In practice, no foreign judgment has refused to recognise a foreign court divorce judgment applying this case. The monetary judgment rendered by the People's Republic of China ("PRC") is not recognised under this clause but the divorce judgment of the PRC is recognised under this clause.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Under Japanese law, separation is not allowed but the nullification of marriage is allowed. Article 742 of the CC stipulates that marriage shall be void only in the following cases:

(i) if one of the parties has no intention to marry due to mistaken identity or other cause; or

(ii) if the parties do not lodge notification of marriage, provided, however, that the effect of marriage shall not be prevented merely because notification was not given in the form prescribed in paragraph (2) of Article 739 of the CC.

If the marriage is declared null, the parties can file a lawsuit or file a petition for Adjudication of Domestic Relations.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

It is generally understood that the Japanese court has jurisdiction over a matter even if there are proceedings in another country, as long as the Japanese court has the jurisdiction. However, once a foreign court has rendered a judgment and the judgment is recognised as valid in Japan by the Japanese court, the Japanese court will dismiss the ongoing petition for the reason that there is no merit to the petition.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

The court can make orders regarding the distribution of property (Article 768 of the CC) and child support payment (Articles 771 and 766(1) of the CC).

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

Under Article 760 of the CC, the husband and the wife shall share the marital cost during the marriage. This marital cost-sharing obligation is terminated upon divorce.

In accordance with Article 762(1) of the CC, the assets obtained or increased during marriage are assumed as the assets of both husband and wife.

The husband and wife may change the above by mutual agreement before the marriage according to Article 755 of the CC.

Upon the divorce, the assets owned by the husband and wife shall be divided in accordance with Article 768 of the CC.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

With regard to orders for the distribution of property upon divorce, the parties to the divorce could agree on how to distribute the matrimonial property. If both parties fail to agree the method of distribution of matrimonial property, the family court shall determine whether to make a distribution, and the amount and method of that distribution, taking into account the amount of property obtained through the cooperation of both parties and all other circumstances (Article 768(3) of the CC).

Distribution of property under Japanese law is generally understood to cover the following three elements:

(i) distribution of matrimonial properties that are acquired during marriage;
(ii) compensation for the emotional damage caused by divorce; and
(iii) post-divorce maintenance.

With regard to element (i) above, except for special cases, the levels of contribution of the parties are assumed to be equal.

With regard to element (ii) above, if a party is responsible for the breakdown of the marriage, the other party can claim compensation for the emotional damage caused by the divorce in accordance with Article 709 of the CC. This claim can be included in the claim of distribution of property.

With regard to element (iii) above, in making an order for the distribution of property, the court can only consider this element when one of the parties cannot support his/herself following the divorce, even if they receive property from the other party as outlined in the elements (i) and (ii).

2.4 Is the position different between capital and maintenance orders? If so, how?

Under the case laws of Japan, maintenance of the spouse, other than the distribution of property upon divorce, is merely supplemental. In other words, one spouse may be required to support the other only if the distribution of property upon the divorce is not sufficient to support the living of the other. The other spouse is, in general, not entitled to receive financial support or alimony other than the distribution of the assets upon the divorce under the laws of Japan.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

If the parties have agreed on financial matters, they do not need to have a court order. With regard to the distribution of property, only when the parties do not, or cannot, settle on agreement, either party may make a claim to the family court for a disposition *in lieu* of agreement (Article 768(2) of the CC).

2.6 How long can spousal maintenance orders last and are such orders commonplace?

As mentioned above, in Japan, there is no spousal maintenance obligation except for the cases where the element of post-divorce maintenance is considered when the court determines the distribution of property.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

With regard to matrimonial property, except the property owned by one party before marriage and property obtained in the name of that party during marriage, the property owned by the parties is regarded as co-owned property.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Under Japanese law, if either the husband or the wife is a Japanese national who has their habitual residence in Japan, their divorce shall be governed by Japanese law (Article 27 of the Act on General Rules for Application of Laws ("AGRAL")).

In other cases, the effect of a divorce shall be governed by the national law of the husband and wife if their national law is the same, or, where that is not the case, by the law of the habitual residence of the husband and wife if their law of the habitual residence is the same, or, where neither of these is the case, by the law of the place most closely connected with the husband and wife (Articles 27 and 25 of the AGRAL).

2.9 How is the matrimonial home treated on divorce?

The matrimonial home is treated as one of the properties which is subject to distribution under the rules mentioned in question 2.3 above.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

There is no special concept of family trusts under Japanese law.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

The grounds for recognition of financial claims made following a foreign divorce are the same as the grounds mentioned in question 1.6 above.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

In Japan, the parties can use mediation and lawsuits.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Under Japanese law, marital agreements are concluded only before marriage (Article 755 of the CC). Though marital agreements are not popular in Japan, the agreements are enforceable

as long as the agreements are not against public policy (Article 90 of the CC). However, if a party has entered into a contract that departs from the statutory property system, the contract may not be asserted against the successor in title of the husband or wife, or a third party unless registered prior to notification of marriage (Article 756 of the CC).

Also, a foreign agreement on marital property concluded under a foreign law may be asserted against a third party when it is registered in Japan (Article 26(4) of the AGRAL).

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

Under Japanese law, marital agreements are concluded only before marriage (Article 755 of the CC). The agreements are enforceable as long as the contents of the agreements are not against the public policy of Japan (Article 90 of the CC). Also, a foreign agreement on marital property concluded under a foreign law may be asserted against a third party when it is registered in Japan (Article 26(4) of the AGRAL).

However, if a party has entered into a contract that departs from the statutory property system, the contract may not be asserted against the successor in title of the husband or wife, or a third party (Article 756 of the CC).

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

If a party has entered into a contract that departs from the statutory property system, the contract may not be asserted against the successor in title of the husband or wife, or a third party (Article 756 of the CC).

As long as the contents of the agreements are not against the public policy of Japan (Article 90 of the CC), they can cover a spouse's financial claims on divorce.

The agreements can deal with financial claims regarding children, such as child maintenance, although the terms and conditions of agreements shall be construed by the prevailing principal in the best interest of the child (see Article 766(1) of the CC).

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

With respect to cohabitation, there is no provision on the subject of the division of property for unmarried cohabitees. However, Article 768 of the CC for married parties is applied *mutatis mutandis* to *de facto* spouses who live together with the intention of getting married but have not yet filed the formal registration in accordance with case law. Therefore, *de facto* spouses have financial claims should they separate.

4.2 What financial orders can a cohabitant obtain?

As mentioned above, *de facto* spouses can obtain an order for property division.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

Under Japanese law, there is no provision regarding formal partnership status for cohabitants.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Under Japanese law, same-sex couples are not permitted to marry. As mentioned above, there is no provision regarding formal relationships other than marriage. Some practitioners believe Article 768 of the CC for married parties is applied *mutatis mutandis* to same-sex couples intending to live forever as a married couple. In that case, a partner may have a financial claim against the other if the couple separate.

On September 18, 2019, an epoch-making judgment was rendered by the Moka branch of Utsunomiya District Court. The court admitted a mental damage claim by a woman against her female partner for sexual intercourse with a third party. The court pointed out that the relationship of female couples is similar to a male and female couple that is not officially married by submitting the report to the ward office in accordance with Article 739(1) of the CC.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

Under Japanese law, the parent who does not reside with the dependent child has an obligation to pay child maintenance to the other parent who resides with the child both within and outside of marriage. Parents have an obligation to support their dependent child.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Parents can decide the amount of child support by mutual agreement. In cases where they cannot reach an agreement, the court or a mediation panel will decide the amount.

In cases where the amount of child maintenance is decided by judgment, mediation or adjudication, the amount is calculated with a formula designed to reflect the concept that the parents are responsible for ensuring their dependent child enjoys the same standards of living as the parents. A simplified chart has been created by court. The chart and usage can be obtained on the website of the Tokyo Family Court (http://www.courts.go.jp/tokyo-f/saiban/tetuzuki/youikuhi_santei_hyou/).

In accordance with the chart, the amount of child maintenance is calculated by taking into account the incomes of both parents, the age of the children, and the number of the children involved. However, in cases where there are special circumstances which result in the amount calculated by the formula being considerably unfair, the court can order an amount which departs from the chart by considering the special circumstances.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Though there is no provision stipulating the cut-off age of child

support, in general, the parent is required to pay child maintenance until the child reaches the age of 20.

However, in cases where there are special circumstances which mean the child is unable to make his/her living by themselves, the parent has to pay child maintenance until the child is able to do so.

5.4 Can capital or property orders be made to or for the benefit of a child?

In cases where the parents cannot agree the amount of child maintenance, the court can decide the amount and make an order regarding child maintenance.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

If the child is represented by its statutory agent, the child can make a financial claim against his/her parents. The court will consider the need of the children, his/her parents' financial conditions and any other factors relevant to maintain the financial conditions of the child in light of the best interests of the child.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

(a) Under Japanese law, both parents have parental authority over children in wedlock during their marriage (Article 818(1) of the CC). Parental authority includes both legal and physical custody. At the time of the divorce, by agreement or by the order of the court, one of the parents shall be given parental authority (Articles 819 (1) and (5) of the CC).

(b) On the other hand, with regard to children out of wedlock, the mother has the parental authority.

6.2 At what age are children considered adults by the court?

Children are considered adults at the age of 18 (or, according to Article 4 of the CC, to be implemented from April 1, 2022, up until the age of 20). However, if the children enter into marriage, they are considered adults even if under the age of 18 (or 20 until March 31, 2022).

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

A child who is under the age of 18 (or 20) is subject to the parental authority of his/her parents (Article 818(1) of the CC). However, in cases where the child enters into marriage, he/she is no longer subject to parental authority (Article 753 of the CC).

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

Upon the divorce, the court shall decide the sole parental authority if the parties to the divorce fail to determine who is to become the sole parental authority in accordance with Articles 819(1) to (3) of the CC.

6.5 What factors does the court consider when making orders in relation to children?

Upon the determination of the sole parental authority, the court will have considered who is the primary caregiver of the child, continuity of the family and school life of the children and the will of the children.

During the divorce mediation and litigation, the primary caregiver is most likely regarded as the mother. After the separation of the husband and wife, the family and school life of the child would easily be established with the mother. In some cases, the child is strongly encouraged by the mother to refuse to see his/her father. Children may also sense the feeling of the mother who is the sole caregiver of the child, and refuse to see the father voluntarily. In that case, the left-behind husband has little chance to be appointed as the sole parental authority by the court based on the continuity of the family and school life of the child and his/her will.

There is a consensus among family law practitioners in Japan, that the mother has a strong incentive to abduct the child(ren) from her husband upon the divorce in the sole custodian determination procedure under Article 819(1) of the CC. Some countries, such as the US, criticise Japan as "the haven of the abductor".

Recently, the Matsudo branch of the Chiba District Court rendered an epoch-making decision on March 29, 2016 (Matsudo Judgment). The Matsudo judgment compared the parenting plans submitted by both the wife and the husband (who had been left behind for six years without visitation of his child) and appointed the husband as the parental authority of the child because his parental plan was friendlier than that of the mother as it provided more chances for visitation to the other. This judgment is recognised as applying the parent-friendly rules adopted in the US and other Western countries.

The Tokyo High Court, however, rendered a reverse decision on January 26, 2017, which concluded that the mother should have the parental authority, pointing out visitation issues as one of the factors to be considered and stating that "how the children have been raised up, their wills, etc. should be taken into account in a total manner".

The Supreme Court judged on July 12, 2017 that the Tokyo High Court decision should be upheld.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

Under Japanese law, parental authority can be exercised without court order. As the parent who has parental authority can determine the residence of the child (Article 821 of the CC), he/she can take the child abroad without a court order.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

Under Japanese law, there is no concept of joint parental authority, and there is no presumption of an equal division of time between separating or divorcing parents. Equal division of time is often regarded to be too much of a burden on the child's family and school life with the primary caregiver.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Under the laws of Japan, unmarried parents are not treated in the same way as married parents. The court also does not have the authority to make orders on the separation or divorce of the unmarried couple. The parental authority is held by the mother of the child until the father adopts the child.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

In cases regarding children, including parental authority and visitation, the judge may have a family court probation officer examine the facts of the case (Article 58(1) of the DRCPA). In that case, the officer meets the child and speaks with them instead of the judge. However, whether the officer speaks with the child is at the discretion of the judge.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

Yes. Only a qualified lawyer can represent the child(ren) in accordance with Article 23 of the DRCPA.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

No. The exclusive custody rights of the child(ren) are given to the parents of the child in accordance with Article 818(1) of the CC.

To resolve disputes relating to children, the methods of mediation and litigation of the family court are available.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

Under the laws of Japan, one of the parents shall have the parental authority upon the divorce, in accordance with Articles 819(1), (2) and (5) of the CC. The parent holding parental authority can decide the place of the residence of child (Article 821 of the CC). He/she can, therefore, move to another country together with the child without the consent of the other parent.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

Under the laws of Japan, one of the parents shall have the parental authority upon the divorce, in accordance with Articles 819(1) and (2) of the CC. The parent holding parental authority can decide the place of the residence of child (Article 821 of the CC). He/she can, therefore, move to another country together with the child without the consent of the other parent.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

Under the laws of Japan, the court has no authority to render a relocation order.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

Under the laws of Japan, the court has no authority to render a relocation order; thus, there is no specific procedure for seeking the permission of the court to remove a child from Japan.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

No practice of the court allows the custodial parent to relocate the child internationally.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Japan entered into the Hague Convention on January 24, 2014, and the Convention became effective in Japan on April 1, 2014. As a result, Japan deals with abduction cases in accordance with the Convention.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

As the answer to question 6.5 explained above, although the Matsudo branch of the Chiba District Court rendered a decision on March 29, 2016 (Matsudo Judgment), applying the parent-friendly rules adopted in the US and other Western countries, it was overruled by the Tokyo High Court decision on January 26, 2017, which concluded that the mother should have the parental authority, pointing out visitation issues as one of the consideration factors and stating "how the children have been raised up, their wills, etc. should be taken into account in a total manner". This view was upheld and finalised by the Supreme Court judgment on July 12, 2017.

In Japan, a child's mother taking him/her away from the father has also been considered parental alienation or brainwashing of the child. Although the courts do not explicitly recognise the concept of parental alienation, which is a controversial concept in the US, the court of Japan implicitly recognises the concept. A district court states that the opinion of the child taken by a Japanese mother from a foreign father is not always trustworthy in that the child is heavily dependent on the mother and may be influenced by her opinion too much.

The issue is how to prevent such parental alienation. Some scholars and practitioners believe the spirit of the Hague Convention, which is applicable only in international abduction cases, should also be applicable in the domestic abduction cases. According to them, the court should order that the provisional retrievable order be issued to avoid the parental alienation.

Introduction of joint parental rights and joint custody system in Japan is a big issue.

Under the Civil Code of Japan, one of the parents of the child should be the sole parental right holder and custodian of the child(ren) under Article 819(1).

Upon divorce, the parents of the child discuss as to who should be the sole parental right holder and custodian of their child(ren).

If they could not reach an agreement, the family court should decide the sole parental right holder and custodian under Article 819(2) during the mediation divorce.

In a litigation divorce, the family court appoints the sole custodian upon the divorce in accordance with Article 819(1).

This sole parental right holder and sole custodian system is not a global standard, being criticised by the US and EU where joint parental rights holders and joint custodian systems are implemented.

This issue is related to the unique customs of Japan.

Upon divorce, the mother is required to take care of the child. Therefore, she is allowed or required to take the children away from home if she wants to divorce and live in her parents' home for a while. The mother leaves without notice; her fatigued husband comes home from work and is shocked to see that his wife and children have suddenly disappeared – this kind of story is quite common in Japan, regrettably.

The sole parental rights holder and the sole custodian is often decided based on the previous and current childcare status, and naturally the mother would get sole parental rights and sole custody of the child.

This unique practice in Japan is sometimes abused by mothers who want to get the sole parental rights and custody of the child(ren), and do not want to allow the husband to see the child(ren).

Husbands, in particular those from Europe and the US, often criticise this outcome resulting from the sole parental rights holder and the sole custodian system used in Japan. Some scholars and practitioners believe it is necessary to abolish this system.

On the other hand, some still hesitate to introduce a joint parental rights holder and joint custodian system in Japan. They claim that as the child cannot stay with both parents at the same time, the real issues should be which decisions for the child should be made and by whom, and how to ensure the visitation of the other parents and child support.

The Civil Law of Japan is not expected to change in the near future.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

Surprisingly, no substantial changes to the court/mediation process have been introduced. The courts merely cancelled court and mediation dates and have not yet introduced remote access or virtual hearings. The government's plan is to promote online proceedings for determining the points at issue, oral proceedings, examination of witness, and even bringing a case online.

These changes would be introduced after the reform of civil litigation law, and it would be possible for oral proceedings to be online by 2023, and to file a suit online by 2025.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

One area that requires improvement is family court investigators' investigation practices. We often see the family court investigator's emphasis on the current status of the mother and the child(ren). As long as the relationship between the mother and the child(ren) seems to be fine, the family court investigator would recommend to the mediation panel that the mother should be appointed as the sole parental right holder and the custodian of the child(ren) for the best interest of the child. The decision-making process of the family court investigator does not seem to be fair. This is because the family court investigator seems to ignore the loyalty conflict of the child(ren) who is (are) solely dependent on the mother, who sometimes takes the child(ren) away from the father without his consent.

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

For Maltese Courts to have jurisdiction to hear a divorce suit, at least one of the spouses must be domiciled in Malta on the date divorce proceedings are filed, or alternatively, one of the spouses must have been ordinarily resident in Malta for a period of at least one year prior to the institution of such proceedings.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

A very recent amendment in our Civil Code has repealed a much longer period of separation previously required for spouses to be able to file for divorce. This recent amendment now stipulates that, provided a) the parties are legally separated, b) there is no prospect of reconciliation, and c) the spouses and their children are receiving adequate maintenance, the spouses may now file a joint application for divorce if they have lived apart for at least six months. If, however, a sole application for divorce is filed by one of the spouses, then it is required that they have lived apart for at least one year.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

There is no concept of 'private' divorce in Malta. Divorce proceedings are instituted by filing an application (be it a joint application by both spouses or a sole application by one of the spouses) in the Civil Court (Family Section) and the Court shall hand down a divorce judgment if all the required conditions are satisfied. If a cause of personal separation is being heard before Malta's Family Court, then the couple may make recourse to the Court, either separately or jointly, so that the demand for separation is instead considered a demand for the pronouncement of divorce.

1.4 What is the procedure and timescale for a divorce?

If the spouses are legally separated, then both or one of them may opt to file for divorce, provided that there is no prospect of reconciliation, adequate maintenance for spouses and/or children is received/transferred, and the parties have been living apart for one year and/or six months out of the preceding year, depending on whether the application filed is a sole application or a joint one.

In the case of a joint application, once the case is appointed for hearing, the Judge will ensure that the parties have confirmed on oath that the required conditions are satisfied and a divorce judgment is handed down very shortly after. When the parties file a joint application, the divorce judgment is usually handed down within three to four months from filing.

In the case of a sole application, once the case is appointed for hearing, the Judge will ensure that the defendant is served with the divorce application and will note whether a reply is filed. If it is proven, on oath, that all of the required conditions are satisfied, the divorce judgment is handed down shortly after. The timescale of a sole application is usually five to six months from filing; however the timescale is heavily dependent on how expeditiously the defendant is served with the plaintiff's divorce request.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

It is particularly important to note that the concept of divorce in Malta is different to divorce in other countries. When a divorce judgment is handed down in Malta, the main consequence is that the marriage is dissolved, thereby granting the parties the possibility to re-marry. All other issues such as access arrangements, maintenance orders, the termination of the default matrimonial regime, liquidation of the marital assets, etc., are dealt with in legal separation proceedings, be they contentious or amicable.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Chapter 255 of the laws of Malta states that a decision or other official act of a foreign Court or competent authority on the status of a married person, including divorce, shall be recognised in Malta if the decision is handed down by a Court or competent authority of the country in which either of the parties to the proceedings is domiciled, or of which either of the parties is a citizen. This decision must, however, be a decision of a judicial nature, as non-judicial divorce decrees will not be recognised. As an EU Member State and in accordance with the Brussels II Regulation, Malta provides for the recognition and enforcement of judicial divorce decrees originating from other EU Member States. This EU Council Regulation (2201/2003), to which Malta is a party, means that subject to the exceptions in

Articles 22 and 23 (where the recognition of a particular divorce decree would be manifestly contrary to public policy, or irreconcilable with an earlier judgment recognised under Maltese law with respect to the same parties), the Maltese authorities must recognise and enforce divorce decrees handed down by another Member State.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Absolutely. In Malta, it is separation proceedings that deal with issues such as custodial rights, visitation rights/access arrangements, maintenance orders, and the termination of the Community of Acquests and/or liquidation and division of the spouses' marital assets.

With regard to nullity proceedings, our jurisdiction provides for two types of proceedings. Parties who got married civilly may opt to institute Civil Annulment proceedings in the Civil Court (Family Section). Parties who celebrated a Christian marriage may choose to institute nullity proceedings by filing a petition in Malta's Metropolitan Tribunal. Thanks to an agreement between the Church and the State, the parties have the possibility of having declaration of nullity handed down by the Ecclesiastical Tribunal to be enforced civilly, too.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Yes, there are instances where the local Courts must stay proceedings if the Court first seized would be a foreign Court. One must bear in mind that, before the local Court decides whether to stay proceedings or otherwise, there are many other conditions that must be factored in.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

As stated above, financial orders (be they spousal maintenance, children's maintenance or other financial orders such as the liquidation of the spouses' relative matrimonial assets) are handed down by the Court during personal separation proceedings.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

Yes, Malta has three different types of matrimonial regimes and these are addressed by the Court during legal separation proceedings, not divorce.

Malta's default matrimonial regime is that of the Community of Acquests.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

The Court will only uphold or refuse the request for a financial order upon the formal request of one or both parties. For example, the Court will only decree a *pendente lite* maintenance request for the parties' minor children if one of the parties files a *pendente lite* application asking the Court to order the other parent to pay 'X' amount to that party for the needs of their minor children. The Courts assess such demands on a case-by-case basis and, prior to handing down a decree on the particular request filed, it considers the defendant's reply as well as a number of different factors such as the ages of the children, their lifestyle, their current circumstances, both parties' income and general wealth, etc., always putting at the forefront of its decisions the ultimate well-being of the child/children.

2.4 Is the position different between capital and maintenance orders? If so, how?

In our jurisdiction, monthly maintenance orders are undoubtedly more common than lump sum payments *in lieu* of spousal and/or children's maintenance. That said, the Court may, if it deems it appropriate in the circumstances, order the spouse liable to supply maintenance to pay to the other spouse (*in lieu* of the whole or part of such maintenance) a lump sum, which the Court deems sufficient in order to make the spouse to whom maintenance is due financially independent (or less dependent) of the other spouse, as the case may be.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

When a couple going through a personal separation agrees on financial matters, such clauses that detail their financial agreement are an integral part of their out-of-court settlement (i.e. deed of personal separation). Prior to publication before a Notary Public, such deed of personal separation must be authorised by the Family Court following the obligatory mediation reading in front of a court-appointed mediator. Once the Judge reads the mediator's report and goes through the separation contract agreed to by the parties, he/she shall hand down a decree authorising the Notary to publish the said deed of personal separation.

If a couple going through personal separation proceedings agrees solely on financial matters but disagrees on other issues, such as their children's custodial and/or visitation rights, they may file a joint note (in the records of their contentious separation proceedings) whereby they would ask the presiding Judge to endorse the financial agreement in its judgment and, in the same judgment, decide and determine other aspects of their separation where no agreement has been reached.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

The answer to this question depends on many factors, such as if the spousal maintenance order is one handed down by a judgment, if the order pertains to a *pendente lite* decree or if the spousal maintenance provision is enshrined in a deed of personal separation. Then, too, the timeline of the order is further dependent on whether the creditor remarries, on whether a declaration of nullity is subsequently granted, on whether the debtor faces the 'impossibility' (not mere difficulty) of abiding by that order, etc.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Absolutely. Naturally, the finer details of what is considered to be matrimonial property depends on the particular matrimonial regime chosen by the spouses.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Malta is a signatory to EU Council Regulation 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. This helps bring legal certainty to international couples going through separation proceedings so that in instances where the international couple does not agree on which law should govern their contentious proceedings, the Court would then determine which national law should apply to the proceedings they have instituted.

2.9 How is the matrimonial home treated on divorce?

In our jurisdiction, issues surrounding the couple's matrimonial home are not dealt with during divorce proceedings but during legal separation. Unless there is a court order to the contrary, one spouse cannot have exclusive use of the matrimonial home or arbitrarily do anything to deny one's spouse from entering the matrimonial home and using this property, even if the matrimonial home happens to be that spouse's paraphernal property. Unless there is a court order regulating the use of the matrimonial home, the ordinary, primary, common home where the spouses resided as a couple only ceases to be called the 'matrimonial home' upon the pronouncement of the legal separation of the parties, either by means of a court judgment or upon the publication of a deed of personal separation.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

Malta is one of the few civil law jurisdictions that has developed its own legal system regarding trusts, which in addition to recognising trusts established under foreign legislation (since the 1980s) also allows for new trusts, governed by another jurisdiction's legislation, to be created. In the European Union, Malta trusts maintain the Anglo-Saxon concept of a trust, within a highly regulated environment. In 1994, Malta ratified the Hague Convention on the recognition of trusts.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

Once a foreign divorce judgment is recognised in Malta, a Maltese Court will not interfere with a judgment handed down by the Courts of another jurisdiction.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Financial settlements are an integral part of legal separation proceedings, be they amicable separation proceedings or contentious ones. In both cases, mediation is always obligatory.

In the event that the spouses, with the help of their respective legal counsel, have already agreed on a deed of personal separation, then the parties usually opt for one-time mediation sitting with a private mediator who simply reads out the contract to the parties and ensures they have understood the terms and conditions therein. The contract would then be passed on to the Family Court Judge, together with the mediator's report, and if the Judge is satisfied with the terms therein, a decree is handed down authorising the publishing Notary to publish the said deed of personal separation.

Where the parties fail to reach an agreement, one or both parties may opt to file mediation proceedings. A court-appointed mediator will then hold a number of sittings with the aim of helping the parties reach an amicable settlement, thereby avoiding contentious separation proceedings which are both time-consuming and costly. If an agreement is reached, the mediator proceeds to read out the separation contract to the parties and passes this on to the Family Court Judge, together with his/her report. Once the Judge authorises the separation contract, a decree authorising the publication of the separation contract is subsequently handed down.

If, despite a number of mediation sittings, an agreement is not reached, the mediator closes the mediation proceedings and simply writes a note informing the Judge that '*the mediation was not fruitful*'. No further details are divulged. The Judge will then hand down a decree wherein either spouse is authorised to file a separation lawsuit within two months from such authorisation.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Pre-nuptial agreements and post-nuptial agreements are enforceable in our jurisdiction.

Foreign pre-nuptial agreements and post-nuptial agreements may also be rendered enforceable and in this respect, it is important to note that Malta is a signatory to both Council Regulation 1103/2016 and Regulation 1104/2016. These 'twin regulations' apply to marriages and civil partnerships concluded after 29th January 2019, and serve to implement enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, as well as the property consequences of registered partnerships, respectively.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

In Malta, a pre-nuptial agreement or a marital agreement (such one detailing the change of the parties' matrimonial regime) is enforced during separation proceedings, not divorce. If the pre-/post-nuptial agreement details what the parties are to do in the event that their marriage irretrievably breaks down, it is most likely that the parties will reach an amicable settlement on the very basis of the terms previously agreed upon in that agreement. Should an out-of-court settlement not be reached and subsequent mediation proceedings are unsuccessful, then it is most likely that the relative agreement will be exhibited as part of the parties' evidence in the eventual separation suit. It is then up to the Courts to interpret the clauses therein and hand down judgment accordingly.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Marital agreements may be as generic or as detailed as the parties wish them to be. It is important to note that any agreement drawn up by spouses will not be valid unless the spouses obtain the prior authorisation of the competent Court.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

Chapter 614 of the laws of Malta (informally known as the new Cohabitation Act) is an opt-in law. This means that a cohabitant by law is only that person who enters into a public deed of cohabitation with the other person he/she is continually and habitually living with (as a couple), so long as they are not already legally bound to another person. Thus, the terms of that particular couple's Cohabitation Deed would most likely regulate what happens in the event that their relationship breaks down and their cohabitation ceases.

4.2 What financial orders can a cohabitant obtain?

Unless children are involved, this very much depends on the terms set out in the couple's Cohabitation Deed.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

Yes. Cohabitants, i.e. couples who would have regulated their cohabitation in a formal manner by entering into a Deed of Cohabitation, are deemed to be 'Registered Partners' as per Council Regulation 1104/2016.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Yes, in our jurisdiction, same-sex couples may either get married, enter a Civil Union or else become registered partners at law.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

In our jurisdiction, unmarried and married parents are treated equally *vis-à-vis* the possibility to request the other parent (whether a spouse, partner or otherwise) to be ordered to contribute for their common child's daily needs (including food and clothing), not to mention health, educational and extracurricular expenses.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

A maintenance order may only be given by the Court after the application of one parent is served to the other parent. The defendant is given a time period within which to file his/her reply, and subsequently the Court hands down a maintenance decree, be it *pendente lite* or otherwise. Our Courts do not yet use a maintenance calculator; however, a number of factors are considered by the presiding Judge. Such factors include the number of children to be maintained, the age(s) of the child/children, their lifestyle, the income of the parties and their general wealth prior to handing down such maintenance order.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Parents are bound to provide maintenance for their children until they reach the age of majority, i.e. the age of 18. However, if the child reaches the age of majority and remains a full-time student, then the maintenance obligation subsists until the age of 23, or until he/she gets married or is in full-time employment, whichever is the earlier. If a child is disabled, maintenance may be due for the duration of the child's life or at least until such time as the child is able to care for himself/herself.

5.4 Can capital or property orders be made to or for the benefit of a child?

Yes, this is possible.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

Once the parties' child turns 18, he/she has the possibility of making a financial claim directly against one and/or both of his/her parents.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

Marital status bears no relevance on custodial rights. It must be noted, however, that in our jurisdiction, conflict usually arises when determining with which parent the child shall be principally resident. It is the issue of 'principal place of residence' rather than custody that unfortunately ends up being a bone of contention between parents.

6.2 At what age are children considered adults by the court?

In Malta, children reach the age of majority upon their 18th birthday. Once 18, they are considered adults by law.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Any order concerning a child is valid while the child is still a minor by law. Unless there is the issue of disability, maintenance orders remain valid even when the child has reached the age of majority should the child remain a full-time student, or reaches the age of 23, or gets married, whichever is the earlier.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

The Court hands down decrees in relation to minor children during separation proceedings and usually does this after a party to the proceedings makes recourse to the Court. The Court may

make orders in relation to the child's place of residence, maintenance, access arrangements, travel arrangements as well as any other issue (in connection to the child's well-being) that causes disagreement between the parties.

6.5 What factors does the court consider when making orders in relation to children?

The main yardstick is the child's best interests. That said, the Court considers any factor (be it age, health, wealth, family history/background, etc.) that impinges or might impinge on the child's well-being. Moreover, whenever a child's well-being is concerned, nothing is set in stone and the Court assesses each situation separately, i.e. on a case-by-case determination.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

Any extraordinary decision, be it one concerning the child's health, education, welfare or upbringing, must be taken by the parties jointly in the child's best interest. If an agreement cannot be reached by the parties on this extraordinary decision, then they are free to apply to the Court, who shall decide for the parties on this issue. It must be noted that a deed of personal separation also specifies such instances.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

Yes, although the term 'equal' cannot be taken literally since the Courts would not want to have a situation where, for the sake of 'equality', the child is ping-ponged from one residence to another without any consideration of that particular child's needs. For example, in Malta, there is no trend of the child spending one week with one parent and the following week with the other parent, especially during the scholastic year.

