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Making the right choices

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November 29, 2016 By Guest Blogger (<http://blogs.lexisnexis.co.uk/family/author/guestblogger/>) – Leave a Comment (<http://blogs.lexisnexis.co.uk/family/making-the-right-choices/#respond>)

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Guest bloggers Suzanne Kingston, Delphine Eskenazi and Mark Haranzo highlight the issues faced by international families on relationship breakdown.

It is often said that the world is getting smaller, and that is certainly true in my experience of practicing family law. One of results is the emergence of the truly international family: families who effectively have homes and lives in a number of different countries. Historically, wealthier families would have a base in one country and 'holiday homes' abroad, but it is no longer an unusual phenomenon for families to have significant ties in various countries. This particularly true where the spouses have different nationalities (and so extended families are based in different counties), and also where their work means that they travel extensively and are not necessarily based in one particular country. A current example of such a family is the Pitt/Jolies.

Being an international family means more choice – where to buy property, where the children should go to school, where (if anywhere) to settle. In the unfortunate event that the marriage breaks down, one of the most important, and often time critical, decisions is where to initiate divorce proceedings. Each country will have its own rules as to whether or not its courts have the power to dissolve the marriage, and deal with the financial implications of divorce.

As different countries have different rules in terms of how assets should be divided, a decision about where to get divorced can have significant implications. To take the Pitt/Jolies as an example, deciding whether to get divorced in France, California or here would involve first considering whether the courts in each country have jurisdiction, and then what the likely outcome would be in each. In order to illustrate the various issues that arise, I discussed the situation with two family lawyers – Delphine Eskenazi of Libra Avocats and Mark Haranzo of Withers New York and California. I set out below our thoughts.

Privacy

The extent to which the details of their divorce are likely to be reported is certainly a key issue. In England, since the President of the Family Division, Sir James Munby, delivered his guidance on transparency more and more family cases are being heard in public. Even if the hearing is in private, the press may attend. However, in either case, it is possible to obtain an order to restrict what the press can report about a case.

When determining issues in relation to privacy, both the English and French courts will consider the relevant articles in the European Convention of Human Rights (ECHR), and will have to balance the right to privacy and family life (art 8) and the right to freedom of expression (art 10). In general in France divorce judgments are not published, or are published anonymously.

Both the French and English courts would be less likely to grant protection to celebrities, in part because often the information is already in the public domain, or there are inaccuracies in the reporting that need to be corrected. However, each case would be decided on its own merits

In California divorce trials are public. The media and public have access to court and administrative records as well as court transcripts of the trial. However, as in England, the judge can restrict or terminate media coverage of a trial. The judge would consider a number of factors including the privacy rights of the parties and the decorum of the court and the privacy rights of the participants to include witnesses and jurors – the ECHR is not of course relevant in California.

Alternatives to court

One way to ensure privacy is to avoid litigating in court. In England parties can use arbitration rather than the court system. Both parties need to agree to be bound by the arbitrators' decision, and it will then be made into a legally binding court order. Family law arbitration was launched in England in 2012 and has many advantages over court proceedings (to include more control by the parties as to the choice of arbitrator, timing, location and the process itself.) In both France and California, the two most popular alternative methods are collaborative law and mediation (both of which are also available in England). In fact, it is worth highlighting that in most cases in England all of the parties must try mediation before issuing court proceedings – the government is trying its best to ensure that cases are dealt with outside of the court process wherever possible.

Mediation involves the use of an agreed third party (qualified mediator) to guide the parties to negotiate a settlement. Collaborative law also involves negotiation, but each party has their lawyer present. Unlike arbitration, if the parties do not agree an outcome the collaborative and mediation process will come to an end and the parties must revert to the court process.

In California there is mandatory child custody recommendation counseling (CCRC) whenever issues in relation to the children are in dispute. The parties negotiate these issues with the help of a professional counsellor, who will prepare a written recommendation to the court regarding any custody and parenting time issues the parties are unable to resolve. In England, all parties have to attempt mediation before using the court process. Since July 2016, it has been possible for parties to use arbitration in relation to disputes regarding children.

Pre-nuptial agreements

Where parties have already signed pre-nuptial agreements, then they are likely to be concerned about how a particular jurisdiction will approach that agreement. In England pre-nuptial agreements are not strictly legally enforceable and binding but they are likely to be upheld if they are fair. Both parties need to have independent legal advice and provide financial disclosure of their asset base to the other.

In England the prenuptial agreement can deal with all financial implications of divorce. In France, however, pre-nuptial agreements are generally used to reflect the parties' choice of matrimonial property regime (a choice which is binding rather than influential), and so determine their legal rights in their assets, and do not deal with maintenance. The court will then determine the level of ongoing maintenance.

If the parties have reached a pre-nuptial agreement in another jurisdiction, the agreement as to maintenance could be recognisable and enforceable in France as long as neither spouse was left in need. To the extent that the foreign pre-nuptial agreement dealt with a property in France, the terms of the pre-nuptial agreement will be generally binding.

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In California, the parties must both have been represented by counsel in reaching the agreement (unless there is a separate written waiver), and there must be full financial disclosure. An agreement would not be binding if it were unconscionable, not voluntary or against the public policy of the laws of California.

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It is not possible in any of the three jurisdictions to contract out of child maintenance.



We have only considered (briefly) three specific issues in three specific countries, but it is clear that when it comes to marital breakdown, being an international family can make decisions extremely complicated and making advice in all relevant jurisdictions, at every stage, is crucial.

Suzanne Kingston is a partner in the family team at Withers LLP. She is widely known for her expertise in all aspects of family work, in particular the resolution of complex financial issues for high net worth individuals. Her cases often have an international element and she has considerable experience in dealing with prenuptial agreements. She has been described as the 'queen of mediation, collaborative law and arbitration', and has spearheaded the arbitration training for family lawyers, and is an accredited arbitrator.

Delphine Eskenazi is a partner at Libre Avocats in Paris. She is admitted to the New York and Paris Bars and has a specific expertise in complex international family litigation.

Mark Haranzo is a partner in the New York office of Withers. He is a private client lawyer but has a large practice drafting and negotiating pre-marital and post-marital agreements involving the States of California, Connecticut, Florida and New York.

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