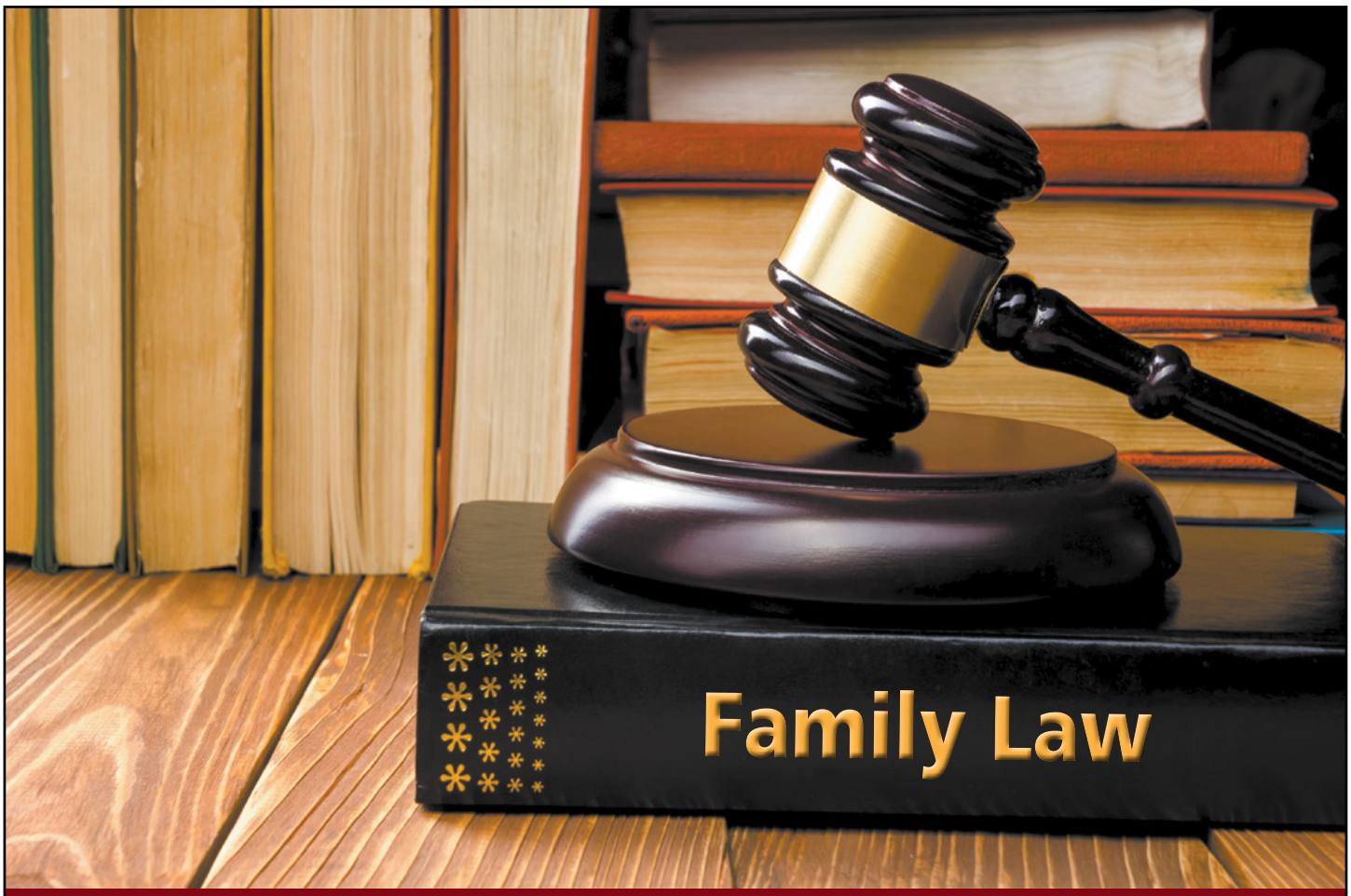
NYSBA FALL 2017 | VOL. 49 | NO. 2

Family Law Review

A publication of the Family Law Section
of the New York State Bar Association



The Changing Landscape of Joint Custody

By Lee Rosenberg, Editor-in-Chief

Also in this issue

- CPLR 5511: Is a Child a Full Party?
- Drafting Prenups
- Divorce by Mutual Consent in France

