

DIVORCE OF WEALTHY SPOUSES IN RUSSIA AND ABROAD:

KEY DIFFERENCES AND NEW DEVELOPMENTS

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NOTE ON ENGLISH DIVORCE LAW

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About the speaker

- MA in Law from Trinity College, Cambridge 1990
- Called to The English Bar in 1991 (Inner Temple)
- Member of 1 Hare Court since 1991: the leading specialist set of chambers for financial provision on divorce
- Appointed Queen's Counsel in 2011 (equivalent of senior counsel)
- Specialist in high net-worth work for over 20 years
- Five major English High Court cases in last four years involving Russian parties
- Otherwise numerous reported and high-profile reported decisions including *McCartney v Mills-McCartney* in 2008 (junior counsel for Sir Paul McCartney)

Overview of English Divorce Law

Jurisdictional basis

- It is a Common Law not Civil Law jurisdiction.
- There is no default marital property regime: parties own all of their own assets beneficially and legally unless and until the court makes orders affecting that ownership.
- The court's powers are established by statute but the principles as to how those powers should be applied has been developed through caselaw, in particular the decisions of the appellate courts: The Supreme Court (formerly the House of Lords) and the Court of Appeal.

Dissolving a marriage (or civil partnership)

- A marriage is dissolved by a decree of divorce pronounced after one party has filed a divorce petition in the English Court which asserts the irretrievable breakdown of the

marriage proved by one of five grounds. There is a Decree Nisi and then a Decree Absolute.

- As to who can file a divorce petition in the English Court, see below
- Once divorce proceedings are underway the court can make financial orders against each party.

Financial provision on divorce: the statute

- The principal statute is The Matrimonial Causes Act 1973 (MCA). Sections 23 and 24 establish the court's range of powers: lump sum orders, property adjustment orders, periodical payments order, pension variation, variation of trusts, orders for sale of property and division of proceeds.
- Plainly some of these powers relate to income provision and some to capital provision; in a normal middle asset case an award might have a mixture of both types of order but in a high asset case the award will generally be just for capital.
- There is only power to make orders against the spouses, not third parties.
- In section 25 of the MCA there are listed the factors which the court must take into account:
 - Interests of the children paramount
 - Capital and income resources (broadly interpreted)
 - Capital and income needs and obligations
 - Standard of living during the marriage
 - Age of the parties and the duration of the marriage
 - Physical or mental disability
 - Contributions to the welfare of the family made during the marriage or in the future
 - Misconduct (very rarely applied)
 - Value of lost benefits because of the divorce
 - The need, if possible without undue hardship, to achieve a financial "clean-break" between the parties"
 - All the circumstances of the case.
- These tell the court what to take into account but they do not say how or what the objective for the judge should be. The final decision by the judge as to the right award is discretionary.
- The factors are not in order of priority but in some cases one factor will be more important than another.

Financial Provision on divorce: the case-law and the principles

- The leading cases are *White v White (2001)*, *Miller v Miller and McFarlane v McFarlane (joined appeals) (2006)*, *Charman v Charman (2007)* and *Radmacher v Granatino (2010)*.
- From the cases the following principles can be distilled:
 - The court will take into account all of the parties' resources, valued realistically and as at the date of the trial: the computational phase.
 - The resources will then be distributed between the parties fairly: the distribution phase.
 - Fairness has three strands: meeting needs, sharing and compensation.

Needs

- Assessing and meeting needs is the basis upon which the vast majority of cases are determined. But “needs” is an elastic concept. It does not mean social security benefit needs. The assessment of needs will reflect the scale of the resources, the standard of living during the marriage and the length of the marriage.
- The needs of both parties are relevant, not just the needs of the claimant.
- The relevant needs are for housing and for income. It is unlikely that the housing need will be at the same level as the matrimonial home but it can be if there are high assets. The housing award can encompass a second property.
- The income needs will be assessed by reference a claimed budget of expenditure and to the marital standard (although not just replicating that standard, especially after a less than long marriage). The income needs can be ordered to be met by periodical payment or by a lump sum income fund (usually calculated on an amortizing basis: using up both the interest and the principal).
- The court must also decide if the income provision should be for whole life or for some shorter period (a term: the length of the marriage, the ages of any children and lost career will inform this question).

Compensation

- Rarely referred to and usually wrapped up in needs

Sharing

- If there the total of the capital resources exceeds the sums required to meet both parties' needs, the court will go on to consider the question of fair sharing of the rest.

