

A world apart

Suzanne Kingston, Mark Haranzo and Delphine Eskenazi review the approaches to pre-nuptial agreements, privacy and alternative dispute resolution in England and Wales, France and the US



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'In the US, property owned by a party prior to marriage, as well as inherited and gifted property received during marriage, is typically considered separate property not subject to equitable distribution.'

Nowadays it is quite common to deal with clients who have international lives – perhaps they have different nationalities, or they travel for work and are not necessarily based in one particular country. We are used to speaking to our colleagues around the world to ask for their help in different situations. Often, we need to inform clients who have a choice as to jurisdiction for divorce where the best place would be for them to divorce. Each country has rules regarding jurisdictional requirements and there can be vastly different outcomes in relation to finances on divorce. As a consequence, making the right decision early on is crucial.

We have considered three particular aspects of family law in three jurisdictions to illustrate the different approaches of the court. We will deal with each in turn.

Pre-nuptial agreements England and Wales

At present, pre-nuptial agreements are not strictly binding but are capable of being highly influential and may be enforced if certain criteria are met. In *Radmacher (formerly Granatino) v Granatino* [2010] the Supreme Court held that:

... the court should give effect to a nuptial agreement that is entered into freely by each party with the full appreciation of its implications unless in the circumstances prevailing it

would not be fair to hold the parties to their agreement.

The court retains a discretion to consider a pre-nuptial agreement and the agreement must be fair. Also, both parties must take independent legal advice concerning the terms of the agreement and must provide a summary of their respective financial positions, and the agreement should be signed at least 28 days before the wedding.

In February 2014, the Law Commission published a report in which it made major proposals to introduce legally binding pre-nuptial agreements (known as qualifying nuptial agreements (QNAs)). If the proposals were adopted by the government then the law would change, and if the QNA met certain requirements it would be capable of being fully binding on the court. It would not be possible to use a QNA to contract out of provision for financial needs. While we are still waiting to hear whether the government will adopt the Law Commission's recommendations, as a precaution, good practice dictates that the disclosure requirements for a QNA are followed so that a court would not be able to overturn an agreement by virtue of a lack of full and frank disclosure.

It is crucial in an international case where there may be other jurisdictions involved to have urgent advice from each of the potential jurisdictions which may have a connection to the marriage now or in the future.

But what is the situation in France and New York?

France

Under French law, pre-nuptial agreements generally deal with the spouses' choice of matrimonial property regime and such agreements are binding rather than simply persuasive. It is quite usual for wealthy families to utilise pre-nuptial agreements so as to avoid a division, and thus dilution, of the family's assets.

This being said, French pre-nuptial agreements do not typically contain any provisions as regards the amounts of spousal support, or alimony, or child support that will be paid in the event of divorce; they only deal with the spouses' matrimonial property regimes. Hence, in the event of divorce, the assets are divided between the spouses in accordance with the matrimonial property regime that they have chosen in their pre-nuptial agreement. Unlike with spousal support payments, the division of assets under a matrimonial property regime does not depend on the cause of divorce or the duration of the marriage.

US

A Uniform Premarital Act (UPA) was promulgated in the US in 1983. It has been adopted in 26 state jurisdictions, although many of those jurisdictions (including California) have amended or modified the UPA. Other states (including New York) have a statute that is not based on the UPA, although the requirements are often similar.

Each state also has a marital and separate property regime that controls financial arrangements in the absence of an agreement. In most states, marital property is subject to 'equitable distribution' on divorce. Property owned by a party prior to marriage, as well as inherited and gifted property received during marriage, is typically considered separate property not subject to equitable distribution. However, it is relatively easy to convert separate property into marital property through use, appreciation, and direct or indirect efforts in managing the property. In community property states, separate property is retained by

the original owner and community property (which may include appreciation on separate property, or other wealth that has accrued during the marriage) is divided upon divorce.

Pre-nuptial agreements help couples ensure their respective assets are protected in the event of a divorce, and provide certainty about how their assets will be divided at death, by broadly permitting the parties to contract around their rights and obligations in their own and each

other's property. These agreements typically address financial concerns, but children's issues, such as custody and support, are usually not addressed. Note that a pre-nuptial agreement cannot adversely affect child support. Pre-nuptial agreements can be used to protect not only pre-marital assets but also any appreciation on such assets, as well as earnings and inheritance.

State statutes often set forth requirements for a valid pre-nuptial agreement, including that:

- the agreement is fair (at the time of signing and/or at the time of a divorce, depending on the state); and
- there needs to be a full and fair disclosure of assets.

Accordingly, a pre-nuptial agreement will be effective upon the parties' marriage, but a court is likely not to enforce the agreement if it determines that its provisions are unconscionable, not voluntary or against the public policy of the laws of the state.