The New Divorce by Mutual Consent in France

Recognition and Risks of Post-Divorce Litigation in Common-Law Countries: The Examples of England and the United States

By Delphine Eskenazi, Carmel Brown, Irwin Mitchell, and Jeremy D. Morley

Introduction

With effect from January 1, 2017, French divorce law has been the subject of a historic reform: in the event of a full settlement between the spouses, their divorce agreement is no longer reviewed and approved in court by a French judge.

The agreement is merely recorded in a private contract, signed by the spouses and their respective lawyers. Such agreement is subsequently registered by a French *notaire*, which allows the divorce agreement to be an enforceable document under French law. Instead of a judicial divorce, the French divorce, in the event of an agreement between the spouses, has become purely administrative.

The implications and consequences of this reform in an international environment were deliberately ignored by the French legislature, with a blatant disregard for the high proportion of divorces with an international component in France.

In particular, the most important risk of this reform is that the French divorce by mutual consent may not be recognized or enforced in many foreign countries, in particular common law countries, thus significantly multiplying the risks of post-divorce litigation. From an amicable divorce to an acrimonious post-divorce, the possibilities to re-litigate have increased significantly with this new French administrative divorce.

Carmel Brown, a solicitor practicing in England, and Jeremy Morley, a lawyer practicing in the United States, consider these issues of recognition and post-divorce litigation, following a French administrative divorce, in their respective countries of practice. Delphine Eskenazi, a lawyer practicing in France (also admitted to practice in New York), will present first the main provisions of this new French administrative divorce by mutual consent.

I. What Is the New French Divorce by Mutual Consent?

A. The Lack of Control or Involvement of the French Courts

In accordance with the new article 229 of the French Civil Code, spouses who agree on the principle of the dissolution of their marriage as well as on all of the consequences of such dissolution, may record their agreement in a contract, without the need to obtain the review or approval by the French courts.

The process is simple: a draft agreement is written by the parties' counsel and signed by the spouses and their attorneys together. After the expiration of a mandatory 15-day reflection period, the agreement is sent by either party to a *notaire*, who will register it and keep an official record. A French court may review the agreement only if a minor child requests to be heard by the judge.

In the absence of a review by the courts, there is no requirement for the spouses to have any connection with France to be able to use this new method of divorce, the consequence being that certain authors consider, rightfully, that "*France will become the new Las Vegas of divorce.*"[1]

The other consequence of this purely French administrative divorce is that no independent third party will ensure that the spouses have freely consented to the agreement or, that their agreement is fair and strikes the right balance between both parties' interests (in particular as regards the provisions relating to the children).

The only requirement intended to ensure the existence of the spouses' free will is the obligation for each party to have his or her own lawyer, which assumes that the lawyer will be committed to the defense of his or her client's best interests.

The lack of control by a neutral and independent third party could nevertheless allow the possibility of agreements where one party will accept a completely unfavorable agreement, even after having received proper advice from his or her lawyer, for the sake of efficiency for instance (given how long divorce litigation can be otherwise in France).

B. The Lack of Financial Disclosure

The issue of spousal support, also called "compensatory maintenance" (*prestation compensatoire*) in France, is also a symptomatic example of the difficulties raised by the reform.

Before this reform, when the divorce agreement was reviewed and approved by the courts, and the parties had agreed that one of the parties was awarded an amount for "compensatory maintenance," there was an obligation to provide to the court a financial disclosure through a

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statement of net worth (*declaration sur l'honneur*), prepared and signed by each party.