If, for example, during the scholastic year, the child ends up spending more time with the parent he/she is mainly residing with, during the summer holidays that 'lost' time is usually made up with ample access arrangements, such as longer visitation times and more frequent sleepovers at the other parent's residence. Though fathers at times complain that the presumption is that the child's principal place of residence is almost always that of the mother, the trend is definitely moving towards the promotion of co-parenting arrangements, where both parents are encouraged to spend quality time with their children in as equal a manner as possible.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Unmarried parents cannot institute separation or divorce proceedings because one only goes through such proceedings if he/she is married in the first place. That said, when it comes to parental rights and obligations, the Maltese Courts make no distinction between unmarried and married parents.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

When circumstances so warrant, the Judge may choose to speak with the child himself/herself or appoint a Child's Advocate, whose role is precisely that of hearing the views of the child when it comes to visitation rights and custody issues. Such decisions are taken on a case-by-case determination.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

As stated above, the Court may appoint a Child's Advocate when (in its opinion) this is required in the interests of any minor child/children of the parties. The Child's Advocate represents the interests of the minor child/children; however, the term 'represent' does not mean the same thing as when the parties themselves engage the services of a lawyer. What it really means is that the child is given a 'voice', thereby allowing his/her views to be heard.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Parental authority is only vested in parents unless this has been removed due to exceptional circumstances. This means that, as a general rule, it is only parents that have the right to decide for their child/children. Couples who have children in common are bound to submit before a mediator, whose main role is to help them reach an amicable settlement. It is only when it is clear that this form of dispute resolution will bear no fruit that the parties may engage in court litigation.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

No, the custodial parent cannot move to another country and change the child's habitual residence without the other parent's prior consent.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

This is not applicable.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

The Court factors in issues such as the child's habitual place of residence, the connection of the child to a particular State, reasons for the parent's opposition (such as uprooting the child and disrupting the child's family life and education) and also whether the country chosen for relocation is a signatory to the Hague Convention on abduction/has a Central Authority.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

This is not applicable.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

If the minor child's habitual place of residence is proven to be Malta and one parent objects to the relocation, it is rare for the other parent, even if that parent is the custodial parent, to be allowed to relocate. If the custodial parent wishes to relocate to a country that is not party to the Hague Convention on the Civil Aspects of International Child Abduction and/or where no Central Authority exists, then the custodial parent's request to relocate will almost certainly be denied.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Yes, Malta is a signatory to the Hague Convention and has a Central Authority whose role is to assist in cases of abduction and/or illegal retention of a minor involving the Maltese Islands. Should the voluntary return of the child not be possible, the Central Authority helps the left-behind parent to institute proceedings so that the child is returned.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

The introduction of the new Cohabitation Act as well as the very recent amendments relating to the time period when separated couples may file for divorce are significant and important steps in the right direction.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

Despite not being able to institute proceedings electronically, during the height of the pandemic both in 2020 and in 2021, mediation sittings, sittings before judicial assistants, legal referees as well as hearings before the Court of Appeal did take place virtually. Despite measures being eased, it must be noted that whenever the parties or their legal counsel could not be physically present for mediation sittings and/or sittings before judicial assistants and/or legal referees, it was possible for the absent person to join virtually. Moreover, virtual meetings have remained a very viable option, favoured by both lawyers and clients alike. Travel restrictions have also made virtual meetings an environmentally friendly commodity and necessity. It is believed that some of these changes are likely to remain once this pandemic becomes a distant memory.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

In the last decade, family law in Malta has evolved greatly. From the introduction of divorce in 2011, the Civil Unions Act in 2014, the new Cohabitation Act in 2020, and the most recent amendments on divorce, huge strides have been made. There is always room for improvement and measures must continuously be taken to ensure that the child's ultimate well-being is always at the forefront of the Courts' decisions. Such steps depend on the case at hand, and they might range from ensuring that co-parenting arrangements are encouraged to ascertaining that the child's views are being heard and valued.

Anne Marie Bisazza has an in-depth knowledge of all areas within family law and has a successful record of representing high-net-worth individuals, often in cases with international jurisdiction issues. Anne Marie has had the opportunity to advise clients with regard to international surrogacy arrangements, international custody disputes and co-parenting agreements with an international element. Following the introduction of the Civil Unions Act in 2014, Anne Marie was counsel in the first same-sex legal separation on the Island. She has gained a reputation for managing to negotiate and achieve optimal out-of-court settlements for her clients going through difficult, high-conflict separations. When a family issue cannot be resolved without the input of the courts, Anne Marie is a familiar face in Malta's Family Court.

In 2002, Anne Marie received her LL.D. and was admitted to the Bar that same year. She read for her Master's in Human Rights and Democratization and graduated a year later. Before setting up Bisazza & Bisazza Advocates in September of 2008, Anne Marie was heading the Family Law department at GVTH Advocates (today GVZH Advocates).

As a member of Malta's Metropolitan (Ecclesiastical) Tribunal, Anne Marie has an enviable track record when representing clients who want a declaration of marital nullity from the Roman Rota. Anne Marie is also a fellow of the European Law Institute, a member of the Academy of European Law and a fellow of the International Academy of Family Lawyers.

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Bisazza & Bisazza is a boutique law firm set up in 2008 by husband and wife duo Anne Marie and Carlo Bisazza. Both are specialised in each of their particular fields, allowing them to provide their clients with reliable and experience-based legal advice. While out-of-court settlements are preferable to litigation, the firm always prepares to zealously represent clients in court by using a team approach that leverages the firm's strengths and in-depth experience. These collaborations with other legal experts in their field often secure positive results while adding value and solidifying clients' trust.

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Netherlands

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

Jurisdiction is based on the grounds of Council Regulation (EC) no. 2201/2003 of 27 November 2003 ("Brussels II *bis*"). According to Brussels II *bis*, the Netherlands has jurisdiction if:

- the spouses have their habitual residence in the Netherlands;
- the spouses were last habitually resident in the Netherlands, if 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 is habitually resident in the Netherlands and resides there for at least one year immediately before the application was made;
- the applicant is habitually resident in the Netherlands for at least six months immediately before the application was made and is a Dutch national; or
- both spouses have Dutch nationality.

If no court of a Member State of the European Union has jurisdiction according to Brussels II *bis*, Dutch law applies the above by analogy.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

Irretrievable breakdown of the marriage is the only ground for divorce. The question of who is to blame, the reason for the divorce, a waiting period and compulsory attempts at reconciliation do not play a role.

If one of the spouses claims that the marriage has irretrievably broken down, the divorce is pronounced. It is not possible to put forward a defence, unless the defending spouse demonstrates that an existing prospect of a surviving dependant's pension is lost as a result of the divorce. In that case, a provision must first be made for this. An uncontested divorce is possible.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

Only the court can pronounce a divorce. In the case of an uncontested divorce, the divorce can be settled in writing and the spouses do not have to appear in court.

1.4 What is the procedure and timescale for a divorce?

A contentious divorce starts with the filing of a petition for divorce, usually accompanied by a request for the granting of ancillary relief. Depending on the application, this is followed by one or more written rounds, after which a hearing takes place. The divorce will be pronounced after this hearing, even if a decision has not yet been made on all aspects of the ancillary relief and the proceedings are still ongoing. Finally, the Divorce Decree must be entered in the civil registry, after which the divorce is a fact. The duration of the proceedings can vary from six months to several years, depending on many factors. Normally, the divorce itself is pronounced within six months to one year after filing the petition for divorce.

If a joint application for divorce is filed, the divorce will be pronounced immediately without any proceedings. A joint petition for divorce is usually settled within two to three months after filing the petition.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Yes, unless children are involved. If this is the case, the parents must submit a parenting plan when filing the petition for divorce and, if they fail to do so, explain the reasons for their failure to do so. The decision of the court will, if necessary, replace the parenting plan.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Yes. If the divorce has taken place in a Member State of the European Union, it is automatically recognised without any proceedings. The Divorce Decree is accompanied by a form especially for this purpose, which makes it easy to register the divorce in Member States of the European Union.

If the divorce has taken place in a non-Member State of the European Union, the divorce will be recognised if the jurisdiction of the foreign court or other authority that pronounced the divorce is based on an internationally accepted ground of jurisdiction and the proper administration of justice has taken place. Proceedings are not necessary. Registration of the divorce in the registers of the Civil Registry requires a bit more paperwork than recognising a divorce from a Member State of the European Union.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Yes. A legal separation is possible. Traditionally this was for religious reasons. The marriage continues to exist, but the consequences are very similar to those of a divorce.

There are a number of limited grounds on which the nullity of a marriage can be invoked, for example if there is a 'marriage of convenience' or a spouse was not *compos mentis* at the time of the solemnisation of the marriage.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

No. The 'first shot rule' is the main rule. If an application for divorce has been made in a country other than the Netherlands, the Dutch court must decline jurisdiction.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

The court can issue both final financial orders by way of ancillary relief, which means in addition to the divorce itself, and temporary financial orders by way of injunctive relief.

By way of ancillary relief, the court may issue a financial order for:

- the settlement (distribution or set-off) of the (marital) property;
- partner alimony;
- child support; and
- pension entitlements.

As injunctive relief, the court may issue a financial order for:

- temporary partner alimony; and
- temporary child support.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

Yes, Dutch law has a legal 'default matrimonial regime'. A recent change in the law creates a clear dichotomy:

- marriages entered into before 1 January 2018 are subject to the general community of property; and
- marriages entered into after 1 January 2018 are subject to the limited community of property.

Before 1 January 2018, both premarital property and property acquired during the marriage, including gifts and inheritances, were considered part of the community of property. As of 1 January 2018, only property acquired during the marriage is included in the marital community of property. Gifts and inheritances are not generally part of the limited community of property.

In principle, spouses and future spouses are free to derogate from the legal system by setting out their property relationship and mutual obligations in a prenuptial agreement.

If the spouses have not requested a ruling from the court on the property, the court may pronounce the divorce without considering the settlement of the matrimonial property. If the spouses, however, do request a ruling on the property, the court will have to decide on that. The spouses may request a ruling on the distribution and set-off in the divorce proceedings in the form of ancillary relief. In that case, the court is obliged to rule in the divorce proceedings.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

The court will only make a decision if the spouses, or at least one of them, submits a request to that effect. The court will not issue a financial order of its own motion.

2.4 Is the position different between capital and maintenance orders? If so, how?

In both cases, the court will only issue an order at the request of the spouses.

The legal 'default' regime and/or any prenuptial agreement lead the property law settlement.

In the case of maintenance orders, the law gives the starting points, which are elaborated on by 'alimony standards'. These standards set out alimony calculation rules, based on the actual financial position of the spouses.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

If the spouses agree on the financial consequences of the divorce then, in principle, a court order is unnecessary. In general, if the spouses do request the court to record the agreement in a court order, they do not have to appear in court.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

Spousal maintenance orders are common in instances where there is inequality of income.

Spousal maintenance orders imposed by way of injunctive relief are valid for the duration of the divorce proceedings.

Due to a recent change in the law, different periods apply to final spousal maintenance orders. The new law means that these different periods apply to requests submitted after 1 January 2020. These are the main rules:

Marriage of less than 10 years:

(a) The alimony obligation ends after a period equal to half the duration of the marriage.

Marriage of between 10 and 15 years:

(b) The alimony obligation ends after a period of five years.

Marriage longer than 15 years:

(c) If the spouse entitled to receive alimony will reach state pension age within 10 years, then the alimony obligation will end when the spouse entitled to receive alimony reaches state pension age.

(d) If the spouse entitled to alimony will not reach state pension age within 10 years and was born on or before 1 January 1970, the alimony obligation will end after 10 years.

(e) If the spouse entitled to alimony will not reach state pension age within 10 years and was born after 1 January 1970, the alimony obligation will end after five years.

For all scenarios ((a) to (e)), by way of derogation from the time limits mentioned above, the obligation does not end before the youngest child (if there are children) reaches the age of 12.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

The concept of matrimonial property is recognised in the Netherlands. Property acquired under the default regime is

considered matrimonial property if there is no deviation from this in a prenuptial agreement.

This does not detract from the fact that the property has been acquired or financed by one of the spouses or by the spouse in whose name it is registered. Although such circumstances may be relevant to the method of allocation, distribution and determination of any claims between the spouses, the entitlement of both spouses to the property derives from the matrimonial property regime.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Foreign nationals will not be treated differently from Dutch nationals by the court.

The Dutch court may apply foreign law. Which law is applicable depends on the subject matter (the divorce itself, assets, maintenance, pension) and the referral factors (choice of law, nationality and habitual residence).

2.9 How is the matrimonial home treated on divorce?

The court can grant one of the spouses the use of the property to the exclusion of the other, independently of ownership. Such a measure may be granted as injunctive relief for the duration of the divorce proceedings and as ancillary relief for a period of six months after the divorce has become final.

In the settlement of the matrimonial property, the allocation of the matrimonial home will depend on: the entitlement of the spouses to the home; the extent to which the spouses are able to finance the allocation of the home; the well-being of the children (if any); and the interests of the spouses.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

The Netherlands is a party to the Hague Trust Convention (Convention on the Law Applicable to Trusts and on their Recognition). In general terms, trusts are therefore recognised in the Netherlands.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

The Dutch court may have jurisdiction to hear and rule on a particular claim that follows from or is made during foreign divorce proceedings.

For example, in the case of a request to determine an alimony obligation, the Dutch court will in principle have jurisdiction if the spouse (or child) entitled to alimony has his or her habitual residence in the Netherlands. This applies even if the divorce has been pronounced elsewhere or the divorce proceedings have been or are being conducted elsewhere.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Spouses may request a (lawyer)-mediator prior to or during divorce proceedings. In general, the court will encourage settlement attempts between spouses and will also offer the spouses the option of mediation and facilitate this to a certain extent. Mediation is always on a voluntary basis.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

In principle, marital agreements (pre- and post-marriage) are binding in the Netherlands if and insofar as the applicable formal requirements have been complied with. The most important requirement is that prenuptial agreements must be set out in a notarial deed. The presence or prior advice of lawyers when entering into prenuptial agreements is not required in the Netherlands.

The substance of the agreement is subject to general contractual restrictions and, for example, provisions contrary to public morality, the law or public order are automatically null and void.

The validity of the foreign prenuptial agreement depends on the nature and substance of the foreign agreement and/or the regulations of the country where it was concluded.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

(Prospective) spouses can only deviate from the 'default' legal provisions by prenuptial or postnuptial agreements. This can be done before or during the marriage.

Prenuptial or postnuptial agreements must be entered into by notarial deed under penalty of nullity.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

In prenuptial agreements, spouses can not only choose the marital property regime of their choice, but both spouses can also set out additional rights and obligations whereby, in principle, they are entitled to 'freedom of contract'. However, agreements in prenuptial agreements concerning alimony obligations are currently considered to be 'null and void' and are therefore not taken into account.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

The applicable law concerning spouses does not extend to cohabitants. Claims can only be made against each on the general grounds of Dutch civil law. There are no specific rules for cohabitants.

However, financial claims may arise on the basis of a cohabitation contract and/or tacit agreements entered into voluntarily. Finally, claims may arise due to connectedness through common assets that are held jointly by the cohabitants.

4.2 What financial orders can a cohabitant obtain?

Possible financial orders are:
- child support (if the couple has children);
- financial orders based on agreements, whether contractual or tacit, that have been entered into jointly; and
- financial orders regarding common property, such as a house.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

There are three formal relationships in the Netherlands: (1) marriage; (2) registered partnership; and (3) cohabitation contract.

A registered partnership is equivalent to a marriage, while a cohabitation contract is quite different and has no marital status consequences.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Registered partnerships were created in 1998 mainly because it was not possible for gay couples to get married. This gave same-sex couples the opportunity to give their relationship the same legal status as married heterosexual couples. Incidentally, it is also possible for heterosexual couples to enter into a registered partnership.

On 1 April 2001, it also became possible for same-sex couples to marry. The Netherlands was the first country to introduce this.

Finally, the cohabitation contract is also an option for same-sex couples.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

After a divorce or termination of the relationship, each parent with custody can file a financial claim with the other parent who may or may not have custody for child support. If the parents are unable to reach agreement, it is possible for each parent with custody to submit an application for child support to the court.

A step-parent has a duty to support his/her step-child if the step-parent is married to one of the parents and the step-child is part of the family of the step-parent and this parent.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Child support is calculated on the basis of a child's needs (costs), the financial capacity of the parents and the division of care.

The needs of a child depend on the income of the parents during the time they were together and the number of children in the family. The needs are determined on the basis of the Nibud (National Institute for Family Finance Information) tables.

The children's needs are divided among the parents in proportion to their financial capacity. The financial capacity is calculated with formulas developed for this purpose on the basis of the current income of the parents.

Depending on the division of care, a care reduction is applied; by caring for a child part of the time, a discount is applied to the child support payable.

If the parents are unable to reach agreement, the court will determine the child support at the request of one of them. The court is the only authority that can impose child support.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Each parent is legally obliged to provide for the living and study costs of their adult children up to the age of 21. After that age, a parent is only obliged to provide for the costs of living and study if the parents have agreed this in writing in a parenting plan or in exceptional circumstances at the time of separation.

5.4 Can capital or property orders be made to or for the benefit of a child?

No, such orders cannot be made.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

Yes. From the age of 18, children have a direct claim to support from their parents and they can independently claim this.

In this case too, need, financial capacity and possible division of care are factors (see question 5.2). The income of a child who is older than 18 years does not play a role, unless his/her income is exceptionally high.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

When parents are married, they automatically have joint custody of their child. When parents are not married, the mother automatically has sole custody of the child. The father may apply for joint custody with the mother's consent. If the mother does not give her consent, it is possible for the father to apply for joint custody in court. The starting principle is that there is joint custody. A request by the father for joint custody will, in principle, be granted.

When the parents have joint parental custody, it is possible for both of them to apply for sole parental custody. Since joint custody is the starting principle, such requests are only granted sporadically.

A parent who has custody of a child has to take care of and raise the child. In addition, the parent with custody can make important decisions, such as enrolling the child at a school or consenting to medical treatment.

Guardianship is something other than custody. Guardianship is authority exercised over a child by someone other than the parents. For example, if the parent or parents have died or if the custody of the parent or parents has been terminated by the court.

6.2 At what age are children considered adults by the court?

Children are considered adults by the court from the age of 18.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Children orders last until the age of 18.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

In the case of a divorce, there is a legal obligation for parents to draw up a parenting plan. A divorce cannot take place without a parenting plan. If the parents fail to agree on a parenting plan, the court will take a number of decisions about the children in the event of divorce. The subjects that are most discussed are: custody; main residence; access arrangements; relocation; and child support.

The court also has jurisdiction to take such decisions regarding the children outside divorce proceedings.

6.5 What factors does the court consider when making orders in relation to children?

The most important factors are:

- the best interests of the child;
- the division of care during the relationship; the court attempts to align the order to the situation that existed during the relationship; and
- practical matters and circumstances, such as working hours, place of residence, etc.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

When two parents have joint custody, responsibility for daily care and related decisions lies with the parent that the child is with. Important decisions (see question 6.1) require the consent of both parents. It is therefore not possible to take a child abroad without the consent of the other parent.

In the case of sole custody, it is possible for the parent who has custody to make both the daily decisions and the important decisions. This means that this parent can take the child abroad without the consent of the other parent. However, the parent with sole custody must inform the parent without custody.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

In 2009, the principle of equal parenthood was enshrined in law. The background to this is that it is in the child's interest to have contact with both parents. However, equal parenthood should not be automatically translated into an equal division of care/co-parenting. There are various factors involved (see also question 6.5), which require customisation. An important factor is the division of care during the parents' relationship. If, for example, there was a traditional role pattern in which one parent worked and the other parent took care of the children, it is not realistic to expect a care arrangement with an equal division.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Yes, unmarried and married parents are treated equally.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

In principle, a decision is taken by the court without involving third parties.

Children from the age of 12 are always heard by the court. More and more children under the age of 12 are also heard by the court.

If the court considers that it does not have sufficient information to make a decision about a child, it can consult an independent professional (the Child Protection Board) for advice. The court usually attaches considerable value to such advice.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

In principle, no. This is only the case if a child has a conflict with his/her parents. In that case, a special guardian may be appointed. The special guardian then represents the interests of the child. The court may appoint a special guardian if it deems this necessary in the interests of the child. The parents or the child himself/herself may also request a special guardian.

In addition, the child has an informal right to bring legal proceedings. It is possible for children to submit a request to the court. Which requests may be made depends on the age of the child.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

No, because in principle other adults do not have custody. If other adults, such as step-parents and grandparents, want to interact with the child, they can coordinate this with the child's parents. If the parents of the child do not agree, it is possible for step-parents and grandparents to apply to the court for a visitation arrangement.

Disputes about the children can be resolved with the help of a mediator, a joint lawyer, two lawyers or the court.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

No, not if the other parent (also) has custody.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

No, not if the other parent (also) has custody.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

The court will take into account:

- the best interests of the child;
- the rights and interests of the relocating parent to relocate and the freedom to rearrange her/his life;

- the need to relocate;
- the extent to which the relocation has been thought out and prepared;
- the alternatives and measures offered by the relocating parent to mitigate and/or compensate for the consequences of the relocation for the child and the parent remaining behind;
- the extent to which the parents are able to communicate and consult with each other;
- the rights of the parent remaining behind and the child to maintain contact with each other in their familiar environment;
- the division of care tasks and the continuity of care;
- the frequency of contact between the child and the parent remaining behind before and after the relocation;
- the age of the child, his/her opinion and the extent to which he/she has roots in his/her environment; and
- the extra costs of access after the relocation.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

See the answer to question 7.3.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

If the other parent does not give his/her permission for the relocation, it is possible to request substitute consent from the court. However, it is difficult to be awarded substitute consent by the court for a relocation. If the relocation is international, this is all the more true. The necessity for the relocation plays a crucial role. Homesickness for the country of birth combined with not being integrated in the Netherlands is usually insufficient. The longer a family is settled in the Netherlands, the more difficult it becomes to get consent to relocate. Generally speaking, the greater the role of the parent left behind in the life of the children, the less chance the relocating parent has of being allowed to relocate. The court then considers that the loss of the relationship with the non-relocating parent is contrary to the well-being of the child.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Yes. In order to comply with the obligations of the Hague Convention, the Netherlands has separate procedural regulations for (incoming) abduction cases that function well. A court hearing will take place within 14 days of receipt of an application for the return of a child. This is followed, if the parents agree, by cross-border mediation using the pressure-cooker method within 14 days. If the parents are unable to reach an overall agreement, a hearing will follow within 14 days of the cross-border mediation, followed by the ruling 14 days later. The appeal period is two weeks. A hearing will take place within 14 days of the appeal being lodged and a ruling will be made 14 days later.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

As of 1 January 2020, the duration of spousal support has been shortened. It used to be 12 years. The duration has now been reduced in general terms and may vary from case to case (see question 2.6).

On 29 January 2019, the Matrimonial Property Regulation (Regulation (EU) 2016/1103) entered into force. As of that date, the grounds of jurisdiction for the Dutch courts in matrimonial property cases have been regulated internationally instead of nationally. The applicable law for spouses married after 29 January 2019 is now governed by the Regulation's choice-of-law rules.

The unmarried partner of the mother who acknowledges his or her child does not automatically acquire custody. Married parents do obtain joint custody by operation of law. So, in the Netherlands the recognition of a child does not automatically lead to obtaining joint parental authority (see question 6.1). There are fairly far-reaching plans to change this.

There are also fairly far-reaching plans to change the statutory system as far as it concerns the division of pension rights after a divorce.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

COVID-19 triggered the digitalisation of justice. As a result of COVID-19, virtual hearings were introduced. They even became the standard. These virtual hearings are still taking place, although to a lesser extent, and will continue until further notice. It is the expectation that virtual hearings will not disappear after COVID-19. In addition, it has become possible to correspond with the courts by email to a limited extent. Insofar as this possibility will be expanded is unknown. A few years ago, the Dutch government started a large project to digitalise justice, but it failed. This is a rather sensitive issue in the Netherlands.

It is now more common for parties to request to complete the proceedings in writing, with one or more extra written rounds instead of a hearing. It is likely that more use will be made of this option after COVID-19.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

International family law in the Netherlands is increasingly being governed by European regulations. This does not only concern the Dutch jurisdiction, but also the jurisdiction of other Member States. This makes it difficult to answer this question. Partly as a result of these European regulations, a patchwork of international instruments has arisen, particularly in the area of child-related matters, which do not work in practice. More cohesion would be desirable.

Within Dutch family law, we would ask to change the law stipulating that the unmarried father of a child does not automatically obtain custody upon recognition. We feel the unmarried father should have custody automatically. Legislation is now being drafted to this end.

Marjet Groenleer has vast experience in family law, focusing on divorce cases. She has a particular interest in the international aspects of family law and in multi- or cross-jurisdictional cases, subjects she has published numerous articles about. Marjet is a member of the International Academy of Family Lawyers, as well as a trained and accredited divorce mediator with the vFAS (Dutch Association of Family Mediators and Lawyers). She has worked as a lecturer in International Private Law at Leiden University and currently holds a position as a deputy judge in the family law department of the Court of Appeals in Amsterdam.

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

Under Russian domestic law (Article 160 of the Family Code of the Russian Federation, or the Russian Family Code), divorce proceedings of nationals of the Russian Federation and foreign nationals or those without citizenship shall be performed in the territory of the Russian Federation, and national family law and civil procedure law will be applied to their divorce.

A Russian national who resides abroad has the right to divorce his or her spouse who also resides abroad irrespective of his or her citizenship in the competent Russian court. If, under applicable Russian law, their marriage could be terminated in an administratively through the Vital Registry, they are able to divorce through the diplomatic representatives of the Russian Federation, i.e. at Russian Consulates abroad.

Under Article 161 of the Russian Family Code, the personal non-property and property rights and obligations of spouses shall be established by the law of the country where they have their common residence. If they do not have common residence at the time of their divorce, it shall be defined under the law of the country where they had their last common residence. If they have never had common residence, their non-property and property rights shall be defined in the territory of the Russian Federation and Russian national law will be applied to their divorce.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

There are no special grounds for a divorce. Under the applicable domestic law, marriage is a voluntary union of spouses. There is no required period of separation. If there are no disagreements between the spouses over their children, or if they do not have children and there are no disagreements relating to their marital property or financial issues, uncontested divorce is possible.

Under Article 16 of the Russian Family Code, marriage shall be terminated pursuant to the death of one of the spouses or if the court has announced one of the spouses to be dead. Marriage can be terminated upon the application for divorce of one or both of the spouses.

Pursuant to Article 17 of the Russian Family Code, a man cannot apply for divorce during the pregnancy of his wife or within one year of the birth of their child.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

In the case of an uncontested divorce in Russia, the parties do not need to attend court if they do not have children. In any case, the court shall be involved when the divorce concerns a family with minor children.

1.4 What is the procedure and timescale for a divorce?

Divorce may be performed through the Vital Registry if the spouses do not have minor children and if they both agree to the divorce (Article 19 of the Russian Family Code). Administrative divorce shall also be performed, irrespective of whether spouses have mutual minor children, upon an application of one of the spouses if the other spouse has been deemed in the court proceedings to be missing or incapable or convicted of a crime with the punishment of imprisonment for a term of more than three years. Administrative divorce at the Vital Registry shall be finalised in one month from the time the application was filed. If the spouses have to apply to court, there is no fixed timescale for a divorce. The timing depends on whether they have disagreements or any contested issues relating to custody over children or child support or dissolution of their common marital property. If they do not have any disputable issues and if both spouses wish to be divorced, their divorce could be finalised in one to three months. If one spouse refuses to divorce, the court may adjourn the divorce hearings and give the parties up to three months to think again over their divorce or to reconcile (part 2 of Article 22 of the Russian Family Code).

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

If both spouses confirm to the Judge during their divorce court proceedings that they have no disputable issues relating to children or property, their divorce will be finalised quickly and in an expeditious manner without the resolution of other associated matters like children and finances. They will be able to resolve these issues later in separate proceedings in case they arise sometime after their divorce has been finalised. So, divorce can be performed quite quickly in Russia.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Under part 3 of Article 160 of the Russian Family Code, foreign divorce of Russian nationals performed abroad or foreign divorce of Russian nationals and foreigners or individuals without citizenship performed abroad shall be recognised in Russia without any special procedural requirements if their divorce certificates are sealed with apostille and translated into Russian with the notary certification of the translation. Pursuant to Article 415 of the Civil Procedure Code of the Russian Federation (the Russian Civil Procedure Code), foreign court judgments on divorce or on annulment of marriage shall be recognised in Russia without any further court proceedings.

1.7 Does your jurisdiction allow separation or nullity proceedings?

There is no concept of "separation" under the Russian Family Code. Chapter 5 of the Russian Family Code regulates marriage nullity proceedings.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Russian courts are very reluctant to stay their divorce proceedings if there are concurrent proceedings in another country. Hypothetically, it is possible if the foreign court is already seized of the matter; however, this happens very rarely in reality. The Russian court shall apply its jurisdiction in any case if one of the parties who is a Russian national insists on the divorce being finalised in Russia irrespective of the divorce proceedings abroad.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

In divorce proceedings, Russian courts issue their orders on the splitting of common marital property where the court will rule on which property goes to which party and what compensation shall be paid to whom, if any. The court can also approve a settlement agreement concluded by the spouses on division of their common marital property. If the spouses have concluded their marriage (pre-nuptial or post-nuptial) agreements (PNA) under Russian family law, the court shall make its order on the splitting of common marital property (a financial order) based on the PNA of the parties. There are also orders on child support and alimony for a spouse, which can be issued in separate proceedings or together with other issues that the court shall consider during the divorce proceedings. Under Article 90 of the Russian Family Code, the following all have the right to recover alimony in his or her favour from the other spouse: an ex-wife during the period of pregnancy and within three years after the birth of their child; an ex-spouse who is in need and who is taking care of their mutual incapable (disabled) child for the period until the child reaches 18 years old or if their child (the first group of disability) is incapable from childhood; and an ex-spouse who is in need and is not able to work if his or her disability occurred during their marriage, before their divorce or within one year since their divorce.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

There is a legal matrimonial regime under the Russian Family Code, which is the regime of common property of spouses (Article 33 of the Russian Family Code). The spouses could change this legal matrimonial regime by concluding a so-called marriage agreement (PNA) in which they could establish a new regime, whether separate, shared or joined, for all or some of their properties, or leave a legal common property regime for some of their properties (Article 42 of the Russian Family Code). The common marital property regime could be considered a default matrimonial regime in Russia.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

It depends on the individual family situation but is based on the presumption of common marital property established by the applicable family law. If there is a PNA (or a "marriage agreement" if using the terminology of the Russian Family Code) concluded by the spouses before or during their marriage, the court will decide how the property should be split based on their marriage agreement. In some situations that are not so common, the court could recognise the shares in common marital property of the spouses as not equal, taking into account the best interests of their minor children, the interests of one of the spouses in case the other spouse did not have income due to reasons that cannot be deemed serious or reasonable, or if the other spouse has spent common finances against the best interests of the family (Article 39 of the Russian Family Code).