- The essential rule is that the wealth built up during the partnership should be shared equally irrespective of the roles of the parties, whether money-making or home-making. To do otherwise would be discriminatory and unlawful.
- This wealth for sharing is called “the marital acquest” or “matrimonial property”.
- “Non-matrimonial property” comprises wealth brought into the partnership by one party, or wealth inherited during the partnership, or to a lesser extent wealth generated after the parties’ separation. It can include passive economic growth on such wealth.
- Non-matrimonial is not completely excluded. It is completely included if it is needed to meet needs. It may transform into matrimonial property over time if it is mingled or merged (especially over a long marriage). And there are competing lines of authority as to whether the non-matrimonial property is completely excluded or whether the whole (including the non-matrimonial property) is distributed disproportionately.
- The marital partnership for this purpose lasts from commencement of pre-marital cohabitation to the parties’ separation (*de facto* not *de jure* length of marriage).
- Unequal sharing of the matrimonial property can also be ordered in a very high asset case if the court finds that the money maker has made a “special contribution”.

Resources

- The court will take into account all of the parties’ assets anywhere in the world and whether or not they are held in their own name or through another entity.
- There is an active duty on both parties to make a full, frank , current and accurate disclosure of their resources and often to prove that disclosure by documents
- Many cases involve the question of the true extent and value of the resources. This tends to raise the following topics:
 - Assets held in trust;
 - Assets held behind a corporate veil;
 - Valuation of business assets (including what discounts for illiquidity, risk, minority and marketability should be applied);
 - Non disclosed or hidden assets;
 - Extent of third party interest in matrimonial assets;
 - The true extent of liabilities.
- In general the English court takes a very robust approach to these questions and has no difficulty in finding that the value or extent of the resources is completely different to how they have been presented (with critical judgments

and costs order as well). The approach is “*wordly realism*” based on proper application of legal principles.

- The court has considerable powers in aid of detection and preservation of assets: eg. questionnaires backed up with imprisonment, letters of request for information to foreign courts, worldwide freezing injunctions, inspection appointments against third parties holding relevant information: these are routinely used to find out the truth.
- However, the right of a claimant to engage in self-help (stealing documents) has been cut back if this entails breaching the other party’s confidentiality.

Procedure

- This is governed by the Family Proceedings Rules.
- There is primary disclosure by both parties of all their resources and certain supporting documentation (The Form E).
- There is then a procedural hearing (First Appointment) where issues of computation are made the subject of court directions.
- When those directions have been implemented there is a Without Prejudice Appointment before a Judge to see if settlement can be reached on the basis of the Judge’s evaluation. This is called the Financial Dispute Resolution Appointment.
- In the absence of settlement, then case is prepared for trial (usually involving further and fuller evidence and updated computation evidence).
- The trial will take place before a judge (for high asset cases this will be in the High Court in London) and will last from 5-15 days.
- The legal fees for this will be high.
- The judge will apply English law and not foreign law (irrespective of the nationality of the parties or their wishes); there is no *lex fori* in the English Family Division.
- The most a judge might do is take some account of the Russian aspects as part of “all the circumstances of the case”; but he will make an English award not a Russian award.
- The judge will give a judgment based on the evidence and arguments. Subject to appeal, for which permission is required, that will be the final order for financial provision on divorce.
- There are then numerous means of enforcement of the order if the respondent defaults.

Specific considerations

The right to petition in England and conflicting jurisdictions

- The generosity of provision for claimants (normally wives) has led to London being described as “*the divorce capital of the world*”.
- In particular some Russian wives are attracted to England because:
 - Equal sharing of the matrimonial property
 - The fact that it does not matter how the marriage broke down (misconduct is almost never taken into account)
 - Potentially lifelong maintenance
 - The fact that all assets in the world are taken into account
 - The fact that the English Courts will look through structures to ascertain the true position regarding ownership or access to resources
 - The powers to aid such investigation
 - The powers of injunction to aid preservation of assets and to aid enforcement.
- So who can petition for divorce in England ? How can a Russian marriage end up before an English Court ?
- The right to file a petition in England is governed by Council Regulation (EC) No 2201 / 2003 (Brussels II Revised), Article 3. This provides:

Article 3

General jurisdiction

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

— the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her ‘domicile’ there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the ‘domicile’ of both spouses.