The new law does not provide for an obligation to exchange or attach any such statement to the divorce agreement. The *circulaire* (which is a document published by the French Ministry of Justice to explain how the new law should be applied in practice) recommends that the parties should exchange such a statement of net worth. This recommendation does not mean, however, that there is a strict legal requirement to do so, sanctioned by the courts. Therefore, the spouses may simply proceed with the divorce agreement, without any form of financial disclosure.

C. The Lack of European Certificates

Finally, the legislature has explicitly recognized that the only certificate which will be issued by the *notaire* is the one provided by Article 39 of the European Union's Brussels II bis Regulation. The certificate of Article 41 of the same Regulation, concerning access to children and the return of children, will not be issued. The certificates provided by the new European Regulation on Maintenance Obligations will not be issued either, which means that the maintenance creditor will not be able to benefit from the facilitated form recognition provided by this regulation.

One can understand from this succinct presentation that the possibility for one of the spouses to attempt to re-open the litigation in other countries such as England or the United States, in the hope of obtaining an additional amount for asset division or spousal support or better arrangements as regards child custody is significant.

Carmel Brown and Jeremy Morley will detail and explain below the reasons for which such possibility could indeed exist in their respective countries of practice.

II. Will the French Divorce by Mutual Consent Be Recognised in England and Wales?

A divorce granted within the European Union will almost always be automatically recognized in England and Wales, provided that it was granted in accordance with the laws of that particular member state. Accordingly, given that the divorce by mutual consent would be prepared in accordance with the law—by a deed, signed by both parties and countersigned by the independent lawyer and a notary, it should be recognized in England and Wales. However, it would need to be accompanied with a certified translation in the usual way. It is fundamental, however, that the divorce is not a "transnational divorce," and instead, must have started and finished in France.

It is a worry that, given a judge will play no active role in the divorce by mutual consent, there will be no control over the validity of the divorce agreements and this is likely to increase litigation and post-divorce disputes in France and open up the possibility of secondary litigation in England and Wales, by way of "top-ups."

If the French courts have not triggered their jurisdiction, owing to the fact that the divorce by consent is just a contract, then there is surely still the ability for another country to seize jurisdiction.

A. Part III of the Matrimonial and Family Proceedings Act 1984 (MFPA 1984)

England is often referred to in the media as the divorce capital of the world. It is widely known to be one of the more generous to wives in the world. Not only this, but the English court can in some circumstances order a divorce settlement even where a couple have already divorced (and received financial provision) in another country.

Part III of the Matrimonial and Family Proceedings Act 1984 (MFPA 1984) provides the English court with discretion to step in and make financial orders upon divorce, provided certain jurisdictional requirements are met.

Essentially, once jurisdiction is accepted, the English court is able to make the same orders as if the divorce had been granted in England, which may include orders for maintenance claims, lump sum orders, property adjustment orders and pension sharing orders. Accordingly, if a party has entered into a divorce by mutual consent in France, and is genuinely dissatisfied with the settlement, possibly in circumstances where they have not had proper independent legal advice with full financial disclosure, they may seek to make an application in the English courts. This is particularly likely given there will be no judicial control or guidance.

The leading authority is the case of *Agbaje v Akinnoye-Agbaje*, which held that the purpose of a Part III application was *"the alleviation of the adverse consequences of no, or no adequate, financial provision being made by a foreign court in a situation where there were substantial connections with England."*

The range of outcomes is wide and will depend on the circumstances of the case—but we may see one party after a French divorce by mutual consent seeking to re-open their financial claims in England (providing there is the requisite connection to England), notwithstanding that there has already been financial provision in a foreign jurisdiction.

Until now, it has been significantly harder to run a successful Part III claim in England and Wales after a foreign divorce in a westernized country, and particularly the EU, given that Part III applications often arise after settlements in more traditional cultures, i.e., those that may still treat women differently, therefore making inadequate provision.

However, that may all change given that French settlements will not be subject to judicial scrutiny and many may sign up to imbalanced and unreasonable settlements, failing to meet both parties' and the children's needs. Practically speaking, this will clog up our court system given that the proceedings are complex, lengthy and expensive.