2.4 Is the position different between capital and maintenance orders? If so, how?

Maintenance orders shall be issued pursuant to Articles 89–92 of the Russian Family Code including spousal maintenance or alimony, and child maintenance or support issued pursuant to Articles 80–88 of the Russian Family Code.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

If a couple agrees on financial matters, they can conclude an agreement on the division of their common marital property and affirm it with a notary public. Alternatively, they can conclude the agreement and ask the court to approve it in the court proceedings. If a couple concludes their PNA before or during their marriage, they do not need a court order on their financial matters but in any case their divorce shall be performed through the court proceedings if they have mutual minor children. In sum, if the couple agrees on financial matters, they do not need a court order.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

In Russia, spousal maintenance orders are only issued in rare situations so it is difficult to consider them commonplace. The grounds for who has the right to recover spousal maintenance are stipulated by Chapter 14 of the Russian Family Code as described above. How long such orders last depends mostly on factors such as who is eligible to recover said maintenance and

the grounds for its recovery under Articles 89–92 of the Russian Family Code. Pursuant to Article 93, the court may grant leave to stop maintenance to the other spouse or put a certain time frame on the responsibility of one of the spouses paying maintenance to his or her disabled spouse or a spouse that was incapable for work during their marriage and after their divorce in certain situations, such as if his or her inability to work was caused by wrongful behaviour such as addiction to alcohol or drugs or as a result of committing a wilful crime. This maintenance period could be shorter if their marriage lasted for a short time and if, in general, his or her behaviour towards the other spouse or other members of the family during the marriage was not decent or appropriate. However, this must be proved in court.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

The main legal marital property regime in Russia (Chapter 7 of the Russian Family Code) is based on the concept of matrimonial property (Chapter 7, Articles 34–35 and 38 of the Russian Family Code).

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Foreign nationals are treated in the same manner as Russian nationals at the Russian courts. If they do not speak the Russian language, which is an official language of the proceedings in court, foreign nationals may have interpreters to help them with translations in the court proceedings and in preparation of court statements or other procedure documents.

Under Article 161 of the Russian Family Code, personal non-property rights and property rights of spouses shall be defined by the law of the country where they have their joint family residence. If they do not have a common family residence, their family non-property and property rights shall be established under the law of the country where they had their last common family residence. So, foreign law can also be applied depending on the location of the mutual place of residence of the spouses. If the spouses conclude a PNA or an agreement on spousal maintenance, spouses who have different nationalities or a mutual family place of residence may choose the law applicable to their rights and obligations under the agreements they conclude and the court may apply the foreign law that the parties have chosen.

Pursuant to Article 166 of the Russian Family Code, when the court or the Vital Registry apply foreign family law, they establish its content in accordance with its official interpretation, case law and doctrine of the country of the origin of the foreign family law. For its correct interpretation and application, the Vital Registry and the court may request help and support from the Ministry of Justice of the Russian Federation or from other competent bodies or experts. The parties and their lawyers may submit to the court the documents confirming and interpreting the foreign law and in other ways assisting the court in its correct application. If the court fails to establish the content of the foreign law, Russian family law will be applied.

2.9 How is the matrimonial home treated on divorce?

There is no concept of a matrimonial home in Russian family law. It is therefore treated as any other common marital property save for a PNA in which the spouses could define it in some other way if they wish and agree on how it should be split or to whom and on which conditions it may go after their divorce.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

Russian family law does not recognise the concept of trusts.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

Financial claims can be made in our jurisdiction following a foreign divorce. There might be several grounds depending on whether a respondent has his or her registered place of residence in Russia or if a property or company or any other assets are located in Russia, or if a foreign order should be recognised and enforced in Russia because the last known place of residence of a respondent was in the Russian Federation. There could be some other grounds depending on the type of foreign financial order and its connection with Russia.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

All of these methods of dispute resolution are available in Russia to resolve financial settlement on divorce. It depends on the parties if they are able to agree. The methods are available to them at any stage of their divorce process, whether that is before they start the court proceedings, during the proceedings or even later at the enforcement stage.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Under Russian family law (Chapter 8, Articles 40–44 of the Russian Family Code), spouses can conclude a marital agreement (pre-and post-marriage) and change their legal regime of common marital property. Russian marital agreements are regulated by Articles 40–44 of the Russian Family Code. They are enforceable and there are some grounds on which the court may set them aside/announce them void under Article 44 of the Russian Family Code and under the Russian Civil Code. If there is a marital agreement under Russian law, the court shall rule based on the provisions of this marital agreement. As for foreign agreements, the position of the courts may differ. There is no unified case law on this matter; it depends on the individual situation and the court itself. There is also no firm position on whether they should be recognised and enforced as they are; however, in many cases, the courts accept foreign PNAs and take them into account during Russian divorce proceedings.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

A marital agreement under Russian law shall be concluded in writing and notarised (part 2 of Article 41 of the Russian Family Code). A marriage agreement cannot restrict the legal capacity of the spouses to act or their right to apply to court for the

protection of their rights. It cannot regulate personal non-property relations between spouses, or the rights and obligations of the spouses in relation to their children. A marital agreement cannot include provisions restricting the right of a disabled spouse to recover maintenance and cannot contain other terms and conditions that put one of the spouses in an extremely unfavourable position or that contradict the basic principles of family law (part 3 of Article 42 of the Russian Family Code). A marital agreement may be declared invalid by a court entirely or in part on the grounds provided for by the Russian Civil Code for the invalidity of deals (Article 44). The court may also declare a marital agreement void in whole or in part at the request of one of the spouses, if the terms of the agreement put that spouse in an extremely disadvantageous position. The terms of a marital agreement that do not comply with the provisions laid out in paragraph 3 of Article 42 of the Russian Family Code are null and void.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Marital agreement provisions can cover a spouse's financial claims on divorce for spousal maintenance or compensation and the spouses can change their matrimonial property regime of all or part of their matrimonial properties. However, marital agreements cannot deal with child support or child maintenance issues. These are issues that should be agreed upon in child support agreements.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

Cohabitation in Russia has no legal consequences. Marriage should be registered under the applicable law to be regulated by the Russian Family Code. By the decree of the Presidium of the Supreme Counsel of the USSR of 8 July 1944, cohabitation is deprived of legal force.

4.2 What financial orders can a cohabitant obtain?

Cohabitants cannot obtain any orders under Russian family law.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

There is no formal partnership status for cohabitants in Russia.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

No, same-sex couples in Russia are not permitted to marry or enter any other formal relationship. Under Article 72 of the Russian Constitution, which was recently revised on 4 July 2020, marriage in Russia is defined as a union of a man and a woman.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

A parent with whom a child resides could recover child support from a parent who resides separately. Child support and maintenance are regulated by Chapter 13, Articles 80–88 of the Russian Family Code. Parents can conclude an agreement on child support or maintenance (part 1 of Article 80 of the Russian Family Code). If the parents cannot agree on child support, the parent with whom the child resides may apply to court. If the children do not receive their maintenance and their parents do not provide them with child support, Welfare Social Workers could apply to court to recover child maintenance from a parent. A parent with whom the child resides could claim the child support/maintenance within or outside marriage.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

If parents are not able to agree on child maintenance, one of the parents may apply to court to recover said maintenance. There is no special agency that shall administer this issue; it shall be administered by the court.

Under Article 81 of the Russian Family Code, if there is one child in the family, the amount of the child maintenance shall be one-quarter of the salary or other income of the parent who is responsible to pay the maintenance and it shall be recovered on a monthly basis. It shall be one-third of the salary and other income for two children, and for three or more children it shall be half of the parent's salary and other income. The amount of child maintenance may be reduced or increased by the court, taking into account the financial or family situation of the parties and other circumstances that the court deems significant.

In the absence of an agreement between the parents on child maintenance and in cases where the parent who is obliged to pay the child maintenance has irregular, varying earnings and/or other income, or if this parent receives earnings and/or other income in whole or in part in foreign currency, or if he or she does not have earnings and/or other income, as well as in some other cases, or if the recovery of child maintenance in proportion to salary and/or other income of the parent is impossible, complicated or materially violates the interests of one of the parties, the court shall have the right to determine the amount of child maintenance recovered on a monthly basis in a fixed amount or simultaneously in shares (in accordance with Article 81 of the Russian Family Code) and in a fixed sum of money.

The amount of the fixed sum of money is determined by the court proceedings from the maximum possible preservation of the child's previous level of living, taking into account the material and family situation of the parties and other circumstances worthy of attention.

If each of the parents has children, the amount of the child maintenance from one of the parents in favour of the other, less well-off parent is determined in a fixed amount of money recovered monthly and determined by the court in accordance with paragraph 2 of Article 83.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

In Russia, a parent is required to pay child maintenance until the

child reaches 18 years old. The applicable family law does not provide that a parent should continue to pay child maintenance if the 18-year-old child is able to work, even if he or she is a full-time university student. Parents are obliged to provide child maintenance to disabled children over 18.

5.4 Can capital or property orders be made to or for the benefit of a child?

Under part 2 of Article 39, the court has the right to divide common marital property between spouses not in equal parts but in another way taking into account the best interests of their children. Although the law provides this, in reality it happens only rarely.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

A child who has reached the age of 14 has the right to initiate a case in court if his or her parents do not duly perform their parental responsibilities of upbringing and education, or in case of abusive exercising of parental rights (Article 56 of the Russian Family Code). They can also apply to cancel their adoption (Article 142 of the Russian Family Code). A minor child cannot make a financial claim against his or her parents as the parents are his or her legal representatives. However, a minor child may apply to the Welfare Authorities who can apply with a financial claim to the court to protect the interests of the child.

Disabled adult children can make a financial claim for the recovery of maintenance (paragraph 1 of Article 85 of the Russian Family Code), and in case they are recognised as legally incompetent, such claims can be filed by appointed guardians.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

In Russia, there is no concept of custody relating to children who have parents. Parents have equal parental rights and responsibilities over their children (Article 61 of the Russian Family Code). It does not matter if the parents are married or unmarried as their marital status does not influence their parental status if both parents are registered as their child's parents.

6.2 At what age are children considered adults by the court?

As a general rule, the court considers children to be adults at the age of 18. Under Article 27 of the Russian Civil Code, a minor who has attained the age of 16 can be declared fully capable if he or she works under an employment agreement, including under a contract, or, with the consent of his or her parents, adoptive parents or guardian, is engaged in entrepreneurial activity. Declaration of a minor as fully capable (emancipation) is made by decision of the Welfare Authorities with the consent of both parents, adoptive parents or guardian, or, in the absence of such consent, by a court order.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Children orders could last up to the age of 18 but, as the parent-child relationship is considered to be ongoing as the children grow and become older, children orders may be modified at different periods of the child's life upon the request of one of the parents.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

The court can make orders on the place of residence of a child, on access rights, visitation and contact rights of a parent who resides separately from the child and orders on recovery of child maintenance. The court can also restrict or deprive one of the parents in his or her parental rights if it is in the best interests of the child.

The court does not make orders automatically in relation to child arrangements in the event of divorce. If the court establishes that the spouses are not able to reach an agreement on the place of residence of their children, on with whom the children will reside, on the child maintenance and alimony for a spouse who is not able to work and is in need, or on the splitting of common marital property, or if it is established that such agreement was not in the best interests of the children or violates the rights of one of the spouses, the court shall make orders on all of these issues in the divorce proceedings (part 11 of Resolution N 15 of the Plenum of the Supreme Court of the Russian Federation dated 5 November 1998 (as amended on 6 February 2007) on the application of legislation by courts when considering cases of divorce).

6.5 What factors does the court consider when making orders in relation to children?

When deciding on the place of residence of children when their parents live separately (regardless of whether they are married), the court will consider the best interests of the children and will take into account the opinions and views of children who have reached the age of 10, provided that this does not contradict their best interests (Article 57 and part 3 of Article 65 of the Russian Family Code).

The court takes into account the age of the child, his or her attachment to each of the parents, brothers, sisters and other family members, the morals and other personal qualities of the parents, the relationship existing between each parent and the child, the possibility of creating good living and educational conditions for the child to be brought up and develop in a good environment (taking into account the type of activity and occupation of the parents and their financial standing, bearing in mind that an advantage in the material and household situation of one of the parents is not an unconditional basis to define the place of residence of a child with this parent), as well as other circumstances characterising the situation, which developed in the place of residence of each of the parents (Resolution N 10 of the Plenum of the Supreme Court of the Russian Federation dated 27 May 1998 (as amended on 26 December 2017) on the application of legislation by the courts in resolving disputes related to the upbringing of children).

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

Under applicable Russian law, one of the parents can take a child abroad temporarily without any written consent of the other parent or a court order. However, in case a parent objects to the child travelling with the other parent, this parent could put a ban to his or her child's travels in an administrative way through the Migration Department at the place of his or her residence or through the Central Migration Authorities. In the event that there is such a ban, the other parent shall lift it through the court (Article 21 of Federal Law N 114-FZ of 15 August 1996 on the procedure for leaving the Russian Federation and entering the Russian Federation (as amended and supplemented), which entered into force on 4 February 2021).

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

There is a presumption of an equal division of time between separating or divorcing parents.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

The courts in Russia can only make orders on divorce relating to married parents. However, parental rights and responsibilities of unmarried and married parents are equal and they are treated in the same way.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

The Children's Welfare Authority is a state organisation and their participation in court proceedings relating to children is mandatory. They prepare a welfare report on the request of the court and investigate the living conditions of a child. If a child has reached the age of 10, the court shall take his or her views and opinions into account while delivering a Child Arrangements Order (in the terminology of the Russian Family Code, an order on the place of residence of a child). So, the Judge will invite and interview a child excluding the presence of his parents unless it is against the child's best interests. If it is complicated for a child to attend the court, the Welfare Authority's representative shall interview the child and find out his or her opinion. The Welfare Authorities can interview a child even if he or she has now reached the age of 10 but is mature and able to formulate his or her own views and opinions. It is mandatory for the court to take into account the views and opinions of a child who is aged 10 or above (Article 57 of the Russian Family Code).

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

In Russia, we do not have a separate representative who represents a child in court proceedings.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Under Article 67 of the Russian Family Code, grandparents, brothers, sisters and other relatives have contact rights with children/grandchildren. If one of the parents refuses contact to the child's close relatives, the Welfare Authorities have the right and duty to oblige the parent not to interfere with these contacts. If one of the parents does not comply with the decision of the Welfare Authorities, close relatives of the child or the Welfare Authorities have the right to apply to the court with a claim to remove the obstacles to the contact with the child. The court resolves the dispute based on the interests of the child and taking into account his or her opinion.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

As explained above, under Russian domestic family law, there is no concept of custody and no concept of custodial and non-custodial parents. Under Russian family law, both parents have equal parental rights. One of the parents with whom the child's place of residence has been defined can move with the child within the country without the consent of the other parent. In 2011, Russia joined the Hague Convention on the Civil Aspects of International Child Abduction, so the removal of a child by one of the parents to another country without the consent of the other parent will be in breach of the other parent's rights and responsibilities and will constitute wrongful removal/abduction of the child.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

Please see above.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

The Russian Family Code and the Russian Civil Procedure Code do not contain any provisions that regulate the relocation of a child abroad. However, the courts issue such orders and take into account the best interests of the child, the age of the child, how greatly the parental rights of a left-behind parent are influenced by such relocation, the preparedness of the relocation, whether the relocation is necessary to the parent taking the child and many other factors.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

In Russia, it is possible for a parent with whom the place of residence of a child has been established to relocate a child to a different part of the country. A relocating parent does not need the consent of the other parent; however, this situation is not ideal when taking into account the size of our country and, if the relocation takes place from Vladivostok to Kaliningrad

or Saint Petersburg, the access rights of the other parent will be violated. Still, such relocation does not need any consent or leave of the court.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

In practice, it is not often that Russian courts grant a parent with whom the place of residence of a child has been established the right to relocate with a child abroad.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Russia is a "Hague" country. It joined the 1980 Hague Convention in 2011 and the 1996 Hague Convention in 2013. However, the application and interpretation of their provisions are still far from being correctly implemented. As a general rule, the Russian courts and other competent authorities will support Russian mothers even if they abduct their children. In Russia, mothers are considered to be the prime carers of children, and the best interests of children are considered by the Russian courts as not to be separated from the mother, who often refuses to return to the country where the child is habitually resident.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

The fact that Russia joined the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1996 Hague Convention on Parental Responsibility and Protection of Children is a great and significant step and will help Russian family law in its further development. There are also some changes in regard to recognition and enforcement of foreign family court orders, even in situations where there is no international treaty of the Russian Federation. However, Russian courts grant permission for an order enforcement based on the general principles of international law – reciprocity, comity, and international courtesy.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

In our country, courts still have more in-person proceedings than remote, even during the pandemic and related lockdowns. The old technical equipment of the courts does not allow for remote hearings.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

It would be great if Russian marital agreements (PNAs) became more stable and protected against invalidation, which is currently quite easy to do. In divorce proceedings, courts should automatically decide on child arrangement issues as well as on dissolution of marital property and should not grant divorce too quickly before all of these issues are resolved. Russia should also join more international child protection treaties, for example, the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

Jurisdiction for divorce is regulated by the Domicile and Matrimonial Proceedings Act 1973. The Scottish courts will have jurisdiction if either of the parties has been habitually resident in Scotland throughout the year before the action is raised or is domiciled in Scotland.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

The pursuer (applicant) must establish that the marriage has broken down irretrievably or that an interim gender recognition certificate has been issued to one of the parties. Irretrievable breakdown must be demonstrated by one of the following:

- since the date of the marriage, the defender (non-applicant spouse) has committed adultery;
- since the date of the marriage, the defender has behaved in such a way that the pursuer cannot reasonably be expected to cohabit with the defender;
- the parties have lived separately for one year or more and both parties consent to divorce; or
- the parties have lived separately for two years or more.

Where the defender does not contest the proceedings, the court will grant decree of divorce on the basis that the proceedings are unopposed.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

Parties are not usually required to attend court where a divorce is uncontested. It is not possible to have a "private" divorce without involvement of the court.

1.4 What is the procedure and timescale for a divorce?

Where no financial orders are sought, there are no children under 16, and one of the grounds for divorce based on the required minimum period of separation is available, parties can use the "simplified divorce procedure", and divorce will generally be granted within a few months.

Where the "simplified divorce procedure" is not available, full divorce proceedings must be raised. Formal legal pleadings issued by the pursuer will set out the orders sought. The defender has strict time limits to lodge defences narrating the basis of their opposition, if any. Orders can be sought by the defender without bringing a separate action. If the action is undefended, the pursuer may then apply for divorce by submitting affidavits and other paperwork to the court, after which divorce will likely be granted within a few months.

Where defences are lodged, in the absence of subsequent agreement, there will ultimately be a substantial evidential hearing to determine the disputed issues, known as a proof. Fully contested actions generally take between a year and two years to conclude. Such proceedings are generally held in open court.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

All financial matters must usually be resolved before or at the time of the divorce being granted. Except in limited circumstances, the granting of decree of divorce brings an end to the ability of parties to make any financial claims arising from their marriage.

Where a divorce action is raised prior to financial and/or child-related matters being resolved, the pleadings may include formal requests for financial provision and orders relating to children, and the defences may likewise seek such orders. If the defender fails to respond within the required timeframe, decree of divorce may be granted in absence and the opportunity to make financial claims will usually be lost.

Where there are children under 16, the court will only grant divorce if it is satisfied with their care arrangements.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

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, e.g., 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 12 months 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.

1.7 Does your jurisdiction allow separation or nullity proceedings?

The same grounds apply to proceedings for judicial separation as those that apply on divorce. The rights and obligations arising from the marriage continue.

Nullity proceedings can be brought where a party to the marriage lacked legal capacity, did not consent, was ineligible to marry, or the other party is incurably impotent. The parties have the same rights to apply for financial provision as they would on divorce.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Within the British Isles, e.g., 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 in any other part of the UK must be sisted, 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.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

The main financial orders 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.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

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, i.e., it has no propriety consequences during the marriage. Parties may enter into a nuptial agreement to modify the effect of the 1985 Act.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

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 an 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 him or her of hardship over a reasonable period.

2.4 Is the position different between capital and maintenance orders? If so, how?

Orders for capital and maintenance are both considered with reference to the principles outlined at question 2.3.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

Often parties negotiate the terms of settlement without applying to the court for any orders (except the divorce itself). Where financial matters are agreed, the terms of settlement can be embodied in a binding and enforceable contract called a Minute of Agreement, which is registered with a public authority. In these circumstances, no court orders are required in relation to finances.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

There is a strong emphasis on achieving a financial clean break. Awards of periodical allowance 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 whilst 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.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Yes, please see question 2.3 above.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

The UK does not participate in any international instruments relating to choice of law in family law matters. Scottish courts will apply the 1985 Act regardless of the parties' nationalities or domiciles.

2.9 How is the matrimonial home treated on divorce?

In most cases, the matrimonial home will fall within the definition of matrimonial property and will be subject to such orders as are justified by the principles outlined at question 2.3 above. The matrimonial home forms an exception to the usual rule that matrimonial property must be acquired during the marriage, provided that the matrimonial home was purchased for use as a family home.

In some cases, the matrimonial home will not be matrimonial property even if it has been the parties' home, e.g., if it was gifted to or inherited by one of the parties alone.

Where the matrimonial home is owned by one party, the other party will have automatic rights of occupation until divorce is granted or a period of non-occupation has elapsed.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

Yes. 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.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

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, e.g., 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.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Most financial settlements are reached by way of negotiation between solicitors instructed by each party (or by the parties themselves). Court proceedings are generally raised only as a last resort. Other methods of dispute resolution are as follows:

- Mediation facilitates discussions with the help of an independent expert. Matters discussed during mediation are confidential and parties may seek their own legal advice.
- Collaborative law involves a series of meetings with separate lawyers retained by each party. Parties agree at the outset that they will not go to court to resolve the substantive issues in the case. If the process breaks down, they must instruct other solicitors to represent them in court.
- Arbitration provides an alternative to litigation where parties refer the resolution of contentious matters to an arbitrator. The process is usually quicker and cheaper than litigation and is entirely confidential.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

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 and the claims being discharged 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.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

There are no specific requirements for a nuptial agreement to be enforceable on divorce although agreements are generally drafted, signed, and witnessed so that they are probative (self-proving) in terms of the Requirements of Writing (Scotland) Act 1995.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Nuptial agreements can address a spouse's specific financial claims on divorce, and such agreements will be upheld provided the requirements addressed in question 3.1 are met. However, such agreements are more commonly used to protect specific assets, and anything deriving from those assets, rather than covering all financial claims on divorce. It is not possible to choose a matrimonial property regime in a nuptial agreement governed by Scots law. It is not possible to regulate financial claims regarding children in a nuptial agreement.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

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.

4.2 What financial orders can a cohabitant obtain?

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.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

Civil partnerships are available to cohabitants, regardless of the genders of the pair. A civil partnership confers upon parties the same rights and responsibilities as marriage.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Same-sex couples are entitled to marry and enter into civil partnerships.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

The financial claims available to parents on behalf of children are the same regardless of whether the parents are married.

Where parents and children are all resident in the UK, child maintenance will be payable to the parent who has primary care of the children. Where care of the children is shared equally, no child maintenance will be due. While claims may be brought by a child over 12, in practice, they are usually brought by the parent with primary care of the child.

In addition to obligations regarding child maintenance, one parent may bring claims against the other for the payment of school fees.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Where all parties are within the UK, child maintenance is administered by the Child Maintenance Service ("CMS"). A statutory formula determines the level of maintenance due in the absence of agreement, based largely on a fixed percentage of the paying parent's gross weekly income. Deductions are made to take account of the nights spent by the child with the paying parent, also known as the non-resident parent. The CMS has broad powers to investigate the paying parent's income.

The court can award additional child maintenance over and above the amount determined by the CMS if the paying parent's gross income exceeds a maximum threshold (currently £3,000 per week). The court can also make orders regarding the payment of school fees.

Where the case falls outside the scope of the CMS's jurisdiction (for example, because one party is resident abroad), jurisdiction remains with the courts. The courts will make awards based on needs, resources, and all the relevant circumstances.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Parents have a statutory obligation to provide reasonable financial support to their children up until the age of 18, or until the age of 25 provided they are undergoing education or training.

The CMS regulates payment of child maintenance until a child reaches the age of 16, or until the age of 20 if the child is enrolled in full-time non-advanced education. While undergoing education or training, a child can bring a claim against one or both parents until they reach the age of 25.

5.4 Can capital or property orders be made to or for the benefit of a child?

Under the 1985 Act, the economic burden of caring for a child of the marriage under the age of 16, or a child who has been accepted as a child of the marriage, should be shared fairly between parties after divorce.

Under the 2006 Act, an application can be made by an unmarried parent for a capital sum in respect of the economic burden of caring for a child under the age of 16 following separation.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

Children can make a claim against their parents provided they have an understanding of what it means to do so. Children are presumed to have sufficient age and maturity to have such understanding from the age of 12. Young adults up to the age of 25 may make a claim against their parents provided they are undergoing education or training. The courts will make awards based on needs, resources, and all the relevant circumstances.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

Mothers have automatic parental responsibilities and rights ("PRRs"), regardless of their marital status. Married fathers have automatic PRRs. An unmarried father will have PRRs if he is named on the child's birth certificate and the child was born after 4th May 2006. Unmarried fathers of children born before that date must either enter into an agreement with the child's mother or apply to the court for recognition of their rights.

Under the Children (Scotland) Act 1995, PRRs include the responsibility to: safeguard and promote the child's health, development, and welfare; provide direction and guidance; maintain personal relations and regular direct contact; and act as the child's representative. A person with PRRs has the right to: have the child living with him or otherwise to regulate the child's residence; control the child's upbringing; and make and be consulted in major decisions.

6.2 At what age are children considered adults by the court?

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).

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Most orders cease to apply when the child reaches the age of 16.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

The court can make any order it sees fit in relation to the care of a child, including orders regulating a child's residence, determining contact, and orders granting or depriving a person of PRRs. Specific issue orders can regulate all aspects of a child's life, including schooling and medical treatment.

The court will not automatically make orders in relation to children in the event of divorce but must be satisfied with the care arrangements before granting divorce.

6.5 What factors does the court consider when making orders in relation to children?

The welfare of the child is the court's paramount consideration. No order shall be made unless it would be better for the child that an order is made than no order at all. The court will have regard to the child's views, subject to their age and maturity.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

A person with PRRs can make most decisions unilaterally, subject to the duty to consult the other parent and the child. An order can be sought from the court preventing a person with PRRs from taking a specific action, if required.

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.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

There are no presumptions in relation to the care of a child. All cases are decided according to what the court considers to be in the child's best interests. Recent years have seen a shift towards shared-care arrangements with many children spending broadly equal time with both parents, but this is not yet an established norm.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Yes, subject to the comments above regarding PRRs for unmarried fathers.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

The court often orders a child welfare report to be prepared by an independent lawyer or other professional. The reporter will usually meet with the child (depending on their age) and other relevant parties and may make recommendations as to the orders that the court should make. The ultimate decision-making power rests with the judge, who does not ordinarily meet with the child. Further developments in this area of law are expected as the Children (Scotland) Act 2020 fully enters into force.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

Children do not usually have separate representation in proceedings relating to their care. Where neither parent can adequately represent the views of a child, a curator may be appointed to conduct litigation on their behalf.

A child may instruct their own solicitor directly and will be presumed to be of sufficient age and maturity to do so from the age of 12.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

While the focus is on parents with PRRs, it is not impossible for others to seek orders in respect of children. The same methods of dispute resolution are available as those outlined at question 2.12 above, e.g., mediation. No matter what is agreed between parties, the court will retain jurisdiction to make such orders in relation to children as it sees fit.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

A child habitually resident in Scotland may not be removed from the UK by one parent without the consent of the other, provided that both parents are exercising rights of custody (residence or contact) over the child.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

The court's permission should be obtained in advance, although intra-UK abductions are governed by the Family Law Act 1986 and are not specifically prohibited.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

The welfare and best interests of the child will be the paramount considerations. The court will consider: the nature and motive behind the proposed move; the extent to which it will affect the child's relationship with both parents and their wider family; the child's views (if appropriate); and the options for schooling and accommodation, and all other relevant matters. It is for the parent who wishes to relocate to prove to the court that the move would be in the child's best interests.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

The same factors as in question 7.3 are taken into account.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

It is difficult in practice to obtain permission from a court, particularly where a move would have an adverse impact upon the child's relationship with the other parent. Clear and compelling evidence will be required to show that such a move is in the child's best interests and that it would be better for the child to move than to maintain the current arrangements.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

The UK is a signatory to the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The Hague Convention seeks to ensure that children who are removed unlawfully from their country of habitual residence are returned to that country as quickly as possible. Applications can be brought by anyone who was exercising "custody rights" at the time of removal or retention.

The Scottish Central Authority deals with applications for the return of children habitually resident in Scotland, who have been wrongfully removed to, or retained in, another Hague Convention signatory state. An applicant seeking the return of a child abducted to Scotland from another Hague Convention signatory state will be entitled to free legal aid in order to raise court proceedings in Scotland provided that the application is first made to that country's central authority.

Where a child is removed to, or retained in, Scotland, from a country that is not a Hague Convention signatory state, decisions will be fact-specific and based on the child's welfare.

It is a criminal offence for a person connected with a child under 16 to remove the child from the UK without consent if there is a court order in place dealing with custody or if there is an order prohibiting the child's removal.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

Significant changes flowed from the end of the Brexit transition period at the end of 2020, and, in particular, to the rules of jurisdiction. For example, the *lis alibi pendens* (first past the post) rule no longer applies in respect of proceedings ongoing in EU Member States. On the domestic front, the Children (Scotland) Act 2020 was passed by the Scottish Parliament in late 2020, although many of its provisions are yet to enter into force. A significant change will include the removal of the presumption that a child of over 12 years of age is entitled to express a view; rather, children of all ages will be entitled to express a view unless they are unable to do so.

The Scottish Law Commission is currently undertaking a review of cohabitation law and changes to the 2006 Act are likely to follow publication of its report in early 2022. Expected changes include the extension of the current strict timebar of one year for bringing claims and some widening of the range of orders available at the end of a cohabitation as currently claims are essentially limited to a capital sum payment.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

Family law proceedings in Scotland have become almost entirely virtual as a result of the COVID-19 pandemic, including virtual hearings and paperless processes. However, some substantive evidential hearings are already now again being conducted in person as such hearings can be difficult to conduct effectively online. It is extremely unlikely that things will fully return to the pre-COVID-19 position and the pandemic appears to have accelerated a shift towards online working.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

Scottish family lawyers are looking forward to the publication of the Scottish Law Commission's report on cohabitation at the start of 2022 and some important changes are expected to follow from that review, particularly an extension of the timebar, which encourages parties to raise proceedings simply in order to preserve a claim. Some welcome changes to the working practices of the courts are likely to follow the COVID-19 pandemic, which should include better use of technology both prior to and during hearings.

Gillian Crandles is Managing Partner and Head of Divorce and Family at Turcan Connell. She is one of Scotland's leading divorce lawyers and is accredited as a specialist by the Law Society of Scotland. According to *Chambers UK*, Gillian "has a very big reputation and it is well-deserved". Dealing with complex, high-net-worth cases, she has extensive expertise in cases involving business valuations, partnerships, and farming, as well as disputes involving significant cohabitation claims. She has a particular interest in international cases including disputes involving children, and jurisdiction for financial claims. She is dual-qualified in Scotland, England and Wales, and is frequently instructed in cases with a cross-border element, particularly in relation to asset protection, prenuptial, and postnuptial agreements. Gillian has a keen interest in alternative dispute resolution, and is a qualified collaborative lawyer, family mediator and arbitrator. She is a member of the Family Law Association and Resolution and IAFL.

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Its family law team is widely recognised as the leading practice in Scotland for high-net-worth divorce cases. The team handles all aspects of separation, divorce, dissolution of civil partnerships, cohabitation, and issues arising from relationship breakdown, whether of a financial nature or concerning the care of children. Prenuptial and postnuptial agreements are a significant aspect of the team's work. With partner-level expertise in Scottish and English law, the team acts in many cross-jurisdictional divorces and divorces involving business valuations and share schemes.