2. For the purpose of this Regulation, ‘domicile’ shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

- Indent 5 is the route by which most Russian claimants get their case before the English Court.
- The practice of trying to bring cases in England when the jurisdictional basis is not properly established is called “forum-shopping”. The English courts are opposed to this. There are numerous reported cases of challenges to the jurisdiction of the English Court on the basis that the claimant was not truly habitually resident for the required periods and / or on the required dates.
- If the other country in which the Respondent wishes the divorce to be heard is also a signatory to Brussels II Revised, the test is simply which petition is first in time. The country second in time will be stayed for so long as the country first in time is seised.
- If the other country is not a signatory to Brussels II Revised (like Russia) there is the Respondent can simply file his petition in Russia and proceed for divorce there.
- What happens then?
- The English court will not proceed to grant a decree of divorce (and more importantly financial provision) if the respondent to the petition raises the question of whether England is the “appropriate forum” (*forum conveniens*). This issue is then tried as a preliminary issue (over 2-3 days normally).
- If the respondent has asked for the English Court to consider this issue he may be required (and ordered) to desist from proceeding with his Russian divorce until the *forum conveniens* question has been decided.
- If the respondent does not ask the English court to consider the question of whether the English court is the appropriate court he can simply press ahead and try to obtain a Russian decree as soon as possible. The court will not grant an injunction stopping him from doing so unless it is demonstrated that this course is vexatious or oppressive (anti-suit injunction). But it may expedite its own procedures to allow the English decree to be pronounced first in time.
- If a valid overseas decree is pronounced and recognised by the English court (which will be the case provided that it has been obtained by “proceedings”) then the English divorce proceedings will be dismissed: there cannot be two divorces in respect of one marriage.
- But note Part III below.
- **For Russian clients wishing to ensure that the case is dealt with in Russia and not England here are key steps:**
 - **Petition straight away in Russia (best is before the other side has done so in England but otherwise immediately afterwards);**
 - **Accelerate the Russian divorce timetable as much as possible; get to decree;**
 - **But do so in such a way as gives the wife notice and complies with Russian divorce procedure;**
 - **Do not apply for a stay of the English proceedings on the grounds of forum non-conveniens because your client will then have been taken to**

accept that the English court should determine the question of which court is the more appropriate (and it will very often choose England for a mixture of good and bad reasons); and he will have to undertake not to take any further steps in Russia;

- **Whereas he is entitled just to get on with his petition in Russia and obtain a decree subject to the wife obtaining an anti-suit injunction (which is very difficult)**
- **If there is an application for a stay of the Russian proceedings by the wife (on the basis of the pending English proceedings) only at that stage apply for a stay in England in response.**
- **When you have a Russian decree, seek an order in the English court for its recognition.**

English Financial Provision after a foreign divorce (Part III proceedings)

- The English Court has power to grant further financial provision to a claimant after a foreign (eg Russian) divorce.
- The power is established by the Matrimonial and Family Proceedings Act 1984 (Part III thereof)
- The claimant has to gain permission to bring such a claim (section 13) and the court should not grant permission unless satisfied that there is substantial grounds for applying for a Part III
- Under section 16 there is a long list of criteria to be considered by the court as to whether England is an appropriate venue for the application
- If permission is granted and section 16 is satisfied then the court has the same range of powers as under MCA
- The factors to be taken into account are the same
- However, the case-law indicates that, whilst Part III awards are not purely to alleviate need or hardship, the power is not there to give the claimant another “*bite of the cherry*” when there has been due process and a decent award made overseas.
- **For Russian clients facing Part III proceedings, here are the key considerations:**
 - **Ensure that the Russian award is made after due process and notice to the other party;**
 - **Ensure that the Russian award, to the greatest extent practicable, takes into account all of the respondent’s wealth, properly appraised, and meets all needs generously;**
 - **Ensure that the award is for a reasonably large capital sum: it is easier to defeat Part III if there has already been a substantial award made and corresponding far harder to do so if a claimant has been left with very little under the Russian award;**

- **Do not allow the claimant to duck out of the Russian process: give them every opportunity to participate and seek relief;**
- **Strongly challenge the connection with England and emphasise the connection with Russia within the English proceedings.**
- **Also emphasise the absence of any English property.**

Pre-nuptial agreements (PNA)

- Since the land mark case of *Radmacher v Granatino* in 2011 PNAs have been more readily upheld by the English courts.
- They do not oust the jurisdiction of the courts, but they can have dispositive force if the court is not satisfied that there are good and substantial grounds for departing from them.
- The court will need to be sure that the parties intended to create binding legal relations on the basis of a full understanding of the implications of the PNA.
- The courts will not uphold an agreement which gives a claimant nothing. But if that is the only flaw in an otherwise valid PNA, the needs-based award will be very conservative indeed
- Case-law has said that it is important that a claimant has an understanding of the rights they are giving up, not just in Russia but also in countries like England which operate as system of discretionary equitable redistribution.
- **For Russian clients wishing to restrict the other spouse's (potentially English) financial claims by a pre-nuptial agreement, here are the key points:**
 - **Ensure that the pre-nup conforms with all the recognised safeguards stipulated by the English Courts:**
 - **No pressure**
 - **Signed as a deed**
 - **Many weeks / months before the marriage**
 - **Full financial disclosure of means on both sides**
 - **Legal advice on both sides**
 - **Recognition that it will affect rights during marriage and on divorce;**
 - **Ensure that the deed itself contains the provision which will be made and the effects of the divorce and does not rely on the effect of another piece of legislation;**
 - **Make it bespoke: not just an election of a married property regime;**
 - **Specify that the deed will be binding all around the world;**

- **State in the deed, and ensure that it is correct, that both parties have taken advice as to the effect of the deed including its effect in a country operating a system of discretionary equitable redistribution;**
- **Make proper provision for needs for the claimant and all children;**
- **Ensure that the needs provision is indexed over time so that it keeps its value.**

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