The English court will, however, be unwilling to entertain an application if it considers the French applicant is simply trying to get a "second bite of the cherry" after a financial award in France by mutual consent.

There is another unresolved issue of relevance, which is whether a matrimonial award, with an element of maintenance in another EU state, automatically precludes the courts of England and Wales from making a Part III maintenance order.

Given that the European Union's Maintenance Regulation is designed to enable a maintenance creditor to easily obtain an Order that is automatically enforceable in another member state without further formalities, it seems reasonable for Part III to remain unaffected by the Maintenance Regulation.

However, the question is whether the recognition of the decisions of the other Member States merely means "recognizing" that actual decision and the payer's liability or whether it allows a determination of the liability under the laws of England and Wales. The preamble states at s25 *"Recognition in a Member State of a decision relating to maintenance obligations has its only object to allow the recovery of the maintenance claim determined in the decision."* (Section 25 of Part III of the Matrimonial and Family Proceedings Act 1984). That said, it does appear reasonably clear that the purpose is not to protect the payer from a Part III claim.

Although a maintenance award made in another EU state will have significant weight on whether leave is granted under Part III and in relation to the substantive application, in practice it is likely that a prior maintenance award in another EU country would not prevent financial provision outside of the scope of the Regulation. Accordingly, if a party has already obtained a maintenance award in France, a Part III application dealing with all financial matters and including maintenance may still be on the table.

B. Children Matters and Contact

The new French legislation has unfortunately failed to deal with cases with international issues and elements and there is no method for obtaining the Certificates provided in the European Regulations (apart from Article 39 of the Brussels II bis), and a notary may not issue such certificates.

Accordingly, the implications are vast and we lose the ability for French Orders complying with the conditions set out in Articles 20 and 40-42, to be directly recognized and enforceable in England and Wales.

The English Courts would consider it unsatisfactory for there to be conflicting Orders in existence in different states affecting children, yet this is the problem we will be faced with in circumstances where we will lose the benefits of the European Regulations.

III. Will the French Divorce by Mutual Consent Be Recognized in the United States?

The extent to which courts in the United States will recognize French administrative divorces is uncertain and raises a host of interesting questions. The issues are rendered particularly complex because of the unusual features of the divorce recognition principles that apply in the U.S., including the American concept of "divisible divorce," the imprecise nature of U.S. comity rules, the unique impact of the due process clause in the U.S. Constitution, the different statutory provisions in the 50 states, variations in judicial interpretations from state to state, and the particular jurisdictional rules as to child custody jurisdiction.

A. Recognition of the "Bare" Divorce

American courts will normally recognize foreign court divorce judgments under the doctrine of comity if one spouse was domiciled in the foreign country when the case was commenced, meaning that it was the place of the spouse's true, fixed, permanent home and principal establishment, and to which, during any absence, the person intends to return. But recognition may nonetheless be refused if the foreign legal system was partial or unfair or if the judgment was procured by duress or fraud.

There are very few reported cases in the U.S. concerning non-judicial divorces. It is likely that U.S. courts will follow the general principle that a divorce regularly obtained according to the laws of the country where at least one spouse is domiciled will usually be recognized as effectively dissolving the marriage. In a case in Hawaii, a decision to recognize a Taiwanese administrative divorce was recently upheld on appeal, and foreign administrative divorces were likewise recognized in some immigration cases.

However, the new French procedures authorize administrative divorces even if neither spouse is domiciled in France or even connected to France. Therefore there is a great likelihood that a French administrative divorce of spouses who were both not domiciled in France will generally not be recognized in the United States.

An exception to this principle may well apply in New York, whose courts have long recognized foreign "bilateral" consent divorces, such as Dominican judicial divorces where one spouse flies there for a weekend with a power of attorney signed by the other party, even though neither was domiciled there. However, courts elsewhere in the U.S. have refused to follow the New York rule.

