International Academy of Family Lawyers
IAFL
Asia Pacific Chapter

EDUCATION PROGRAM MATERIALS PACK

IAFL Introduction to International Family Law Conference
Bangkok, Thailand
30 May 2023

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International Academy of Family Lawyers
Asia Pacific Chapter

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IAFL INTRODUCTION TO
INTERNATIONAL FAMILY LAW CONFERENCE
Bangkok, Thailand

Chair: John Spender (Australia)

Tuesday 30 May 2023

10:25-10:30: Introduction and Welcome

Geoff Wilson (Australia), IAFL Asia Pacific Chapter President and
Thomas Sasser (Florida, USA), IAFL President

10:30-11:30: Marriage and Divorce

- Requirements for a marriage
- Whether various religious ceremonies are recognised as marriages
- Whether same sex marriages are recognised
- Recognition of foreign marriages or divorces
- Jurisdictional requirements for divorce
- Grounds for divorce
- Whether common law marriages or de facto relationships are recognised

Moderator: Sandra Verburgt (Netherlands)
Presenters: Eleanor Lau (Australia), Diane Sussman (France) and Claudia Zhao (China)

11:30-12:00: Coffee Break

12:00-1:00: Parenting Matters

- Principles generally - what are the legal principles and bases for making parenting orders in the jurisdiction of the panellist?
- Approaches when a child is abducted by one parent to the jurisdiction of the panellist, including:
  - The approach and process where the 1980 Hague Abduction Convention applies and
  - The approach and process when the 1980 Hague Abduction Convention does not apply
- Approaches to relocation or leave to remove applications

Moderator: Corinne Remedios (Hong Kong, China)
Presenters: Makiko Mizuuchi (Japan), Ivan Cheong (Singapore) and Simon Bruce (England)

1:00-2:00: Lunch

2:00-3:20: Property and Financial Matters

- Jurisdictional requirements
- Does the relief sought need to be linked to an application for divorce?
- The property regime(s) prevailing in each jurisdiction
- Valuation and discovery issues, including whether there is a duty to make disclosure
- Dealing with assets overseas
- Forum disputes when more than one country may have jurisdiction
- Is it possible to have such pre-nuptial agreements in the jurisdiction of the panellist? If not, what is the next best thing one can do?
- Is it possible to have cross-jurisdictional agreements in the jurisdiction of the panellist
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- Limitations of pre-nuptial agreements, including grounds to set them aside or declare them not to be binding

Moderator: John Spender (Australia)
Presenters: Kee Lay Lian (Singapore), Keturah Sageman (Australia), Steven Yoda (California) and Rita Ku (Hong Kong, China)

3:20-3:30: Closing Remarks

Geoff Wilson (Australia), IAFL Asia Pacific Chapter President and
Thomas Sasser (Florida, USA), IAFL President

EDUCATION CHAIR & INTRODUCTION

JOHN SPENDER

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Admitted as a lawyer in New South Wales in 1992 and in Victoria in 1993 and has practised in family law ever since. Accredited by the Law Institute of Victoria (LIV) as a specialist practitioner in family law in 2003. Joined the specialist family law practice, Kennedy Partners, in 2007, and became a partner of the firm in 2012. Has expertise in all aspects of family law, including parenting and financial matters, and has worked significantly in the area of international family law. An active member of committees of the Family Law Section of the LIV since 2003, including a member of the Executive Committee since 2011 and Chair of the Maintenance and Property Sub-Committee since 2011. Has written or co-authored a number of papers and has presented at continuing legal education seminars (both in Australia and overseas) since 2009. Is a consultant editor for precedents with LexisNexis.

GEOFF WILSON

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Geoff is the President of the Asia-Pacific Chapter of the International Academy of Family Lawyers, past Parliamentarian of the IAFL and current co-chair of its Dispute Resolution Committee. Geoff has been a fellow of the IAFL since January 2008 (admitted to fellowship during the Presidency of Donald Sasser father of our current President Tom Sasser!).

Geoff is a partner and co-manages HopgoodGanim Lawyer's Family and Relationship Law practice. He is also a lead Partner of HopgoodGanim's HG Private practice and Pro Bono practice.

Geoff has practiced family law for the past 36 years. Geoff's specialisation includes international family and relationship law, relationship agreements, prenuptial agreements, representation of third parties and high net worth individuals, trusts and property disputes and dispute resolution (particularly arbitration).

Geoff is recognised as a Preeminent Family & Divorce Lawyers by Doyle's Guide at both a state level from 2012-2023 and national level from 2015-2023, he was also ranked by Doyle's Guide as a Leading Family Lawyer in High-Value and Complex Property matters from 2018-2023.

Geoff was named Brisbane's Lawyer of the Year in Family Law Mediation category by The Best Lawyers™ in the 2021 edition, as well as Lawyer of the Year in Family Law category 2018 and 2020. The recognition extends with Geoff included as a leading Australian practitioner for Alternative Dispute Resolution — 2021–2024, Family Law — 2014–2024, and Family Law Mediation — 2019–2024 categories

Geoff is the legal advisor to the Australian website - https://www.pre-nuptialagreements.com.au/. He is a Queensland Law Society Accredited Specialist (Family Law) and Arbitrator registered under Regulation 67B of the Family Law Regulations. Geoff was a lecturer at the Queensland University of Technology (1993-2005).

Geoff has prepared and presented over 190 papers on family law topics throughout his career and has been a contributing author to the Wolters Kluwer / CCH loose-leaf Services, Australian Family Law and Practice, Australian De Facto Relationships Law, and Matrimonial Property Guide and to the Queensland Law Handbook. Geoff is the author of the Australian chapter of the leading international text, International Pre-Nuptial and Post Nuptial Agreements by London based publisher Jordans in 2012.

MARRIAGE AND DIVORCE

SANDRA VERBURGT

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Sandra Verburgt is a partner at Delissen Martens and a member of the Family Team with a special focus on International Family Law.

She is a trained collaborative divorce lawyer and skilled litigator and has gained experience in family law for over 20 years. Her work mainly concerns the more complicated divorces, maintenance and property settlements. Sandra is engaged as an expert in foreign proceedings frequently. She also provides advice on international estate planning and prenuptial agreements for high-net-worth individuals and business owners.

Accurate, analytical and committed; that is Sandra's way of working. 'I like to solve complex issues and to put these issues in order. In addition, I am committed and focus 100% of my attention on my clients. I want to make the most of everything so that I can achieve the best possible outcome.'

In addition, she advises her foreign colleagues on Dutch family-law matters. Sandra is also engaged as an expert in foreign proceedings on a regular basis. Sandra is a member of vFAS, VvCP, IAFL fellow and President of the IAFL European Chapter. In the Chambers Practice Guide Family Law 2023– the Netherlands chapter, Sandra contributes by covering a wide variety of aspects regarding Family Law in the Netherlands.

ELEANOR LAU

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Eleanor is an Accredited Family Law Specialist who practises exclusively in family & relationship law. She advises clients on all areas of family law including property settlement, spousal maintenance, parenting matters, financial agreements, child support, and international family law matters. She has particular expertise in financial matters involving complex structures such as trusts, companies and partnerships, including where assets are held both within Australia and overseas. She is also experienced in complex parenting matters, particularly in cases that cross international jurisdictions. Eleanor regularly represents clients in different jurisdictions including Australia, Singapore, Hong Kong, China, United States, United Kingdom and the UAE.

Eleanor is a Fellow of IAFL. She is also a member of the NSW Law Society Specialist Accreditation Family Law Advisory Committee, which oversees and assesses other family lawyers in gaining their specialist accreditation in Australia. She is one of only a small number of Cantonese and Mandarin speaking family lawyers in New South Wales who has attained specialist accreditation in family law. She is also an accredited arbitrator and mediator, assisting clients in resolving their property and financial disputes outside of traditional court proceedings.

Eleanor is recognised by Doyle's Guide as a Leading Family & Divorce Lawyer in both Australia and New South Wales.

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Diane Sussman has been a member of the Paris Bar since 1996. She is an accredited specialist of family and patrimonial law with the French Bar. Her practice is exclusively dedicated to family and patrimonial issues, from advice to litigation, especially where there is an international element. Diane Sussman is involved in *pro bono* work. She is a member of the IAFL (International Academy of Family Law). She is fluent in English and holds a Postgraduate Diploma in North American Commercial Law from University Paris 1 – Pantheon Sorbonne.

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Ningning Zhao graduated from China University of Political Science and Law with Master Degree. She is committed to cross-border family law for around 14 years. She is a Fellow of International Academy of Family Lawyers; Fellow of LAWASIA; Director of China Private International Law Society; Member of Shanghai Bar Association; Tutor of Shanghai University of Political Science and Law; Member of Pro Bono Lawyer Team of Shanghai Bar Association. Some of her publications are Family Law (Co-author, Sweet & Maxwell, 2021); Matrimonial and Succession Law (Co-author, Law Press-China, 2016 and revised edition 2021);International Handbook on Child Participation in Family Law (Co-author, INTERSENTIA, 2021); Legal Practice of International Family Cases (Sole-author, Law-Press China, 2015), Lawyer Practice in Civil Litigation (Co-author, Law-Press China, 2014).

IAFL Introduction to International Family Law Conference – Bangkok, Thailand

Tuesday 30 May 2023

Panel Marriage and Divorce

What is a marriage in your jurisdiction?

- De facto relationships / common law marriage?
- Civil marriage?
- Religious marriage?
- What is the status in your jurisdiction in relation to civil marriage?

Who can marry?

- Marriage age?
- If under age, permission from parents or court required?
- Different sex / same sex?
- Is a religious marriage open to same sex couple?

What is a (registered) partnership?

- De facto relationships
- Registered partnership

Who can enter into a registered partnership?

- Age?
- If under age, permission from parents or court required?
- Different sex / same sex?

Recognition of foreign marriages in your jurisdiction

- Requirements?
- Different sex / same sex marriage?
- Religious marriage?

Recognition of foreign registered partnership in your jurisdiction

- Requirements?
- Different sex / same sex?

- What if a couple wants to marry in your country, while they have already registered their foreign registered partnership in their home country. Would that be possible or would the foreign registered partnership be an impediment for the marriage?

- What if the same couple would return to their home country (your country). Would that marriage be recognised or would the registered partnership be an impediment for recognising the foreign marriage?

Divorce

- Wat are the jurisdictional requirements for divorce (residence, nationality/common law domicile)?
- Is there a waiting term for divorce?
- What are the grounds for divorce (no fault / fault based system)?
- Which authority is competent to deal with the dissolution of the marriage?
- Is it possible to ask the court an order to condemn the other spouse to co-operate in ending the religious marriage (for example a Jewish *gêt*, but also Catholicism) in order for them to be able to remarry? Or do people simply leave the Church?
- Is it possible to ask for financial relief / division of the matrimonial property regime in the same proceedings?
- Is it possible to ask for financial relief / division of the matrimonial property regime in free standing proceedings prior or after the divorce?
- Would a foreign divorce decision be recognised in your country and what are the requirements?

Dissolution of the registered partnership, if recognised in your jurisdiction

- Wat are the jurisdictional requirements for dissolution of the registered partnership (residence, nationality/common law domicile)?
- Is there a waiting term for dissolution of the registered partnership?
- What are the grounds for dissolution of the registered partnership (no fault / fault based system)?
- Which authority is competent to deal with the dissolution of the registered partnership?
- Would a foreign decision with the dissolution of a registered partnership be recognised in your country and what are the requirements?
- Is it possible to ask for financial relief / decision on the property consequences of the dissolution of the registered partnership in the same proceedings?
- Is it possible to ask for financial relief / decision on the property consequences of the dissolution of the registered partnership in free standing proceedings prior or after the divorce?

