



ICLG

The International Comparative Legal Guide to:

Family Law 2017

1st Edition

A practical cross-border insight into family law

Published by Global Legal Group, with contributions from:

Amorós Arbáizar
Attorney Zharov's Team
Boulby Weinberg LLP
Chia Wong LLP
Cohen Rabin Stine Schumann LLP
Delerue Sharma
Diane Sussman
Etude de M^e Anne Reiser
FSD Law Group Inc.
Gama e Gerace – Advogados Associados
Haraguchi International Law Office

Kingsley Napley LLP
Laura Dale & Associates, P.C.
Lebenberg Advokatbyrå AB
Lloyd Platt & Co Solicitors
Mangan & Company Solicitors
Shang & Co.
SKO Family Law Specialists
The International Academy of Family Lawyers
Villard Cornec & Partners
Withers
YTT Law Office



global legal group

Contributing Editor
Charlotte Bradley, Kingsley Napley LLP

Sales Director
Florjan Osmani

Account Directors
Oliver Smith, Rory Smith

Sales Support Manager
Paul Mochalski

Editor
Tom McDermott

Senior Editor
Rachel Williams

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
January 2017

Copyright © 2017
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-911367-32-1
ISSN 2398-5615

Strategic Partners



General Chapters:

1	International Marital Agreements – the Approach by the English Court on Divorce – Charlotte Bradley, Kingsley Napley LLP	1
2	The Practice of International Family Law – William Longrigg & Nancy Zalusky Berg, The International Academy of Family Lawyers	6
3	It's Time For No Fault Divorce – Vanessa Lloyd Platt, Lloyd Platt & Co Solicitors	12

Country Question and Answer Chapters:

4	Brazil	Gama e Gerace – Advogados Associados: Marco Aurelio Gerace & Gustavo Antonio Silva	16
5	Canada – Ontario	Boulby Weinberg LLP: Sarah Boulby & Oren Weinberg	24
6	Canada – Quebec	FSD Law Group Inc.: Pierre-Hugues Fortin & Marie-Hélène Saad	30
7	England & Wales	Kingsley Napley LLP: Claire Wood & Charlotte Bradley	36
8	France	Diane Sussman: Diane Sussman	44
9	Germany	Delerue Sharma: Stefanie Sharma	51
10	Hong Kong	Withers: Sharon Ser & Philippa Hewitt	55
11	Ireland	Mangan & Company Solicitors: Avril Mangan	64
12	Japan	Haraguchi International Law Office: Kaoru Haraguchi	72
13	Malaysia	Shang & Co.: Fion Wong Sook Ling & Chris Chin Shang Yoon	78
14	Russia	Villard Corneé & Partners and Attorney Zharov's Team: Julie Losson & Anton Zharov	84
15	Scotland	SKO Family Law Specialists: John West & Rachael Kelsey	92
16	Singapore	Chia Wong LLP: Wong Kai Yun	100
17	Spain	Amorós Arbáizar: Amparo Arbáizar	108
18	Sweden	Lebenberg Advokatbyrå AB: Torgny Lebenberg & Kristin Håkansson	115
19	Switzerland	Etude de M ^e Anne Reiser: Anne Reiser	121
20	Turkey	YTT Law Office: Mert Yalcin	127
21	USA – New York	Cohen Rabin Stine Schumann LLP: Gretchen Beall Schumann, Esq.	133
22	USA – Texas	Laura Dale & Associates, P.C.: Laura D. Dale & Ashley V. Tomlinson	139

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

England & Wales

Claire Wood



Charlotte Bradley



Kingsley Napley LLP

1 Divorce

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

Jurisdiction to commence divorce proceedings in England and Wales is established under European Council Regulation no. 2201/2003 (“Brussels II”). The Courts of England and Wales will have jurisdiction for divorce proceedings where:

- the habitual residence of both spouses is in England and Wales;
- the last habitual residence of both spouses was England and Wales and one spouse still resides there;
- the respondent’s habitual residence is in England and Wales;
- the applicant’s habitual residence was in England and Wales for at least one year immediately before the application is made;
- the applicant’s habitual residence was in England and Wales for at least six months and he/she is domiciled in England and Wales;
- both spouses are domiciled* in England and Wales; and
- where the Court of no other EU Member State (party to Brussels II) has jurisdiction for divorce proceedings, jurisdiction can be based on the domicile* in England and Wales of one of the spouses.

*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.

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.

Divorces can proceed uncontested and usually do, although we do not yet have “no fault” divorce unless the parties have been separated for at least two years and both consent to a decree of divorce.

1.3 In the case of an uncontested divorce, do the parties need to attend court?

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.

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 *decree absolute*.

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.

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* (the final step in the divorce) can be granted.

1.6 Are foreign divorces recognised in your jurisdiction?

Yes, in certain circumstances. The rules are set out in the Family Law Act 1986 and, as between EU Member States (not Denmark), in European Council Regulation 2201/2003 (“Brussels II”).