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

In respect of non-Islamic marriages, Singapore's courts have jurisdiction for divorce proceedings where one of the parties is either (a) domiciled in Singapore at the start of proceedings, or (b) habitually resident in Singapore for a period of three years immediately before the start of proceedings (s 93(1) Women's Charter, "WC").

However, no writ for divorce may be filed unless, at the date of the filing, at least three years have passed since the date of marriage (s 94(1) WC) or the court allows such a writ to be filed on the ground(s) of "exceptional hardship" suffered by the plaintiff or "exceptional depravity" on the part of the defendant (s 94(2) WC).

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

The "irretrievable breakdown of marriage" is the sole and only ground of divorce in Singapore. It is proved by one of five facts, namely, adultery, unreasonable behaviour, desertion for at least two years, separation for at least three years with consent, or separation for four years (s 95(3) WC). There is no required period of separation to establish adultery and unreasonable behaviour, and parties may choose not to contest the proceedings regardless of the facts relied upon above.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

The court may dispense with the need for parties to attend court if the divorce is uncontested (r 81 Family Justice Rules, "FJR"). However, it is not possible to have a "private" divorce without court involvement.

1.4 What is the procedure and timescale for a divorce?

The procedure and timescale for a divorce depends on whether the divorce is contested or uncontested. After the plaintiff files and serves a writ for divorce, the defendant must file a memorandum of appearance within eight days, indicating whether he/she wishes to contest the divorce. If the divorce is contested, parties will have to file pleadings (the defence/defence and counterclaim, and the reply/reply and defence to counterclaim), followed by Affidavits of Evidence-in-Chief, respond to requests for discovery of documents and/or interrogatories, and proceed to a trial including cross-examination of witnesses.

There would also be case conferences (r 23 FJR), and mediation and counselling (r 174 FJR) involved in the process. A contested divorce typically takes about nine months to a year to proceed to trial, but can of course be settled on an uncontested basis at any point in time if the parties agree.

As a side note, parties should be mindful of how they frame their prayers in their pleadings from the outset. R 401 of the FJR provides that the Statement of Claim must specify the relief or remedy the plaintiff claims and the court has recently stated that the wide powers of the Family Court under the matrimonial jurisdiction should not be invoked to allow parties to depart from their pleadings which are binding on them (*USD v USC* [2021] SGHCF 4).

Where the parties have agreed from the outset (a) that the divorce proceedings will proceed on an uncontested basis, and (b) on all ancillary matters, they may apply for the divorce proceedings to be heard by the court within 10 days after the date of setting down on the "uncontested simplified hearing track" (r 83 FJR). The court may, with the consent of all parties, make orders in the terms agreed without the parties' attendance (r 670 FJR).

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

An Interim Judgment for divorce may only be finalised after the hearing of all claims for ancillary relief relating to children and finances has been concluded unless leave of court is otherwise granted (r 96(3) FJR).

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

The recognition of foreign matrimonial decrees is governed entirely by common law principles. An application may be made to the Singapore courts to recognise a foreign matrimonial decree on the grounds of international comity if it originates from a court of competent jurisdiction and is not otherwise impeached for fraud, breach of natural justice or contravention of Singapore's fundamental public policy (*Ng Sui Wah Novina v Chandra Michael Setiawan* [1992] 2 SLR(R) 111; *Ho Ah Chye v Hsinchieh Hsu Irene* [1994] 1 SLR(R) 485; *Yap Chai Ling and another v Hou Wa Yi* [2016] 4 SLR 581).

1.7 Does your jurisdiction allow separation or nullity proceedings?

The Singapore court may order judicial separation or nullity of marriage subject to the same jurisdictional requirements set out under question 1.1 above. Additionally, even where neither of the two jurisdictional requirements are fulfilled, the court may grant relief in proceedings for nullity of marriage where both parties reside in Singapore at the time that the proceedings are commenced.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Divorce proceedings in Singapore may be stayed in favour of a foreign court on the ground of *forum non conveniens* unless substantive justice will be denied by the stay of proceedings. The courts will assess whether there is another forum that is clearly or distinctly more appropriate than Singapore to determine the divorce based on the rules in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

The court is empowered to order the just and equitable division of matrimonial assets and to make orders for maintenance for the wife/incapacitated husband and children of the marriage (ss 113, 127 WC).

With respect to the division of matrimonial assets, the court may make any order necessary or expedient to effect the division. This includes making an order for sale or vesting of any asset or any part thereof by or in either party, for any asset to be held in trust on such terms as may be specified, and for the payment of money by one party to the other party (ss 112(3), 112(5) WC). An example of a "necessary or expedient" consequential order includes ordering a spouse who has exercised the option of taking over a matrimonial property to bear the mortgage and property tax payments from the date of the court order (*TIC v TID* [2018] SGCA 75).

The court's powers to make such orders read within the wider context of s 112 as a whole give effect to the primary orders for division under s 112(1) of the WC and cannot, however, be exercised to, for example, order that property be held on trust, without a proper consideration and determination first of how the matrimonial assets should be divided (*VIG v VIH* [2020] SGHCF 16).

With respect to maintenance orders, in addition to the typical orders of payment of a lump sum or periodical payments, the court may make an attachment of earnings order or require security for the maintenance by vesting property in trustees upon trust to pay the maintenance out of the income of the property (ss 81, 115 WC).

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

There is no equivalent concept of matrimonial regimes which parties could elect or which operate by default, whether of separate or community property regimes, in Singapore.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

With respect to the division of matrimonial assets, the court takes into account all the circumstances of the case, including the matters listed in s 112(2) of the WC. The court assesses, amongst other things, the contributions made by each party towards acquiring, improving or maintaining the matrimonial property, and to the welfare of the family. Financial contributions towards the acquisition of matrimonial property are broadly categorised as "direct contributions", and financial/non-financial contributions to maintaining and caring for the family are broadly categorised as "indirect contributions".

The court generally takes a structured "global assessment approach" by first identifying the matrimonial pool of assets, then ascribing a ratio representing the parties' direct contributions relative to each other, followed by a ratio representing the parties' indirect contributions relative to each other, and finally averaging the ratios for both direct and indirect contributions to determine the distribution ratio determining each party's share of the matrimonial pool (*ANJ v ANK* [2015] SGCA 34). Where there are multiple classes of assets within the matrimonial pool and parties have made varying degrees of contributions within each asset class, the court may opt to apply a "classification approach" ascribing a different distribution ratio for each asset class (*AYQ v AYR* [2013] 1 SLR 476).

With respect to spousal and child maintenance orders, the court takes into account all the circumstances of the case, including the matters listed in s 114(1) of the WC. The determination involves an assessment of the income, earning capacity, property and other financial resources that each party has, and the claimant's and/or child's financial needs, standard of living and their respective ages (ss 114(1), 127(2) WC).

Different policy considerations underlie spousal and child maintenance. Notably, the court's power to order spousal maintenance is supplementary to its power to order a division of matrimonial assets. There may be no order for maintenance for the former wife where there is a sum from the division of matrimonial assets which, if invested properly, would be sufficient to maintain the wife (*TNL v TNK* [2017] SGCA 15; *BOR v BOS* [2018] SGCA 78 *cf. UTQ v UTR* [2019] SGHCF 13), and the court has also held that even nominal maintenance for a former wife to preserve her right to claim maintenance in the future is not to be awarded automatically or as a matter of course (*ATE v ATD* [2016] SGCA 2).

2.4 Is the position different between capital and maintenance orders? If so, how?

The WC requires the court to take into account all the circumstances of the case whether in making orders for division of matrimonial assets or for maintenance orders, although the principles and the specific factors between the two differ. Broadly speaking, the division of matrimonial assets is aimed to be "just and equitable" (s 112(1) WC) in light of the parties' respective contributions towards the marriage, while maintenance is aimed at preserving the wife's standard of living during the marriage (s 114(2) WC).

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

The parties' agreement must be incorporated by way of a consent order to be granted by the court. If the proceedings are uncontested, the court may dispense with the requirement for attendance. See question 1.3 above.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

If the maintenance is for a lump sum, it is intended to extinguish all further and future claims. Otherwise, if the order for periodic payments is not expressed to be for any shorter period, the order would last until either the payee spouse's remarriage or upon either party's death (s 117 WC).

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

All "matrimonial assets" are subject to division upon a divorce (s 112(1) WC). "Matrimonial assets" are defined as (s 112(10) WC):

- any asset acquired during the marriage by one or both parties to the marriage; or
- any assets acquired before the marriage by one or both parties to the marriage:
  - ordinarily used or enjoyed by both parties or their children for shelter, transportation, household, education, recreational, social and aesthetic purposes; or
  - substantially improved during marriage by the other party or both parties to the marriage.

Any assets (not being a matrimonial home) acquired by gift or inheritance by one party at any time and that have not been substantially improved during the marriage by the other party or both parties are not "matrimonial assets".

The interpretation of the term "acquired" under s 112(10)(a) of the WC is approached sensibly and realistically with a view to identifying material gains of the marital partnership. Where, for example, a property was purchased pre-marriage with an outstanding mortgage loan which was then paid off during the marriage, the equivalent portion of the value of the property corresponding to the proportion of the mortgage paid off during marriage may be said to have been continually "acquired" during marriage, and thus constitute a matrimonial asset for division (*USB v USA* [2020] SGCA 67).

The operative date for the ascertainment of the pool of matrimonial assets is most commonly taken to be the date of Interim Judgment (*ARY v ARX* [2016] SGCA 13) although this depends on an assessment of when the marriage can be treated as "practically at an end" which may, for example, in certain cases point to the earlier date of separation (*CLD v CLE* [2021] SGHCF 12).

Parties are subject to a duty of full and frank disclosure to disclose all their assets whether solely or jointly owned, and the court has stated that it is not for parties to tailor their disclosure according to their own views of what constitutes a matrimonial asset or not (*UZN v UZM* [2020] SGCA 109). The court may draw adverse inferences against a party who has failed to make full and frank disclosure where there is a *prima facie* case of concealment of matrimonial assets or wrongful dissipation (*UZN v UZM*), and may give effect to it by either making a finding on the value of the undisclosed asset to be included in the pool of matrimonial assets, or by ordering a higher proportion of the known assets to be given to the other party, whichever it deems would lead to the most just and equitable result (*CHT v CHU* [2021] SGCA 38).

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Apart from the court's jurisdictional requirements for granting a decree for divorce (see question 1.1), there is no explicit rule stating that foreign nationals are to be treated differently on divorce, and the WC applies even in cases of divorce between two foreign nationals in Singapore.

2.9 How is the matrimonial home treated on divorce?

The matrimonial home would be considered a "matrimonial asset" and the entire value of the property regardless of when and how acquired and whether or not substantially improved would be placed in the pool of matrimonial assets for division (*VPH v VPI* [2021] SGHCF 22). However, it need not inevitably be sold and the proceeds divided. Depending on the circumstances, the court may order that one party may retain title of the home or have the right to occupy the home to the exclusion of the other party as part of the division of matrimonial assets (s 112(5) WC).

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

"Trusts" are recognised in Singapore. Generally, a fixed/irrevocable trust settled in favour of a third party will be left to stand (and thus its property deemed not to be a matrimonial asset) unless it was created to deprive the spouse of his/her claim to maintenance or asset division (*CH v CI* [2004] SGDC 131). As for a discretionary/revocable trust in favour of a third party, the court would exercise its discretion to decide whether the trust property is a matrimonial asset.

The court has the power to set aside the trust on application under s 132 of the WC (*NI v NJ* [2006] SGHC 198; *AQT v AQU* [2011] SGHC 138), and also has the discretion to otherwise treat the value of the assets of the trust or the value of the assets expended to set up the trust as a resource of the settlor/beneficiary, whether for division of matrimonial assets or in determining spousal maintenance (*Marie Eileen Guin nee Fernandez v Arun Guin* [1994] SGHC 157).

The Singapore Family Justice Court does not, however, have the jurisdiction or power to hear or determine third-party claims on assets involved in divorce proceedings, and third parties or spouses seeking to establish the third-party legal or beneficial interests of a disputed asset must start a separate civil suit. The ancillary proceedings to divide the matrimonial assets may then be stayed pending the outcome of such a third-party suit (*UDA v UDB* [2018] SGCA 20). This would not be necessary where the court exercising its matrimonial jurisdiction was making a determination neither of the legal or beneficial ownership of the asset, nor whether the asset in question was a matrimonial asset, but exercising its discretion to add the sums contributed by the parties to the asset in question back to the matrimonial pool (*TWM v TWN* [2021] SGHCF 25).

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

Financial claims following a foreign divorce may be made in Singapore by way of Chapter 4A, Part X of the WC (*Tan Poh Leng v Choo Lee Mei* [2014] 4 SLR 462) provided that the court recognises the foreign divorce as valid, the jurisdictional requirements are satisfied, there is substantial ground for the financial claims, and the court deems it appropriate for the necessary orders for financial relief to be granted by the Singapore courts.

It is not necessary for the applicant to show that Singapore is the more appropriate forum to grant financial relief or that all foreign remedies have been exhausted before applying to the

Singapore courts (*UFN v UFM and another matter* [2019] SGCA 54). Additionally, one may enforce foreign maintenance orders from reciprocating countries under the Maintenance Orders (Reciprocal Enforcement) Act.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

The family justice system has undergone substantial reform, with the unified Family Justice Courts, comprising the High Court (Family Division), the Family Court and the Youth Court being established on 1 October 2014, and a judge-led approach that came into operation on 1 January 2015.

In divorce proceedings involving children below 21 years old, parties must attend court-mandated mediation, counselling or both. In other instances, the court is also empowered to refer parties to attend mediation, counselling or other family support programmes. Such mediation would normally be conducted by specially appointed judge-mediators or legal professionals at the Child Focused Resolution Centre or Family Dispute Resolution Chambers, except in cases where assets are above a gross value of $2 million and there are no contested child issues. For such cases, private mediation is available through a number of organisations, including the Singapore Mediation Centre, which has an accredited Collaborative Family Practice panel.

There are no rules or systems set up for family arbitration in Singapore.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Marital agreements are not in and of themselves enforceable whether by operation of the common law or by statute. However, the courts may take them into account when deciding on the ancillary matters. The weight to be accorded to each agreement would depend on the facts of each case. The courts draw a distinction between pre- and post-nuptial agreements in that, all things being equal, post-nuptial agreements would generally be given more weight as they are made after the parties have undertaken responsibilities as between each other.

Where a marital agreement is (a) a valid foreign law-governed agreement, (b) not contrary to Singapore's public policy, and (c) entered into between foreign nationals, the courts would generally accord its terms with "significant (even critical) weight" (*TQ v TR* [2009] SGCA 6). In relation to other agreements that possess a domestic element, e.g. involving Singapore nationals, the weight to be accorded to such agreements would depend on the facts of the case (*TQ v TR*).

Agreements on child custody are *prima facie* unenforceable as there is a presumption that it is in the interests of the parties and not the child. The onus is on the party asserting otherwise to prove it to the courts (*TQ v TR*). The courts' paramount consideration is the welfare of the child, although the marital agreement may itself be indicative of what the parties to the agreement felt was in the child's welfare and best interests as his/her parents.

Agreements on wife and children maintenance would also be subject to judicial scrutiny, in particular on the adequacy of the maintenance, and the courts have power to vary the terms of maintenance if there has been a "material change in the circumstances" (*TQ v TR*; ss 119, 132 WC). Such agreements are considered as a part of "all the circumstances of the case" (s 69(4); *AUA v ATZ* [2016] SGCA 41).

Agreements on the division of matrimonial assets must be taken into account by the courts in their exercise of discretion when dividing matrimonial assets if such agreements were made in "contemplation of divorce" (s 112(2)(e) WC; *TQ v TR*). Significant, even conclusive, weight can be placed on an agreement on the division of matrimonial assets if the parties freely and voluntarily entered into the agreement with full knowledge of the relevant circumstances and matters to be considered (*AUA v ATZ*).

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

There are no explicit procedural requirements, but the courts have suggested that greater weight would be given to marital agreements entered into where both parties were represented and properly advised fully of the circumstances when they entered into a marital agreement (*AUA v ATZ*).

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Marital agreements can cover a spouse's financial claims pursuant to divorce or financial claims regarding children, but the enforcement of the terms is ultimately subject to judicial discretion. See question 3.1 above.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

There is no legislation that provides for a cohabitant's financial claims upon separation, and the ordinary principles of general property law would apply (*Chia Kum Fatt Rolfston v Lim Lay Choo* [1993] 2 SLR(R) 793). If the cohabiting couple subsequently get married and then seek a division of matrimonial assets upon divorce, the court also does not recognise the period of cohabitation in that the assets acquired during cohabitation would not be considered matrimonial assets (save where they are transformed into matrimonial assets upon satisfying the statutory requirements) and parties' indirect contributions during cohabitation would not be taken into account (*USB v USA and another appeal* [2020] SGCA 57).

4.2 What financial orders can a cohabitant obtain?

See question 4.1 above.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

Singapore does not have a formal partnership status for cohabitants.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Same-sex marriages, whether solemnised in Singapore or elsewhere, are void under the WC (s 12(1) WC).

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

Parents may seek maintenance for their children within and outside of marriage. See question 5.2 below.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Both parents have a duty to maintain or contribute to the maintenance of the child (s 68 WC). The court may order a parent to pay a monthly allowance or a lump sum for the maintenance of his/her child up until he/she attains 21 years of age (ss 69(2), 127 WC). The court has regard to all the circumstances of the case when ordering child maintenance, including the income, earning capacity, property and financial resources of the parents, as well as the financial needs of the child and the standard of living enjoyed by the child, and how the parties expected him/her to be educated or trained (s 69(4) WC).

There is no agency administering maintenance claims in Singapore, and maintenance orders must be enforced through court proceedings.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

A parent is generally required to provide financial support for their child until he/she turns 21 years old. However, maintenance may be ordered for the benefit of a child above 21 years old if the child: (a) has a physical or mental disability; (b) is or will be serving full-time national service; (c) is or will be studying or undergoing training for a trade, profession or vocation whether or not under gainful employment; or (d) has special circumstances justifying the making of the order (ss 69, 70 WC).

5.4 Can capital or property orders be made to or for the benefit of a child?

The court may, if it considers it just, order the person liable to pay maintenance to secure the whole or part of it by vesting any property belonging to the person in trustees upon trust to pay the maintenance or a part of it out of the income from the property for the settlor (ss 69(8), 70(5) WC).

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

A child who has attained 21 years of age may make a financial claim directly against his/her parents. If the child is under 21 years old, his/her siblings who have attained 21 years of age or his/her guardian or a person having actual custody of him/her may do so on his/her behalf instead (ss 69, 70 WC). The court will consider all the circumstances of the case, including the factors listed in question 5.2 above.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

There is no difference between married and unmarried parents with respect to their rights to custody of their children.

6.2 At what age are children considered adults by the court?

The WC defines a "minor" as a person who is below the age of 21 years and who is not married or a widower or widow. However, a child who has attained 18 years of age but is below 21 years old would not be considered to be a minor in relation to any legal proceeding or action in which, by virtue of s 36 of the Civil Law Act, he/she may, in his/her own name and without a litigation representative, bring, defend, conduct or intervene in as if he/she were of full age (r 3(4) FJR).

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Child custody orders last until the child is 21 years of age.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

The court typically makes three types of orders in relation to children, namely, "custody", "care and control" and "access" to the non-care parent in the event of divorce.

The court may make an order for joint custody, sole custody or may make no custody order at all. The effect of a "joint custody", as with no custody orders, is essentially that both parents have the joint responsibility over making major decisions relating to the upbringing, education, health and religion of the child (ss 126(1), 126(2) WC). The Court of Appeal has endorsed the idea of joint parental responsibility even where there is acrimony between the parents (*CX v CY* [2005] 3 SLR 690) and joint custody orders are very much the norm in Singapore.

Care and control determines with whom the child resides and who is responsible for the day-to-day decisions concerning the child's upbringing and welfare (*AQL v AQM* [2012] 1 SLR 840). The court may make an order for either sole or shared care and control, although the latter is rarer in Singapore on account of various reasons, e.g. due to the logistical difficulties, the fact that it may be disruptive, and the parents having markedly different parenting styles (*AQL v AQM*). In deciding which parent should be given care and control of the children, the court considers, amongst other factors, the benefit of preserving *status quo* and continuity (*Wong Phila Mae v Shaw Harold* [1991] 1 SLR(R) 680; *TSF v TSE* [2018] SGCA 49), a young child's need for his/her mother (*Soon Peck Wah v Woon Che Chye* [1997] 3 SLR(R) 430 read with *CX v CY*) and that siblings should not be separated (*Kim Chun Ahe v Ng Siew Kee* [2002] SGDC 276).

Where one parent is granted sole care and control, the court will grant "access" to the other parent to have regular contact with the child (*AQL v AQM*). Common orders for access

include weekday visits during the school week, one night overnight on the weekends and half of all school holidays/public holidays, although what "access" orders are appropriate will depend on the facts of each case.

6.5 What factors does the court consider when making orders in relation to children?

See question 6.4 above. The paramount consideration is the child's welfare and best interests.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

Where a custody or care and control order is in force, the child may not be taken out of Singapore without the other parent's written consent or the leave of the court, unless the trip is for a period of less than one month (ss 126(4), 126(5) WC).

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

There is no presumption of equal division of time or shared care and control. In fact, the courts have held that the practical realities upon a separation or divorce may entail that equal division of time or shared care and control could do more harm than good (*TAU v TAT* [2018] SGHCF 11).

The court takes the view that while a parent will need sufficient amounts of regular and frequent time with the child to build a strong relationship, equally important is how the time is spent with the child. "Sufficient" time is not equivalent to mathematically equal time between parents, and whether shared care arrangements are suitable for a particular family depends on the precise facts and circumstances of each case (*VJM v VJL* [2021] SGHCF 16).

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Whilst the procedure for applying for custody, care and control, and access is different under the Guardianship of Infants Act ("GIA") for both married and unmarried parents and under the WC for married parents, the courts treat unmarried parents and married parents in the same way.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

The decision is ultimately made by the judge. However, in making the decision, the judge may (via an application by a party or otherwise) order the production of reports (e.g. Custody Evaluation Reports, Access Evaluation Reports, etc.) by experts and/or interview the child (rr 35, 36 FJR; *AZB v AZC* [2016] SGHCF 1). These avenues are not mutually exclusive.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

The court may (via an application by a party or otherwise) appoint a child representative for a child for any action involving the child or the custody or welfare of the child (r 30 FJR).

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Other adults can "have a say" by giving witness statements on behalf of a parent. While the grandparents' role cannot ordinarily overtake the priority that the law places on parental love, responsibility and care, the child's bond with the grandparents may be taken into account in making the appropriate orders (*TSF v TSE*). However, such relatives do not have *locus standi* to apply for custody, care and control of the child even under the GIA, save in limited circumstances, such as where the child has no surviving natural parents (*UMF v UMG* [2019] 3 SLR 640). The court does not have jurisdiction to grant a parent's application to appoint a non-parent as guardian even if such application was by consent, and the parent had already voluntarily delegated or shared parental responsibility over his/her child with the non-parent (*VET v VEU* [2020] SGHCF 4).

For methods of dispute resolution, see question 2.12 above.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

The custodial parent cannot move a child who is subject to a custody order out of Singapore, except with the written consent of the other parent or the leave of court.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

This is not applicable to Singapore, which is a small, single-state country.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

In considering relocation applications, the welfare of the child is paramount and overrides any other consideration (s 3 GIA; *BNS v BNT* [2015] SGCA 23; *TAA v TAB* [2015] SGHCF 1). The court balances all the circumstances of the case, and has in past cases considered: the effects on the child if the (reasonable) wishes of the parent with primary care to relocate are denied; the child's loss of relationship with the parent left behind, especially risk of estrangement due to lacking physical contact with a young child (*UUI v UUJ* [2019] SGFC 59); the parties' and child's immigration statuses and prospect of long-term stability, or where the "seat" of the family may be said to be (*UYK v UYJ* [2020] SGHCF 9; *VPG v VPF* [2021] SGHCF 18); and the feasibility and meticulousness of the applicant's relocation plan, including, for example, the compatibility and prospects of the education system that the child would be exposed to after relocation (*TOF v TOE* [2019] SGFC 38).

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

See question 7.2 above.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

Until about 2015, such applications were generally allowed so long as the care parent's desire to relocate was not unreasonable or founded in bad faith. However, the courts have since criticised this approach and made it clear that there is no presumption in favour of allowing the care parent's reasonable wishes. The care parent's reasonable wishes are not determinative but are only one of the factors among others to be balanced, such as the loss of relationship with the left-behind parent. The assessment is an intensely fact-centric exercise (*UFZ v UFY* [2018] SGHC 8). The applicant ultimately bears the burden of establishing how relocation serves the child's best interests. In *UYK v UYJ*, the court observed that in recent decisions granting leave to relocate, many of the cases involved a parent returning to his or her home country after the breakdown of the parents' relationship where the child's stay in Singapore was never intended to be permanent.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

The International Child Abduction Act came into force in Singapore on 1 March 2011 pursuant to Singapore's ratification of the Hague Convention on Civil Aspects of International Child Abduction (the "Hague Convention"). A child who has been removed in breach of custody rights effectively exercised under the law of the country of his/her habitual residence must be promptly returned, subject to certain narrow exceptions in Art. 13 of the Hague Convention (*BDU v BDT* [2014] SGCA 12). Undertakings may be required as a prerequisite for the return of the child, and this acts as a protective measure to ensure that justice and fairness are achieved.

The country of habitual residence of the child immediately before the date on which the allegedly wrongful removal or retention of the child is determined by considering two things: the degree to which the child is settled or integrated in that country and the joint intention of the parents as to whether the child is to reside in that country (*TUC v TUD* [2017] SGHCF 12). Joint parental intention and the objective circumstances bear particular significance where the child is young and his stay in the country is short (*VAA v VAB* [2019] SGFC 92). The weight to be placed on each concern is dependent on the circumstances of each case (*TUC v TUD*).

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

Over the last two years, the Presiding Judge of the Family Courts, the Honourable Justice Debbie Ong, elaborated on her vision of "therapeutic justice" as part of the Family Justice Courts Workplan. The focus in Singapore's Family Justice Courts has been and is being driven towards problem-solving instead of adversarial litigation, through re-examination and reform of substantive rules, laws, legal procedures and practices, with a view to developing a non-adversarial system less about rights and wrongs, than one that adopts a multi-disciplinary approach to "problem-solve" and address the consequences of family breakdown so that families can heal. This was endorsed by the Court of Appeal in *VDZ v VEA* [2020] SGCA 75 (decided on 4 August 2020), opining that "therapeutic justice is not merely an ideal; it is a necessity". In turn, this pronouncement by the Court of Appeal was affirmed by both the Honourable Justice Ong and the Honourable Chief Justice Sundaresh Menon in their respective keynote addresses at the 8th Family Law & Children's Rights Conference, World Congress 2021: *Through the Eyes of a Child*, which was held in July 2021.

In line with the goals of therapeutic justice, parties and lawyers alike have also been repeatedly reminded by the courts that ancillary matters proceedings should not be treated as a forum to vent frustrations, and that parties should focus instead on moving forward positively. Family law practitioners have been called upon to be more conscious of the ways, both overt and subtle, in which they can influence a parenting dispute, including the use of language in correspondence and the mindset they bring to proceedings (*VDX v VDY* [2021] SGHCF 2). Further developments are under way, which include the certification of family law practitioners in therapeutic justice and the revamping of the FJR.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

The Family Justice Courts in Singapore have generally evolved to deal with movement restrictions by integrating the use of technology for remote hearings and processes. As noted by the Honourable Justice Ong in her Family Justice Courts Workplan 2021 (delivered on 4 February 2021), the Zoom hearing has become the default mode of hearing for all hearings, mentions, case conferences, mediations, counselling, and even trials; and the Family Justice Courts have provided training on virtual tools and doubled the number of "Zoom rooms" from 14 when we first started remote hearings in 2020, to 28 by February 2021, to ensure continued access to justice for litigants-in-person.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

In line with the move towards therapeutic justice, and calls to allow "no-fault divorces", the Ministry of Social and Family Development has since sought views from 2 May to 3 June 2021 on a new "amicable" divorce option that does not require couples to cite faults to divorce, which has elicited varied and even opposing responses.

The Honourable Justice Ong in her Family Justice Courts Workplan 2021 also announced that work continues in respect of sweeping statutory reform to provide for, among other things, enhancing the court's powers for the judge-led approach and enhancing compliance and enforcement of orders, the latter of which continues to be problematic in family proceedings.

With maintenance, the complainant who is already deprived of the payment of the ordered maintenance is still required to expend time and costs to go through yet another process of a full-blown trial to show non-compliance. Even if non-compliance is proven, the respondent is typically given an opportunity to pay the arrears computed as at the date of hearing by way of instalments, which is often compounded by further proceedings

if the respondent is still not duly paying the ongoing maintenance ordered, or if the respondent counter-applies for backdated downward variation of the ordered maintenance.

As for access, the only real recourse is to file a case for contempt of court, which involves first endorsing a penal notice to the access order and serving it on the contemnor before then making an application upon further breach. The applicable standard of proof to both criminal and civil contempt is that of the criminal standard of proof beyond a reasonable doubt. Even where the court does mete out deterrent sentences in the most serious of cases, it is not clear how helpful to the family this would be (see, for example, *VDZ v VEA* where the appeal was allowed for a fine to be imposed instead of imprisonment as meted out in the court below; and also *VFV v VFU* [2021] SGHCF 23 where the conviction for contempt was overturned on appeal given the reasonable possibility that the mother's non-compliance with the access order was an honest mistake).

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Ms Wong is a Fellow of the International Academy of Family Lawyers (IAFL), as well as a registered practitioner of the Society of Trust and Estate Practitioners (STEP). She is an accredited Singapore Mediation Centre Associate Mediator, an accredited Mediator on their Family Panel, and sits on the panel of their Collaborative Family Practice and is also a Mediator on the panel of Cross-Border Family Mediators of *Mediation bei Internationalen Kindschaftskonflikten* (MiKK), Germany. She is a Fellow of the Singapore Institute of Arbitrators (SIArb) and the Chartered Institute of Arbitrators (CIArb). She is also the Executive Editor of the *Singapore Journal of Legal Studies*, the flagship law journal of the Faculty of Law, National University of Singapore.

From its inauguration in 2013 to date, Ms Wong has been honoured as part of the *Top 200 IFC (International Financial Centre) Power Women*, and was included as one of a select few of Singaporean lawyers listed on the *Citywealth Leaders List*. She was also named in the *Doyles Guide for Family & Divorce Lawyers* from 2015 to date, as well as recognised by *Benchmark Litigation Asia-Pacific* (Litigation Star) since 2019 to date.

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The firm handles a variety of cases, including heavily contested matrimonial cases and many cross-border disputes that involve foreign individuals, entities and assets.

The firm was named as the Editor's Choice in the Global Law Experts 2015 Practice Area Awards as the Boutique Family Law Firm and Boutique Criminal Law Firm of the Year in Singapore, the Boutique Family Law Firm of the Year in the ACQ5 Global Awards 2015, in *Doyles Leading Family & Divorce Law Firms Singapore* from 2018 to date, and in *Benchmark Litigation Asia-Pacific* from 2019 to date. They were also featured in the *Business Times Salutes Enterprise* in 2016, *Corporate INTL Magazine* in 2017, the 2018 *Annual Who's Who Handbook*, and in *The Straits Times* in 2020.