IAFL Introduction to International Family Law

Conference Bangkok

Tuesday 30 May, 2023

Panel Marriage and Divorce

10:30

France - Diane Sussman

WHAT IS A MARRIAGE IN YOUR JURISDICTION ?

Under French law, marriage is a legal union entered into with free consent by two persons of different or same sex, which creates rights and duties between the spouses.

In France, the trend of the last 20 years is a liberalisation of the notion of couple. The Civil code has progressively recognised relationships alongside the marriage (in 1999): *de facto* relationships (or cohabitees) and partners which still differs from marriage even if they tend to be more and more alike : cohabitees (also called "free union"; no specific legislation and no duties) and partners (which are governed by a specific legislation entered into in 1999, with more duties than free union).

De facto relationship/common law marriage ?

- **De facto relationships** or Cohabitees or « *free union* » : it is about two people involved in a *de facto* relationship (same sex or not) sharing a common life. It differs from registered partnership which requires an administrative process (registration in front of a clerk of a specific court or the civil servant of the city hall) and creates duties between partners. Notwithstanding a few tax consequences and entitlement to some social benefits, the law did not create any personal or patrimonial duties between cohabitees (there is no obligation to be faithfull for example). Each cohabitant retains full ownership of his separate property. No maintenance of compensatory benefice claim are possible in the case of the breakdown of cohabitation, unless mentioned in a conventional agreement signed by the parties.
- **Common law marriage?** there is no concept such as a "common law marriage" in French law (a common law marriage is one in which the couple lives together for a period of time and holds themselves out to friends, family and the community as "being married," but without ever going through a formal ceremony or getting a marriage license. In some states of the US, once established, a common law marriage is just as valid and binding as a formalized marriage).

Who can marry ?

- **Marriage age ?** 18
- **If under age, permission of parents or courts required ?** Yes
- **Different sex / same sex marriage ?** Both - Same sex marriage are authorized since 2013
- **Is a religious marriage open to same sex couple?** Religious marriage is not recognised in France.

What is a registered partnership ?

- **Registered partnership** (acronym « PACS ») = a union which was created at the origin as a written contract for same-sex couple who were prohibited to get married (until 2013) ; homosexual couples now represent only 2,5% of partnerships (in 2022 : 192 000 PACS : 10 000 for same sex couple / 182 000 for different sex couples).

Partners have a duty of assistance, common life and mutual help which is similar to marriage ; the dissolution process is very different as you only need to declare it to the clerk of a judicial court or send a bailiff to notify the end of the union to the other party (unilateral and administrative dissolution whereas dissolution of marriage is judicial or conventional).

Partners are deemed to have adopted a separation of property regime as a default regime, but they can opt for a joint ownership regime either at the time they enter the PACS or later on by amending their partnership agreement.

International private law rules: Since 2016 there is an EU Regulation concerning registered partnerships which applies between 18 Member States (for example Poland did not adopt this regulation). It is a European recognition of this new conjugality, the marriage losing its unique status.

Similarities to marriage: partners are considered as spouses according to labour law - parental leave issues.

Who can enter into a registered partnership ?

- **age ?** 18
- **If under age, permission of parents or courts required ?** No
- **Different/same sex ?** Both
  - Not between relatives or someone already married or in another partnership
  - It can be two French, two foreigners, one French and one foreigner (obligation to justify common residence). If foreigner, duty to provide for an affidavit stating the person is over 18 years old, single and with full capacity.

Recognition of foreign marriage in your jurisdiction ?

- **Requirements ?** a French rule of conflict of law applies to this issue. Indeed, France recognises a foreign marriage and considers it valid if:
  - it was celebrated in respect of the law of the country of celebration + each spouse respected requirements of their personal law (law of their citizenship about age, sex etc);
  - However, French law protects consent: a marriage won't be recognised if a lack of consent is demonstrated (or a spouse was seeking to get marry for wrong reasons - ex: to get a visa). It can be considered a void marriage.
- **Different/same sex marriage ?** As per the specific rule of conflict of law, same sex marriages are recognised if the personal law of one of the spouse **or** law of residence of one spouse allows it.
- **Religious marriage ?** Not recognized in France.

Recognition of registered partnership in your jurisdiction ?

- **Requirements?** Under a French rule of conflict of law, a partnership is submitted to the law where it was registered. If all the requirements according to the foreign law were met, France recognises the partnership.

  A foreign partnership is recognized if partners establish that it was registered by a rightful authority in the foreign country and contains no violation of the French international public order (a partnership between brother and sister would violate French international public order).

  Since 29 January 2019, France applies the EU Registered Partnerships Regulation which states which imposes an automatic recognition of decisions relating to the property effects of registered partnership for the 18 member states that have opted into the regulation.

- **Different/same sex?** Both are recognised as both exists in France.

- **What if a couple want to marry in your country, while they have already registered their foreign partnership in their home country. Would that be possible or would the foreign registered partnership be an impediment for the marriage ?** A French partnership between two persons is dissolved by the marriage of these two persons.

  Therefore, eventhough the foreign registered partnership is recognized in France, as explained in previous paragraphs, the marriage, if requirements are met, would dissolve it.

- **What if the same couple would return to their home country (your country). Would that marriage be recognised or would the registered partnership be an impediment for recognising the foreign marriage ?**

  Same logic as previous question. If the foreign marriage is valid in France, it would dissolve the previous French partnership.

Divorce ?

- **What are the jurisdictional requirements for divorce (residence, nationality, common law domicile) ?** As far as divorce is concerned, French courts apply EU Regulation named Brussels II ter entered into force on 1st August 2022, which concerns all Member States.

  As per article 3, French judge has jurisdiction if one of the party is living in France (for 1 year for non French citizens or 6 months for French citizens) or if both parties have French citizenship.

  If the jurisdiction of none of the Member states is established by the provisions set out in Brusells II Regulation, then Article 6 of the Regulation provides that jurisdiction shall be determined in each Member State, by the law of that State.

  In France, article 14 and 15 of the Civil code, known as "jurisdiction privilege", may apply : therefore in the case of a Brazilian living with a French in Canada, the French judge has jurisdiction based only on his sole French citizenship. However, this would not be possible if it was an italian living with a French in Canada as we consider we cannot use this French private international rule against a EU citizen.

- **Is there a waiting term for a divorce ?** No.

  No waiting term to seize a jurisdiction ; it is to be mentioned that to obtain a divorce order, if no fault was committed, parties need to wait 1 year of separation to obtain a decision (since sept. 2020. Before it was 2 years).

- **What are the grounds for divorce (no fault / fault based system) ?**
  - Mutual consent divorce, without a judge: parties agree on the principle of divorce + consequences and sign a contract (not recommended in international situation as it is a sole contract);
  - Acceptance of principle of divorce (parties agree on the principle of divorce but not on the consequences),

- Separation of one year without consent (judicial): also called definitive alteration of the bon of the marriage
- Fault: any violation of a marriage duty (ex: adultery, abandonment of the house without a motive, leaving a spouse without any financial support …)

- **Which authority is competent to deal with the dissolution of the marriage ?** French family judge for judicial divorce; in case of a mutual consent divorce, lawyers and notary (simple contract).

- **Is it possible to ask the court an order to condemn the other spouse to co-operate in ending the religious marriage (for example a jewish gêt, but also Catholicism) in order to be able to remarry ? or do the people simply leave the church ?** No ; religious marriage are not valid and not considered by the French State and judges.

- **Is it possible to ask for financial relief/division of the matrimonial property regime in the same proceedings?** Yes

- **Is it possible to ask for financial relief/division of the matrimonial property regime in free standing proceedings prior or after the divorce?** Under French law it is impossible to ask financial relief or division of the property regime before the divorce is ordered in free standing proceedings.

  Financial relief, if the French judge has jurisdiction on that issue, is asked at the time of the divorce proceeding.

  Division of the matrimonial property regime is asked in free standing, once the divorce is ordered.

- **Would a foreign divorce decision be recognised in your country and what are the requirements?**

  Yes. Requirements are different whether the foreign country is European or not, or linked to France via an international cooperation convention or not.

  If Member state divorce judgement: automatic recognition except if it violates the French public order.

  If not a Member State divorce judgement: it depends on the conditions of the bilateral convention if it exists. If no bilateral cooperation convention, the case law requirements are as follows: **(1)** the foreign judge had jurisdiction over the case, **(2)** public procedural order was respected (parties were represented and notified the divorce request + the decision), **(3)** the international French public order was respected (no violation of the principle of equality between men and women of discrimination against a sexual orientation - Ex of foreign divorces which are not recognised: Algerian or Moroccan repudiation), **(4)** decision is final.

Dissolution of the registered partnership, if recognised in your jurisdiction ?

- **What are the jurisdictional requirements for dissolution of registered partnership (residence, nationality, common law domicile) ?** France is part of a European Union cooperation between

18 Member States which applies solely to the division of assets between partners but not to the dissolution itself.

Rules of dissolution depend on the law which applies to the partnership ie. **the law of registration**.

If the partnership was registered in France, under French law, the dissolution of partnership is extra-judicial: it is a system based on the will of the partners.

If it is a foreign law, a strange situation can occur if this law states that the dissolution of the partnership is judicial. Indeed, in France, no judge has jurisdiction to dissolve a partnership. In such a situation, the French family judge could pronounce the dissolution and then will also have jurisdiction over division of assets and might apply a foreign law to this.

Partners must have a common residence in France to ask for dissolution in France.

- **Is there a waiting term for dissolution of a registered partnership ?** No.

- **What are the grounds for dissolution of a registered partnership (no fault / fault based system)** ? No fault only

- **Which authority is competent to deal with the dissolution of the registered partnership ?** either by common declaration of the partners to the officer of the civil state or by one of them who asks a bailiff to deliver the dissolution to the other partner.

- **Would a foreign decision with the dissolution of a registered partnership be recognised in your country and what are the requirements ?** if the dissolution was ordered by one of the 17 Member States of the EU Regulation, it benefits from automatic recognition and enforceable through a simple procedure by production of a copy of the decision which leads to a declaration of its enforceability.

  If the dissolution is ordered by a non-member state's jurisdiction, then, the decision would be recognized if it complies with the 3 case law requirements: indirect jurisdiction of foreign judge or authority, compliance with international public order and absence of fraud in law.

- **Is it possible to ask for financial relief/decision on the property consequences of the dissolution of the registered partnership in the same proceedings?** no because as explained, in France, the dissolution is an extra-judicial process.

- **Is it possible to ask for financial relief/decision on the property consequences of the dissolution of the registered partnership in free standing proceedings prior or after the dissolution of the partnership ?** French law does not authorize a partner to ask for a financial relief to a judge (as a compensatory allowance between spouses) unless agreed by parties in a previous agreement.

  A partner is able to ask for an order on the property consequences of the dissolution of the registered partnership in free standing after the dissolution.

IAFL Introduction to International Family Law Conference Bangkok, Thailand

Tuesday 30 May 2023
Panel Marriage and Divorce
10:30

The Netherlands – Sandra Verburgt

What is a marriage in your jurisdiction?

In the Netherlands a marriage may be entered into by two persons of a different or of the same sex. The law only considers marriages with regard to its civil aspects.