As between EU Member States, a judgment i.e. divorce in a member state is recognised by other Member States without a special procedure.

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.

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.

Within the EU, Brussels II provides for mandatory stays where there are proceedings first seized in another Member State.

The Domicile and Matrimonial Proceedings Act 1973 provides for a mandatory stay when there are proceedings elsewhere in the British Isles. That statute 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.
- 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 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 husbands and wives 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 orders to make? What factors are taken into account?

The Court has regard to the following factors set out in section 25 of the Matrimonial Causes Act 1973:

- all the circumstances of the case with 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 which 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 which 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?

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 are 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 *Lexi 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?

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 in so far as it is a nuptial settlement capable of variation (section 24(c) 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 regards to:

- the connection which the parties have to England and Wales;
- the connection with the country of divorce and any other country;
- financial benefit already received/likely to be received as a consequence of the divorce; and
- the extent to which any foreign order has been complied with;
 - any right which 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 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 was it a simple contract to choose the couple's property regime and does not mention a future separation?

For further details of the English court's approach to foreign agreements see Chapter 1 of this guide, *International Marital Agreements – the Approach by the English Court on Divorce*, by Charlotte Bradley.

3.2 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?

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.

3.3 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 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.

4 Cohabitation and the Unmarried Family

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

Cohabitants, especially those 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 cohabitee 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 allow civil partnerships for homosexual couples but not for heterosexual couples. There is pressure on the Government to change the law to allow civil partnerships for all couples and reform may well follow. 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.

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 section 15 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 Child Maintenance Service (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: <http://www.cmoptions.org/en/calculator/>.

The maximum amount of gross weekly income that can be taken into account when the CMS calculate 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 children are entitled to capital themselves unless there are exceptional circumstances (e.g. severe disability requiring long life care).

5.5 Can a child make a financial claim directly against their parents?

Yes, in limited circumstances; i.e. a child over the age of 16 and in 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?

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 which by law a parent has in relation to the child and his property. This means that both parents need to agree 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; and
- 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 age and understanding);
- his physical, emotional and educational needs;
- the likely effect on him of any change in his circumstances;
- his age, sex, background and any characteristics of his which the Court considers relevant;
- any harm which he has suffered or is at risk of suffering;
- how capable each of his parents, and any other person in relation to whom the Court considers the question to be relevant, is of meeting his 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 organisation CAFCASS, the Children and Family Court Advisory and Support Service). 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?

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

6.11 What methods of dispute resolution are available to resolve disputes relating to children?

Court, mediation, arbitration and non-legal routes such as family therapy. 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 who the child lives with) 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 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?

In England and Wales, particularly in cases where there is a shared residence arrangement, the Courts are 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.

7.3 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.

7.4 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 Children and Family Court Advisory and Support Service (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 non-EU 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).

The UK is a member of the EU and signatory to the Brussels II Regulation, European Council Regulation no.2201/2003 ("Brussels II") and in cases of child abduction between England and Wales and other European countries the provisions of Brussels II are used (they are similar to the provisions of the Hague Convention but with more limited defences).

**Claire Wood**

Kingsley Napley LLP
Knights Quarter
14 St John's Lane
London EC1M 4AJ
United Kingdom

Tel: +44 20 7814 1200
Email: cwood@kingsleynapley.co.uk
URL: www.kingsleynapley.co.uk

Claire is a partner in the Family team at Kingsley Napley and has experience in all areas of family law, in particular complex financial proceedings arising on divorce, often with an international element. Claire is a fluent French speaker and regularly drafts and advises on pre-nuptial agreements. She is also a renowned specialist on international surrogacy arrangements.

Clients and peers in the legal world have great confidence in Claire's commercial approach to cases and in the legal directories (*Chambers UK* and *The Legal 500*) she has been described as "very bright", "absolutely outstanding" and "highly efficient and well organised".

In 2014, she won the prestigious International Academy of Matrimonial Lawyers (IAML) European Chapter Annual Award for young family lawyers for her essay on international pre-nuptial agreements and marriage contracts.

Claire is a regular commentator on international surrogacy issues and has written for a variety of publications.

**Charlotte Bradley**

Kingsley Napley LLP
Knights Quarter
14 St John's Lane
London EC1M 4AJ
United Kingdom

Tel: +44 20 7814 1200
Email: cbradley@kingsleynapley.co.uk
URL: www.kingsleynapley.co.uk

Charlotte 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 *The International Comparative Legal Guide to: 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 "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".

Kingsley Napley

Kingsley Napley is an internationally recognised law firm based in central London. Our wide range of expertise means that we are able to provide our clients with joined up support in all areas of their business and private lives. The Family team, made of 14 lawyers and headed by Charlotte Bradley, covers all areas of family work, including divorce, financial issues, children (including relocation and surrogacy), cohabitation disputes and pre-nuptial agreements. Over 50% of our work has a significant international aspect.

The team has been described by its peers as "a team that has a great breadth of experience across the board and particularly in international cases", "a standout firm", and "the team always fights hard to defend your interests".

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk