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London's reputation as divorce capital could be tested by legal shake-up: Jaqueline Julyan SC

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***The UK Government is reviewing 50-year-old legislation that determines how financial assets are split after divorce in England and Wales:* Jaqueline Julyan SC**

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A marital property regime is a system of property ownership between spouses. Property includes landed property, chattels, money in a bank account, businesses, shares in companies and claims (eg a loan). Marital property regimes differ from country to country. In

some countries the matrimonial regime is imposed by operation of law and arises automatically upon marriage. Many civil law countries allow parties to select a matrimonial regime. This is usually by way of a pre-nuptial agreement.

When a couple marry in England and Wales, each spouse retains a separate estate. This means that the property owned by each spouse at the time of the marriage, and property acquired by the spouse during the marriage, remains the property of that spouse.

This is different from the marital property regime known as community property or community of property, which originated in civil law jurisdictions and can be found in countries such as Sweden, Germany, Italy, France, South Africa and parts of the USA (The marital property systems in the USA differ from state to state.) The consequence of community of property is that all property of the spouses is joined into a single joint estate, and any property acquired during the marriage is part of the joint estate. On divorce, the joint estate is divided in half, each spouse taking an equal share.

A hybrid system is community of acquests, accruals or gains. This system provides that each spouse keeps his or her property as at the date of marriage, and that property acquired during the marriage is shared equally on divorce.

Because a system of separation of assets, with no accrual sharing, can cause financial hardship at the end of a marriage, either by death or divorce, many countries have introduced reforms, to address this. In England & Wales, the Matrimonial Causes Act, 1973 makes a provision for the court, on divorce, to make financial provision orders or property adjustment orders. The court has the power to make orders for sale of a property, and orders relating to pensions.

A court in England or Wales has a discretion in deciding what financial provision or property adjustment orders to make. There are guidelines for the exercise of this discretion: the court has to have regard to the factors set out in section 25 of the Matrimonial Causes Act.

The Section 25 factors are:

(a) the income, earning capacity, property and other financial resources;

(b) the financial needs, obligations and responsibilities;

(c) the standard of living enjoyed by the family;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which 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;

(g) the conduct of each of the parties;

(h) in the case of proceedings for divorce or nullity of marriage, 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.

This legislation has been interpreted by the courts so that it is accepted that the principle is to achieve sharing and fairness, measured by the yardstick of equality. In general, this means that everything is shared equally.

There may be exceptions, requiring a departure from equality. A common instance is need: one spouse may have more than half, for example where a wife is caring for children, and needs a bigger house than the husband. Another reason to depart from equality is an unmatched contribution by one spouse. Premarital assets may represent a contribution unmatched by an equivalent contribution of the other spouse. A stellar contribution argument usually arises in so-called “big money” cases, where the court may accept that the “genius” of one of the spouses was the generator of the family wealth, and that is would be unfair to ignore this in making a financial provisional property adjustment order.

No one of the section 25 factors is more important than the other, and the Court has to consider the factors holistically in considering each case. It has however been said that in a particular case, there may be a “magnetic factor”.

The existence of a prenuptial agreement may be such a “magnetic factor”. The case law about

prenuptial agreements is anything but simple. In 2010 the UK Supreme Court of Appeal recognised a prenuptial agreement, in determining a financial remedies case. However, it is not automatic that a prenuptial agreement will be recognised, and this is within the discretion of the Judge.

The result of section 25 is that any order is within the discretion of the judge. Views diverge on the merits of judicial discretion: some practitioners consider it a blessing, others a curse.

In a system such as community of property, there is no room for discretion, as everything is divided equally. In the place of community of accruals or acquests, there is an arithmetical formula for calculating how property is to be divided upon divorce, and discretion plays no role.

By contrast, in England & Wales, there is no simple formula for arriving at a result. The section 25 factors are guidelines, and each judge may treat the same facts differently. Because the exercise is a discretionary one, there is no certainty, and it can be down to the luck of the draw as to the judge allocated.

In practice, the orders made by the English Court are very generous. A pre-eminent Scottish family lawyer has described the awards made in the English Courts as “barking mad”. Usually, it is the wife who seeks an order. The “stellar contribution” argument is successful in limited and exceptional circumstances only. For these reasons London has come to be seen as the preferred place to be divorced, for the financially weaker spouse, and on the contrary, a place to be avoided by the financially stronger spouse. Because of the generous awards made in the English Courts, a spouse wanting a bigger share of the pie will try to have a decision made in an English Court.

When an international couple’s marriage breaks down, there is likely to be a rush to secure jurisdiction in the forum most favourable to that spouse. A Russian husband will try to secure jurisdiction is Russia, while a Russian wife will want to secure jurisdiction in England. This is known as “forum shopping”.

The costs of litigating can be enormous. In the recent decision of *AA v AB (Costs)* the Judge

described the level of costs as having been “ruinous to the parties” and “utterly disproportionate to the assets involved”. It is not unusual for costs to exceed £1 million.

International couples can seek financial relief in the English Courts, even after an overseas court has made an order. This is because of Part III of the Matrimonial and Family Proceedings Act, 1984. The purpose of that provision is to alleviate the adverse consequences of inadequate financial provision being made by a foreign court. In the Supreme Court of Appeal case of A*gbaje v Agbaje*, a Nigerian couple had been married for 38 years. They had total assets of £700,000.00. Of this, £530,000.00 was represented by the equity in two properties in London. The husband obtained a divorce in Nigeria and the Nigerian court ordered a life interest in property in Lagos to the wife (worth £86,000.00) with a lumpsum for maintenance of £21,000.00. The wife applied to the English Court under Part III. At the end, the English Court gave the wife 39% of the assets. Thus, divorcing in a foreign country is no guarantee against the generous awards of the English courts.

A review of the law is underway. Will Section 25 be replaced and if so, with what? Will there be a judicial discretion or will there be a formula for calculation?

While the law remains as is, England is an attractive divorce jurisdiction for a spouse seeking a big payout on divorce, hence the popular view that London is the “divorce capital” of the world.

Jaqueline Julyan S.C. has an international family practice and is an expert in the field. She is also a skilled practitioner in all aspect of domestic and child matters. Jaqueline is astute and has an eye for the fine detail, and is able to achieve the best possible outcomes for her clients.

Jaqueline Julyan S.C. *was quoted in the Financial Times, published on 28 August 2023. Read the article in full here (via subscription service).*