Since 1 April 2001 marriage has been open to persons of the same sex.

- **De facto relationships**
  A "de facto relationship" of non-registered cohabitants does not establish any rights or obligations between the cohabiting partners by virtue of the length of the cohabitation or children born from relationship. They are not heirs to each other and if the relationship unexpectedly breaks down, no financial rights or obligations arise upon separation. If they do wish to establish such rights, they can do so by entering in a cohabitation agreement. Any right or obligations between the cohabitants do arise from the contract but not from family law. They may however buy property in joint ownership; in which case they will co-own the property in the proportion of their share in the property. These ownership rights are based on Dutch property law, not on matrimonial property law.

  If children are born from this relationship the mother will in principle have sole custody, unless the father recognises the child at birth. Since 1 January 2023 recognition of a child automatically results in both parents being vested with parental authority. For children born before 1 January 2023, recognition of the child will not automatically result in joint custody. The mother must give permission for registration of joint custody, which can be done online.

  Common law marriage?
  there is no concept such as a "common law marriage" in Dutch law (a common law marriage is one in which the couple lives together for a period and holds themselves out to friends, family and the community as "being married," but without ever going through a formal ceremony or getting a marriage license.

- **Religious marriage?**
  The Netherlands is a secular state. Only a civil marriage will be recognised as a marriage under Dutch law. It is forbidden to have a religious marriage before the civil marriage has been solemnized.

- **What is the status in your jurisdiction in relation to civil marriage?**
  The civil marriage is the only marriage which has legal effect. Only a civil marriage creates rights and duties between the spouses.

Who can marry?

- **Marriage age?** 18
- **If underage, permission from parents or court required?**
  Since 5 December 2015 underage marriages are abolished to prevent and combat child marriages and to limit the recognition of foreign marriages to marriages which comply with the Dutch standards. Prior 5 December 2015 parents must give permission to marriages of underage spouses to be (16 and 17 years old)
- **Different sex / same sex?** Both, since 1 April 2001
- **Is a religious marriage open to same sex couple?**
  Religious marriage is not recognised in the Netherlands.

What is a (registered) partnership?

- **De facto relationships**
  See above under marriage. De facto relationships do not establish any rights between the cohabitants.

- **Registered partnership**
  Registered partnership is effective since 1 January 1998. In the Netherlands, a person may only enter into one registered partnership with one another person whether of the same or the other sex at any one time. The rights and obligations between the partners are the same as between married spouses. The difference is in the way the partnership or marriage can be dissolved. Marriages can only be dissolved by the family court, while registered partners without minor children may submit a declaration to dissolve their partnership with the Registrar of Births, Deaths, Marriages, and Registered Partnerships of the municipality where they live. Registered partnerships were very popular by same sex couples before 1 April 2001.

Who can enter into a registered partnership?

- **Age?** 18
- **If underage, permission from parents or court required?**
  Underaged partners cannot register their partnership.
- **Different sex / same sex?** Both, since 1 January 1998.

Recognition of foreign marriages in your jurisdiction

- **Requirements?**
  A marriage solemnized outside the Netherlands which is or subsequently became legally valid under the law of the state where the marriage was solemnized shall be recognised as such in the Netherlands.
  A marriage solemnized outside the Netherlands in the presence of a diplomatic or consular official which fulfils the requirements of the law of the State the official represents shall be recognised as valid, unless the ceremony was not permitted in the State where it took place.
  However, recognition can be refused in case recognition would be contrary to public policy and in case:
    - One of the spouses was already married or in a registered partnership with a Dutch national or that spouse is a Dutch national.
    - one of the spouses was related to the other in the direct line or the sibling was the spousal partner
    - one of the spouses has not reached the age of 18, unless at the time of the request for recognition they are 18 years old.
    - Mental incapacity of one of the spouses, unless at the time of recognition that spouses has regained capacity and explicitly agrees to the marriage
    - One spouse has not freely given his or her consent to the marriage unless he or she expressly consents to the recognition of it.

- **Different sex / same sex marriage?**
  No difference, as there is only one kind of marriage in the Netherlands

- **Religious marriage?**
  Not recognised in the Netherlands, if the (foreign) country has a civil marriage. However, if the country where the religious marriage was solemnized acknowledges the religious marriage as valid, then it shall be recognized.

Recognition of foreign registered partnership in your jurisdiction

- **Requirements?**
  A registered partnership entered into outside the Netherlands which is or subsequently became legally valid under the law of the state where the registered partnership was entered into shall be recognised as such in the Netherlands.
  A registered partnership entered into outside the Netherlands in the presence of a diplomatic or consular official which fulfils the requirements of the law of the State the official represents shall be recognised as valid, unless the ceremony was not permitted in the State where it took place.

Regardless the above, a registered partnership entered into outside the Netherlands can only be recognized as such if it concerns a legally regulated form of cohabitation of two persons who maintain a close personal relationship, which form of cohabitation at least:

- has been registered by an authority competent to do so in the state where the registration took place.
- excludes the existence of a marriage or other legally regulated form of cohabitation with a third party.
- creates obligations between the partners that are substantially like those associated with marriage.

Recognition will also be refused if such recognition would be contrary public policy

- **Different sex / same sex?** Yes, possible

- **What if a couple wants to marry in your country, while they have already registered their foreign registered partnership in their home country. Would that be possible, or would the foreign registered partnership be an impediment for the marriage?**
  That would be an impediment as marriage and registered partnership between the same spouses/partners cannot exist at the same time. However, they may seek recognition of their partnership in the Netherlands and then they may dissolve it by simple declaration (if they have no children together). Under Dutch law it is also possible the convert a registered partnership into a marriage.

- **What if the same couple would return to their home country (your country). Would that marriage be recognised, or would the registered partnership be an impediment for recognising the foreign marriage?**
  If the registered partnership was entered into in the Netherlands, the succeeding marriage which took place abroad, cannot be recognised in the Netherlands, as the existence of the registered partnership between the partners is an impediment for marriage between the same partners under Dutch law and therefore also for foreign marriages.
  In case both the registered partnership and the marriage was entered into abroad and the registered partnership already recognised in the Netherlands under Dutch International Private law, then the registrar could also interpret the request from the parties to register the foreign marriage certificate as the parties' desire to convert their registered partnership into a marriage and then still convert the registered partnership into a marriage.

Divorce

- **Wat are the jurisdictional requirements for divorce (residence, nationality/common law domicile)?**
  As far as divorce is concerned, Dutch courts apply EU Regulation named Brussels II-ter entered into force on 1st August 2022, which concerns all Member States. The Dutch Court has jurisdiction regarding the divorce if:

  (i) the spouses are habitually resident in the Netherlands,
  (ii) the spouses were last habitually resident in the Netherlands, insofar as one of them still resides there,
  (iii) the respondent is habitually resident in the Netherlands,
  (iv) in the event of a joint application, either of the spouses is habitually resident in the Netherlands,
  (v) the applicant is habitually resident in the Netherlands if he or she resided there for at least a year immediately before the application was made, or
  (vi) the applicant is habitually resident in the Netherlands if he or she resided there for at least six months immediately before the application was made and is a Dutch national; or

  Or if both spouses have Dutch nationality.

- **Is there a waiting term for divorce?**
  There is no waiting term prior the petition for divorce.

- **What are the grounds for divorce (no fault / fault-based system)?**
  The Netherlands has a no-fault divorce system since 1973. Divorce will be pronounced by the court if the marriage has been broken down irretrievably, upon request of one spouse or by mutual consent of both spouses.

- **Which authority is competent to deal with the dissolution of the marriage?**
  Only the family Court can pronounce the divorce between the spouses.

- **Is it possible to ask the court an order to condemn the other spouse to co-operate in ending the religious marriage (for example a Jewish *gêt*, but also Catholicism) for them to be able to remarry? Or do people simply leave the Church?**
  It has been assumed in case law that not cooperating in a religious divorce may conflict with the due care that should be observed concerning the other party. As early as 1982, the Supreme Court ruled that the husband's refusal to cooperate in bringing about a rabbinical divorce decree against the wife may be unlawful. In that case, the court may order him to cooperate after all. This ruling was confirmed again several times. The Court of Appeal in The Hague ruled in 2017 in

the same way concerning the man's refusal to cooperate in ending a Sunni religious marriage and sentenced the man to cooperate within two weeks.

- **Is it possible to ask for financial relief / division of the matrimonial property regime in the same proceedings?**
  Yes, this can be requested ancillary to the request for divorce.

- **Is it possible to ask for financial relief / division of the matrimonial property regime in free standing proceedings prior or after the divorce?**
  Yes, this is also quite possible. Although in most cases more expensive and with a risk of longer lasting proceedings as these cases are being dealt by the commercial court – which sets higher court fees - and follow the same route as any other claims civil law matters.

- **Would a foreign divorce decision be recognised in your country and what are the requirements?**
  A divorce decision obtained abroad is recognized in the Netherlands
  - after due process of law. This is the case if the foreign decision was taken in legal proceedings that meet the requirements of proper and sufficiently safeguarded justice
  - if the decision of a judge or other authority established it
  - and if that judge or other authority had jurisdiction to do so according to their law.
  - the decision is binding and can no longer be appealed against and further, it can be enforced in the country of origin.
  - the recognition of the foreign decision is not contrary to Dutch public policy.

Dissolution of the registered partnership, if recognised in your jurisdiction

- **Wat are the jurisdictional requirements for dissolution of the registered partnership (residence, nationality/common law domicile)?**
  If the registered partnership was entered into in the Netherlands, the Dutch court will also have authority to dissolve the partnership. If the registered partnership was entered into abroad the Dutch court will apply the EU Regulation Brussels II-ter, entered into force on 1st August 2022, by means of analogy.

- **Is there a waiting term for dissolution of the registered partnership?**
  No, there is no waiting term prior to the petition to end the registered partnership (if submitted to the court) or the declaration to the Registrar of Births, Deaths, Marriages, and Registered Partnerships of the municipality where they live (if they have no children)

- **What are the grounds for dissolution of the registered partnership (no fault / fault-based system)?**
  The same applies as for the divorce. The Netherlands has a no-fault based system. The partnership should have been irretrievably broken down.

- **Which authority is competent to deal with the dissolution of the registered partnership?**
  Family court (in case the partners have children, or it is a petition for ending the partnership submitted by one spouse)
  Registrar of Births, Deaths, Marriages, and Registered Partnerships of the municipality where they live (in case of no children and mutual consent)

- **Would a foreign decision with the dissolution of a registered partnership be recognised in your country and what are the requirements?**
  A termination of the registered partnership established outside the Netherlands by mutual consent is recognised if the termination was validly established there.
  A termination by dissolution of the registered partnership obtained outside the Netherlands shall be recognized in the Netherlands:
  - after due process of law
  - if the decision of a court or other authority established it
  - and if that judge or authority was vested with jurisdiction for that purpose
  - the decision is binding and can no longer be appealed against and further, it can be enforced in the country of origin.
  - the recognition of the foreign decision is not contrary to Dutch public policy.

- **Is it possible to ask for financial relief / decision on the property consequences of the dissolution of the registered partnership in the same proceedings?**
  Yes, this can be requested ancillary to the request for ending the partnership.

- **Is it possible to ask for financial relief / decision on the property consequences of the dissolution of the registered partnership in free standing proceedings prior or after the divorce?**
  Yes, this is also quite possible. Although in most cases more expensive and with a risk of longer lasting proceedings as these cases are being dealt by the commercial court – which sets higher court fees - and follow the same route as any other claims civil law matters.