Another exception will likely apply to prevent a spouse from contesting a divorce if he or she has relied on the divorce in order to obtain any kind of benefit or advantage. However, that would not preclude a third party, such as the U.S. immigration authority, from refusing to recognize the divorce.

B. Recognition of the Financial Consequences of the French Divorce

In order for a U.S. court to recognize the financial component of a foreign divorce decree, each party must have had a significant connection to the foreign country, or have been served with process in that country or have submitted to the foreign court's jurisdiction. This element will presumably be satisfied in the case of French administrative divorces since the consent of both parties is required for the divorce.

However, subsequent and serious problems may well arise if a party has second thoughts about the financial terms, and seeks to have them set aside in a court in the United States. Any such effort will benefit from the fact that the French procedures do not require in a compulsory way any prior financial disclosure.

Courts in the U.S. will normally not reopen the financial issues that have been determined in a foreign divorce case unless there is clear proof of fraud or duress, as long as the foreign court had jurisdiction over the marriage and personal jurisdiction over the defendant. A U.S. court will normally not even allow a party to make claims about assets that were not considered by the foreign court unless it is clearly established that the foreign court had no power to consider those assets.

However, administrative divorces may well be treated differently, since they are based on the mere agreement of the parties and they require no judicial oversight. U.S. courts will likely apply to such divorces the more flexible and liberal principles that they have developed concerning the avoidance of spousal settlement agreements leading to a judicial divorce. In general, U.S. courts may set aside a financial settlement agreement at the request of a spouse who establishes that his or her consent was procured by undue influence or in some jurisdictions merely because the result is unfair.

In reviewing the financial provisions of a French administrative divorce the relevant factors will certainly include whether or not, before entering into the French agreement, the complaining spouse had adequate knowledge of the relevant financial facts, received full and frank financial disclosure, adequately understanding what was being agreed to and the consequences of entering into the agreement, and had separate and independent legal representation. The attitudes of courts in different U.S. states to such claims will vary from state to state, based on the specific case law that has been developed in each such state concerning the avoidance of divorce settlement agreements, the specific provisions of any governing local legislation and the attitudes of local judges.

C. Recognition of the Child Custody Elements of the French Divorce

American courts will certainly not recognize any portion of a French administrative divorce that deals with the custody of children except to the extent that the statutory jurisdictional rules of the local U.S. state are satisfied.

Each U.S. state has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), except Massachusetts, which has adopted a prior but similar statute. In very broad terms, it provides that a child's "home state"—meaning the state or foreign country where the child has lived for the past six months—has exclusive jurisdiction to issue an initial child custody order and has continuing exclusive jurisdiction neither the child not either parent lives in that state or country.

This means that if, for example, a French administrative divorce were to purportedly settle custody issues concerning a child who does not live or has not lived in France, the custody terms would almost certainly be unenforceable in the United States.

D. Support Provisions

Significant problems will arise in the U.S. concerning the enforcement of the child support and spousal support provisions of a French administrative divorce. The Uniform Interstate Family Support Act, adopted throughout the U.S., provides measures to enforce "support orders" issued by other U.S. states or by most foreign countries. However, the term "support order" is defined as "a judgment, decree, or order, or directive" that has been "issued by a tribunal," meaning "a court, administrative agency, or quasi-judicial entity." Since the support terms of a French administrative divorce will not be in the form of a judgment, order or the like issued by a "tribunal," it may well be especially difficult to enforce such provisions in the U.S.

Conclusion

The enforceability of French administrative divorces in the United States and in England will raise a host of complex and interesting legal issues. Full disclosure of such issues to parties who have a connection to a common-law country is strongly recommended.

In summary, these changes in France are likely to have various and quite large-scale implications in other countries, in particular in countries such as the United States and England and Wales, which are based on a very different legal culture.

We are hopeful that the comments of practitioners are noted and the necessary and appropriate changes are made.

Endnote

1. See Alexandre Boiché, in the French family law journal, *AJ Famille*, January 2017.