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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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