IAFL INTRODUCTION TO

INTERNATIONAL FAMILY LAW CONFERENCE

EDUCATION PROGRAMME

BANGKOK

Panel on Tuesday 30 May, 2023

People's Republic of China

Claudia Ningning Zhao

WHAT ARE THE REQUIREMENTS FOR MARRIAGE?

In China, a valid marriage should be satisfied with both substantive and procedural requirements.

Ⅰ.Substantive Requirements for a Marriage

(I) The principle of monogamy. Polygamy, polyandry is not recognized by Chinese law.

(II) Heterosexual marriage. A legal and valid marriage only can be established under the union of a male and a female, same sex marriage is not recognized by Chinese law.

(III) True intentions for marriage. Marriage must be based upon the complete willingness of both parties, which is the concrete embodiment of the principle of freedom to marry and the marriage should be independently registered by the marriage parties. Coercion by any party is prohibited.

(IV) Minimum Legal Marriage age. 22 years for male and 20 years for female.

(V) No kinship that prohibits marriage. Marriage in proximity of blood is prohibited, that is, it forbids people to get married who are lineal relatives by blood or collateral relatives by blood up to the third degree of kinship. The lineal relatives by blood includes between parents and children, grandparents and grandchildren, maternal grandparents and maternal grandchildren; and the collateral relatives by blood up to the third degree of kinship include siblings from the same parents (including half-siblings), uncles, aunts, cousins, nephews and nieces.

(V) Bigamy is prohibited by Chinese law.

Ⅱ. Procedural Requirements for Marriage

A legal and valid marriage in China has to be registered under a mandatory legal procedure by the male and the female who’re planning for marriage. They should apply in person to the marriage registration authority for the marriage registration, the marriage registration authority then shall ex officio examine all supporting materials submitted by the parties and inquire about the relevant information as well as both parties willingness to marriage. If both of them are eligible for marriage, a marriage certificate is issued, which means the marriage is legally established.

ARE RELIGIOUS CEREMONIES RECOGNIZED AS MARRIAGES?

In China, the civil registration at the marriage registration office stipulated by law is currently the only formal requirement for a valid marriage. Besides the mandatory marriage registration, a religious marriage wedding/ceremony held by the marriage parties is not interfered with or prohibited by laws unless it violates the substantive provisions of Civil Code of China. However, a religious marriage ceremony without civil marriage registration is not recognized as a legally valid marriage in China. Foreign marriage should be considered under the local law of the country where the marriage was established.

ARE SAME SEX MARRIAGES RECOGNIZED?

Ⅰ. Public Opinions

A poll ran by the website iFeng.com in 2019, showed that 67.34% of 9.9 million Chinese netizens supported legalizing the same-sex marriage into the Civil Code.

Some Chinese sociologist and liberal feminist, drafted and submitted the proposal on same-sex marriage for legislative discussion but failed.

Ⅱ. Judicial Practice

In 2016, the case, called “the first case on defending right of the same-sex marriage in China”, a same-sex couple, Sun and Hu, sued a Civil Affairs Bureau in Changsha City, Hunan Province for refusing to register their marriage in 2015. Finally their claims were rejected by Court on the grounds that the application of the same-sex couple for marriage registration obviously does not meet the legal requirements of marriage registration under Chinese laws.

Ⅲ. Law Provisions

Chinese laws including original Marriage Laws and newly implemented Civil Code of PRC in 2021 stipulate the marriage should be established by the parties of male and female.

Ⅳ. Conclusion

Same-sex marriage cannot be recognized in China.

ARE FOREIGN MARRIGES RECOGNIZED?

The Law on the Application of Laws to Foreign-related Civil Relations of PRC applies

while considering this issue. The marriage established under local law is usually recognized unless it breaches the mandatory provisions or public order and good customs in China.

ARE FOREIGN DIVORCES RECOGNIZED?

Ⅰ. Generally speaking, Chinese courts recognize foreign divorces. If one of the divorcing parties is Chinese or the marriage originally registered in China, the recognition should go through a court process of recognition. This foreign divorce with Chinese connection is recognized unless, (1) the judgment has not yet taken legal effect; (2) the foreign court who rendered the judgment has no jurisdiction over the divorce; (3) the judgment was rendered in the defendant's absence and without a lawful summons; (4) the divorce case between the parties is being heard or has been tried by a Chinese court, or the divorce judgment rendered by a court of a third country between the parties has been recognized by a Chinese court; (5) the judgment violates the basic principles of Chinese law or against national sovereignty, security, and the social public interest.

Ⅱ. If there is any financial or children issues dealt in the foreign divorce judgment, the financial and children issues are probably dealt separately by Chinese court if Chinese court has relevant jurisdiction.

WHAT ARE JURISDICTIONAL REQUIREMENTS FOR DIVORCE?

Ⅰ. General Provisions on Jurisdiction for Divorce

In Mainland China, the Court at the location of the defendant’s domicile has jurisdiction over a divorce lawsuit; if the domicile is different from his/her habitual residence, the court of habitual residence of the defendant takes the jurisdiction. The court at the location of the plaintiff's domicile or habitual residence has jurisdiction over the divorce filed against a person who does not reside in China, or a declared missing person.

Ⅱ. Special Provisions on Jurisdiction for Divorce

(I) In order to improve the efficiency and quality of adjudication, a system of centralized jurisdiction over foreign-related cases is applied in China. E.G., the Guangdong Provincial High Court has designated the People's Court of the Guangdong-Macao Intensive Cooperation Zone in Hengqin to have centralized jurisdiction over foreign-

related divorce cases with a subject amount of less than RMB 40 million (excluding the principal amount). The Higher People's Court of Fujian Province has designated Longhai Court to have cross-regional centralized jurisdiction over first-instance foreign-related, Hong Kong-related and Macao-related civil and commercial cases in its jurisdiction and Longwen District, Hua'an County and Changtai County.

(II) For overseas Chinese who marry in China but reside abroad, if the court of their residence rejects their divorce lawsuit on the ground that the lawsuit comes under the jurisdiction of the court of their marriage place, the Chinese court in the place where the marriage is registered or the last domestic residence of either party concerned shall take the jurisdiction of the divorce; or the court in the former domicile or last domestic residence of either party's if being rejected by foreign court due to their nationality.

(III) Both overseas Chinese are abroad but not settle, the jurisdiction is taken over by the court in the place where the plaintiff or the defendant has his/her domicile originally in China.

Ⅲ. Jurisdiction for Divorce of Foreign Couples

The Civil Procedure Law is lack of provisions that Chinese court's jurisdiction over the divorce of foreign couples with their marriage registered outside of China. In judicial practice, the courts are willing to accept their divorce application if one party of the foreign couple has a habitual residence (continuously residing for at least one year when applying for divorce) in China, or both husband and wife, especially the defendant, consent to comes under the jurisdiction of the Chinese court.

GROUND FOR DIVORCE

The irreversible broken-up of a marriage is the ground for divorce. Two ways to divorce in China:

Ⅰ. Divorce by Registration: If both husband and wife intend to get divorced voluntarily, a divorce by registration at Civil Affairs authority is available. They need to conclude a written Divorce Agreement that set forth their intention of voluntary divorce and consensus on settlements regarding children, property, financial and debt, etc. And then they should make the divorce application and submit all documents required by law and complete the registration in person, finally the parties should be granted divorce by issuing

them a Divorce Certificate.

Ⅱ. Divorce by Court Proceedings: If the husband and wife are not possible to conclude mutual agreement on divorce, the court taking jurisdiction shall deal and decide on the divorce on the ground that the marriage is irreversibly broken up. One of the circumstances should be taken into consideration: (I) Bigamy or cohabitation with a third party. (II) Domestic violence, maltreatment to or abandonment of family members. (III) With gambling, drug taking and other bad habits, which are not changed after repeated education. (IV) Separation from each other for two full years due to the alienation of mutual affection. (VI) One party is declared to be missing and the other party starts divorce proceedings. (VII) After the court has made a judgment rejecting the divorce, both parties live apart for another year and a party files a divorce suit again. (V) Other circumstances proving the broken-up of marriage.

ARE COMMON LAW MARRIAGE OR DE FACTO RELATIONSHIP RECOGNIZED?

A man and a woman living together in the name of husband and wife without having gone through marriage registration before February 1, 1994, when the Regulation on Administration of Marriage Registration was implemented, shall be deemed to be in a de facto marriage; February 1, 1994 afterwards, those, who meet the requirements for marriage registration but fail to go through marriage registration, shall be dealt with as the cohabitation and the cohabitation relationship is not protected by law. So de facto marriage has not been recognized since February 1, 1994. Any valid marriage should go through the legal marriage registration and verified by the marriage certificate in China. There’s not the concept of common law marriage in China neither.

IAFL Introduction to International Family Law Conference

MARRIAGE AND DIVORCE IN AUSTRALIA

Eleanor Lau, Partner, Accredited Specialist - Family Law

MARRIAGE

1. What is a marriage in your jurisdiction?

A marriage in Australia is a union between two people to the exclusion of all others, that has been voluntarily entered into for life, and which has been solemnised by an authorised celebrant (e.g. a registered minister of religion or a marriage celebrant).

2. Civil / religious marriage?

Civil/religious marriage ceremonies may be conducted and the legal recognition of the marriage will depend on whether the other requirements for a valid marriage have been met, referred to further below.

Religious ceremonies must be performed by a religious minister of an organisation that is listed as a recognised denomination under s 26 of the Marriage Act, in order to be legally recognised as valid. A list of recognised denominations can be found in the Marriage (Recognised Denominations) Proclamation 2018

3. De facto relationships / common law marriage?

A de facto relationship is a relationship between two people (different sexes or same sex) as a couple living together on a genuine basis. Unlike marriage and registered partnerships, there is no formal or administrative process involved in entering a de facto relationship.

If the existence of a de facto relationship is disputed, a factual enquiry is required. The circumstances that may give rise to a de facto relationship are discussed further below.

The Australian jurisdiction recognises de facto relationships and gives parties in those relationships the same rights as married couples.

4. Who can marry?

Anyone who is of marriageable age, not already lawfully married to another person, and not in a prohibited relationship (between ancestors or descendants of one another, or siblings).

In order for the marriage to be valid, the parties must enter the marriage by consent.

5. Marriageable age?

Unless the Court has authorised the marriage, parties to a marriage must be at least 18 years of age.

6. If underage, permission from parents or court required?

In exceptional circumstances, if one party is between 16 to 18 years of age, the party can apply to the Court to authorise the marriage. The Court's determination is discretionary. See

s 12 of the *Marriage Act* 1961, which states that *the circumstances of the case as so exceptional and unusual as to justify the making of the order"*.

7. Different sex / same sex?

Since 9 December 2017, following a national plebiscite, parties in a same sex relationship can legally be married.

8. Prior to this, the *Marriage Act* defined "marriage" as " the union of *a man and a woman* to the exclusion of all others, voluntarily entered into for life", which excluded same sex marriages. **Is a religious marriage open to same sex couples?**

The recognition of same sex marriages in various religions is subject to the rules of those religions/organisations, rather than being a legal issue in Australia.

DE FACTO RELATIONSHIPS

9. What is a (registered) partnership?

Parties may register their relationships with relevant state registries in Australia (except for in the Northern Territory and Western Australia). This is a factor that may be considered if the existence of a de facto relationship is contested.

10. What is a de facto relationship?

A de facto relationship will be established if, having regard to all the circumstances of the relationship and subject to paragraph 11 below, the parties have a relationship as a couple living together on a genuine domestic basis.

The Court assesses such circumstances by having regard to a variety of factors, including:

- the duration of the relationship;
- the nature and extent of the parties' common residence;
- whether a sexual relationship exists;
- the degree of financial dependence or whether there is care and support of children;
- the degree of financial interdependence;
- the ownership of property;
- the degree of mutual commitment to a shared life, and
- the public aspects of the relationship.

This list is not exhaustive, and none of these factors are determinative.

11. Who can enter into a de facto relationship?

Parties who are not legally married to each other (but can be legally married to another person or in a de facto relationship with another person) and not related by family can be a in a de facto relationship.

12. Age?

There are no legislative age requirements for de facto relationships.

13. If underage, permission from parents or court required?

Not applicable.

14. Different sex / same sex?

The de facto relationship provisions of the Australia jurisdiction have always recognised same sex relationships. Prior to the legalisation of same sex marriage, same sex couples had to establish they were in a de facto relationship before they could seek relief from the Court.

RECOGNITION OF FOREIGN MARRIAGES

15. Requirements?

A foreign marriage will be recognised in Australia if it is legally recognised in the relevant jurisdiction and also meets the requirements for a valid marriage in Australia.

16. Different sex / same sex marriage?

Same as above.

17. Religious marriage?

Same as above.

RECOGNITION OF FOREIGN REGISTERED PARTNERSHIPS

18. Requirements?

As set out above, there are only two (2) types of relationships recognised for family law purposes in Australia - marriage and de facto relationships. A foreign registered partnership will therefore only be recognised in Australia if it is found to be a de facto relationship. The fact of its registration may assist in assessing the circumstances of the relationship.

19. Different sex / same sex?

Same as above.

20. What if a couple wants to marry in your country while they have already registered their foreign registered partnership in their home country? Would that be possible, or would the foreign registered partnership be an impediment for the marriage?

As set out above, parties can marry in Australia as long as they are not already legally married (in Australia or any other jurisdiction). If the parties are in a registered relationship/de facto relationship in another jurisdiction and are not married to anyone else, they can marry.

Further, a person can be in a de facto relationship with one person and marry another person. A person can also be legally married to one person and be in de facto relationships with other person(s), which may give rise to interesting and overlapping family law property settlement claims.

21. What if the same couple would return to their home country (your country)? Would that marriage be recognised, or would the registered partnership be an impediment for recognising the foreign marriage?

Same answer as above.

DIVORCE

22. What are the jurisdictional requirements for divorce (residence, nationality/common law domicile)?

The jurisdictional requirements for divorce are that at least one of the parties to the marriage:

- regards Australia as their home; or
- is an Australian citizen or resident; or
- is an Australian citizen by birth or descent; or
- is an Australian citizen by grant of an Australian citizenship; or
- ordinarily lives in Australia and has done so for the 12 months prior to the filing of the divorce.

The parties must also have been separated for a period of at least 12 months. The court must be satisfied that there has been an irretrievable breakdown of the marriage and there is no reasonable likelihood of cohabitation being resumed.

23. Is there a waiting term for divorce?

Subject to the 12 month separation period, the waiting period for a divorce to be granted is subject to the Court registry's availability. A divorce hearing is generally listed within about 6 - weeks from the date of filing, subject to the Court's availability.

If parties have been married for less than 2 years, the parties must first attempt reconciliation with a family counsellor or consultant prior to filing a divorce, unless leave is granted by the Court.

A divorce order, once granted, takes effect one month and one day from the date of the Order being made (which is usually the date of the divorce hearing).

24. What are the grounds for divorce (no fault / fault-based system)?

Australia has a no-fault based system for divorce. Parties must only establish that there is an irreconcilable breakdown of the marriage, evidenced by a period of separation of at least 12 months.

25. Which authority is competent to deal with the dissolution of the marriage?

Applications for divorce should be filed in the Federal Circuit and Family Court of Australia, except for residents in Western Australia who would apply to the Family Court of Western Australia or the Magistrate's Court.

An application can be filed by one party to the marriage, or the parties can choose to file the application jointly.

26. Is it possible to ask the court for an order to condemn the other spouse to co-operate in ending the religious marriage (for example a Jewish *gêt*, but also Catholicism) in order for them to be able to remarry? Or do people simply leave the Church?

Given Australia is a no-fault based system, no such option is available within the legal framework.

27. Is it possible to ask for financial relief / division of the matrimonial property regime in the same proceedings?

28. An Application for Divorce and the divorce hearing is separate to property proceedings. Parties do not need to be divorced to bring an application for property settlement or

spousal maintenance. **Is it possible to ask for financial relief / division of the matrimonial property regime in free standing proceedings prior or after the divorce?**

Parties can file an application for property settlement or spousal maintenance any time after separation and if a divorce Order has been made, within 12 months of such Order.

Unlike an Application for Divorce, applications for property settlement or spousal maintenance do not require the parties to wait 12 months from the date of separation prior to filing. Therefore, some parties may seek financial relief as soon as there is a separation and prior to the 12 month separation period, and then file an Application for Divorce separately after the 12 month separation period has elapsed.

29. Would a foreign divorce decision be recognised in your country and what are the requirements?

For a foreign divorce to be considered valid, the divorce must have been effected in accordance with the laws of country in which it was made.

A valid foreign divorce will be recognised in Australia if the court is satisfied that either party has a sufficient connection with the overseas jurisdiction in which the divorce order was made. A sufficient connection may be established in several ways, including but not limited to, demonstrating that either party was domiciled in the overseas jurisdiction on the date divorce proceedings were filed, or that the respondent was ordinarily resident in the overseas jurisdiction at the time divorce proceedings were initiated.

DISSOLUTION OF THE REGISTERED PARTNERSHIP

30. What are the jurisdictional requirements for dissolution of the registered partnership (residence, nationality/common law domicile)?

The family law system does not deal with the dissolution of a registered partnership. As set out above, the relevant threshold for family law purposes is whether the parties are in a de facto relationship, and the fact of registration of the relationship is only one of numerous considerations. When parties separate on a final basis, the de facto relationship ceases.

A court will determine when such a relationship ceases (i.e. the date of separation), if contested, by assessing when the indicative factors described above ceased. The Federal Circuit and Family Court of Australia has jurisdiction to make the determination if at least one party is ordinarily resident in Australia.

31. Is there a waiting term for dissolution of the registered partnership?

In most states and territories, the revocation of the relationship is not finalised until 90 days after the filing of the relevant application. In the ACT, the waiting period is 12 months from the date of filing the relevant application.

32. What are the grounds for dissolution of the registered partnership (no fault / fault-based system)?

Like with divorce, the dissolution of registered relationships in Australia operates within a no-fault based system. The ways in which a party to a registered partnership may apply to revoke the registered partnership varies slightly depending on the state or territory of registration. Generally, the process involves making an application to the relevant state authority to revoke the relationship and showing that written notice has been served on the other party of an intent to revoke the relationship.

A registered relationship will also automatically be revoked if either party dies or gets married (to each other or to someone else).

33. Which authority is competent to deal with the dissolution of the registered partnership?

For registered relationships, the relevant state authority deals with the dissolution of the registered relationship. However, a registered relationship does not automatically give rise to the existence of a de facto relationship, and in the same way the dissolution of a registered relationship is but one factor that a court will consider in determining whether a de facto relationship has ended.

34. Would a foreign decision with the dissolution of a registered partnership be recognised in your country and what are the requirements?

Not applicable.

35. Is it possible to ask for financial relief / decision on the property consequences of the dissolution of the registered partnership in the same proceedings?

It is possible to ask for financial relief if the registered partnership meets the threshold of a de facto relationship. Parties to a de facto relationship have two (2) years from the date of separation (end of the de facto relationship) to commence proceedings for property settlement in the Court.

36. Is it possible to ask for financial relief / decision on the property consequences of the dissolution of the registered partnership in free standing proceedings prior or after the dissolution of the partnership?

Same as above.

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THAI MARRIAGE LAWS

Source : Thai Civil Code, Book V Title I, Marriage

1. BETROTHAL (Chapter I)

Betrothal. Betrothal (formal engagement) is the subject of a chapter in the Thai Civil Code. Betrothal is considered a contract = legal commitment.

	Thai Civil Code
• **Requirements**. - Between a man and a woman - 17 years of age or older (NB : The age of majority is 20 years in Thailand). ➔ If the betrothed is minor, his/her parents must consent to the engagement.	**Section 1435.** **Section 1436.**
• ***The khongman*.** Betrothal is not valid until the man gives the woman an element of his property = khongman. The **khongman** shall become the property of the woman after the betrothal has taken place. • ***The sinsod.*** The man must also offer a dowry to the woman's parents. ⇨ Both the khongman and the sinsod are returned to the man if the marriage does not take place due to the woman's fault.	**Section 1437.**

2. CONDITIONS OF MARRIAGE (Chapter II)

Requirements for marriage.
- Be at least 17 years old (if not, parental consent required) ;
- Be healthy in body and mind ;
- Not being related to each other ;
- Not being married.

Same-sex marriage. No.

Recognition of factual relationships and domestic partnerships. No.

Recognition of traditional marriage. No.

3. RELATIONSHIP OF HUSBAND AND WIFE (Chapter III)

Duty of cohabitation. Husband and wife shall cohabit UNLESS the mental health or happiness of one of the spouses is endangered.	**Section 1461** **Section 1462**.

4. TERMINATION OF MARRIAGE (Chapter VI)

Marriage is terminated by death, divorce or cancellation by the Court. — **Section 1501**

- ***Divorce by mutual consent.*** — **Section 1514**
  - Must be made in writing and certified by the signatures of at least two witnesses.
  - Only for marriages celebrated in Thailand
  - Fast and inexpensive procedure

- ***Grounds for judicial divorce.*** — **Section 1516**
  - Adultery ;
  - Insult to the spouse or his ascendants ;
  - Serious harm or torture to the body or mind of the spouse ;
  - Abandonment of the home for more than 3 years and being uncertain whether he or she is living or dead ;
  - Insanity for more than 3 years
  - one spouse is suffering from a communicable and dangerous disease which is incurable and may cause injury to the other.

- ***Void Marriages.*** A marriage may be declared void under the following conditions : — **Section 1506 to 1509**
  - Incest ;
  - Insanity at the time the marriage ceremony took place ;
  - Lack of registration at the appropriate district office ;
  - Pre-existing marriage.

- ***Voidable Marriages.*** A marriage may only be dissolved by Thai courts based on being voidable if a petition to do so is made within a certain time limit. A marriage may be dissolved if it is declared voidable under the following conditions : — **Section 1502 to Section 1508**
  - Age: 17 years of age; parties between the ages of 17 and 20 may only marry with the consent of a parent.
  - Mistaken Identity - If one spouse misrepresents their identity to another spouse in order to facilitate the marriage, the deceived spouse may submit a request for the marriage to be cancelled within 90 days of the marriage's registration.
  - Fraud – If one spouse misrepresents their financial status or personal background to facilitate the marriage, the deceived party has 90 days from the time of learning reality of the marriage to request that the marriage be cancelled, or 1 year from the date of the marriage, whichever occurs first.
  - Force – If one party is forced into a marriage, under physical or mental duress, they have until 1 year after the marriage to apply for the marriage to be dismissed.