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

There is a general jurisdiction rule for divorce, legal separation and marriage annulment in article 3 of the Brussels II *bis* Regulation, which provides jurisdiction in the following cases:

- the spouses are habitually resident in Slovakia;
- the spouses were last habitually resident in Slovakia, insofar as one of them still resides there;
- the respondent is habitually resident in Slovakia;
- in the event of a joint application, either of the spouses is habitually resident in Slovakia;
- the applicant is habitually resident in Slovakia if he or she resided there for at least a year immediately before the application was made; or
- both spouses are Slovak citizens.

Further, in case the Brussels II *bis* Regulation does not apply, based on article 38 of the Slovakian Private and Procedural International Act, Slovak courts have jurisdiction where at least one of the spouses is a Slovak citizen.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

Based on the Slovakian Family Act, there is only one ground for divorce: when the relations between the spouses are so seriously and permanently damaged that the marriage cannot fulfil its purpose and the spouses cannot be expected to resume marital cohabitation. There is no required period of separation according to the law. In divorce proceedings, the Slovakian divorce judge attempts to understand the reasons of the divorce from each of the spouse's viewpoints and attempts to reconcile them before resorting to divorce, especially when there are children involved.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

In Slovakia, only the court can grant a divorce, and in each case a court hearing is scheduled for this purpose. Even when both spouses claim they both want to divorce, their involvement is still necessary, one of the reasons being that the court has a duty to try to reconcile the spouses before granting a divorce.

1.4 What is the procedure and timescale for a divorce?

There is no minimum or maximum timescale for a divorce, nor any other limitation within the procedure provided by statute.

The procedure is similar to other family cases, meaning it is a non-adversarial proceeding and fully within the discretionary power of the judge.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Both yes and no. In case there are any children from the marriage, it is obligatory to process the divorce together with the children regime to be put in place after the divorce. Divorce without resolving on the parental rights to the common children of the marriage is not possible.

Resolutions on property are made after the divorce in all cases. According to article 100 of the Civil Procedure Code for Non-adversarial Procedures, divorce proceedings must include proceedings on the adjustment of the relations between the spouses and their minor children for the time after the divorce.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Foreign divorces do not have effect in the Slovak Republic unless they have been recognised by the Slovak authorities. Depending on the country in which the divorce decision was issued, it is necessary to proceed either in accordance with the Slovakian Private and Procedural International Act or according to the Brussels II *bis* Regulation (in case of decisions on matrimonial matters issued in EU Member States other than Denmark).

According to article 21 of the Brussels II *bis* Regulation, divorces granted in other Member States are recognised without any special procedure.

According to article 67 of the Slovakian Private and Procedural International Act, a foreign decision on divorce issued outside the EU Member States can only be recognised by a special statement of a Slovak court. The proposer is obliged to attach to the proposal:

(a) the original or an officially certified copy of the foreign decision in full;
(b) confirmation from the competent foreign authority of the validity or enforceability of the foreign decision or that the decision can no longer be challenged by a proper appeal;
(c) documentary evidence; and
(d) officially certified translations of attached documents into the Slovak language.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Yes, there are proceedings for annulment or non-existence of marriage allowed and specifically recognised by the Civil Procedure Code for Non-adversarial Procedures.

The Family Act states that the marriage does not arise (absence of marriage) or the marriage is invalid (annulment of marriage) if the declaration of marriage was:

(a) made by force;
(b) made by a minor under the age of 16;
(c) made before a non-competent registry office, with some exceptions;
(d) made in front of a church or religious society that is not registered according to a special regulation, or if the declaration of marriage was made in front of a person who was not authorised to perform the activity of a spiritual registered church or religious society;
(e) made abroad before an authority not designated for that purpose; or
(f) made by a representative without a valid power of attorney or whose power of attorney has been revoked.

A marriage that is contrary to the Family Act is invalid if there are no legal exceptions justifying that it should be valid. The prohibitions set by the Family Act, the violation of which constitute the annulment of marriage, are as follows:

- marriage cannot be entered into by a married man or a married woman;
- marriage cannot be entered into between ancestors and descendants and between siblings;
- a minor cannot marry a minor;
- marriage cannot be entered into by a person deprived of legal capacity; and
- the marriage is void if the declaration of marriage has not been made freely, seriously, definitively and intelligibly.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

It depends on the kind of proceedings. There are some proceedings (other than divorce proceedings) that might be a condition for the divorce proceedings and so the latter will be stayed until a final decision is made on the former. The Brussels II *bis* Regulation also applies in this regard.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

Regarding children, a child support order might be issued in the divorce decision. Divorce is not connected with any other financial order except the proceedings on the adjustment of the relations between the spouses and their minor children. Until the divorce is final, a spousal maintenance order can be issued too.

The matrimonial assets are dealt with after the divorce by a court decision or an agreement between the ex-spouses.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

In Slovakia, it is possible for the matrimonial property to be in joint co-ownership of the spouses. The matrimonial regime is not addressed by the court or dealt with during the divorce proceedings. Proceedings for the settlement of matrimonial property may take place only after the marriage legally ends in divorce.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

In most cases, the family court decides based on the application or a specific motion. The court has a right in family matters related to minor children to decide *ex officio*, mostly based on a report by social services.

For child maintenance orders, the court decides based on the parents' abilities, opportunities and property conditions as to what their financial contributions to the child should be. The court shall also take into account the justified needs of the child.

2.4 Is the position different between capital and maintenance orders? If so, how?

Capital cases and maintenance cases are different and each of them is regulated by a separate legal act.

Proceedings for the settlement of the community property are regulated by the Civil Procedure Code for Adversarial Proceedings. The procedure depends on the regime between the spouses during the marriage; most commonly this is a legal regime for the community property.

Maintenance proceedings are regulated by the Civil Procedure Code for Non-adversarial Procedures.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

No, they do not need a court order for agreements on financial matters related to common property. However, they do need a court order in case of an agreement on child maintenance where the child is a minor.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

Spousal maintenance orders last until divorce and are issued in case of a disparity between the spouses' property and income. There is a generally applicable rule that the spouses shall have a common living standard until the marriage is no longer valid.

After the divorce, spousal maintenance can be granted only under specific circumstances.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Matrimonial property or "tenancy by the entirety" is recognised in the Slovak jurisdiction and regulated by the Civil Code. Assets acquired by either of the spouses during the duration of the marriage are considered part of the matrimonial property. Two dates are relevant: the date of marriage and the date of divorce.

The following assets are not subject to asset division:

- assets acquired before the marriage;
- assets acquired by inheritance or gift;
- assets that, by their nature, serve the personal needs or profession of only one of the spouses; and
- assets acquired by restitution.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Foreign nationals are treated in the same way as Slovaks in divorce proceedings.

The Anti-discrimination Act provides that compliance with the principle of equal treatment consists in prohibiting discrimination on grounds of nationality or citizenship.

Foreign nationals have an additional right to a translator and interpreter in case he or she does not understand Slovak.

According to EU legislation, in some cases a foreign law might be applied.

2.9 How is the matrimonial home treated on divorce?

In case the marital house is a part of the community property, it will be settled after the divorce as part of the settlement of common assets. Where applicable, the interests of the child(ren) is the decisive factor in assigning the marital house to one of the spouses.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

This concept is not recognised in Slovakia.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

Yes, financial claims can be made in Slovakia following a foreign divorce where there are conditions for the Slovak court's jurisdiction, e.g. the property is situated in Slovakia. The divorce decision must be issued by an EU Member State or recognised by the Slovak courts if issued by a non-EU Member State.

Another example is child maintenance in case the divorce was made in a different country without a child maintenance order.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Two methods are available in Slovakia for the settlement of marital property: court proceedings and court orders; and mediation. The court tries to reach an agreement between the parties on the first court hearing. Mediation is voluntary and both parties must agree to it.

Arbitration is not allowed in cases of divorce or property settlement. However, court and mediation proceedings are available in Slovakia for all other family issues (e.g. divorce and maintenance).

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

The situation in Slovakia differs from that in other countries, as pre- and post-nuptial agreements are not legally binding.

According to article 143a of the Civil Code, the spouses may, by agreement, extend or reduce the statutory scope of matrimonial ownership. Similarly, they can agree on the management of the joint property.

The spouses may also agree to reserve the creation of share-free co-ownership on the day of the dissolution of the marriage.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

Regarding pre- and post-nuptial agreements, Slovakia is in a unique position, as they are not legally binding.

Regarding the extension or reduction of the matrimonial regime, agreements on such shall be in the form of a notarial deed.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Marital agreements are limited to the election of a matrimonial property regime.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

No, cohabitants, who do not have common children, do not have financial claims if the couple separate.

The rights and obligations of cohabitating partners are not enshrined in legislation in Slovakia. Legal provisions governing the dissolution of marriage are not applicable to non-marital cohabitation. Each partner remains the owner of their assets when cohabiting. In case they own any property together, they have specified shares (for example, one half) and this status does not change when they separate. Cohabiting partners are not obliged to pay maintenance to each other.

4.2 What financial orders can a cohabitant obtain?

Cohabitants cannot obtain any financial orders.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

There is no formal partnership status for cohabitants.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

None of the abovementioned is permitted for same-sex couples in Slovakia yet. Discussions are under way in this regard, but legislation has not yet been enacted.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

The maintenance obligation of parents towards their children is regulated in the Family Act.

The parents are legally obligated to fulfil their maintenance obligations toward children, which last until the children are capable of supporting themselves independently.

Children within or outside of marriage have an equal position and are governed by the same legal provisions.

However, children cannot claim for property transfer; they are only entitled to regular monthly payments (to the custodial parent) and to savings if the financial situation of the obliging parent allows such.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

The factors that should be considered are set by article 62 of the Family Act; both parents should contribute to the well-being of their children according to their abilities, opportunities, and financial conditions. The amount of maintenance depends on the individual financial circumstances of each parent as well as the needs of the child.

In determining the scope of the maintenance obligation, the court considers which of the parents, and to what extent, personally take care of the child.

Depending on the circumstances, the child might be entitled to the creation of a savings account by one parent. If the property conditions of the obligated parent allow it, the creation of a savings account can also be considered as a justified interest of the child. The consent of the court is required for the use of the funds in a child's saving account.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

The obligation to pay maintenance ends once the child is able to maintain him/herself.

The maximum time period during which maintenance can be provided to the "dependent child" is provided in the Act on Social Insurance as until the child reaches the age of 26. To be precise, a child is considered dependent until:

(a) the end of the child's compulsory school attendance; or
(b) after the end of compulsory school attendance, up to the age of 26, if:
    (1) the child is continuously preparing for a profession;
    (2) due to diseases and conditions that require special care according to Annex no. 2, the child cannot continuously prepare for a profession or may not pursue a gainful activity; or
    (3) due to a long-term unfavourable health condition, the child is unable to continuously prepare for a profession or is unable to perform a gainful activity.

5.4 Can capital or property orders be made to or for the benefit of a child?

No, there are no claims available for capital or transfer of property to the benefit of the child.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

Minor children cannot make direct claims against their parents. In case of a claim, the person authorised to make such a claim is the parent who has custody over the child. In case of shared custody, both parents are entitled to do so. The minor child is represented by the social services office in such cases.

After the child reaches full age and gains full legal capacity, only the child is entitled to make claims against his/her parents.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

The position of unmarried parents is the same as that of married parents regarding parental responsibility for their children where they are officially registered on the marriage certificate as the mother and the father of the child.

Parental responsibility is given automatically by the law, regardless of marriage, and both parents have the same level of parental responsibility.

6.2 At what age are children considered adults by the court?

Children become adults at the age of 18. Regarding cases where a child wants to enter into marriage, when the child reaches 16 years old they are considered as being able to act in front of the court as a legally capable person. In this case the consent of the court is required to enter into marriage.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

The duration of children orders is not explicitly limited by time. After the child reaches an age where he/she is capable of maintaining him/herself, the obliged parent must file a claim to the court for cancellation of the maintenance duty to that child.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

In Slovakia, it is obligatory for the court in a divorce case to decide on the parental duties and rights. The court cannot dissolve the marriage without making such a decision. The court decides on the following:

(1) care/custody;
(2) representing the child and managing the property;
(3) child support/maintenance; and
(4) right to contact.

6.5 What factors does the court consider when making orders in relation to children?

There are many factors set by legislation and the judicature that should be considered in relation to children, but the most important is the interests of the child.

According to article 5 of the Family Act, the interests of a minor child is a primary consideration in all matters relating to him/her.

In determining and assessing the interests of a minor child, the court takes into account, in particular: the level of child-care; the safety of the child, as well as the safety and stability of

the place where the child resides; the protection of the child's dignity as well as his/her mental, physical and emotional state; circumstances relating to the child's state of health or to the child's disability that endanger the development of the child by interference with his/her dignity; endangerment of the child's development by interference with the mental, physical and emotional integrity of persons who are considered close to the child; the conditions for development of the child's abilities; the child's opinion and his/her possible exposure to a conflict of and subsequent guilt; the conditions for establishing and developing relationship ties with both parents, siblings and other related persons; and the use of possible means to maintain the family environment of the child when interference with parental responsibility is being considered.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

A parent can take a child abroad for holidays and trips. In case a parent plans to take a child abroad for a longer time period with the intention of settling in a different country, the consent of the other parent or a decision of the court is needed.

Daily decisions can be made by either parent unilaterally. There is a non-exhaustive list of matters which are not considered common and which require the consent of the other parent or the court, such as: the moving of a minor child abroad; the management of the property of a minor child; a change in nationality of a minor child; the granting of consent for the provision of healthcare to a minor child; and preparations/studies for future occupations of a minor child.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

There is no presumption of an equal division of time.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

In Slovakia there are no proceedings on separation. Divorce proceedings are only for married couples.

In case an unmarried couple separates, only the parental rights and obligations are dealt with by the court, and in the same way and by the same rules as for a divorce of a married couple.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

The decision is taken by the judge alone. Where a minor child is involved, he/she is represented by a social services worker who provides advice and suggestions to the judge about the decision. His suggestions are not binding on the judge.

The child shall always be heard in case he/she reaches an age where he/she is capable of expressing his/her opinion. The child can be heard by social workers or by the judge personally.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

Yes, there is separate representation. As the parents of a minor child cannot represent him/her in court proceedings in which both parents and children are involved and the interests of the parents are contradictory, the court appoints a guardian for the minor child from a social services authority. The social services worker proposes procedural evidence and suggests to the court how to decide on the case, taking into account the best interests of the child and the child's opinion.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

No. Other adults may only be heard as witnesses in the case.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

Custodial parents cannot move to another state/country without the other parent's consent; this is not allowed and such relocation for a long time without the other parent's consent should be recognised as child abduction.

The movement of a minor child abroad is not considered a common matter in the course of a parent's custody; according to article 35 of the Family Act, the parents must agree on the relocation. In case the other parent does not agree, the court may rule that the custodial parent can relocate even without the consent of the other parent.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

Yes, it is possible and not forbidden by law. However, the jurisprudence of the Slovak courts considers such cases carefully, with a focus on the interests of the child and his/her social connections, as well as their options to see the other parent.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

In case of a court decision on relocation of a child abroad, the court considers the best interests of the child, their circumstances and the reasons for moving out of the country, and the possibility of visitations and connections with the other parent.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

Again, in this case the court takes into account factors like the child's best interests, the opinion of the other parent and the possibility of visitation.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

It depends on the circumstances of the specific case. However, it is not that common.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Slovakia is a party to the Hague Convention, and child abduction cases are dealt with based on the Convention. In case EU countries are involved, these cases also consider the Brussels II *bis* Regulation.

There are specialised courts for dealing with abduction cases; there are only three such district courts in the Slovak Republic.

These proceedings are also covered by special national regulation: in the Civil Procedure Code for Non-adversarial Procedures. The swift return of the child shall be ensured unless an exemption is applicable.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

There have not been many recent legislative changes. However, the introduction of the Cochem model into court practice has led to many more amicable cases and more agreements being reached.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

There has not been any significant adaptation of the court process and other dispute resolution methods for family law as a result of COVID-19. In Slovakia, the electronic system for court filing is already fully adapted and correspondence with the court is done mostly by electronic data boxes.

While other court hearings have been postponed because of COVID-19, family law cases and abduction cases have continued, as some priority proceedings were allowed even during lockdown, in which a negative COVID-19 test was required for attendance.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

A legal framework for pre- and post-nuptial agreements would be a great benefit for Slovak family law and allow for more amicable divorces and separations.

Slovakia should also provide legislation for same-sex couples and a specific rule for the separation of unmarried couples.

In case of shared custody, more specific rules about the tax allowance and child state allowance should be enacted.

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Our law firm specialises in family law and has been ranked as a leading law firm for family law for many years. Our firm is an independent law boutique focusing on all aspects of family law, wills and inheritances, domestic and international, both in relation to finance and children. We also deal with difficult international cases in cooperation with other colleagues from the IAFL (International Academy of Family Lawyers). The firm prepared an update to the Handbook on EU law relating to the rights of the child in connection with the FRA (European Union Agency for Fundamental Rights).

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

As per section 2(1) of the Divorce Act 70 of 1979, a court will "*have jurisdiction in a divorce action if the parties are or either of the parties is* ***domiciled*** *in the area of jurisdiction of the court on the date on which the action is instituted; or* ***ordinarily resident*** *in the area of jurisdiction of the court on the said date* ***and*** *have or has been ordinarily resident in the Republic for a period of* ***not less than one year*** *immediately prior to that date*".

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

South Africa has adopted a no-fault divorce system, and irretrievable breakdown is the primary ground for divorce.

In terms of section 3 of the Divorce Act, a marriage may only be dissolved by a court on the grounds of either the irretrievable breakdown of the marriage, or that one party suffers from a mental illness or continuous unconsciousness.

Evidence of adultery, desertion, unreasonable behaviour and mistreatment are rarely relevant, except insofar as they may have a bearing on a maintenance claim or a claim that one party should forfeit the patrimonial benefits of the marriage. Divorce law in South Africa endeavours not to be punitive in nature.

There is no required period of separation. Divorce summons can be issued by either party at any time. If it is unopposed, the court can grant the order sought by the Plaintiff if it is satisfied that it is in the best interests of the children. It can also be unopposed if the parties enter into a settlement agreement.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

All South African divorces must go through the court unless they are religious marriages which are not yet civilly recognised, e.g. Muslim marriages (although this will shortly change) require court involvement.

Although a divorce action may be unopposed, an open court hearing is still required and at least one of the parties is required to attend. Certain high case-load jurisdictions, such as the High Court in Johannesburg, have made provision for testimony by affidavit but an advocate/barrister is still required to present the affidavit in open court. During the COVID era, all unopposed divorces are heard virtually.

1.4 What is the procedure and timescale for a divorce?

Summons commences a divorce and is served personally on the Defendant, who has 10 days to oppose. Twenty days thereafter, the Defendant must submit his Plea and Counterclaim, if applicable. The Plaintiff will then have 15 days to plead to the Defendant's Counterclaim. Thereafter, the parties must make discovery and prepare for trial. Most divisions in South Africa's High Court system now require that a matter be certified as trial-ready prior to a trial date being allocated. From summons to trial (if the matter is not settled, as the vast majority are) usually takes 12 to 18 months.

A divorcing party may apply to the court for an interim court order for maintenance for him/herself and the children, and/or contact with children, and/or a contribution to their legal costs.

Uncontested or unopposed divorces are relatively quick to process and are on average heard before a court within three to four months.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Section 6 of the Divorce Act dictates that a decree of divorce shall not be granted unless the court is satisfied that provisions have been made with regard to the welfare of any minor or dependent child of the marriage.

Finances are usually dealt with at the same time, but there are rare cases where a "separation of issues" is ordered, and financial issues are determined subsequent to the divorce order being granted.

A court can also refuse to grant a divorce if it appears that, despite the granting of a divorce, the spouses or either one of them will, by reason of the prescripts of their religion, not be free to remarry unless the marriage is also dissolved in accordance with such religious prescripts.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

In terms of section 13 of the Divorce Act, 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.

An application for a "mirror order" may be brought to the South African High Court if the parties require enforcement of particular rights afforded to them in the foreign divorce order, such as pension sharing or orders relating to children.

1.7 Does your jurisdiction allow separation or nullity proceedings?

A marriage can be declared *void ab initio* (as if it never existed) by application to court under certain circumstances, such as:

(a) where consent has not been provided for an underage minor;
(b) if a party does not have mental capacity;
(c) an impediment to concluding a valid marriage exists;
(d) the marriage ceremony was conducted by someone who is not a marriage officer; or
(e) the marriage was entered into under fraudulent conditions by one of the parties (in which case the other party has a claim for damages).

Section 14 of the Divorce Act abolished court orders for the restitution of conjugal rights or for judicial separation.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

A South African court has the discretionary power to stay proceedings before it.

The applicant, in an application to stay proceedings, bears the onus of proving to the court that the balance of equity and convenience favours the other proceedings.

In exercising its discretion, the court will likely consider, *inter alia*, the circumstances of the matter, if foreign law applies to the marriage, the country in which the evidence is situated, where the children and assets are situated, if the proceedings were instituted for procedural advantage, any possible prejudice suffered, desirability to avoid duplication of proceedings and the comparable costs of litigating in each country.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

The proprietary orders made depend on the parties' matrimonial property regime.

In the absence of an order by agreement, the court may make an order in respect of the payment of maintenance for any period, a transfer of assets, lump sum payment, periodic payments and/or transfer of a portion of a pension interest.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

There are two main matrimonial property systems in South Africa: marriage in and marriage out of community of property. Marriage "in community of property" (universal property) applies as the default matrimonial property system in civil marriages in South Africa. The consequence of a marriage in community of property is a "joint estate", where all the assets are combined (even premarital assets) and the parties are jointly responsible for the liabilities of each other.

In a marriage "out of community of property", created by prenuptial agreement, complete separation of property subsists during the marriage, each party maintaining legal autonomy to contract with third parties and each other. Unless the parties expressly exclude it in their prenuptial agreement, the accrual system will apply, in terms of which all value accrued during the marriage (with a few exceptions) is shared on its dissolution by death or divorce.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

If the parties are married in community of property, there is an automatic equal division of the net joint estate (which includes premarital assets) unless forfeiture by one party is ordered in certain limited circumstances.

If the parties are married with the accrual system, the party with the lesser accrual is entitled to one half of the difference between the parties' respective accruals (again, unless forfeiture in certain circumstances is ordered).

If the parties are married out of community without accrual, the court has no discretion to award any redistribution unless the marriage took place before 1984. Clarks Attorneys is presently involved in a constitutional challenge to this exclusion of judicial discretion.

2.4 Is the position different between capital and maintenance orders? If so, how?

Yes, as set out above, capital orders depend on the matrimonial property regime.

The reciprocal duty of support between spouses comes to an end on divorce unless the divorce court orders otherwise. A court granting a decree of divorce may make an order with regard to the payment of maintenance by the one party to the other, having regard to:

(1) the existing or prospective means of each of the parties;
(2) their respective earning capacities;
(3) their financial needs and obligations;
(4) the age of each of the parties;
(5) the duration of the marriage;
(6) the standard of living of the parties prior to the divorce;
(7) their conduct insofar as it may be relevant to the breakdown of the marriage; and
(8) any other factor which in the opinion of the court should be taken into account.

A child's claim for maintenance is a completely separate claim from spousal maintenance.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

In respect of the dissolution of a legally recognised marriage, a decree of divorce in South Africa is declared in open court, regardless of whether the issues in the divorce have been settled between the parties by agreement. Generally, at least one party must attend at court, although provision has been made for testimony at the court hearing by way of affidavit (where there are no minor children involved) in certain high-volume High Court jurisdictions, such as Johannesburg.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

If maintenance was granted in terms of section 7(2) of the Divorce Act, then maintenance terminates on the death or

remarriage of the recipient, unless the parties agreed in their divorce settlement that the order would be binding on their deceased estates.

A post-divorce spousal maintenance order may be terminated if a court rescinds the order in terms of section 8 of the Divorce Act, or discharges it in terms of section 16 of the Maintenance Act. This would happen pursuant to an application by one party to the effect that good cause exists for the variation or discharge. Good cause is usually taken to mean a material change in the circumstances of one or both parties.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Aside from the "joint estate" of parties married "in community of property", parties married out of community of property maintain a complete separation of property during the marriage, unless otherwise agreed for any particular asset (e.g. a jointly owned home).

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

In South Africa, the proprietary consequences of a marriage are governed by the *lex domicilii matrimonii*, which is the laws of the place where the husband was domiciled when the marriage was concluded. While this common law position subsists, it is generally regarded as an out-dated policy, as one quickly recognises that due to its patriarchal nature, it is vulnerable to constitutional challenge.

Nevertheless, section 7(9) of the Divorce Act confers upon South African courts the power to grant a decree of divorce in respect of a marriage where the patrimonial consequences of the parties are governed by the laws of a foreign state.

As a consequence, parties married in terms of foreign law are required to plead in accordance with the laws of the applicable country and foreign law experts may be called as expert witnesses at trial to provide evidence with regard to the patrimonial consequences of the marriage in that country.

2.9 How is the matrimonial home treated on divorce?

Unlike in many international jurisdictions, the marital home does not automatically become marital property in South Africa. If the home used is the sole and absolute property of a spouse, married "out of community of property", it remains their sole and absolute property unless otherwise agreed.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

Trusts are recognised in South Africa. Ownership of the trust property is held by trustees by virtue of the trust instrument (deed) for the benefit of certain persons or entities (beneficiaries).

Trust property is normally not considered part of a person's estate (trustee, founder, beneficiary), unless it can be proven that the trust is the "alter ego" of one or more of the trustees of the trust, or that the trust is a sham, and that a party has transferred assets into the trust *mala fide* in order to deprive the spouse of their claims on divorce. Only then would the trust assets be included in the determination of the value of the estate of such party in divorce cases. This issue is presently before the courts with a view to making it easier for a spouse to claim against trust assets in a divorce.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

South African divorces aim to resolve all financial claims between the parties upon a decree of divorce. Financial claims following a foreign divorce are not common in our jurisdiction, unless the claim is in terms of a foreign divorce order, such as a claim to a South African pension interest.

Child maintenance claims may be brought in terms of the Children's Act 38 of 2005, as it has jurisdiction over any child within South Africa, regardless of nationality.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Aside from court process, the other forms of dispute resolution currently available to parties to resolve financial disputes in divorce are mediation and the collaborative law process. Mediation is gaining popularity due to being cost saving. It is also promoted and mandated by the Children's Act as well as the Rules of the High Court.

Collaborative law is still relatively unknown to the South African public and, as a result, while available through a few select practitioners, is not generally practised.

In terms of section 2 of the Arbitration Act 49 of 1965, the referral of matrimonial matters to arbitration is not currently permissible. This stance is being reviewed in draft legislation, which may in future allow for arbitration on the proprietary consequences of divorce. Arbitration in child related aspects of divorce is unlikely to be permitted, as South Africa's High Court remains the upper guardian of all minor children and this power of final determination cannot be arbitrarily delegated.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Prenuptial agreements, referred to as antenuptial agreements in South Africa, are enforceable.

Clauses which are against public policy (*contra bonos mores*) are not enforceable. Examples of *contra bonos mores* clauses are those which: limit a common law right to spousal maintenance; dictate what religion a person may practise; and permit adultery or recreate the husband's marital power (preventing a woman from disposing of her own assets without her husband's consent), which has been abolished in South African law.

Postnuptial contracts which purport to change the matrimonial property regime of the parties or terms of the existing antenuptial contract must be sanctioned by application to the High Court to be enforceable.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

The formal requirements of an antenuptial contract are that it must be notarially executed in front of witnesses and registered within three months at the Deeds Office. If the prenuptial contract is not registered, it is still considered binding *inter partes*.

Foreign prenuptial agreements enjoy recognition and validity in South Africa insofar as the parties' marriage was validly concluded in accordance with the laws of that foreign state, and the antenuptial contract was validly executed in terms of the laws of that state.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

While antenuptial contracts declare the parties' elected matrimonial property regime, and whether or not the accrual system will apply if the marriage is one "out of community of property", marital claims against property can also be included.

Periodic lump sum payments, donations between spouses, donations from third parties, or testamentary bequests can be recorded in an antenuptial contract. A testamentary bequest in an antenuptial contract is a unique exclusion to our law, which does not normally permit one to regulate the succession of their assets on death by means of contract (a *pacta successoria*), as South Africans enjoy complete freedom of testation.

Clauses which limit the amount of maintenance a party will receive on dissolution of marriage, either by death or divorce, are considered to be *contra bonos mores*, as it is impossible to predict the future financial positions and needs of the parties. While post-marriage maintenance may be undertaken in an antenuptial contract, this does not preclude or limit a spouse's claim for maintenance in terms of the common law.

A child's right to maintenance is regulated in terms of the Children's Act 38 of 2005 and the Maintenance Act 99 of 1998. Every holder of parental responsibilities and rights as defined in the Children's Act has a duty to contribute to the reasonable monthly expenses of the child according to his or her means. While child maintenance may be undertaken in an antenuptial contract, as with spousal maintenance, this does not limit or preclude a child's claim for adequate maintenance.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

In South Africa, there is no legal duty of support for unmarried cohabitants.

4.2 What financial orders can a cohabitant obtain?

At present, South African law makes no express provision for the regulation of the affairs of cohabitants upon termination of their relationship. There is the long pending *Draft Domestic Partnerships Bill*, but this draft legislation has not been enacted by our government.

That being said, the common law rules governing universal partnership may in some circumstances assist cohabitants. A universal partnership, which may be tacit, is a contract in which the parties agree to put in common all their property, both that which they presently own and that which they are to acquire in the future. It is a difficult claim to prove.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

There is no formal status for cohabitants at this time in South Africa.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Same-sex couples are permitted to marry in South Africa in terms of the Civil Union Act 17 of 2006. Same-sex couples in our jurisdiction enjoy the same status, benefits and obligations that marriage accords to opposite-sex couples.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

In terms of section 18 of the Children's Act 38 of 2005, every parent has a responsibility to contribute to the maintenance of the child.

Whether or not the biological father of a child is recognised as having any parental rights in respect of the child does not affect the duty of a father to contribute towards the maintenance of the child (unless the child has been adopted by someone else).

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Child maintenance is determined on a needs versus means analysis. The reasonable monthly expenses of the child are determined and apportioned between the parents according to what they can respectively afford, taking into consideration their incomes, the net value of their respective estates and their other financial obligations.

There is no formula for calculating maintenance and each matter is determined in terms of its own unique circumstances. The educational, medical and living expenses of the child are taken into consideration.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

In South Africa, there is a legal duty of support until a child is self-supporting.

5.4 Can capital or property orders be made to or for the benefit of a child?

Child maintenance is, generally speaking, ordered on a monthly basis, either payable directly to a service provider (school, medical aid), or in cash to the primary caregiver.

Given the real possibility of a future change of circumstances with regard to either the financial position of the parties and/or the fluctuating maintenance needs of the child as he or she grows older, it would be unlikely for a court to entertain a lump sum payment for child maintenance in full and final settlement of all future maintenance claims.

The exception may be an order for a lump sum child maintenance payment against the deceased estate of a maintenance debtor.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

A major dependant may approach the courts for a maintenance order for financial support until he or she is self-supporting, which may include a claim for university costs.

As in any maintenance claim, the claimant will have to prove a duty to support, what his or her reasonable monthly expenses or "needs" are and the ability of his or her parents to contribute to such monthly expenses (the "means" of both parents).

Some of the factors that would be taken into account are the expenses and incomes of all parties (the major dependant claimant and both parents, respectively), the ability of a major dependant to contribute to his or her own expenses (part time employment), the age of the claimant, the financial obligations of the parents, the assets and liabilities of all parties, the standard of living of the parties and what is just and equitable in the particular circumstances of the matter.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

In terms of section 18 of the Children's Act, the parental responsibilities and rights that a person may have in respect of a child include the responsibility and the right:

(a) to care for the child;
(b) to maintain contact with the child;
(c) to act as guardian of the child; and
(d) to contribute to the maintenance of the child.

A biological father of a child automatically has parental responsibilities and rights in respect of a child if he is married to the child's mother at the time of conception or birth.

An unmarried father *acquires* parental responsibilities and rights if he was living with the mother in a permanent life-partnership at the time of the child's birth, or:

(a) consents to be identified as the child's father or pays damages in terms of African customary law;
(b) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; *and*
(c) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

6.2 At what age are children considered adults by the court?

The Children's Act defines "child" as a person under the age of 18 years. This is the age of majority.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Children orders last until the age of majority.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

In accordance with section 6 of the Divorce Act, a decree of divorce will not be granted unless it contains provisions with regard to the welfare of any minor or dependent children.

This will include details regarding the care, contact and maintenance arrangements for the children, which have been reviewed by the Family Advocate's Office. The court will take into account any endorsements (of a settlement agreement) or recommendations of the Family Advocate's Office in making its final determination.

The High Court is the upper guardian of minors and can make any order at any time in the best interests of children. The Children's Court has similar jurisdiction, apart from a few limitations.

6.5 What factors does the court consider when making orders in relation to children?

In terms of section 7 of the Children's Act, an investigation into the best interests of a child includes taking into account the following factors:

(a) the nature of the personal relationship between the child and the parents or the child and any relevant person;
(b) the attitude of the parents towards the child and the exercise of parental responsibilities and rights;
(c) the capacity of the parents or of any or person, to provide for the needs of the child, including emotional and intellectual needs;
(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from both or either of the parents, siblings, caregiver or person, with whom the child has been living;
(e) the practical difficulty and expense of a child having contact with the parents;
(f) the need for the child to remain in the care of his or her parent, family and extended family and to maintain a connection with his or her family, extended family, culture or tradition;
(g) the child's age, maturity and stage of development as well as gender and background;
(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
(i) any disability or chronic illness that a child may have;
(j) the need for a child to be brought up within a stable family environment if possible, or something similar;
(k) the need to protect the child from any physical or psychological harm;
(l) any family violence involving the child or a family member of the child; and
(m) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

The consent of both parents (holders of parental responsibilities and rights) is required for a child's marriage, adoption, departure or removal from the Republic, application for a child passport, and alienation or encumbrance of any immovable property belonging to the child.

When making a decision that affects the child's contact with the other parent or which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being, a parent must take the other parent's views into account.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

There is no presumption of an equal division of time between separating or divorcing parents in South African law.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

The Children's Act and courts do not discriminate between those parents who automatically have parental responsibilities and rights through marriage (married parents), and those parents who acquire parental responsibilities and rights (unmarried parents).

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

The South African Department of Justice has made provision for an independent legal officer to represent the welfare of children within the Family Advocate's Office. Any party to a dispute concerning the welfare of any minor child may make a request to the Family Advocate's Office to investigate, evaluate the parties' circumstances and make recommendations to the court. In many cases, parties appoint independent experts to evaluate the best interests of children. Children may on occasion meet with Judges, although this is unusual.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

In terms of section 28 of the Constitution, "*every child has the right to have a legal practitioner assigned to her, at state expense, in civil proceedings, if substantial injustice would otherwise result*".

Section 55 of the Children's Act provides that "*where a child involved in a matter before the children's court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to the Legal Aid Board referred to in section 2 of the Legal Aid Act 22 of 1969*".

While children are afforded the right to independent legal representation, in practice this only happens upon application by either the child's guardian or parent, and in exceptional circumstances.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

In terms of section 53 of the Children's Act, anyone acting in the interest of the child can approach a court. A caregiver, or any person who the court decides has sufficient interest in the matter, has the right to adduce evidence before a court.

In terms of dispute resolution, mediation is promoted and even mandated in certain circumstance in terms of the Children's Act and rules of court.

The court may, where circumstances permit, refer a matter to any appropriate lay-forum, including a traditional authority, in an attempt to settle the matter by way of mediation out of court.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

The consent of both parents is required for the international relocation of a child. If consent is not forthcoming then the relocating parent will have to bring an application to the High Court for an order dispensing with the consent and allowing the international relocation.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

A local relocation within South Africa is a major decision that will significantly affect the child's contact with the other parent in addition to the child's living situation and health. In terms of section 31 of the Children's Act when making a major decision, a parent must give due consideration to any views and wishes expressed by the other parent, and must give due consideration to any views and wishes expressed by the child.

While consent is not an explicit requirement in a local relocation, the relocating custodian parent might be facing an urgent interdict from the non-custodian parent opposing the relocation.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

The motive for relocation must be genuine, reasonable and *bona fide*, and should not serve merely to frustrate the access rights of the other parent (or holder of parental rights and responsibilities). Some of the factors taken into account by a court in an application for the international relocation of a child include, *inter alia*:

(a) the best interests of the child;
(b) the purpose of relocating;
(c) whether the country of relocation is a signatory to the Hague Convention;
(d) arrangements made in respect of the child's relocation with regard to accommodation, education and after-school care;
(e) the interests of the relocating parent (right to freedom of movement and family life);
(f) the interests of the non-relocating parent (proposed frequency of contact);
(g) the relationship between the child and the parents as well as the child and other significant persons;
(h) the gendered nature of the roles within the post-divorce family; and
(i) the views of the child.

New legislation is pending which will give courts specific guidelines for relocation cases.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

The same basic factors will be taken into consideration in a local relocation application as in an international relocation application.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

Our courts continue to have a neutral approach to relocation, with each case being judged on its own merits. Draft legislation is being considered to guide the courts in making these decisions. However, if the primary caregiver's decision to move is shown to be reasonable and *bona fide*, the arrangements they have in place for their new location are adequate to meet the children's needs, and the adverse effects on the children can be mitigated by sufficient contact with the other parent, then it is fairly likely that the relocation will be granted. It is less likely if the parties have shared residence and there is no clear primary caregiver.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

South Africa ratified the Hague Convention in 1996 and the Act came into operation on 1 October 1997.

In South Africa, the Chief Family Advocate has been designated as the central authority in international abduction matters and assists in both "outgoing" cases when a child has been wrongfully removed from South Africa to a foreign country or retained in a foreign country, as well as "incoming" cases, where a child has been wrongfully brought to, or retained, in South Africa.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

In December 2020, the landmark judgment of *President of the RSA v Women's Legal Centre Trust*; *Minister of Justice and Constitutional Development v Faro*; and *Minister of Justice and Constitutional Development v Esau (Case no 612/19) (2020) ZASCA 177* saw the Supreme Court of Appeal change the marriage laws in South Africa by declaring that the Marriage Act and Divorce Act were declared inconsistent with the Constitution as they fail to recognise Muslim marriages. These Acts failed to recognise marriages solemnised in accordance with *Sharia* law (Muslim marriages) as valid marriages (which have not been registered as civil marriages) as being valid for all purposes in South Africa, and failed to regulate the consequences of such recognition. As a consequence of the decision, a spouse in a Muslim marriage may now claim a redistribution of assets on the dissolution of marriage. In the next year, we expect findings in two extremely important areas – the discretion of the courts to override certain terms of prenuptial agreements, and to take family trust assets into account in divorces.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

While the COVID-19 crisis has seen the introduction of virtual hearings in the Johannesburg and Pretoria High Courts, for other parts of the country, court appearances are still largely in person.

A paperless court filing system allowing remote access to court files was introduced in the Johannesburg and Pretoria High Courts at the end of 2019, but in-person filing is still utilised in the rest of the country. It is the aim of the South African Office of the Chief Justice to eventually extend the implementation of "paperless digital courtrooms" across the country.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

An adoption of the principles set down in the UK case of *Radmacher v Gratino* into South African law in respect of antenuptial (prenuptial) contracts would be welcome to safeguard parties in weaker bargaining positions against duress, discrimination, ignorance and prejudice.

Currently, a court's power in respect of orders regarding the proprietary consequences of a South African marriage are limited by legislation and contract law. The court should have a wider discretion to order a redistribution of assets if just and equitable.

Beverley Clark, B.A. (Hons) (University of Cape Town, 1988), LL.B. (University of the Witwatersrand, 1991) is a specialist family and personal law attorney, admitted in the High Court of South Africa and practising in Johannesburg, but specialising particularly in matters with an international angle. Beverley is an accredited mediator and collaborative practitioner, and sees herself practising within an integrative law paradigm. She is a fellow of the International Academy of Family Lawyers.

Beverley started Clarks Attorneys in 1998 and it has grown to be one of the most highly regarded family law firms in the country, not only for its high quality of work, but also its commitment to the wellbeing of the individuals and families it works with, and to the ongoing development of family law in South Africa. Beverley does not see divorce as a failure or an ending, but as a transition to a new, different and often better life. She believes there is every reason for divorcing parties to treat each other with respect and kindness, and to honour their history together, rather than seeking to destroy each other. She believes that a successful divorce is one in which the parties still retain a relationship afterwards, and she tries to guide her clients to share her view.

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Clarks Attorneys, founded by veteran attorney Beverley Clark in 1996, is a boutique specialised firm practising exclusively in the areas of family and personal law. Based in Johannesburg, we have attorneys and consultants working from Johannesburg, Cape Town, London, Dubai and Toronto. We have made our reputation in outstanding family law litigation work and legal opinion, in South Africa and internationally.

Clarks frequently acts in the more complex matters and fraught situations, involving high conflict parties, high-net-worth, and/or complex issues around children. Despite this, we still approach every matter not only with our usual specialist legal training and expertise, but also with compassion and sensitivity for the parties involved. We are known for working closely with psychologists and social workers who specialise in the effects of divorce on children, as well as for having excellent professional relationships with specialist advocates, forensic accountants, drug testing analysts, maintenance court experts, tracing agents and private investigators.

We have extensive experience in divorce litigation, parental rights and responsibilities, maintenance, adoption, mediation, antenuptial contracts, co-habitation, same-sex relationships, paternity, curatorship applications, relocation matters and international maintenance cases, and have particular expertise in matters with an international angle, including international child abduction, Hague Convention cases, expat divorces, foreign divorces and all manner of international cases involving children.

Clarks Attorneys is a dynamic and progressive firm of attorneys that strives to keep abreast of the complex and rapidly changing field of family law in South Africa and around the world. We are not only dedicated to upholding the law but becoming involved in its progress.

Clarks Attorneys promotes professional development by hosting the *Johannesburg Annual Family Law Conference*, which is well attended by judges, attorneys, advocates, psychologists as well as international delegates. Clarks Attorneys was also instrumental in the formation of the Gauteng Family Law Forum in 2016, a body of family law practitioners dedicated to ethical and constructive practice, frequently called upon to assist the judiciary in developing practice directives appropriate to family law matters.

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

Spain is party to the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, known as "the Brussels IIa Regulation". 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 of the 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:

- 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.

Article 8 of "the Brussels IIa Regulation" rules that the Courts of the Member State where the child is habitually resident at the time the Court is seised, shall have international jurisdiction for parental responsibility and childcare arrangements. The Spanish Law of the Judicial Power has been reformed and its article 22 *quáter* d) meets the grounds for jurisdiction as set out in article 8 of the Regulation.

Spain retains the residual jurisdiction on parental responsibility and childcare arrangements when:

- the descendent is habitually resident in Spain at the time the proceedings are issued; and
- the petitioner is Spanish or has been habitually resident in Spain for at least six months before the proceedings are issued.

Regarding article 3 of the Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations in Member States, jurisdiction shall lie with: a) the Court where the defendant is habitually resident; b) the Court where the creditor is habitually resident; c) the Court which 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 d) the Court which, 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 of the Judicial Power rules 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 the status of a person or concerning parental responsibility and the matter relating to maintenance is ancillary to those proceedings.

Spain is party to the Council Regulation (EU) No. 2016/1103 of 24 June 2016, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, which is applicable between Member States as of 29 January 2019.

According to this Regulation, the 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 which is ruling the succession of the spouse pursuant to Regulation (EU) No. 650/2012 on Succession. The 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 which is seised for the divorce, legal separation or annulment pursuant to Regulation (EU) No. 2201/2003.

Article 22 *quáter* c) of the Spanish Law of the 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;
- 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 for 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.

Article 769 of the Spanish Law of Civil Procedure rules the competent Court in Spain to make orders in matrimonial and child proceedings:

- First instance Court of the matrimonial residence, last matrimonial residence, respondent's residence and if it cannot be found, the petitioner's residence.
- Agreement on divorce: First instance Court of the last matrimonial residence or residence of any of the petitioners.

Only for childcare arrangement proceedings (custody and maintenance):

- First instance Court of the parents' last residence. If the parents live in different countries, the petitioner can choose between the respondent's residence or the children's residence.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

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.

Yes, the parties can have an uncontested divorce.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

Yes, they do if they have children together, since only the Courts can make child arrangement orders. They can sign the agreement before a notary public if they do not have any minor children and therefore directly obtain the Divorce Absolute.

1.4 What is the procedure and timescale for a divorce?

It is very different from Court to Court, but in the main cities with specialised Family Courts, the timescale is approximately six months for a first instance Divorce Decree. The appeal may take about six months/one year. In small town Courts, this will usually not be more than one year.

Uncontested divorce proceedings are much quicker: between one month and three months to obtain a Divorce Absolute.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

It cannot be finalised without resolving child arrangements, maintenance and the use of the family home.

The matrimonial property regime will be liquidated in separate Court proceedings (or with a notary public) after the Divorce Decree.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Yes, they are directly recognised by all parties of the Brussels IIa Regulation.

Otherwise, a foreign divorce will be recognised in "*Exequatur*" proceedings on grounds of international/bilateral conventions or on a mutual recognition basis.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Yes, they do.

Separation proceedings are treated like divorce proceedings.

The grounds for nullity are different and it is much more difficult to obtain than a divorce or separation.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Yes, they can.

Article 19 of the Brussels IIa Regulation is applicable between parties.

Otherwise, the "*Declinatoria*" proceedings, due to a lack of international jurisdiction, are provided by articles 63–66 of the Spanish Law of Civil Procedure (LEC).

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

Spousal and children maintenance orders and the use of the matrimonial home in the child's best interest.

In the case of the **separation of assets** matrimonial regime, a compensation order to the spouse for his/her dedication to the family which has produced a corresponding loss of professional opportunities, as well as a financial order to put an end to the joint properties of the spouses, can both be made on divorce.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

Yes, they do. The matrimonial property regime will finish "*ope legis*" at the Divorce Decree date. 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 have an out-of-court agreement and liquidate the matrimonial property regime in a notary public Deed.

Spain comprises several territorial units, some of which have their own rules of law in respect of family and succession. The common point is that in all of them you can choose your matrimonial property regime in a notary public Deed. But, in the absence of an agreement, a matrimonial property regime 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.

- Navarra: Matrimonial company of conquests (*Sociedad conyugal de conquistas*).
- Parts of Extremadura: Community of assets (*Fuero del Baylío*).

2.3 How does the court decide what financial orders to make? What factors are taken into account?

The choice of orders on divorce is ruled in the Spanish Civil Code and the Spanish Law of Civil Procedure rules on how to obtain them from the Court.

The Divorce Court Order must rule parental responsibility and all the child arrangement issues including, but not limited to: maintenance; custody; right of access; and use of the matrimonial home.

The Court will only order spousal maintenance obligations if it is requested in the divorce petition.

After the Divorce Decree, any ex-spouse can issue Court proceedings to liquidate the matrimonial property regime.

Interim measures orders on maintenance, custody, rights of access and use of the family home during the divorce proceedings must also be requested by any party to the divorce petition and not more than 30 days before the divorce petition is lodged.

2.4 Is the position different between capital and maintenance orders? If so, how?

The position of the Court is a little bit different. The aim of maintenance orders is to redistribute the family incomes in order to minimise the effects of the divorce mainly 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. Please see question 2.6 below.

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 the separation of assets. If there is no matrimonial property, on divorce, the Court can issue an order to compensate one of the spouses for his/her dedication to the family which has produced a corresponding loss of professional opportunities.

We must take into account whether the couple has children and whether they have entered into a matrimonial property regime other than the separate ownership of assets.

If the couple has children, 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*" (see question 6.4 below) must approve the settlement protecting the child's best interest.

If the couple lived under a separate ownership of assets, on divorce, the Court can issue an order to put an end to the joint properties of the spouses and to compensate one of the spouses for his/her dedication to the family which has produced a corresponding loss of professional opportunities.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

A couple without children that agrees on financial matters can sign an agreement in a Deed in front of a Spanish notary public on divorce regarding spousal maintenance obligation and liquidation of matrimonial property regime.

A couple with minor children must always issue divorce proceedings before the Court to obtain maintenance orders and the use of the family home.

After the divorce, a couple that agrees on financial/capital matters can sign, in front of a Spanish notary public, a Deed of liquidation of the matrimonial property regime. They do not need to have a Court Order or to attend Court. The Deed of liquidation of the matrimonial property regime can be directly enforced by the Courts in Spain as a Court Order.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

After a divorce, it is normally expected that each spouse supports him or herself.

The main aim of these orders is to help the ex-husband or ex-wife 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 to one of the spouses; and if there has been a loss of professional opportunities because of the marriage. The 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 taken into account.

Lifelong spousal maintenance orders are rare and only apply in cases in which the marriage was very long and the spouse is of an age with no prospects to earn a living after having invested his/her life in the family's welfare.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Yes, it is. There are three matrimonial property regimes recognised in the Spanish Civil Code: joint ownership of assets; separation of assets; and participation in acquisitions.

Joint ownership of assets: the acquisitions obtained by each of the spouses during the marriage are common and divided equally when the matrimonial property is liquidated. The assets that each spouse brought into the marriage and those inherited or acquired gratuitously afterwards are considered the personal property of each spouse.

Separation of assets: each spouse retains what he/she brought into the marriage and becomes the sole owner of the property acquired during the marriage. Where it cannot be established to whom the property belongs, there is a presumption of an equal division between each spouse.

Participation of acquisitions: each spouse retains what he/she brought into the marriage and becomes the sole owner of property he/she acquired during the marriage. At the end of the marriage, the acquisitions made will be calculated and each spouse is entitled to a share of the acquisitions made by the other spouse during the marriage. This regime is rather unusual in Spain.

There are other matrimonial property regimes recognised under the family law of some autonomous communities, as explained in question 2.2.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Spain is a party to the Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation

in the area of the law applicable to divorce and legal separation, known as the "Rome III Regulation". This Regulation shall apply in conflicts of law on divorce between participating Member States.

Article 107.2 of the Spanish Civil Code rules the applicable law on divorce for foreign nationals and it has been reformed to converge with the grounds as set out in "Rome III Regulation".

Spain has opted into the 2007 Hague Protocol of the EC Regulation No. 4/2009 in relation to maintenance as set out in article 15. The general rule (article 3) on applicable law in accordance with the 2007 Hague Protocol on the law applicable to maintenance obligations shall be the law of the State of the habitual residence of the creditor. According to articles 7 and 9 of the Spanish Civil Code, the law applicable to maintenance obligations shall be ruled by the 2007 Hague Protocol.

Spain is a party to the Council Regulation (EU) No. 2016/1103 of 24 June 2016, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the Council Regulation (EU) No. 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships. These Regulations apply in conflicts of law between participating members to marriages or civil partnerships performed after 29 January 2019.

Otherwise, the Spanish Civil Code rules in its articles 2–3 and 9, that the applicable law to the matrimonial regimes is determined by:

- Common nationality when they got married.
- Public Deed choosing between the national law/habitual residence of any spouse.
- First common habitual residence after the marriage.
- Country where the marriage took place.

Foreign Law can be applied by the Spanish Courts, subject to the proof of the Foreign Law by the party who seeks its application.

How to give evidence of the Foreign Law before the Spanish Court:

(1) Content and validity of the Foreign Law: by a public document issued by the Embassy in Madrid or the Spanish Embassy in the foreign country.

(2) Application of the Foreign Law to the specific case: two different expert reports (foreign lawyers) explaining to the Spanish Judge how the Foreign Law would be applied to this case by the foreign Court.

There is the risk that, if the Judge considers that the Foreign Law was not sufficiently proved, Spanish law will be directly applied.

2.9 How is the matrimonial home treated on divorce?

The children remain in the matrimonial home with the spouse who has custody of them.

In the case of shared custody, the children remain in the matrimonial home with the spouse who has more difficulty in earning a living and the spouse whose financial situation is better must find a new home. When both spouses are in a similar financial position, the children will live each period of shared custody in each parent's new home. The parents can then put an end to the matrimonial joint property.

If there are no children, the spouse who is in a weaker financial position remains in the matrimonial home until he/she can have access to another home. The Divorce Decree can determine how long this spouse might remain in the matrimonial home.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

No, it is not. Spain is not party to the Hague Convention of 1985.

A foreign trust can be recognised by the Spanish Court subject to strong evidence of Foreign Law (as explained in question 2.8) so that the Spanish Judge can understand the content, legal nature, instrumentality, purpose, etc. of the trust in this specific case.

There are some Spanish legal instruments similar to trusts, such as investments funds, pension funds, protected properties for the disabled, etc.

The Spanish foundation ("*fundación*") must have a general interest purpose but its legal frame is similar to a trust.

In the Spanish Law of Succession, the "*fideocomiso*" is similar to a trustee as outlined in article 781 of the Spanish Civil Code and article 426 of the Catalonian Civil Code. Law 293 of the Navarra New Regional Code contains the rules of the "*fiducia continuada*" which is quite similar to the trust.

There are different civil law contracts which can be selected on a case-by-case basis to obtain the same purpose as with a trust: donation; agency; company; mortgage; foundation; mandate; protected properties for the disabled, etc.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

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.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Court and mediation are the most common now whilst arbitration and collaborative law are not as common.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

The marital agreements are recognised as private contracts under the Spanish law and are therefore binding for the contracting parties if they are not against the child's best interest and the Spanish "*ordre public*". The marital agreement will be enforceable when included in a Court Order after the divorce proceedings.

The foreign marital agreement can also be recognised as a private contract subject to evidence of the Foreign Law before the Court. It can be enforced if the Court recognises its terms and conditions and includes them in the Court Order.

The marital agreement can be directly enforceable if it is granted in a Deed in front of a Spanish notary public.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

The marital agreement must first be approved by the Court on divorce and included in the Divorce Decree, which can be enforced afterwards.

The marital agreement could be directly enforced on divorce if it was granted in a Deed in front of a Spanish notary public and the couple does not have minor children.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Marital agreements can cover a spouse's financial claims on divorce, e.g. maintenance. Compensation can be agreed in cases where couples choose the separation of assets matrimonial property regime.

The election of the matrimonial property regime must be granted in a Deed in front of a Spanish notary public.

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 interest. See question 6.4 below.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

The grounds for a financial claim are to prove that the couple had joint properties, joint bank accounts, etc. The grounds to make a financial claim are the intention and existence of shared estates between the cohabitees.

4.2 What financial orders can a cohabitant obtain?

In the absence of children, they can claim for compensation and an order to sell the joint properties. The claim must be lodged in the Civil Courts; they are not under the family law jurisdiction.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

The formal partnership status for cohabitants is not regulated in the Spanish Civil Code or at a national level.

Some autonomous communities have produced their specific laws on partnership with legal provisions for the existence of a partnership register: Andalucía; Aragón; Asturias; the Balearic Islands; Basque Country; Canary Islands; Castilla-La Mancha; Castilla y León; Extremadura; Galicia; Madrid; and Valencia.

Catalonia only provides for municipal registers. The existence of a partnership is proved by means of an authentic/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.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Yes, they can marry and adopt children or adopt a civil partnership.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

Child maintenance and use of the matrimonial home are available. There is no difference within or outside of marriage.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Child maintenance can only be calculated and administered by the Court.

The costs and expenses of the child, such as upbringing, clothing, education, healthcare, etc. must be estimated.

The incomes of each parent are also taken into account when considering maintenance and which spouse remains in the matrimonial home.

The Spanish General Council of Justice has produced an illustrative table of child maintenance calculation for the Courts, lawyers, parents, etc. The main aim is to facilitate the estimation of child maintenance nationwide to encourage agreements between the parents.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

The parent is required to pay child maintenance until he/she can obtain financial support for themselves. That is at least until he/she is 18 years old and can therefore apply for a job. The child can seek maintenance during university.

5.4 Can capital or property orders be made to or for the benefit of a child?

No, they cannot be made on divorce.

They can, however, be made in inheritance proceedings and some other cases, such as to protect disabled children.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

An adult can make a claim for financial support directly against their parents when he/she is 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, for example unemployment, etc. and the parent's resources.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

In Spain, "rights of custody" actually refers to "parental

responsibility" which is 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 this specific matter.

Parental responsibility will not be affected by a divorce. The Court must decide at the time of the divorce which parent the child lives with (custody) and which parent has the "right of access". However, it should be noted that the usual order is one of "shared custody".

There is no difference between married or unmarried parents to exercise the rights of custody.

6.2 At what age are children considered adults by the court?

Children are considered adults by the Court when they are 18 years old. Under the Spanish Law of Civil Procedure, a child must be heard at Court when they are 12 years old or older. The child might be heard before if he/she shows enough maturity.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Children 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 he/she does not want to.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

Maintenance orders, parental responsibility orders, custody orders, right of access orders, national and international relocation orders and payment orders of reimbursement of extra costs and expenses made on the child's behalf and not included in the maintenance obligation.

If the parents must make a decision concerning the child and they cannot agree, they must issue proceedings and the Court will issue an order stating which parent can decide in this specific matter (for example, religious issues, medical treatments, surgery, choice of school, etc.).

Yes, 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 interest. They represent the Spanish Authorities' protection of the child's best interest. The *Ministerio Fiscal* cooperates closely with the Court and has a similar education and professional background as a Judge; however, they are not independent because they are Spanish Government Civil Servants.

A parent can also request the Court to order interim measures regarding maintenance, custody, rights of access and use of the family home until the Divorce Decree is produced.

6.5 What factors does the court consider when making orders in relation to children?

The main factor is the child's best interest. They also take into account the child's opinion when he/she is older than 12 years and also the welfare report.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

Both parents almost always have the children's parental responsibility; therefore, they must agree in almost every important decision relating to their children's welfare.

They can take a child abroad on holidays unilaterally. They must inform the other parent; however, his/her permission is not required.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

The tendency now is to grant shared custody to both parents if at least one of them applies for it and it is in the child's best interests.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

They are equally treated in relation to parental responsibility, child arrangements and use of the family home.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

Most Family Courts have a psychologist and a social worker that prepare a welfare report upon the request of the parents, the *Ministerio Fiscal* or the Judge.

The Judge will meet the child if he/she is 12 years old or older. If they are much younger, the Judge will only take into account the welfare report to avoid disturbing the children too much with the divorce proceedings.

The Judge will ensure that his decision meets the *Ministerio Fiscal* report.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

The *Ministerio Fiscal* must always be invited by the Court to proceedings relating to children, to defend the child's best interest. The *Ministerio Fiscal* cooperates closely with the Court and has a similar education and professional background to a Judge but they are not independent because they are Spanish Government Civil Servants. They represent the Spanish Authorities' protection of the child's best interest.

Otherwise, the children are represented by their parents until they are 18 years old.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Grandparents, siblings and other close relatives (also step-parents) have the right to be in contact (right of access) with the children, according to article 160.2 of Civil Code.

At present, the principal method is mediation. There are also collaborative lawyers.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

No, he/she cannot do it in any event.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

No, he/she cannot do it in any event.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

The child's best interest is taken into account, as well as the age of the children, wider family support in the new country, better education opportunities and whether there will eventually be a better standard of living in the new country.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

The child's best interest is taken into account, as is the distance between the former and new residence which would facilitate the other parent to meet the child. Better employment opportunities for the parent who wants to move, as well as wider family support in the new place are also taken into account.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

If both parents are foreigners, it is easier to relocate internationally. If one parent is Spanish, and therefore the child is too, it is more difficult.

The main ground to allow relocation in Spain is a better job with better financial prospects for the custodial parent when the earnings of the left-behind parent are not relevant and it would provide a better standard of living to the children.

Other factors are the distance between the left-behind parent and the new home, the existence of wider family support in the new residence, etc.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Spain is a party of the Hague Convention and of the Brussels IIa Regulation.

Articles 778 *quáter*–778 *sexies* of the Spanish Law of Civil Procedure rule the return proceedings in Spain between party States in cases of the wrongful removal or retention of the child.

The Spanish Central Authority is the Ministerio de Justicia – Servicio de Convenios.

Address: Calle San Bernardo, nº 62 – E- 28071, Madrid
Tel: +34 91 390 4437
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8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

One development is the new Law 8/2021, of 2 June, on civil law and procedural law to support persons with disabilities. The aim of this new Law 8/2021 is to meet the standards of the New York Convention on the Rights of Persons with Disabilities (CRPD) of 13 December 2006.

The most significant development is the Spanish High Court of Justice (*Tribunal Supremo*) case law establishing shared custody as most beneficial for the child's best interest.

There is a draft bill providing for pets in family disputes, which will modify some articles of the Civil Code.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

Digital technology was introduced in the Spanish Civil Procedure Act 2000, and since then all cases have been recorded. Live evidence was possible if the witness was in another Court, from one Court to another. Filing petitions and lodging documents may be done electronically, through the platform Lexnet, since 2011. We already have paperless processes. Access to Court is still required to be in person in most cases.

Due to COVID-19, Royal Decree 16/20 implemented virtual hearings and remote access. Court hearings will return to being in-person, but it will be easier than before to obtain remote access and virtual hearings under certain circumstances.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

- We need a nationwide Registered Civil Partnership Law (PACS) (please see question 4.3).
- I am in favour of regulating surrogacy in Spain, which is currently prohibited.
- Family law experts request a better ruling of the use of the family home on divorce and separation in the Civil Code articles.
- Spain comprises several territorial units, some of which have their own rules of law in respect of family and succession. Please see question 2.2. This situation affects the applicable law regarding the "EU Regulation on Succession" and the "EU Regulation on Matrimonial Property Regime" and treats Spanish nationals and other Member States nationals differently.
- Articles 9 and 8 of the Spanish Civil Code must be amended to be in accordance with the EU Succession Regulation's general rule on applicable law: the law of the State in which the deceased had his/her habitual residence at the time of death (not the deceased's nationality).
- Articles 8 and 9 of the Spanish Civil Code must be amended to be in accordance with the "EU on Succession" and the "EU Regulation on Matrimonial Property Regime" which rule that the applicable law to the succession rights of the widowed spouse is the law of the succession (not the law of the matrimonial effects).
- Training for Judges, *Ministerio Fiscal*, psychologists, social workers to identify emotional abuse and manipulative behaviour toward the spouse and/or children.

Amparo Arbáizar holds a law degree from the University of Málaga, Spain, and an LL.M. from the University of Trier, Germany.
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Amparo is a Family Mediator and regards mediation as a valuable alternative means of settling disputes. She is a research fellow for European Union family law and law of succession in the Higher Institute of Law and Economics (ISDE) of Complutense University of Madrid. She has been awarded the Spanish Association of Family Lawyers Accolade 2018 for the best article on family law. She is fluent in English and German.
Amparo is a member of the International Academy of Family Lawyers (IAFL) and is listed as a lawyer by the German General Consulate in Spain. She is a member of the Spanish Association of Family Lawyers (AEAFA), a member of Lawyers in Europe focusing on international Parental Child Abduction (LEPCA), a member of ASIME, a member of the British Spanish Lawyers Association (BSLA), and a member of the German Spanish Lawyers Association (AHAJ-DSJV).

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Switzerland


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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

According to Swiss law, the following authorities shall, alternatively, have jurisdiction over divorce proceedings:

- Swiss Courts at the defendant's domicile; and
- Swiss Courts at the plaintiff's domicile if he/she resided in Switzerland for at least one year or if he/she is a Swiss citizen.

In case the spouses are not domiciled in Switzerland and if at least one of them is a Swiss citizen, the Swiss Court at the place of origin has jurisdiction to hear an action for divorce, provided that said action cannot at all or cannot reasonably be expected to be brought at the domicile of either spouse.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

Should both spouses agree on the divorce principle and on its ancillary consequences* – either fully or partially – they can directly translate their agreement into a Convention and submit said document to the judge. The latter will check whether the Convention is fair and compatible with the applicable law and decide the issues on which parties could not reach any agreement. If the Convention complies with the mentioned criteria, the judge will simply endorse it through a divorce judgment. This procedure is the least burdensome and the speediest existing under Swiss law.

In case spouses' positions regarding divorce and its ancillary consequences differ, one spouse may independently petition for divorce if, at the time the petition is filed, the spouses have lived apart for at least two years. The requesting spouse will have to prove that the separation effectively lasted two years (e.g., change of telephone number, address, etc.).

Finally, one spouse may independently petition for divorce if the marriage has irretrievably broken down for compelling reasons for which he/she is not responsible. The requesting party must prove that it would be considered abusive for him/her to stay married until the end of the said two-year period. For this purpose, the requesting party shall invoke solid reasons, as case law tends to be very strict when it comes to admitting such a possibility.

**Parental rights, liquidation of the matrimonial regime, child and spousal maintenance, division of the pension rights.*

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

No. Swiss law imposes a mandatory submission of any comprehensive or partial agreement to the judge, who has to endorse it through a divorce judgment after checking whether the agreement really is the product careful reflection and free will from both spouses.

The judge will take a particular look at the spouses' arrangements on children-related questions, in order to ensure that the well-being of the latter is fully respected.

1.4 What is the procedure and timescale for a divorce?

The procedure depends on the path selected in order to divorce, as detailed at question 1.2.

The timescale for a divorce highly depends on the selected path and the Courts' availabilities at the time the request is submitted.

As a mere indication, a divorce by joint request with a comprehensive agreement might take up to a couple of months to be achieved; meanwhile a more conflicting divorce might need few years to be fenced off, especially in Geneva.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

The Court's decision generally aims to address any ancillary issues that arise in connection with the divorce itself.

However, a clear-cut decision only on the principle of divorce is not something completely excluded under Swiss law. Further, and subject to a strong motivation, spouses can ask the Court to decide on the termination of their matrimonial regime in different proceedings.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Foreign decisions on divorce are normally recognised in Switzerland when issued in the country of domicile or of habitual residence, or the state of citizenship of either spouses, or if recognised in one of these countries.

However, a decision rendered in a State of which neither of the spouses or only the plaintiff one is a citizen can be recognised in Switzerland only where:

- at the time the application was lodged, at least one of the spouses was domiciled or had his/her habitual residence in that State and the defendant spouse was not domiciled in Switzerland;
- the defendant spouse has submitted without reservation to the jurisdiction of the foreign Court; or
- the defendant spouse expressly consents to the recognition of the decision in Switzerland.

To register a divorce pronounced abroad in the Swiss civil status register, the following must be submitted to the competent Swiss civil registry office: (i) the divorce decree with the date on which it takes full effect; and (ii) the decision concerning the parental authority over any common child with the date it became fully effective.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Yes, Swiss law allows for both types of proceedings.

First, spouses may petition for a separation action, called a "request for provisional measures to protect the conjugal union". It allows them to live separately for an indefinite period of time and regulates the consequences of the separation such as children- and maintenance contributions-related questions.

Such an institution generally is the first step undertaken by a spouse wishing to divorce when the other refuses to do so. Indeed, the separation procedure will mark the beginning of the two-year separation period required by law in order to be able to unilaterally initiate divorce proceedings (see question 1.2).

Also, spouses (and even public offices) may annul a marriage based on specific grounds provided by law. For instance, marriage annulment can be sought if a spouse has not married of his/her own free will or if one of the spouses was already married at the time of the wedding and the previous marriage had not been dissolved by a divorce or by the death of the previous spouse.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Yes. If divorce proceedings are pending in another country and are expected to lead to a decision likely to be recognised in Switzerland in a reasonable period of time, parallel proceedings in Switzerland will be stayed.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

As an exemplative list, the Court can pronounce or approve (in case of a comprehensive agreement on these matters, see questions 1.2 and 1.3) the following financial orders: child and spousal maintenance; division of marital assets and spouses' pension rights accumulated during the marriage; and other interim measures (such as freezing the spouses bank accounts, for instance).

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

Yes. In Switzerland, spouses are free to choose one regime that best suits their interests from among three schemes offered by Swiss law: (i) the "participation in acquired property" (i.e. spouses equally share each and every asset they acquired during their marriage, which is the "by default" scheme in case the spouses did not agree otherwise within a marital agreement); (ii) the community of property (i.e. spouses share the assets that they decided to qualify as "joint property"); or (iii) the separation of assets (i.e. each spouse is the sole owner of his/her assets and assumes his/her debts alone; nothing is shared between the spouses).

2.3 How does the court decide what financial orders to make? What factors are taken into account?

When deciding on the principle and the amount of spousal maintenance, the Court takes into consideration the very circumstances of the case at hand (such as the length of the marriage, the allocation of duties within the marriage, etc.) as well as each spouse's financial capabilities (including the spouses' lifestyle during the marriage, the earning capacity and hypothetical income of each spouse, considering their age and their education background and professional experience, etc.).

When deciding on the amount of child support, the Court mainly considers the parents' financial capabilities and the custody arrangements.

When it comes to determining the termination of the matrimonial regime and other financial orders, the Court takes into account, among others, the principles detailed in the answer to question 2.2.

2.4 Is the position different between capital and maintenance orders? If so, how?

As a principle, maintenance contributions are to be paid monthly. Exceptionally, if the parties agree on the principle and if the judge allows so, a lump sum might replace such monthly pay-out.

It is, however, worth noting that when in the form of a monthly pay-out, the amount can be re-evaluated based on new and relevant circumstances, while a lump-sum payment does not provide for such flexibility.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

Yes, as detailed in the answer to question 1.3, each and every agreement found between spouses related to the divorce principle and its ancillary consequences must always be endorsed by a judge.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

In Switzerland, the "clean-break" principle requires each ex-spouse to be financially independent and responsible at the time the divorce is pronounced. However, a spouse may have to financially support his/her ex-spouse when circumstances require so (e.g. length and allocation of duties during the marriage, age, health and career prospects of the said ex-spouse, etc.).

There is no clear time limit when it comes to a spousal maintenance. It will all depend on both spouses' financial and personal situations, re-evaluated when necessary.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Yes, see question 2.2.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

In the context of an international divorce (i.e. international by reason of domicile or habitual residence of the spouses, nationality(ies) of the spouses, place(s) of the spouses' property), the Swiss judge is obliged to apply the foreign law designated by the applicable private international law rules.

Questions encountered during a divorce procedure may be governed by laws of different jurisdictions. Basically, a distinction must be made between the divorce pronouncement, which is automatically subject to Swiss law, and the various ancillary effects of the divorce.

For instance, when it comes to the dissolution of the matrimonial property regime, the applicable law is determined based on a cascade approach. Except if the parties agreed otherwise, the applicable law can either be that of the State in which both spouses are (or were last) domiciled simultaneously, or that of their common State of citizenship. If there is none, Swiss law will apply.

The law applicable to maintenance obligations to be paid to children is determined based on the rules contained within the Hague Convention of October 2nd 1973 on the Law Applicable to Maintenance Obligations.

The question of the spousal pension rights accumulated in Switzerland will exclusively be determined based on Swiss law and decided by Swiss Courts who have exclusive jurisdiction on said matter (see question 2.11).

2.9 How is the matrimonial home treated on divorce?

The allocation of the family home question is decided according to the rules and principles applicable to the applicable matrimonial regime (see question 2.2).

In principle, one of the spouses takes over the accommodation and pays a compensatory indemnity to the other. However, mixed solutions also are conceivable (e.g. agree to sell the property and share the profit).

In case of a contentious divorce, the judge will allocate the family home to one of the spouses following an overall assessment of the concrete situation (i.e. needs of each spouse and of the children if any).

In case of a lease, and where the interests of the children or of one spouse require so, the judge may transfer the rights and obligations under the tenancy agreement to that very spouse, provided that this is not inequitable for the other. The other spouse, as a previous tenant, will, however, be jointly and severally liable for the payment of the rent.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

To date, Switzerland does not have a "trust law" as such. Nonetheless, foreign trusts have been recognised domestically since the entry into force of the Hague Convention on the Law Applicable to Trusts and their Recognition in 2007.

Currently, and since June 2018, a group of experts (put in place by the Federal council) is working on the elaboration of a legal framework related to these concerns.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

Yes, in case new and relevant facts are invoked by the parties, Swiss Courts have jurisdiction to hear claims that aim at amending or modifying a divorce decree, regardless of the nationality of such decree if (i) the respondent is domiciled in Switzerland, or (ii) the plaintiff has resided in Switzerland for at least one year or is a Swiss citizen.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Mediation is being increasingly put under the spotlight when it comes to resolving all kind of disputes in Switzerland, especially divorce cases. Even during proceedings, judges are encouraged to seek, at any stage of the proceedings, a consensual solution to the dispute.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Swiss law allows for prospective spouses to conclude a marital agreement (but does not force them to do so), before or after the wedding. Spouses may choose, set aside or amend their marital agreement at any time but within the limits set by law.

It has to be noted that, as far as the matrimonial property regime is concerned, it is in the spouses' best interest to enter into such an agreement should they wish to opt for a different regime than the default one (see question 2.2). In this configuration, the marital agreement must be executed as a public deed and duly signed by the parties.

Foreign marital agreements are usually recognised on matrimonial regime questions, but the judge remains free to rule differently on other points.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

Basically, the same principles applicable to the endorsement of a comprehensive/partial agreement on divorce and its ancillary matters, as detailed in the answer to question 1.3, apply.

Essentially, the judge will investigate in order to establish whether the spouses willingly and carefully concluded the marital agreement and that it is not manifestly unfair, while carefully assessing the children-related questions.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

In principle, yes.

Swiss law does not clearly limit the scope of such a marital agreement to the selection of their matrimonial regime. It is not excluded for prospective spouses to agree, in advance, on other financial claims upon divorce. However, it should be kept

in mind, as detailed in the answer to question 3.2, that such an agreement is subject to the judge's control, especially concerning children-related matters.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

No. Partners living together without being married or in a registered partnership do not enjoy the same social and legal rights as a married couple.

No specific mutual support claims exist by law based on a cohabitation relationship. The only claims cohabitants might make are the ones based on standard law, meaning simple partnership, co-ownership, etc.

However, cohabitants can conclude an agreement on financial matters in order to ensure that some legal rights stem from their relationship.

4.2 What financial orders can a cohabitant obtain?

At the time of the separation, one cohabitant cannot claim any financial order based on the relationship he/she had with his/her partner, except if both cohabitants anticipated such eventuality (see question 4.1).

However, in case one of the cohabitants devoted his/her time to take care of the couple's children, he/she might be entitled to receive financial support through a child maintenance contribution, as detailed in question 5.1.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

No, there is no such status.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

No; as at the time of writing, same-sex couples are not permitted to marry in Switzerland. Nonetheless, they are able to conclude a registered partnership, which, to a certain extent, is quite similar to marriage.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

In Switzerland, both parents are under the obligation to provide for the child's maintenance, irrespective of whether they are married, separated or divorced. Whichever parent does not hold custody of the child must financially provide for the child's maintenance. Custody and maintenance contributions are seen as corollaries under Swiss law and the custodial parent can claim, on behalf of the child, the payment of such contributions by the non-custodial parent.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

In case of a conflicting discussion about child maintenance between the parents, the judge decides on the amount of such contribution based on the financial resources of both parents and the financial needs of the child.

The child's assets and income also are taken into account in the calculation. Basically, the idea is to maintain the level of the couple's lifestyle known by the child during the marriage.

In any case, the size of the maintenance contributions shall not exceed the financial means of the paying parent and prevent him/her from covering his/her own basic expenses (such as rent, health insurance and other general living expenses).

It is to be noted that the Court may order that the child maintenance contributions be automatically increased or decreased in case of changes in circumstances (e.g. evolution of the child's needs, the parents' financial resources, the costs of living, etc.).

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

In principle, a parent is required to pay child maintenance until the child turns 18 years old.

However, in case the child has not completed his/her education by the time he/she reaches the age of majority and if the education is to be completed within a reasonable period of time, the parent must, to the extent of his/her means, continue to provide for the child's maintenance until completion of such education. As far as university studies are concerned, education is considered complete upon graduation with a Master's degree.

It is to be noted that if, as an adult, the child refuses to establish or maintain a minimum of contact with his/her proving parent and if that parent has unsuccessfully tried to establish such contact, that parent may not be required to pay for the child's education.

5.4 Can capital or property orders be made to or for the benefit of a child?

As a principle, child maintenance is to be paid monthly. Exceptionally, if the parties agree on the principle and if the judge allows so, and subject to strong motivation, a lump sum might replace such a monthly pay-out (see question 2.4).

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

Yes. When minor, to make such a claim, the child must be represented either by his custodial parent or by a curator named by the Court if the child and the circumstances require so. After turning 18, such claim will be subject to the conditions detailed within the answer brought to question 5.3.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

Since July 1st 2014, shared parental authority has become the norm in Switzerland.

This means that, even in the case of a divorce, both parents will in principle continue to exercise together parental authority, which covers the power to take important decisions on behalf of

the children (e.g. place of residence, choice of schooling, etc.). However, joint parental authority does not mean shared custody.

Indeed, when it comes to child custody, and should the parties not be able to find any agreement on this question, it is up to the judge to take a decision based on the child's well-being. Among others, and keeping in mind the child's well-being, the judge will take into account the parental capacity of the parents, their places of residence and the distance between them, the child's own preferences, etc., in order to take his/her decision.

Following a change of law dated January 1st 2017, it is now mandatory for the judge to assess whether alternate custody would serve the interests of the children.

6.2 At what age are children considered adults by the court?

Children are considered adults at 18 years old.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

In principle, child orders remain relevant until the child reaches 18 years old. However, as detailed in the answer to question 5.3, the judge can order maintenance contributions to be paid beyond the child's majority in case he/she pursues serious studies.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

When it comes to child-related matters, the judge compulsorily acts, evaluates the situation based on the specific circumstances of the case and takes a decision based on the child's well-being.

Even if the parents agreed on the questions of parental authority, custody, maintenance contributions and visitation rights, the final word goes to the judge.

6.5 What factors does the court consider when making orders in relation to children?

As mentioned in this chapter, the core guiding principle when deciding on children-related questions (e.g. custody or parental authority) is the well-being of the latter. The judge will, in any situation (and even when the parents managed to find a comprehensive agreement about such issues), have to assess which solution best meets the child's interests and needs.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

As detailed in the answer to question 6.1, in case of joint parental authority, parents can and commonly have to take important decisions concerning their child (e.g. the child's place of residence). In case of a conflict on this very matter, the decision will be entrusted to the judge.

In case of sole parental authority, the custodial parent is able to take these decisions alone but must inform the other parent of such decisions in due time.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

No. It is a simple consideration that the judge will evaluate in case parental authority is exercised jointly and if the father, mother or child so requests. In any case, Swiss law gives priority to the child's well-being when determining the division of time between divorcing parents.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Generally, and other than the child maintenance question, unmarried and married parents are far from treated equally with respect to separation and/or divorce proceedings. When it comes to child maintenance contributions, both married and unmarried parents benefit from the same treatment on the merits. The new law that came into force on January 1st 2017 eliminated unequal treatment among children of unmarried parents and children of married ones through the generalisation of the inclusion of the cost of their care in the calculation of the child maintenance contribution.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

In principle, it is the responsibility of the judge to evaluate and determine the child's welfare, based on the circumstances of the case at hand.

To this purpose, in divorce or separation proceedings, the judge must hear the child before taking any decision that will potentially impact his/her day-to-day life. The judge hears the child alone and takes precious care not to place him/her in a confusing state or a conflict of loyalty towards his/her parents by asking direct questions that he/she cannot answer (such as which parent he/she prefers).

However, such a hearing need not to be conducted if the child is young (i.e. under 6 years old), or if the child's personal development or any other good reason prevents the judge from giving any weight to his/her statements.

The judge might consider that it is necessary to delegate the child's hearing to a child specialist (usually the child protection service), which will be in charge of drawing up a report summing up the child's narrative.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

Yes, in specific cases, the child's well-being might command the judge to appoint a representative to advocate on behalf of the child. This is especially the case: (i) when both parents adopt different positions on the child's fate (e.g. his/her place of residence, parental responsibility); (ii) when the child protection authority or one of the parents so requests; or (iii) when the Court doubts the merits of the parents' joints conclusions or is considering ordering a child protection measure.

A child who has the capacity to consent (generally at the age of 11 years old or more) may also request the appointment of such a representative.

The law does not specifically require a lawyer to assume this role; the said person only has to be experienced in the welfare field and able to deal with legal matters.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

No, only the spouses/parents have a say when it comes to the principle of divorce, its ancillary matters, and specifically, children-related ones.

The child's relatives might only be solicited during a preliminary stage, especially at the time of establishment of reports that may be enquired into by the Court during proceedings (mainly conducted by the child protection service; see question 6.9).

As detailed in the answer to question 2.12, mediation is highly promoted and urged by the judge when it comes to matrimonial disputes. When the children question is raised, the judge may even force parents to attempt mediation.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

Joint parental authority (as detailed in the answer to question 6.1) requires the habitual residence of the child to be determined by both parents, via a common decision.

Only a parent who possesses sole parental authority is allowed to move to another state/country without the other parent's consent. However, the other parent must be kept informed of such move in reasonable time prior to the departure.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

In case of sole parental authority, the custodial parent is allowed to move to another part of Switzerland without the other parent's consent but has to notify him/her of the move in good time.

In case of joint parental authority, the custodial parent is only allowed to do so if the change of the place of residence does not have serious consequences on the ability of the other parent to exercise parental authority and have contact with the child.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

As in all proceedings relating to children and parental rights, the aim is to determine which solution best serves the interests and well-being of the child.

To this purpose, the factors taken into account are the personal relations between the parents and the child maintained up to that point, the educational capacities and respective availability of each parent, and the needs of the child guarantors for his/her harmonious development, particularly with regard to the necessary stability of his/her living conditions. The child's preferences are also of paramount importance.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

See question 7.3.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

Nothing prevents a parent who benefits from sole custody to relocate internationally/interstate, provided that the conditions detailed in the answers to questions 7.1 and 7.2 are fulfilled and that the child's welfare is respected.

However, as soon as share custody is concerned, such relocation might be quite problematic, primarily if it affects the visitation rights of the other parent.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Switzerland is a party to the Hague Convention on the Civil Aspects of International Child Abduction of October 25th 1980.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

Although this development dates back to 2017, the elimination of unequal treatment among children of unmarried parents and children of married ones in terms of the calculation of child contributions (as detailed in the answer to question 6.8) marked a turning point with regard to equality in family law in Switzerland.

A more recent development is the case law establishment of a uniform method of calculating child support contributions. Previously, Courts were given a wide margin of appreciation and cantonal specificities were not prohibited, which led to a pluralism of methods, different results and less predictability. The new "concrete two-step" method, although still vague, is thus very promising.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

The practice varies from one canton to another. In Geneva, for instance, nothing other than compliance with public health basic rules (i.e. wearing of masks, use of hydroalcoholic gel, social distancing, limited access to certain hearings) are to be observed.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

It will be interesting to keep an eye on the evolution of the judicial system's approach to the peaceful resolution of family disputes upon separation, especially with regard to the children question.

In our opinion, the so-called "Cochem method", first developed in Germany, is quite an interesting model. Briefly, it establishes an "orderly cooperation" between the different professionals involved in the management of family conflict (be they judges, lawyers, experts or psychologists) and the parents of the child.

This alternative and constructive dispute resolution method presupposes a common objective, shared by all actors involved in the process, including parents, in favour of the peaceful resolution of the conflicts in the child's interests. In other words, the idea is to avoid post-separation conflict, which is highly detrimental to the child's development and well-being.

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

The parties must meet jurisdictional requirements, found in New York Domestic Relations Law ("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.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

Grounds for divorce are set forth in 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 which 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.)

The parties may be granted an uncontested divorce, either in the event of one party's default (failure to appear and defend) or in the event that neither party is contesting the cause of action (grounds). Parties often submit uncontested divorce filings following a settlement. These documents would include a proposed Judgment of Divorce; if there is litigation and the parties appear at a Preliminary Conference before the court, the parties must indicate at that time whether they have resolved grounds for divorce. Even when the parties indicate that the grounds for divorce are resolved, in most instances the Judgment of Divorce is not granted until the conclusion of the proceedings.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

No, 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.

1.4 What is the procedure and timescale for a divorce?

There is no mandatory timescale and courts maintain discretion with respect to the length of individual proceedings. Courts in some counties have established timescale guidelines by level of case complexity.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Upon consent or court approval, and with the exception of NY DRL §170(7) (irretrievable breakdown), the cause of action may be bifurcated from the ancillary relief, but this is atypical. The Supreme Court, which hears all divorce actions, may also refer relief (*e.g.* custodial and child support issues) to Family Court for resolution, as set forth in New York's Family Court Act. The New York courts may also address limited issues where another jurisdiction is the forum in which one or more requests for ancillary relief must be heard (*e.g.* the parties are divorcing

in New York and addressing the ancillary financial matters in New York, but the custody/access matters must be heard in a different state/country which is the child(ren)'s home state or which otherwise has jurisdiction over the child(ren)).

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Yes, provided that they do not violate public policy. If a party is asking a court to enforce the provisions of a foreign divorce, then the party would make an application for recognition and/or registration of the foreign decree, depending upon the provisions sought to be enforced (*e.g.* financial, custodial, etc.).

1.7 Does your jurisdiction allow separation or nullity proceedings?

Yes. Actions may be maintained to void a marriage, for annulment or separation (NY DRL §§5, 6 and 7, 140 and 200, respectively).

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Yes, they can.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

The court may make orders which distribute marital and separate property, award spousal support and/or necessaries, grant child support and direct that a party maintain disability and/or life insurance. The court may also award counsel and expert fees to the less monied spouse.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

New York is an Equitable Distribution state. The definitions of marital and separate property are contained within NY DRL §236B(1). Please see question 2.7.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

The court considers 15 factors set forth in NY DRL §236B(5).

2.4 Is the position different between capital and maintenance orders? If so, how?

Yes, support orders are calculated pursuant to formulaic guidelines. The court may also consider potential factors, distinct from the distribution factors, which are set forth in the temporary and post-divorce maintenance guidelines at NY DRL §236B.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

The couple does not need to attend court, but they will need to obtain a Judgment of Divorce, which is in the form of a court order. If the matter is simple, and there is no property distribution or other relief, the parties may submit an uncontested divorce packet which will result in a Judgment of Divorce. For more complex matters, the parties may submit a written Settlement Agreement or Stipulation of Settlement, acknowledged or proved in the manner required to entitle a deed to be recorded, with uncontested divorce filings, which will likewise result in a Judgment of Divorce.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

Spousal maintenance orders may be interim (*pendente lite*) or final (following the resolution of an action by settlement or court order). Spousal maintenance is frequently durational and under certain circumstances, lifetime maintenance may be awarded. New York has adopted both temporary and post-divorce maintenance guidelines, at NY DRL §236B, which provide for a presumptive amount and deviations from the presumptive amount in circumstances where the presumptive amount would be unjust or inappropriate; in that case, the court will consider various factors contained within the statute. In the case of post-divorce maintenance, the statute provides duration guideposts, which are percentage ranges applied to the length of the marriage.

Such orders are commonplace where a party is the dependent spouse.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Yes, NY DRL contains a definition of "marital property" at §236B(1)(c). This includes "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held […]. Marital property shall not include separate property as hereinafter defined". Separate property is defined in §236B(1)(d) as "(1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse; (2) compensation for personal injuries; (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; (4) property described as separate property by written agreement of the parties which conforms with DRL §236B(3)".

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Foreign nationals are not treated differently upon divorce. New York law will be applied unless there is a marital agreement containing applicable choice of law provisions which require the application of foreign law.

2.9 How is the matrimonial home treated on divorce?

The court has the discretion to distribute the home to either party or to issue an order directing the home to be sold. If one party retains the marital residence as his or her distribution, the other party will typically receive a credit for his or her interest in the marital equity. To the extent a party meets his or her burden of proof that he or she invested separate property into

the marital residence, the separate property may be returned prior to distribution of the remaining proceeds/equity.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

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.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

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.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Alternative dispute resolution (mediation, arbitration and/or collaborative law) is available and may be entered into voluntarily by the parties, to be conducted by privately retained individuals.

Alternative dispute resolution programmes are also available in many county courts and judicial districts, which either mandate party participation or permit voluntary participation by parties and/or their attorneys (*e.g.* matrimonial mediation programmes, matrimonial neutral evaluation programmes).

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Yes, marital agreements are widely enforceable, as set forth in NY DRL §236B(3): "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. (This may be either compliance with the choice of law contained within the agreement or in the event that there is no effective choice of law provision pertaining to validity, then the formalities required by the place of execution will generally control.) An agreement's terms must not violate New York's public policy; there are limited other bases which might render an agreement, or certain of its terms, unenforceable (*e.g.* the agreement was procured by fraud, duress, coercion or contains unconscionable provisions).

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

For a New York agreement to be enforceable, it must be subscribed by the parties and acknowledged or proved in the form required for a deed to be recorded. These formalities, including the form acknowledgments, are found in New York's Real Property Law.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Marital agreements may cover the spouses' financial obligations during the marriage and/or financial claims upon divorce, including, without limitation, maintenance, distribution and counsel/expert fees. The agreement might outline a process for the valuation and distribution of assets with specificity. Marital agreements often address estate and other rights upon death of a party. Where there are existing children of the marriage, a marital agreement may address child support, provided that the provisions of the marital agreement comply with the mandatory language and representations set forth in New York's Child Support Standards Act.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

There is no relief available under NY DRL. There may be remedies available in a civil suit, especially if the parties entered into a cohabitation agreement or otherwise maintain a basis for court intervention (*e.g.* civil litigation related to the disposition of a jointly titled asset).

4.2 What financial orders can a cohabitant obtain?

This is not applicable in our jurisdiction, with the exception of those outlined in question 4.1 above.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

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. The termination statement simply says that the partnership is terminated and the partners are no longer partners. If either domestic partner gets married to another person, or to each other, the domestic partnership is automatically terminated. Domestic partnerships are not dissolved by divorce courts.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Yes, same-sex couples are permitted to marry.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

The court may award basic child support to the party who is the primary residential custodian of the child(ren). The parties may also be ordered to pay a *pro rata* share of additional ("add-on") expenses articulated in NY DRL §240(1-b.)(a) *et seq.* and New York Family Court Act §413, identical statutes referred to

as the "Child Support Standards Act" or "CSSA". Add-ons may include child-care, unreimbursed health-related expenses, and at the court's discretion, educational and enrichment costs. A party might also be directed to maintain health insurance for the child(ren) and to provide life insurance to secure child support obligations. The court may also award counsel fees to the party seeking support on behalf of the child(ren).

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Child support is calculated pursuant to a formula. If application of the formula would be unjust and inappropriate, child support is further adjusted in consideration of factors set forth in the CSSA. These factors are commonly known as the "f" factors, in reference to their statutory location, and include:

(1) the financial resources of the custodial and non-custodial parent, and those of the child;
(2) the physical and emotional health of the child and his or her special needs and aptitudes;
(3) the standard of living the child would have enjoyed had the marriage or household not been dissolved;
(4) the tax consequences to the parties;
(5) the non-monetary contributions that the parents will make toward the care and well-being of the child;
(6) the educational needs of either parent;
(7) a determination that the gross income of one parent is substantially less than the other parent's gross income;
(8) the needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from income pursuant to DRL §240(1-b)(b)(5)(vii)(D), and the financial resources of any person obligated to support such children, provided, however, that this factor may apply only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action;
(9) provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and
(10) any other factors the court determines are relevant in each case.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Until age 21; however, the parties may agree to extend the age of emancipation beyond age 21.

5.4 Can capital or property orders be made to or for the benefit of a child?

No, they cannot.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

A child may make a claim in limited circumstances. Such actions are rare. The court would likely examine whether the child was emancipated and the reasons for the child having left home.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

Married and unmarried parents have the same rights to seek custody of and access to their child(ren).

6.2 At what age are children considered adults by the court?

Although children are not considered emancipated for child support purposes until age 21, for custodial purposes, orders regarding custody or access will terminate at age 18.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Please see question 6.2 above.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

In most circumstances, with the exceptions described in question 1.5 above, the divorce court must make a determination as to custody and access. The court can make orders with regard to how child-related decisions are made, and each parent's access, including regular holiday, vacation and other access. The court may, in certain circumstances, establish protocols with regard to the parents' conduct and communications.

6.5 What factors does the court consider when making orders in relation to children?

The court considers the best interests of the child(ren), giving regard to the circumstances of the case and the parties. NY DRL §240(1)(a). The court must take into consideration findings of domestic violence and other findings which place a child at substantial risk of harm (*e.g.* if the child is a victim of abuse).

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

Parents have broad discretion and freedom of movement in the absence of court orders; however, a parent who is objecting to the removal of the child(ren) from the jurisdiction may contest the other parent's removal by seeking court intervention. (Applicable laws are the federal Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction and Enforcement Act.) For international removals, please see question 7.2 below.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

No, there is not.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Yes, although for child support purposes, a court might consider whether the parties established a particular standard of living for the child(ren) within a joint household.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

If custody and access issues are disputed, the court will often appoint a forensic evaluator (*e.g.* a mental health professional) who prepares a report. The court maintains discretion to make a determination without such an appointment. The court is not bound by any conclusions or recommendations in the report.

Courts may interview the child, if the circumstances warrant. This is referred to as a *Lincoln* hearing (or *in camera* interview), where only the court, the Attorney for the Child and the child are present. Either party's attorney may ordinarily submit questions for consideration by the court. The transcript of the *Lincoln* hearing is sealed from access by the parties and their attorneys.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

Yes, the court may appoint an Attorney for the Child(ren).

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

If standing exists, grandparents, siblings and half-siblings may maintain claims for visitation; relatives or third parties may also petition for custody on the basis of extraordinary circumstances.

With regard to dispute resolution methods available, please see question 2.12 (with the exception of neutral evaluation, which involves discrete financial issues). Several county courts have established custody and access mediation programmes. Parents may also retain the services of a parent coordinator, who will assist the parties in resolving child-related disputes; the implementation of a parent coordinator is sometimes incorporated into the parties' final custody/access agreement.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

No; however, there is an exception for emergency circumstances pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

Please see question 7.1 above.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

The court has broad discretion to consider the individual facts and circumstances of each case. In *Tropea v. Tropea*, the New York Court of Appeals articulated "[…] we hold that each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child. […] in all cases, the courts should be free to consider and give appropriate weight to all of the factors that may be relevant to the determination. These factors include, but are certainly not limited to each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements. In the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests." 87 N.Y.2d 727 (1996).

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

Please see question 7.3 above.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

While not uncommon, these cases often present complexities and are highly fact-specific. The burden may be high.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Yes, the jurisdiction is a party to the Hague Convention. Domestically, the Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction and Enforcement Act would apply.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

One significant development is the addition of domestic violence as a factor to the Equitable Distribution provisions of the NY DRL, at §236B(5)(d)(14).