Freedom of information and expression against privacy

England and Wales

In April 2009, important rules were introduced into the family

courts in England and Wales to allow accredited journalists to attend family proceedings (with exceptions, including first hearing dispute resolution appointments in children cases and financial dispute resolution appointments in financial cases). The aim of these new rules was to improve the scrutiny of, and public confidence in, the family justice system. Commentators have noted that while this may be necessary in public law proceedings, ie where

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the state is involved in the litigation, when there are only two private individuals involved in a case it is questionable whether it is necessary for the media to report on the proceedings, and that a media presence may sometimes be nothing more than voyeurism.

It is possible to make an application to the court to impose restrictions on what can and cannot be reported by the media, and this is dealt with on a case-by-case basis. However, there are concerns that this has effectively given the weaker economic party an advantage and they could potentially try to blackmail the other party to reach a compromise, failing which potential disclosures would be made in the press. The courts are currently considering the extent to which media reporting should continue in the family law arena and we await further guidance.

More widely, the European Convention of Human Rights (ECHR) needs to be factored in and the balance between the right to privacy (Art 8) and the right to freedom of expression (Art 10). This of course raises the question as to the extent to which England and Wales will remain a party to the ECHR post-Brexit.

France

Article 9 of the French Civil Code states that 'everyone has the right

to respect for his or her private life'. Nevertheless, the right to privacy is not absolute, since freedom of expression and freedom of information can interfere. This conflict between right to privacy versus freedom of information is particularly significant when the affective and sentimental life of celebrities is concerned.

Celebrities and public figures tend to be granted less protection than ordinary citizens by the French courts, which can take

relevant factors, including the security and dignity of the court, the parties' support of or opposition to the request, and the privacy rights of all participants in the proceedings, including witnesses and jurors.

Alternative dispute resolution England and Wales

Family law mediation has been with us for a long time and although now apparently there is anecdotally a decrease in the number of publicly

with the lawyers/parties involved prior to signing any documents, so that all can be familiar with the right process before committing to it.

France

Collaborative law and mediation are among the most popular methods in France to avoid litigation in court. Arbitration is not possible in France for issues relating to family law. Collaborative law is a pragmatic process, mostly used for family law issues. Mediation is also very popular in family law. With these alternative methods of dispute resolution, confidentiality will apply to the discussions, negotiations and documents exchanged between the parties. If the discussions are successful and lead to an agreement, this agreement will need to be submitted and approved in court, but the court will receive only the agreement itself and not the documents or information exchanged between the parties during the negotiations.

US

The parties have options to help them resolve issues pertinent to a divorce or legal separation out of court. One such option is mediation, in which an impartial mediator assists in helping the parties settle the issues themselves. The mediator cannot make decisions and all parties must agree to the final settlement. However, the final agreement need not cover all issues and the parties may leave unagreed-upon points for a judge to decide.

States may also allow collaborative divorce, in which the parties each hire a specially trained lawyer to negotiate the settlement. The parties meet with their lawyers regularly, and may also bring experts on child custody or accountants to the meetings. If the parties cannot reach a settlement and must go to court as a result, the collaborative lawyers withdraw and the parties will need to retain new counsel if they want to be represented in court. ■

*Radmacher (formerly Granatino)
v Granatino*
[2010] UKSC 42

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into account whether the celebrity takes ordinary precautions to protect their private life or whether they frequently and voluntarily disclose aspects of their private life to the media. For instance, the French Supreme Court has ruled that the publication of information relating to a divorce that is common knowledge does not breach an individual's right to privacy. Judges also commonly rule that the disclosure of financial and patrimonial information, without reference to the details of an individual's life, does not violate privacy rights. In general, however, divorce judgments are not published and if they are published in legal journals, they are anonymised. Individual privacy therefore receives a higher protection than in other jurisdictions.

US

Although journalists must receive permission from a judge to record divorce trials, they are public and may garner significant attention if the parties are celebrities. The media and public also have access to court and administrative records, as well as court transcripts of the trial. The judge has discretion to limit, or terminate, media coverage of a trial, and may consider any

funded mediations, there has been an increase in the number of private mediations. This may be a consequence of the introduction of mediation information and assessment meetings, conducted by a mediator prior to litigation and in which a mediator will discuss all forms of dispute resolution but will often signpost mediation as a potential way of resolving issues. Unfortunately, apart from certain 'hot spots', collaborative practice seems to be on the wane. Talking to people up and down the country, collaborative practice can be seen by lawyers as a good mechanism for resolving disputes, particularly if the parties have a genuine wish to deal with matters constructively and amicably, but unfortunately there are very few cases being dealt with in this way at the moment. Perhaps the most exciting initiative recently is family arbitration. Here the parties are bound by the decision of the arbitrator who can now determine both children and financial matters. There are excellent resources available for practitioners to find out more about arbitration (see www.ifla.org.uk, www.resolution.org.uk and www.familyarbitrator.com). Most arbitrators are now undertaking 'pre-commitment' meetings/conference calls in which they discuss the potential scope and cost of the arbitration