PARENTING MATTERS

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Corinne is the immediate Past President of the Asia Pacific Chapter of the IAFL. She is a Barrister, and the immediate Past Chairman of the HK Bar Association's Committee on Family Law, having handed over in 2022 after chairing it for 6 years. Corinne was called to the Bar in England & Wales and Hong Kong and is a member of the Honourable Society of Gray's Inn. Practising from Chambers at 601 Dina House, Hong Kong, she is also an Associate Member of Chambers at 1 Crown Office Row, Temple, London, England. She specialises in Family Law, both as to children and finances. She is also a Family Mediator, a General Mediator and a Member of the HK Collaborative Practice Group. Corinne is an Advocacy Trainer for the HK Bar and an External Examiner for the professional practice qualifying course in Family Law at 3 Universities: The University of HK, HK City University, and The Chinese University of HK. She has been a member of the HK Committee on Children's Rights for many years.

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Ivan is a Fellow of the International Academy of Family Lawyers, membership of which is exclusive to family lawyers with extensive experience in international disputes relating to maintenance, division of assets and children's issues. He has represented clients in reported landmark judgments and has advised and acted for clients as lead counsel in matters involving division of matrimonial assets for high-net-worth individuals, international relocation and abduction of children.

Ivan is an accredited Family Mediator on the Singapore Mediation Center's (SMC) Family Panel, a panel of family mediators accredited by the Family Justice Courts and SMC. Ivan has also been appointed as a mediator to mediate family and matrimonial disputes at the SMC. Ivan is on the Law Society's Panel of Mediators and Neutral Evaluators for the Law Society Mediation and Neutral Evaluation Schemes.

SIMON BRUCE

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Simon is at the pinnacle of family law and is widely sought-after by clients. *"Simon Bruce remains at the top of the tree….he continues to provide an effortlessly first class service"*, said The Legal 500 in 2022.

He's been practising for over 35 years, and regularly does the top cases.
Almost uniquely, Simon has wide expertise in money and children cases. His case-load in pro bono family law clinics in London is mostly child custody work.

And his naturally empathetic and caring style is widely admired by clients.

Most of his cases get settled amicably, in mediation or round a table. Simon likes to talk and negotiate, rather than simply writing letters. He is direct and gives strong advice.

Simon is a fearless and reassuring presence in a client's life, and a reliable guide to good settlement.

Simon speaks French, and has many international cases and contracts. He has good friends throughout the family law world.

He likes to be absolutely up to date with developments in family law – and has made new law, for example with prenups and postnups. And he loves to mentor young lawyers.

Simon is an experienced collaborative lawyer and trained mediator; he is Resolution Accredited Specialist in Big Money cases and Emergency Procedures in financial relief cases.

His memberships include Resolution, the International Academy of Family Lawyers (having formerly sat on its Executive Committee) and the Union Internatiole des Avocats (UIA) (formerly being the elected President of its Family Law Commission).

This is no ordinary lawyer. Bruce is a super-lawyer. And he's funny. And a really good chess player, so don't mess. The first thing he says to a client? 'I hope that you never have to see me again.' He has this advice for those thinking of divorce. 'Generally avoid lawyers. Use us as facilitators and for high level advice. And be insistent on knowing the financial costs.' So it is all mediation, mediation, mediation with him. That and Liverpool Football Club.

IAFL Introduction to International Family Law Conference, Bangkok, Thailand 30 MAY 2023 Parenting Matters-Japan

Legal Profession Corporation CastGlobal

Partner, Attorney at Law, Makiko Mizuuchi

Q1. What are the legal principles and bases for making parenting or child care orders in your jurisdiction?

- In Japan, child custody is almost equivalent to parental authority, and only one parent is granted parental authority following a divorce.
- Parental authority includes various parental rights. Article 820 of the Civil Code provides that “a person who exercises parental authority holds the right, and bears the duty, to care for and educate the child.”

- Criteria for Determining Which Parent Will Be Granted

Parental Authority

In determining which parent will be granted parental authority, “the interest of the child” is paramount. All relevant circumstances are taken into account, but the following factors are given particular weight:

(1) The stability of the child’s custody

The parent currently raising the child tends to be given priority in being granted custody. However, when the child becomes older, the opinion of the child as to which parent should have parental authority is given greater weight.

(2) The child’s opinion

The Family Court must take into account the opinion of a child over the age of fourteen. In some cases, the Court will seek the opinion of a child over ten, or so.

Visitation (Access) Rights

- Allowing the child to visit the non-custodial parent, or allowing the child and the non-custodial parent to spend time with each other or engage in other forms of direct or indirect contact, is known as “visitation rights”.
- Whether visitation is allowed or not depends on the facts of the case. The following general criteria are taken into account:

- Criteria relating to the circumstances of the child
- Age, gender, mental and physical development, adaptation to the past and current nurturing environment, adaptation to the change of environment, intention of the child, connections with the parents and relatives, and relationship with the siblings, etc

- Criteria relating to the circumstances of the parents
- Capacity and willingness as a custodian, experience as a custodian, emotional connections with the child, mental and physical health, character, financial ability, attitude for life, existence of violence or abuse, conditions of the residence, environment of the residence, educational environment, affection toward the child, conditions of the past custody, the support by the relatives or other people, wrongfulness of the removal, and tolerance of visitation, etc.

Q2. What is the approach in your jurisdiction when a child is abducted by one parent to your jurisdiction where the 1980 Hague Abduction Convention applies?

The Hague Implementation Act

- The Hague Convention came into force on April 1, 2014 in Japan.
- The Hague Implementation Act, “Act” prescribes domestic procedures and other matters required to implement the Hague Convention. The official title of the Act is “Act for Implementation of the Convention on the Civil Aspects of International Child Abduction”.
- Please refer to English translation of the Hague Implementation Act,
- http://www.japaneselawtranslation.go.jp/law/detail/?id=3484&vm=04&re=0

- Making an application to the central authority, which is the Minister of Foreign Affairs, is not required in order to file a petition for the return of the child.
- However, it is recommended to make an application to the central authority to seek assistance for the return of the child. The court refers to the central authority for the address of the taking parent and the child in order to serve the court documents and the petition after the petition is filed. If the assistance is not provided by the central authority, it may take longer to serve the documents from the court to the taking parent.

Proceedings in the court

- The left behind parent can file a petition for the return of the child to either Tokyo Family Court or the Osaka Family Court under the Act. If the child resides in the eastern part of Japan, the Tokyo Family Court has jurisdiction over the case. If the child resides in the western part of Japan, the Osaka Family Court has jurisdiction over the case.
- ADR, the alternative dispute resolution in the several bar associations or other institutions, is also available to settle the case.

- In the court procedure, in general, if the requirements for the grounds for return are satisfied, and the taking parent cannot prove the grounds for refusal of return, the court will order the return of the child to the country of the child's habitual residence.

In-court conciliation proceedings

- The mediation proceedings are not required in order to file a petition for the return of the child.
- However, in general, the in-court mediation (conciliation) is conducted during the court proceedings when both parties consent to hold conciliation proceedings in order to seek amicable solutions.

Statistics of the cases

- The statistics are provided by the joint report of the Ministry of Foreign Affairs and the Ministry of Justice of Japan. The report is written only in Japanese. Please refer to the website of the Ministry of Foreign Affairs,
- https://www.mofa.go.jp/files/100012160.pdf

Enforcement

- The Hague Implementation Act was amended. It was enacted on April 1, 2020 in Japan.
- The left behind parent can procced to the compulsory enforcement(execution by substitute) of the child's return when the taking parent does not comply with the return order issued by the court. The return order needs to be final and binding.
- The left behind parent can procced to the compulsory enforcement of the child's return when the taking parent does not comply with the agreement to return the child made in the court-based conciliation proceedings as well.

- It became easier and faster to file the execution by substitute due to the amendment of the Act. The enforcement officers gained more flexibility as to when, where and how to carry out the execution by substitute.

Habeas corpus

- When the execution by substitute is not successful, the relief by the petition under the habeas corpus is possible.
- Overall, including the relief under a habeas corpus order, there is a high possibility that the return of the child to the state of its habitual residence is realized.
- Please refer to the Japanese section of INCADAT of the HCCH, the Hague Conference on Private International Law.

Q3. What is the approach if the 1980 Hague Convention Abduction Convention does not apply?

- The parent in the foreign country would like the child to return to that foreign country after the child has been taken away to Japan, and has been kept in Japan. In that case, the parent in the foreign country may file a petition to have the child handed over to the parent, or file a petition under a relief of the habeas corpus to a court in Japan.

Q4. What is the approach in your jurisdiction if one party wishes to relocate permanently with a child (ie seeking leave to remove)

- After a couple divorces, one parent holds solo parental authority over the children.
- The parent who has parental authority can decide the location of the child. The residence of a child shall be determined by a person who exercises parental authority (Article 821 of the Civil Code.
- In order for the court in Japan to have jurisdiction over parental authority or custody cases, the child needs to reside in Japan. Even though a Japanese parent files a petition for a change of parental authority or the (physical) custody of the child, the court will dismiss the case if the child does not reside in Japan.

Thank you very much for listening

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Parenting Matters: A Singapore Perspective

IAFL INTRODUCTION TO FAMILY LAW CONFERENCE, Bangkok, 30 May 2023

Ivan Cheong, Partner, Withers KhattarWong LLP

Legal Principles – Basis for the making of parenting orders.

In Singapore, the legal principles in relation to children and the making of parenting orders are primarily found in legislation (Statutes) and case law (Court Judgments interpreting the law). The main statutes which set out the legal principles governing the making of parenting orders are as below:

a. Women's Charter (Cap 353)
b. Guardianship of Infant's Act (Cap 122)
c. International Child Abduction Act (Cap 143C)

The general and overriding legal principle that forms the basis of all orders in relation to Children (including Parenting Orders) is the children's welfare. In making parenting orders, the Court's paramount consideration is what is in the children's best interests. The primary importance of the child's welfare trumping all other considerations for all matters concerning children has been described by the Supreme Court (apex court of Singapore) in ***BNS v BNT***[1] as " *the golden thread that runs through all proceedings directly affecting the interest of the children*".

Welfare of the Child being the paramount consideration.

The principle of the Child's welfare as being of paramount importance is enshrined in the governing statues.

Section 3 of the Guardianship of Infants Act ("GIA")

Welfare of infant to be paramount consideration

3. Where in any proceedings before any court the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income thereof is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration and save in so far as such welfare otherwise requires the father of an infant shall not be deemed to have any right superior to that of the mother in respect of such custody, administration or application nor shall the mother be deemed to have any claim superior to that of the father.

[1] [2015] 3 SLR 973

Section 125 of the Women's Charter ("WC")

Paramount consideration to be welfare of child

125.—(1) The court may at any time by order place a child in the custody, or in the care and control, of the child's father or mother or (where there are exceptional circumstances making it undesirable that the child be entrusted to either parent) of any other relative of the child or of any organisation or association the objects of which include child welfare, or of any other suitable person.

The enabling provisions in the aforesaid legislation are Sections 5 of the GIA and Sections 124 to 129 of the WC. These provisions empower the Court to make any orders in relation to parenting matters for the children upon the relevant application being made to the Court or the matter having come up for determination during the course of proceedings (i.e. where there are ongoing divorce proceedings and parties are unable to agree on parenting matters)

Factors considered by the Court when making parenting orders.