Another development is the passage and codification of The Child-Parent Security Act, which modified New York's Family Court Act to permit gestational surrogacy and to provide a means of establishing parentage for children born via reproductive technology.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

Courts have been embracing a number of virtual and electronic methods, including audio-visual technology for trials and conferences, as well as the e-filing of documents in new and ongoing proceedings. It is likely that many of these methods, having proven efficient, will remain in place; New York courts had previously begun implementing e-filing in matrimonial matters and incorporating new technologies.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

One change that occurred during the COVID-19 pandemic was the implementation of an Executive Order permitting virtual notarisation throughout New York State. At the time of writing, that has been terminated. This author believes that a reinstatement of the Executive Order would be of assistance to practitioners.

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

Sections 20-96 and 20-97 of the Code of Virginia, 1950, as amended, contain Virginia law for jurisdiction of divorce proceedings. Our *Circuit* Courts have jurisdiction of suits for annulling or affirming marriages and claims for separate maintenance and divorce. To file a claim for affirmation, annulment or divorce, one of the parties (Plaintiff or Defendant) must be an actual *bona fide* resident and domiciliary of Virginia for at least six months prior to filing such action.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

Grounds for divorce in Virginia are governed under Section 20-91. They are limited to: 1) *adultery* or for *sodomy* or *buggery* committed outside of the marriage; 2) conviction of a felony (but sentenced to confinement for more than a year without cohabitation after knowledge of the confinement); 3) cruelty (causing apprehension of bodily harm) or wilful desertion (after passage of a year); and 4) separation of the parties for a year with the intention of one of the parties that this is permanent (without intervening cohabitation of the parties). An exception is that either party may be granted a divorce after six months of intentional separation if the parties have no minor children and do have a separation agreement.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

Virginia has no "private divorce". To be legal, a divorce must be by decree from our Circuit Court. In many of our counties and cities, there does not have to be a Court appearance if it is uncontested. Some of our Courts make use of deposition transcripts and a signed final decree (by the parties or their counsel) and some allow divorce by the signed decree accompanied by affidavits of separation in accordance with our statute. In these latter circumstances, no Court appearance is necessary. See Section 20-106.

1.4 What is the procedure and timescale for a divorce?

Section 20-99 sets out the requirements for procedure. There must be independent corroboration for the residency, domicile and grounds. This section sets out the notice requirements and the required process for service.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Generally, if there is no challenge, a divorce can be granted alone. This may, or may not, affect such other matters, such as finances, if *in personam* notice has been effectuated.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Foreign divorces may be recognised in Virginia, but in keeping with our laws, it is not by full faith and credit, but by the process of comity. This means that, depending on the circumstances of the individual case, a Court may recognise the validity of such a decree. In general, practitioners find it is within the discretion of our Courts as to whether a decree is recognised. Recognition of validity will depend on matters such as valid notice, timely notice, where and how notice was served, ability of one of the litigants to be engaged in the process, whether both parties entered into the process, and overall fairness/equity.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Suits to annul a marriage are permitted under several circumstances. Section 20-89.1 details how a marriage can be void (unable to continue) or voidable (can later be affirmed, but can be voided by the aggrieved party), with reference to other relevant code sections in Title 20: 20-13; 20-38.1; 20-45.1; and 20-48.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

This would be entirely up to the discretion of the sitting Judge in our Circuit Court. There is no prohibition against such a stay, nor is there a requirement to do so.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

Depending on the request of the party/parties, and during a divorce action, the Court can and will deal with *temporary* support orders, Section 20-103, which gives Courts the power

to make orders pending the final divorce for spousal and child support, for exclusive use of a residence, and for injunctions and other relief concerning security of finances to preserve the marital estate for final hearing (or disposition) and to continue health and life insurance. At the final hearing or disposition, our Courts will deal with, if requested by the parties/party, the issues of child support (Sections 20-107.2, 20-108.1 and 20-108.2), spousal support (alimony) (Section 20-107.1) and equitable distribution of marital property (Section 20-107.3).

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

Virginia does not have any such category as a matrimonial regime.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

Referencing spousal support, Section 20-107.1(E)1 through 13 sets out the factors our Courts use to determine the amount and the duration of such support. Currently, spousal support is not deductible to the payor nor taxable to the payee. Distribution of marital property is governed by the factors in Section 20-107.3. Generally, the factors in each statute allow the Court to assess the status of the parties, physically and mentally, their current employment status, education, ability to obtain employment, their age, their assets, their roles during the marriage, tax implications, and the fault for the dissolution of the marriage relationship.

2.4 Is the position different between capital and maintenance orders? If so, how?

Generally, Virginia Courts are required, per Section 20-107.1(E)8, to have considered and decreed as to the distribution of property/assets, both separate and marital, prior to determination of maintenance/spousal support/alimony. The issues are generally heard during the same trial if the matters are contested, and both are included in a final order.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

Parties generally do not need to attend Court once they have "agreement"; however, to provide for Court enforcement of such agreement(s), the agreement(s) must be incorporated in an order of the Court.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

Spousal maintenance orders can be temporary, for a period of years or during the joint lives of the parties, generally subject to modification under changed circumstances. Refer to Sections 20-109 and 20-110 of Title 20 of the Code of Virginia.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

If the reference to "matrimonial property" is the same as our "marital property", it is recognised in Virginia, and only marital property can be distributed at divorce. The separate property of parties cannot be distributed under our equitable distribution laws. For example, a party's inherited property, not co-mingled to the point where the separate origin cannot be traced, cannot be distributed to the opposing spouse. Separate property can, however, be used to award lump-sum spousal support when the circumstances would dictate the necessity.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

From experience, our Courts do not treat foreign nationals differently from our own citizens. There have been occasions where a Court has applied foreign law in making a decision on distributing property or where the parties have undergone Court hearings and processes in a foreign jurisdiction. The facts and circumstances would dictate the Judge's discretion in making a decision. We have no formal statutes that would treat foreign nationals differently, nor do we have statutes that would disallow use of applying foreign law depending solely on the facts of an individual case.

2.9 How is the matrimonial home treated on divorce?

The marital residence is treated no differently than other marital property. Unlike some of our fellow states, in Virginia there is no law allowing one party, after divorce, the use of a marital residence, even if that party has minor children in his/her custody. The transfer of ownership (if sale is not ordered) to one party or the other would depend on factors involving the ability to pay for the equity to and for the non-owning spouse and to remove the spouse from liability on the liens (mortgage notes and others such as tax liens, vendor liens, etc.).

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

Whether the concept of a *trust* is recognised is dependent on whether it is relevant to distribution of marital funds/assets contained in the trust, and how the document reads. Regarding spousal or child support, income from such trusts is relevant, and under certain circumstances the corpus may be relevant as well. However, there is no separate law dealing with trusts in our domestic relations statutes.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

If this question is whether our Courts will enforce financial requirements/orders contained in a foreign divorce decree, our Courts have the jurisdiction, assuming the jurisdictional and notice requirements are met to incorporate by order such claims/order when requested, again given the discretion of comity in recognition and the individual facts of the case.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Resolution of disputes regarding finances can be by negotiation between the parties and/or with counsel, mediation, arbitration or Court adjudication.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Pre-marital and marital agreements made during marriage are enforceable. Section 20-109.1 of the Code of Virginia recognises the incorporation, ratification and/or affirmation of such agreements. Sections 20-146 through 20-155 sets out Virginia's Premarital Agreement Act. This statutory section includes both pre-marital and marital agreements. Section 20-155 specifically recognises marital agreements between persons. The difference in application, however, is that marital agreements are immediately effective, otherwise they are entitled to the conditions in Sections 20-147 through 20-154.

The question as to enforcement of foreign agreements has to be answered in a way most attorneys answer questions: it depends. Our state looks to its own contracts laws but will obviously look to the individual facts in each case, to include but not be limited to: whether each were represented by counsel; the culture in that foreign jurisdiction as to the rights of wives *versus* husbands; and all other relevant facts. The Court in both cases, pre- and post-marriage, has discretion as to incorporation into a divorce decree. Failing the divorce Court to enforce, litigants are left up to a *suit* for *specific performance*, where similar factors guide a Court's decision.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

The procedures are no different than for a separation agreement. After an agreement has been incorporated into a Court order, it becomes enforceable by the Court.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance)?

Yes, marital agreements can cover all financial matters; however, child custody and support remain under the jurisdiction of the Court and cannot be controlling in a marital or pre-marital agreement. Child custody and support may be modified if the moving party can show there has been a material change of circumstances that warrants the modification.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

Virginia does not have spousal support for unmarried persons. If there are property claims, one should investigate the equitable remedies of specific performance of a contract (if the parties have one) or unjust enrichment, equitable lien, constructive or resulting trust. The provisions of the law are not in the domestic relations purview, but available to all persons.

4.2 What financial orders can a cohabitant obtain?

There are no laws recognising the status of cohabitants that would give them any rights non-cohabitants have.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

In Virginia, there is no such formal category that would yield the rights and obligations of a married couple.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Virginia has same-sex marriage and the rights are the same as if the parties were opposite sexes.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

Parents are entitled to seek child support whether the parents are married or not.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Child support in Virginia is calculated using guidelines, as set out under Section 20-108.2 of the Code of Virginia. The parents' incomes, healthcare premiums for the children, and work-related childcare costs, are inputted into either a regular or shared guidelines chart (depending on the custody schedule). A parent can petition the Court for a deviation from the guidelines, using the factors in Section 20-108.1. Child support may be paid directly from one parent to the other, or administered by the Virginia Department of Social Services, Division of Child Support Enforcement.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

In Virginia, child support obligations generally cease at age 18 (or if still in high school and a full-time student, at age 19). The only exception for a longer support obligation is for a child who is incapacitated and unable to support themselves. There is no provision for university assistance.

5.4 Can capital or property orders be made to or for the benefit of a child?

Generally, child support is calculated based on the parents' incomes as described above but can be ordered from a parent who has a substantial liquid asset if, for example, that parent is unemployed.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

Children, if not in the custody of their parents, under general circumstances could obtain support through a guardian or other custodian. The Court would take the incomes of the parents, and any substantial liquid assets of the parents, among other factors, into consideration.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction, whether (a) married, or (b) unmarried.

Rights of custody in Virginia do not depend on marriage, and there is no presumption for primary custody in favour of either parent.

6.2 At what age are children considered adults by the court?

Children are considered adults by the Court when they reach the age of 18.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

As noted above, the duration of a child support order would cease at a child's turning 18, or 19 if a full-time high school student, and may continue if a child is permanently disabled, not self-supporting and living in the home of the parent seeking to continue child support. See Section 20-124.2 of the Code of Virginia.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

A Court does not automatically make custodial orders in the event of a divorce but will do so if requested by one or both parents. The Court has the power to award sole or joint custody of children, decision-making authority of either parent, and can make awards concerning schedules, even extending to attendance in certain schools, psychological and medical assistance.

6.5 What factors does the court consider when making orders in relation to children?

The factors used by the Courts in Virginia are codified under Section 20-124.3, known colloquially as the "best interests of the child". They assess the physical and mental condition of the child and the parents, the relationship with each parent, the role each parent has played or will play in the care and the upbringing of a child. They consider whether there has been alienation by one parent and how each has or has not supported the other in the relationship with the child. Preference of the child is a factor, given the age and reasonable intelligence of the child. Many facts and situations are considered by a Court when granting custody in a litigated setting.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

A parent can make day-to-day decisions on behalf of their child absent a Court order and can even make certain major decisions such as enrolling a child in school or moving to a different jurisdiction (within Virginia or the United States). However, the other parent would have the right to file a petition with the Court to attempt to reverse or stop such a decision. Without a Court order, a parent may travel abroad with their child; however, it is strongly recommended that the travelling parent obtain a "permission to travel" letter from the other parent.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

In many jurisdictions outside of Virginia, there is a presumption of equal time; however, in Virginia, the presumption is only that children generally need both parents and a division of time does not have to be equal. In more recent years, our Courts have been increasingly open to a more or less equal time, but it is by no means a presumption.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Our Courts cannot make orders on separation or divorce when parents are unmarried. The Virginia Juvenile and Domestic Relations District Courts have jurisdiction over custody disputes between unmarried parents, or where the parents are married but no grounds for divorce exist.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

Welfare reports are not required; however, there are occasions when a Court will, generally upon request of a litigant, appoint a custodial evaluator (a psychologist who will do testing of the parties and often the children and talk with medical authorities and family members), but the opinion of the evaluator is not set in stone where a Judge is concerned. The Judge alone makes the decision. In some instances, the child will meet the Judge.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

There is no "separate representation" for children. The Court might appoint a guardian ad litem who will investigate and report on the issues, but that professional, generally an attorney, does not represent the child as his/her attorney, but is an arm of the Court to present information related to the best interest of the child factors. There is no prohibition against a child hiring his/her own lawyer, but it is not a general practice in Virginia.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Generally speaking, there are no other adults who have any say in arrangements for children. Parents can utilise old-fashioned negotiation or can engage in mediation. Arbitration is not generally permitted for custodial decisions. In practice, however, litigants have used arbitration but understand it is non-binding and not authorised by statutory law.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

In most original custodial decisions, there is no prohibition against a parent with chief custody moving. However, Section

20-124.5 of the Code of Virginia is required to be restated in all custody orders, and it provides that the moving party has to provide 30 days' advance notice prior to such move to the other party. It is believed that this would give the injured party time to petition the Court for a temporary injunction and to schedule a hearing. Further, if the move would reduce or eliminate the access time to the parent left behind that is set out in a custodial order, the moving party could be held in contempt of Court as denying the other's access to the child/children.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

The response to this question is the same as question 7.1.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

The Court uses the factors in Section 20-124.3 to determine whether or not to allow a parent to relocate with a child, whether it is abroad or not. In addition, the Court weighs how the move would impact the child's relationship with the left-behind parent and the location and safety of the intended relocation. In practice, it is rare that a Court would allow an international relocation, especially if the relationship between the left-behind parent and the child would be negatively impacted.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

There is less reluctance to allow relocation within the U.S.; however, the same factors would be considered in making a decision as to relocation outside of the United States. It is decided in favour of "the best interest of the child". This is a very broad concept and allows a Court wide latitude in making such decisions. In addition to the traditional factors discussed elsewhere in this chapter, other factors include, but are not limited to: the place of relocation; distance and travel; possible residences; and schools in the place of relocation. The Court also considers whether the move would independently benefit the children, not just provide benefits to the moving parent, and how the move would impact the relationship between the child and the non-moving parent.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

It is rare for a custodial parent to be allowed to relocate, either internationally or interstate. But as noted in Virginia, the concept of "best interest of the child", habitual residence and how these factors affect the decision play a substantial role.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Our country is a party to the Hague Convention and is cognisant and aware of the provisions, assuming practitioners bring the rules and regulations to the attention of the Court. In practice, however, it does not bind the Court in its decision-making; Section 20-146.23 of the Code of Virginia states that a "court of this Commonwealth *may* enforce an order for the return of a child made under the Hague Convention on the Civil Aspects of International Child Abduction" (emphasis added). Note the word *may*, as it differs from our own UCCJEA between states in the U.S.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

Several changes codified in the 2021 legislative session appear to be significant:

- Section 20-99(1) has been amended to drop the requirement for a corroborating witness to the separation to proceed with an uncontested divorce.
- Section 20-108.1(B)(3) was amended to include that a party's incarceration of over 180 consecutive days or more "shall not be deemed to be a voluntary unemployment or underemployment" and the new statute shall be a material change of circumstances upon which to base a child support modification.
- A new chapter, the Uniform Collaborative Law Act (Sections 20-168 through 20-187) codifies a framework for the collaborative law process in Virginia. Collaborative law is a process where parties attempt to resolve their domestic dispute without the intervention of a tribunal, and such process must begin with a signed agreement. If the matter is pending before the Court, the signed agreement must be filed with the Court.

We anticipate there will be litigation surrounding the recent change to Section 20-108.1(B)(3), as the new wording does not consider what is best for the children, and that there will be further changes to this code section.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

The Court process in Virginia was greatly affected. Courts were closed for some significant time; now it is left to the discretion of the individual Chief Judges of the various judicial entities whether to have in-person or remote hearings. It is hard to say whether such process will remain after COVID-19 – we personally think it is not likely. Some local Courts have stopped allowing pleadings to be emailed or faxed. However, we have found that Judges are much more inclined to allow a hybrid trial, where some witnesses testify remotely while the parties and counsel are present in the courtroom.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

We need better clarification of Virginia's recognition of the Hague Convention, spelled out in some detail as opposed to our present statute. The *Coe v. Coe* case, 66 Va. App. 457 (2016), dealt with the issue of "habitual residence", which is not really defined in the Hague Convention. In Virginia it is now defined, as it was in a U.S. Court of Appeal's 4th Circuit decision for purposes of the Convention, as "the place where a child has been physically for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective". The authors believe that the Court's reliance on that concept fell mainly on the facts of that specific case and should not be applied generally.

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

Washington has subject matter jurisdiction over a divorce if either party resides in the state for 90 days preceding the filing of the case or is a member of the armed forces stationed in Washington. The party filing must be in Washington at the time the Petition for Divorce is filed. Revised Code of Washington ("RCW") Chapter 26.09.030.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

The sole ground for divorce in Washington is "irreconcilable differences". One party must allege that the marriage is irretrievably broken. No further proof is necessary to achieve divorce. To enter a Divorce Decree, 90 days must have elapsed since the service of the Petition for Divorce. RCW 26.09.030.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

At least one party must appear in court to offer proof to the court to finalise the divorce by entering the Findings of Fact, Conclusions of Law and Divorce Decree. Some counties have differing court rules regarding entry of final documents. For example, in a divorce that does not involve children, the Findings of Fact, Conclusions of Law, and Decree can be offered electronically. To do so, the parties may request entry of the final documents without the necessity of a court appearance by executing a Declaration in Lieu of Formal Proof.

It is not possible to have a private divorce, but a court may seal a file or certain documents in a file to protect the parties' privacy. Judges may also accept offers of proof in chambers, rather than a public courtroom, depending on the circumstances of the case.

1.4 What is the procedure and timescale for a divorce?

A divorce is commenced by filing a Summons and Petition for Divorce Decree, which must be served upon the other party. The responding party has 20 days to respond to the Petition. Most county local rules provide case schedules to manage case deadlines. In many counties, parents are required to attend a parenting seminar. If the parties reach agreement on all issues, and 90 days have lapsed between the service of the Petition, the case may be finalised at a hearing to offer proof that the marriage should be dissolved. If the parties do not reach agreement, the case proceeds to trial.

The required 90-day period waiting period commences when the service of Summons was made upon the respondent or the first publication of the Summons was made. *In re Marriage of Bueckling,* 179 Wn.2d 438, 313 P.3d 999 (2013), *cert. den.*, 135 S. Ct. 181, 190 L. Ed. 2d 129 (2014).

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

A divorce cannot be finalised without resolving all associated matters. Pursuant to statute, in entering a decree of dissolution of marriage, the court shall determine the marital status of the parties, make provision for a parenting plan for any minor child of the marriage, make provision for the support of any child of the marriage entitled to support, consider or approve provision for the maintenance of either spouse, make provision for the disposition of property and liabilities of the parties, make provision for the allocation of the children as federal tax exemptions, make provision for any necessary continuing restraining orders, make provision for the issuance within this action of the restraint provisions of a domestic violence protection order or an antiharassment protection order, and make provision for the change of name of any party. RCW 26.09.050.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Yes, courts in Washington recognise foreign divorces under the legal principal known as "comity", unless the foreign order conflicts with local law or violates the state's public policy. Issues can and do arise when one party seeks to enforce a foreign divorce decree in Washington with respect to property disposition, child support, or other related issues. A foreign divorce may be recognised in Washington by recording a foreign divorce decree with a county auditor or recorder's office. Whether the county auditor or recorder's office will record a foreign divorce decree is determined by each individual county. If the documents are in a language other than English, they will need to be translated. The Washington State Department of Health does not register foreign divorces.

Orders for child custody from a foreign court will be enforced under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), RCW 26.27. However, if the child custody law of a foreign country violates fundamental principles of human rights, Washington courts are not required to apply the UCCJEA.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Parties may petition for a legal separation or declaration concerning the validity of a marriage pursuant to RCW 26.09.020. Most health insurance plans continue to cover a separated spouse. Any assets and liabilities are separate once the Decree of Legal Separation is entered.

A marriage is voidable when either party to a marriage is incapable of consenting thereto, for want of legal age or a sufficient understanding, or when the consent of either party is obtained by force or fraud. A Decree of Invalidity is entered upon the court finding the marriage invalid.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Yes. In particular, proceedings involving child custody will be stayed until the courts in both countries can determine jurisdiction.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

The court orders a disposition of property and liabilities, either community or separate, as appears just and equitable.

The court can also enter orders for spousal maintenance and child support on a temporary and permanent basis.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

Washington is a community property state. The court applies statutes to determine the fair and equitable distribution of property and liabilities as well as the definitions of separate and community property.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

In dividing assets and liabilities, the court considers the following factors: (1) the nature and extent of the community property; (2) the nature and extent of the separate property; (3) the duration of the marriage or domestic partnership; and (4) the economic circumstances of each spouse at the time the division of property is to become effective.

In determining spousal maintenance, the court considers the length of the marriage, the ability to pay of one spouse and the need for maintenance of the other spouse.

Child support is determined by statutory factors including the parents' incomes, ages of the children, and any credits for expenses that one parent pays, such as health insurance.

2.4 Is the position different between capital and maintenance orders? If so, how?

Yes, courts address property division and maintenance separately. Property division is based upon a fair and equitable distribution of property. Maintenance is based upon the needs of one spouse and the ability of the other spouse to pay maintenance, in consideration of child support that may also be ordered.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

Yes, parties will need to enter agreed court orders with the court. This requires an appearance unless they file a Declaration in Lieu of Formal Proof.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

In general, spousal maintenance is ordered based upon the length of the marriage. The recommended duration is one year of maintenance for every four years of marriage. Spousal maintenance is ordered in cases where one party has the ability to pay and another party has a need.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Yes, Washington is a community property state.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

No, foreign nationals are not treated differently. Courts do not apply foreign law in the state of Washington.

2.9 How is the matrimonial home treated on divorce?

The matrimonial home is generally awarded to the primary parent of the children. Remaining in the home with the children is in the best interests of the children. If the parties do not have children, they negotiate who keeps the house or if they want to sell it and divide the proceeds. If one party is awarded the house, that party refinances the mortgage on the home to remove the other spouse from the liability and that spouse's name is removed from the deed to the property.

2.10 Is the concept of "trusts" recognised in your jurisdiction? If so, how?

Yes. A court can consider trust distributions to a party as income to that party. If the community has contributed to the trust, the trust may be deemed community property and result in the final property distribution. Additionally, trusts are used for estate planning and asset protection.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

If a foreign divorce is registered in Washington, any outstanding judgments may be enforced by the court depending on the terms of the judgment, agreements, or spousal maintenance.

In general, property distributions are not modifiable except in circumstances such as fraud. Child support is subject to modification after the children have lived in Washington for at least six months.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Mediation, settlement conferences, and arbitration are all available to resolve financial settlements. Many counties require the parties to engage in dispute resolution prior to trial.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Pre- and Post-Nuptial Agreements are enforceable. They must comply with common law. Bases that may render agreements unenforceable include if the agreement was procured by fraud, duress, coercion, or contains unconscionable provisions.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

Marital Agreements must comply with contract law and Washington common law. They must be signed by the parties and acknowledged by a notary. They must include full disclosure of the parties' respective financial holdings and be entered into freely and voluntarily.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Parties can agree to limit or exclude financial support for a spouse in Marital Agreements. Marital Agreements do not include financial claims regarding children, such as child support. Marital Agreements are limited to disposition of property and liabilities, as well as spousal maintenance.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

Yes, domestic partners and parties in Committed Intimate Relationships ("CIRs") have the same financial claims as a married couple, with the exception of spousal maintenance. Spousal maintenance is not awarded in these cases. The grounds for making financial claims are the same as in a divorce – property and debt accumulated during the relationship must be divided. RCW 26.60.015.

4.2 What financial orders can a cohabitant obtain?

A decree or Separation Contract and Property Settlement Agreement dividing the property and debt. RCW 26.09.070. If the cohabitants have children together, child support will be ordered. RCW 26.23.050.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

Washington recognises state-registered domestic partners who are over the age of 62. RCW 26.06.030. This requires that parties inhabit the same residence. CIRs are also recognised under RCW 26.04.010.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Yes, Washington recognises same-sex marriage by statute as well as CIRs. RCW 26.09.030.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

The court may award child support based upon the statutory factors outlined in RCW 26.19. In calculating child support, a court may consider additional factors such as extraordinary income of parents, day-care expenses, private school expenses, and medical expenses.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Child support is calculated pursuant to RCW 26.19. It can be administered by the court or by the Washington State Support Registry.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Post-secondary education support is advisory, not mandatory. A parent must apply for post-secondary support prior to the child turning 18 or graduating high school, whichever is later. RCW 26.19.090.

5.4 Can capital or property orders be made to or for the benefit of a child?

Child support cannot be satisfied with capital or property. Child support is intended to be a monthly payment to support the child's basic needs and to provide additional support commensurate with the parents' income, resources, and standard of living. The child support obligation should be apportioned between the parents.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

Generally, no. Child support is an obligation by parents to provide for the child's basic needs. There is a statute of limitation of 10 years for claiming past due child support. Any amounts received go to the parent to whom the child support was owed.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction, whether (a) married, or (b) unmarried.

Both parents have rights to a Parenting Plan or Residential Schedule regardless of whether they were married or not. The state of Washington does not use the term "custody".

6.2 At what age are children considered adults by the court?

The court considers children adults at the age of 18.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Children orders last until the age of 18.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

The court enters a Parenting Plan or Residential Schedule that provides for the time the children will spend with each parent. The court does not automatically make these orders in the event of divorce. Parties either agree to these orders in alternative dispute resolution or the court will enter an order after considering evidence at trial.

6.5 What factors does the court consider when making orders in relation to children?

RCW 26.09.184 requires the court to consider the following:

"(1) OBJECTIVES. The objectives of the permanent parenting plan are to:
- (a) Provide for the child's physical care;
- (b) Maintain the child's emotional stability;
- (c) Provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for future modifications to the permanent parenting plan;
- (d) Set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria in RCW 26.09.187 and 26.09.191;
- (e) Minimize the child's exposure to harmful parental conflict;
- (f) Encourage the parents, where appropriate under RCW 26.09.187 and 26.09.191, to meet their responsibilities to their minor children through agreements in the permanent parenting plan, rather than by relying on judicial intervention; and
- (g) To otherwise protect the best interests of the child consistent with RCW 26.09.002.

(2) CONTENTS OF THE PERMANENT PARENTING PLAN. The permanent parenting plan shall contain provisions for resolution of future disputes between the parents, allocation of decision-making authority, and residential provisions for the child.

(3) CONSIDERATION IN ESTABLISHING THE PERMANENT PARENTING PLAN. In establishing a permanent parenting plan, the court may consider the cultural heritage and religious beliefs of a child.

(4) DISPUTE RESOLUTION.

(5) ALLOCATION OF DECISION-MAKING AUTHORITY.

(6) RESIDENTIAL PROVISIONS FOR THE CHILD. The plan shall include a residential schedule which designates in which parent's home each minor child shall reside on given days of the year, including provision for holidays, birthdays of family members, vacations, and other special occasions, consistent with the criteria in RCW 26.09.187 and 26.09.191.

(7) PARENTS' OBLIGATION UNAFFECTED. If a parent fails to comply with a provision of a parenting plan or a child support order, the other parent's obligations under the parenting plan or the child support order are not affected. Failure to comply with a provision in a parenting plan or a child support order may result in a finding of contempt of court, under RCW 26.09.160.

(8) PROVISIONS TO BE SET FORTH IN PERMANENT PARENTING PLAN. The permanent parenting plan shall set forth the provisions of subsections (4)(a) through (c), (5)(b) and (c), and (7) of this section."

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

Without court orders, parents can take any unilateral action. However, any unilateral action taken that is not in the best interests of the child will be addressed by the court and the court, in its discretion, can consider such action in ordering a Parenting Plan.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

No, there is no such presumption.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Yes, unmarried parents are treated in the same way as married parents.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

Yes, in some cases a Guardian ad Litem ("GAL") or Parenting Evaluator is appointed to conduct a Parenting Evaluation. A judge has discretion in ordering Parenting Plans and may consider any report or recommendations. The child does not meet the judge. The child's voice is provided through the GAL or Parenting Evaluator.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

GALs represent the interests of the children and GALs can be lawyers. Attorneys can directly represent children pursuant to statute; however, it is rarely done.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Step-parents have input regarding Parenting Plans; however, grandparents do not. Mediation, settlement conferences, and arbitration are methods of dispute resolution regarding Parenting Plans. Most Parenting Plans require dispute resolution before court action.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

Yes; however, a court must order that the parent may relocate with the children. The Relocation Act is codified in RCW 26.09.405 and governs these cases.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

No. The Relocation Act applies.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

RCW 26.09.520 provides:

> "The person proposing to relocate with the child shall provide his or her reasons for the intended relocation. There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following factors. The factors listed in this section are not weighted. No inference is to be drawn from the order in which the following factors are listed:
>
> (1) The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;
> (2) Prior agreements of the parties;
> (3) Whether disrupting the contact between the child and the person seeking relocation would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;
> (4) Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191;
> (5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;
> (6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
> (7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;
> (8) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;
> (9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;
> (10) The financial impact and logistics of the relocation or its prevention; and
> (11) For a temporary order, the amount of time before a final decision can be made at trial."

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

The same factors identified in question 7.3 apply.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

It is not rare. There is a rebuttal presumption that the intended relocation of the child will be permitted.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Yes, the US is a party to the Hague Convention. For domestic abduction cases, the UCCJEA and the Parental Kidnapping Prevention Act apply.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

Washington state's Non-Parent Custody Law changed in 2021. Pursuant to RCW 26.10, a non-parent must ask for legal guardianship instead of a Non-Parent Custody Order. Non-Parent custody orders in effect prior to 2021 will remain in effect.

Due to COVID-19, meetings, hearings, dispute resolution, and trials were held virtually in most of 2020 and 2021. Post-COVID-19, courts are allowing in-person appearances; however, they are making overall changes to the rules that may likely keep virtual hearings as an option for litigants. The court will hear in-person motions for emergency matters such as domestic violence cases. Face coverings or masks are still required.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

Hearings are held virtually with the exception of emergency domestic violence orders. All filings are electronic, including judges' working papers. Some counties are considering long-term changes to procedures.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

Standards for GALs in performing Parenting Evaluations need to be instituted.

Stacy D. Heard is a family law sole-practitioner in Seattle, Washington, where she has served clients for more than 20 years. Her family law practice includes cases involving high-conflict parenting/custody issues, international custody disputes, relocation, complex financial issues, and post-decree matters. Stacy is trained in cross-border mediation, arbitration, collaborative law, and as a Guardian ad Litem. She is a fellow of the International Academy of Family Lawyers (IAFL), the Association of Family and Conciliatory Courts (AFCC), and the American Bar Association Family Law Section, for which she is the International Law Committee Chair and serves on the governing council. Stacy frequently teaches CLE (Continuing Legal Education) courses on family law to other professionals throughout the US and internationally.

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The Law Office of Stacy D. Heard, PLLC provides a full range of family law services, including divorce, legal separation, complex financial issues, parenting plans and custody disputes, international child custody disputes, relocation, paternity, modifications of parenting plans and child support orders, as well as other post-dissolution matters.

The firm's owner, Stacy Heard, is well-respected for her intense advocacy, strong work ethic, pragmatism, and compassion in cases involving both traditional and non-traditional families. She prides herself on providing caring counsel to clients while, at the same time, being a skilful and effective advocate.

In addition to providing empathetic representation, Stacy has the ability to prepare successful strategies in all aspects of family law cases. Stacy frequently teaches CLE (Continuing Legal Education) courses on family law to other professionals throughout the US and internationally.

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