The Court has great discretion when making parenting orders and in ascertaining the children's welfare and what is in their best interests, some factors which the Court considers (amongst others) are:

a. Wishes of the parents;
b. Wishes of the child where the child is of an age to express an independent opinion [2];
c. Current status quo care arrangements (continuity of living environment, home residence of the child, the child's daily routine)[3];
d. the age of the children;
e. between the two parents who has been the primary caregiver for the children;
f. standard of care received by the children under each parent's care;
g. standard of living enjoyed by the children and the manner in which the parents expected the children to be educated (where an order for maintenance for the children needs to be made); and
h. parents' work routine and children's schedule (in considering the feasibility of care arrangements as well as contact time/ access orders to the parent without physical custody (care and control) of the children)

This list of factors is non-exhaustive and serves to highlight some of the many facts that the Court takes into account when making parenting orders in relation to the children's welfare. While there is no statutory definition of what the concept of welfare entails, the Courts have consistently held that the child's welfare must be considered in the widest

[2] Section 125(2) of the Women's Charter. May be obtained via judicial interviews with the child, the appointment of a child representative or the relevant report being commissioned by the Court (i.e. Custody Evaluation Report).
[3] Where the children have been wrongfully removed from the family home by a parent without the other party's consent, the Court may consider that a return to the familiar familial home (or status ante quo) would be in the children's best interests.

sense and includes the '*general well-being of the child and all aspects of his upbringing, religious, moral as well as physical'*. [4]The child's welfare is not to be measured in monetary terms and should maintain the ties of affection that the child enjoys. The statutory definition of "child" is set out in Section 122 of the WC read together with Section 92 of the WC. Briefly, the child must be under the age of majority which in Singapore is 21. Parenting Orders last until the child turns 21.

Parenting Orders

Parenting orders in Singapore (apart from orders for maintenance of the children) take the form of three kinds of orders. These orders are for custody, care and control and access. While individual and separate concepts, these three orders usually form part of a single parenting order that sets out the parties' obligations and care arrangements for the children.

Custody

Since the seminal Court of Appeal case of ***CX v CY*** [2005] SGCA 37, custody has been defined as the ability of the parents to make the important long-term decisions concerning the children's welfare. This includes the right of parents to decide on long term aspects of the child's upbringing such as health, education, religion and major medical decisions for the child.[5] By endorsing the concept of joint parental responsibility as being in the child's best interests, the Court held that joint custody orders are in the welfare of the children and should be ordered unless exceptional circumstances exist. This reinforces the view that parenthood is a lifelong responsibility and serves as a reminder to both parents that neither parent has a better right over the child and both have a responsibility to bring up the child in the best possible way.[6] A sole custody order may be only made in exceptional circumstances such as where one parent physically, sexually or emotionally abuses the child.

Care and Control

Care and control is defined as the parent with whom the child resides and confers the authority on the parent to make the day to day short term decisions concerning the child's welfare and activities. Examples include what the child should wear, what he should have for his meals, how he should travel to school and what the child wears. They are the day to day ordinary decisions that the parent with whom the child resides with has the authority to make.

[4] *Tan Siew Kee v Chua Ah Boey* [1987] SLR(R) 725 (High Court)
[5] *CX v CY* [2005] SGCA 37 (Court of Appeal) at [31] to [33]
[6] Ibid at [38]

Access

Access (or contact time) is the time which the child spends with the parent who does not have care and control of the child (i.e. the parent with whom the child does not stay with). Generally, the parent without care and control is granted reasonable access to the child to ensure that there is regular contact between the child and the said parent. Reasonable access is to allow the child to interact with both parents such that despite the breakdown in the relationship between the parents, he is assured to the greatest extent possible of a normal life with two parents.[7] Reasonable access orders generally take two forms. The first being unspecified liberal/reasonable access orders where parties are free to make access arrangements between themselves and requires parties' cooperation in agreeing on access terms. The second being specified reasonable access orders where parties are unable to decide and the Court decides on the details of access including the access period, venue for handover, durations for overseas access as well as how the public holidays are to be shared between parents.

In certain cases, the Court may make orders for supervised access where appropriate. [8] Supervised access or Assisted access when ordered usually involves access taking place in a neutral environment like a Divorce Support Specialist Agency where a trained counsellor is on hand to assist and observe the access sessions. Such sessions are not intended to be permanent and should transition towards reasonable access where the underlying concerns have been addressed. Older supervised access orders where the parent with care and control accompanies the child during the other parent's access session are hardly made these days. Such supervised access orders can be seen to be highly intrusive and tends to increase the opportunity for conflict and friction between the parents which would not be beneficial for the child.

Equal division of time between parents?

While joint parenting and joint parental responsibility is firmly enshrined in local jurisprudence, there is no legal presumption that each parent has an equal amount of time with the children. The closest situation is where there is a shared care and control order. Even then a shared care and control order where both parents have care of the children during the duration that the children reside with them does not necessarily equate to an equal division of the children's time between the parents. Likewise, there is no presumption for or against shared care and control orders.[9]

The following principles may be gleaned from local case law:

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[7] *BG v BG* [2007] SGCA 32 at [11] and [13]

[8] Such as where the parent having access has not had contact with the child and the relationship between the parent and child is terse or there were previous incidents of violence or neglect by the parent having access to the child.

[9] *BNS v BNT* [2017] SGHCF 5 (High Court) at [73]; *TAT v TAU* [2018] SGHCF 11

a. It is not necessary for a shared care and control order to be made to allow the other parent to play an active role in the child's life as access serves that purpose.[10]
b. A shared care and control order should not be made for 'signaling' effect (that joint co-operation by parents would be in the child's best interests). A joint custody order serves this purpose.[11]
c. While the ideal state is for the child to be in an intact family cared for by both parents, this is no longer achievable with a breakdown of a marriage (or relationship). Ignoring the realities such as parental conflict, parties' emotional baggage and dynamics of the various relationships in order to impose the perceived ideal of equal time-shared parenting or shared care and control can do more harm than good.[12]
d. There is no legal presumption that equal time-shared parenting or shared care and control is always in a child's welfare. While the frequency of contact between a parent and child may be important, the quality of contact is also important.[13]
e. Shared care and control orders which entail the children having two homes and spending significant amounts of time under the care of both parents who are primary caregivers would be ordered if they are in the children's best interests. The parents' ability to co-operatively co-parent, the parenting styles, the age of the child and the disruption to the child's routine are all factors that the Court considers in assessing whether a shared care and control order is in the child's best interests.

How are parenting orders enforced?

Disputes over parenting orders usually arise in relation to access to the children and to a lesser extent, parenting decisions that require the joint input and consent of the parents (i.e. important long-term factors affecting the child's welfare). Where the relief sought is for the recalcitrant parent to comply with existing parenting orders, the obvious recourse for enforcement is to seek an order of committal against the defaulting parent for contempt of court by disobeying the Court Order.

It is currently a two-stage process in which the party applying for an order for committal must first file an ex-parte application seeking *leave of Court* before filing an inter parte application for an order for committal after leave of court has been granted. The matter is then fixed for hearing. Such an application is made by way of a Summons, a Statement setting out particulars of the breach of order and a supporting affidavit. Given the relative draconian nature of the consequences of a committal order, all procedural requirements must be strictly adhered to and any failure to comply, even if technical, would be fatal to the application be it at the *ex parte* stage to obtain leave or at the inter parte committal proceedings.

[10] *AUA v ATZ* [2016] SGCA 41 at [59] - [60]
[11] *Supra* 9 - *BNS* at [75]
[12] *TAT v TAU* [2018] SGHCF 11 at [12]
[13] *Ibid* at [21] and [22]

Applying to enforce a Court Order by way of committal proceedings must be seen to be a remedy of final resort and should only be considered where a party deliberately and persistently refuses to obey a Court Order.[14] Given the need to expedite the process to ensure compliance with parenting orders as well as to provide a simpler mode of enforcement proceedings where child access orders have been breached, recommended reforms to the Family Justice system were proposed by the Committee to Review and Enhance Reform in the Family Justice System (RERF) on 19 September 2019.[15] Briefly, the suggested reforms for enforcement of parenting orders included:

a. Simplifying the process for enforcement of parenting orders through the introduction of a new Summons for Compliance application which would replace the current reliance on Contempt of Court proceedings. The Court would still have the discretion to impose a fine or custodial sentence for failure to comply with the Court orders.
b. Empowering the Court with more tools to ensure compliance with the parenting orders and to address the underlying issue to prevent further breaches. Some examples include ordering the parent in breach to provide a security bond to ensure compliance with the access orders (such bond being forfeited upon a further breach), ordering parents to attend counselling and therapy programs and compensating a parent for the loss of access time through make up access.
c. Appointment of a Parenting Coordinator ("PC"), a trained professional to facilitate the carrying out of parenting orders by educating, coaching and mediating the parents through their conflict. A refusal to cooperate with the PC would result in a situation where the uncooperative parent's conduct is reported to the Court along with the PC's recommendations which would be considered by the Court in making further orders.

These reforms were approved and part of the extensive amendments to the Women's Charter that was passed by the Singapore parliament in January 2022. Amongst some of the amendments, the process for ensuring compliance with parenting orders has been simplified with parties being able to file a single application for enforcement for custody or access orders. The Court is empowered to make *inter alia* orders for the child to be returned to the care of the rightful parent, orders that compensate the innocent parent for reasonable expenses incurred as a result of the breach and may order one or all parties to attend mandatory counselling or such programs as may be directed by the Court. The Court may also order the defaulting parent to execute a bond to secure their future compliance with the parenting order and has the power to impose a custodial sentence for a term not exceeding 12 months or a fine of up to S$20,000.[16]

Such an enforcement application can be made separately from the committal proceedings procedure outlined above. These amendments while passed by parliament have not yet come into law though it expected that this should take

[14] *Tan Beow Hiang v Tan Boon Aik* [2010] 4 SLR 870 at [63]
[15] Full recommendations by the RERF committee may be found at https://www.reach.gov.sg/-/media/reach/old-reach/2019/public-consult/msf/consulation-paper-on-recommendation-submitted-by-rerf-committee/annex.ashx
[16] Women's Charter (Amendment Act) 2022 S35, with respect to S126A

place by 2024. It is a welcome step in empowering the Court with a greater array of tools to enforce parenting orders while deterring future repeated breaches by addressing the root courses through therapy and education.

Rights of parents who are not married and other family units.

Save that the procedure for applying for parenting orders for unmarried parents is different from married parents who are undergoing divorce proceedings (applications under GIA for the former and WC for the latter), the rights of the parents remain the same regardless of their marital status. The Court treats all parents in the same way and the paramount consideration remains the child's welfare.

There is no room for a third party to be recognized as an additional parent apart from the biological parents or where the child has been legally adopted, the adoptive parents. Save for the exceptional circumstance where a child has no parent, no guardian and no other adult having parental rights over the child, a person even if a family member of the child, may not apply for parenting orders under Section 5 under the GIA.[17] Parents stand in an exalted position with respect to having authority over the upbringing of their child and are entitled to raise their own child without unnecessary interference from third parties. This flows from the settled principle that ordinarily, it is in children's welfare to be brought up by their parents. Save for exceptional circumstances where a parent is unfit, parents know their child best and are the most suitable persons to make decisions and bear responsibility for their child.[18]

Therefore partners of the biological parent of the child regardless of whether they are in a heterosexual or homosexual relationship would not enjoy any parental rights in relation to the child. The partner would also have no locus standi to apply for parenting orders under the GIA. There is no formal partnership status for cohabitants and same sex marriages wherever they may be solemnized are void under the WC. While the biological parent may apply to appoint his or her partner as a guardian of the child, the Court has in cases refused to make such an order notwithstanding there was no objection by the other biological parent of the child on the basis that there is no necessity for such parenting orders to be made.

<u>Wrongful abduction / retention of the Child to Singapore.</u>

Approach and process where the 1980 Hague Abduction Convention ("Hague Convention") applies.

The enactment of the International Child Abduction Act ("ICAA") on 28 December 2010 was to give effect to the Hague Convention that Singapore had acceded to and came into force on 1 March 2011. The Ministry of Social and Family

[17] See *UMF v UMG* [2018] SGHCF 20 at [28], [29], [31], [32] &[35]
[18] *UXH v UXI* [2019] SGHCF 24 at [28]

Development (MSFD) is the designated Central Authority in Singapore ("SCA"). For the Hague Convention to apply, both Singapore and the Contracting State from which the child was abducted from must be signatories and have recognized the other's accession of the Hague Convention. As of 1 April 2021, a total of 63 Contracting States have formally accepted Singapore's accession and are Contracting States for the purposes of Singapore's Hague Convention obligations under the ICAA.[19]

Procedure/Process for Hague Application

If a Child is wrongfully removed to/ retained in Singapore, the parent seeking the return of the child may request for assistance from SCA to seek the voluntary return of the child from the abducting parent. In most cases due to the refusal of the offending parent to return the child to the Contracting State where the child was habitually resident in, it would be necessary for the parent seeking return of the child to file an Originating Summons application under Section 8 of the ICAA ("Hague Application") along with a supporting affidavit in the Family Justice Court.

Given the nature and urgency of the application, the process is expedited with the hearing of the Hague Application at first instance within one month of the filing of the application. The Hague Application and supporting affidavit(s) should contain all relevant information to assist the Court in determining whether there was a wrongful removal/ retention of the children in Singapore. Such information includes but is not limited to the following:

i. information concerning the identity of the applicant, the child in question and the person alleged to have removed or retained the child;

ii. Date and place of birth of the child;

iii. Grounds and reasons on which the applicant is asking for the child to be returned;

iv. Particulars surrounding the wrongful abduction of the child to/ retention in Singapore and any evidence to show that there was no consent on the part of the applicant to the removal of the child to/ retention in Singapore;

v. All relevant and available information relating to the whereabouts of the child and the identity of the person whom the child is presumed to be with;

vi. Certified authenticated copy of any agreement between the parties in relation to the child or judicial/ administrative decisions/ orders setting out parties' custodial rights;

[19] List of Contracting States are set out in the Schedule to the International Child Abduction (Contracting States) Order 2011 at https://sso.agc.gov.sg/SL/ICAA2010-S211-2011?DocDate=20191220

vii. Certificate or affidavit from the Central Authority/ competent authority/ qualified legal professional concerning the relevant law of the requesting Contracting State; and

viii. All other relevant documents and evidence.

The application is to be made 1 year before the date of the alleged wrongful removal/ retention of the child to Singapore. The Court can order an injunction against any person from removing the child from Singapore pending its determination of the Hague Application and all other ongoing proceedings in relation to parenting orders for the child in Court are stayed pending final orders made on the Hague Application.[20]

Approach

The ICAA incorporates Articles 1, 3, 4, 5, 7, 8, 9, 10, 12, 13, 14, 15, 17, 18, 19 and 20 of the Hague Convention. A *prima facie* (default) case is made out for return of the child where (i) the child is under 16 years of age (article 4), (ii) wrongful removal/retention has been established (article 3 read with article 5) and (iii) less than one year has passed from the date of the wrongful removal/retention to the commencement of the Hague Application (article 12). The first two conditions are prerequisites. If the child is over 16 years old and/or wrongful removal/retention cannot be established, the Hague Convention has no effect. While a Hague Application may still be made more than one year after the wrongful removal or retention, the ability of the abducting parent to demonstrate to the Court's satisfaction that the child has settled in Singapore would be a defence to the Hague Application.[21] This is as Singapore would effectively have supplanted the Contracting State as the Child's new habitual residence.

When hearing a Hague Application, the Court is only concerned with the return of the children to their country of habitual residence from which they were first abducted and is not concerned with the substantive merits relating to relevant issues of custody, care and control and access between parents.[22] The Court will first have to consider whether there was a breach of the applicant's custodial rights which were being exercised as defined under Article 3 of the Hague Convention. Once this is established, the Court must then determine whether the Contracting State is the child's habitual residence. In this regard, the habitual residence of the child is determinative, and the Court would not examine the substantive merits of custodial disputes on the presumption that the country of habitual residence would be determine these matters in the child's best interests.

If the Child's habitual residence is determined to be that of the Contracting State, the child must be returned to the Contracting State unless the exceptions in Article 13 of the Hague Convention apply. The Court may also order

[20] Section 11 and 13 of the ICAA.
[21] Article 12 of the Hague Convention
[22] *BDU v BDT* [2014] SGCA 12 at [38]

undertakings to be given by parties when making an order for the return of the child to the state of habitual residence in order to ensure that the return of the child to the Contracting State would not adversely impact the child and/or the abducting parent.

Wrongful retention/removal

In the absence of a judicial/administrative decision from the Contracting State setting out the applicant's custodial rights, evidence should be given by the applicant showing how his or her custodial rights which he or she had either been exercising or would have been able to exercise, have been breached due to the other parent's abduction of the child to Singapore. Such evidence should be given by way of an affidavit affirmed by the relevant authorities or qualified legal professionals in support of the applicant's Hague Application. A certified document by the relevant authorities as to the law of the Contracting State would also suffice.

Habitual residence

In determining the child's habitual residence, the Court looks at where the child has been habitually resident immediately ***before*** the date of the alleged wrongful abduction/ retention of the child in Singapore. In determining the child's habitual residence, the Court will consider where the child has been living and how settled the child is in the country. This would also include the extent to which the child is integrated in the country in terms of environment, education, culture and the people around the child in that country. The Court would also have regard to the joint intention of both parents as to whether the child is to reside in the country. [23] Where the child is older, the assessment of the child's habitual residence should include both objective facts and subjective facts such as the child's views and perceptions of being in the new country. Where the child is younger, the objective factors and the parents' joint intentions take on greater significance. The query of the child's habitual residence is a question of fact and the weight to be given to each concern will depend on the circumstances of each case.[24]

Defences – Article 13 exceptions to the return of the child to the country of habitual residence under the Hague Convention

Where it is established that there has been wrongful removal or retention of the children under Article 3 and that the requesting Contracting State is the habitual residence of the children at the time of the wrongful removal, the Court is to order the return of the children to the Contracting State subject to conditions or undertakings as it thinks fit[25] unless one of the limited exceptions in Article 13 are satisfied. The three limited exceptions under Article 13 are:

[23] *TUC v TUD* [2017] SGHCF 12 at [43], [53] and [55]
[24] *Ibid* at [55]
[25] Section 8(3) of the ICCA and Article 12 of the Hague Convention

a. The parent has consented to or subsequently acquiesced in the removal or retention of the children. (Article 13(a))

b. The child objects to being returned and is old enough to express his views with a degree of maturity such that it is appropriate to take into account the child's views.

c. There is a grave risk that the child's return would expose him to physical or psychological harm or otherwise place the child in an intolerable situation. (Article 13(b))

A parent seeking to rely on the exception of consent under Article 13(a) must show on a balance of probabilities that the left behind parent had unequivocally consented to the removal or retention of the child from the country of habitual residence. Such evidence must be clear and compelling. Inferences of consent and acquiescence will not be drawn lightly by the Court. [26]

A parent who seeks to rely on the Article 13(b) exception (grave risk of the child being exposed to physical or psychological harm if returned) must identify the specific harm which the child would allegedly face, show that the harm would be faced and must be of a grave character. The supporting evidence must be clear and compelling.[27] The abducting parent cannot seek to rely on his or her conduct to create a situation of grave risk of physical and/or psychological harm to the child in order to rely on that alleged risk as an Article 13(b) exception.[28] Article 13(b) is to be applied restrictively for an expansive application would defeat the very objective of the Hague Convention.[29]

There are no reported local cases under the Hague Convention in which the Court has declined to order the return of the child to the country of habitual residence solely on the exception that the child objects to being returned and has attained an age and degree of maturity to take into consideration the child's view. This would certainly be a factual enquiry and would be dependent on the circumstances of the case.

Approach and process where the 1980 Hague Abduction Convention ("Hague Convention") does not apply

Where the Hague Convention does not apply because the country of habitual residence is either not a signatory to the Hague Convention or one of the recognized Contracting States as set out in the ICAA, the parent alleging wrongful abduction would need to take out an Originating Summons application under the GIA for return of the child.

Unlike a Hague Convention application where the habitual residence of the child is determinative as the issue there is the choice of jurisdiction, 'return' applications commenced under the GIA would be considered based on what is in the

[26] *Supra* 22 at [81] – [85]
[27] *BDU v BDT* [2013] SGHC 106 at [35] Upheld on appeal.
[28] *BDU v BDT* [2014] SGCA 12 at [49]
[29] *In Re D* [2007] 1 AC 619 at [51]

child's best interests. In this regard, the Court will consider the substantive issues in terms of the child's welfare and would likely make parenting orders such as custody, care and control and access when determining whether to order the return of the child to the foreign country.

The approach is thus similar to applications for leave to relocate the children to a foreign jurisdiction, namely that the Court must be satisfied that an order for the child to returned to the foreign country or country of habitual residence is in the child's welfare. Some of the factors which the Court would consider are the same factors that the Court considers when making parenting orders. In addition, the Court would also ascertain the habitual residence of the child and the degree to which the child has been settled in Singapore as well as his connecting ties to the foreign country. This remains a fact centric exercise that is guided always by the paramount consideration of what is in the best interests of the child.[30]

Relocation

Process

An application for leave to relocate overseas with the children is essentially an application for an order for leave of the children to be permanently removed from the jurisdiction of the Singapore Courts. The application is commenced by way of a summons application under the Divorce proceedings or by way of an Originating Summons under the GIA if there are no divorce proceedings. Leave to relocate overseas with the children will only be granted to the parent with care and control of the children. It is for this reason that an application for leave to relocate the children often includes substantive claims for parenting orders like custody and care and control where no prior custody orders subsist.

Approach and principles

When considering relocation applications, the paramount consideration remains the welfare of the child. Prior to 2014, the Court appeared to give great weight to the care and control parent's reason for wanting to relocate overseas with the children as the main factor in its consideration on whether to allow the parent's application for leave to relocate with the children. Relocation applications were generally allowed as long as the custodial parent's reasons for relocation were reasonable and that the Court should only refuse leave if it is clearly shown by the parent opposing relocation that it would be against the child's best interest and welfare.

[30] In *TSF v TSE* [2018] SGCA 49, the Court of Appeal allowed the father's appeal for care and control with the result that the child remained in Singapore (where he had been staying most of his life) notwithstanding multiple English Court Orders for the child to be returned as it found that it would be in the child's best interests to remain in Singapore.

In *Re C (an infant),* the Court of Appeal held that it is the reasonableness of the party having custody to want to take the child out of the jurisdiction which would be determinative and always keeping in mind that the paramount consideration is the welfare of the child.[31] This was subsequently interpreted by the lower courts to mean great, if not conclusive weight should be given to the reasonableness of the care and control parent's reasons for wanting to relocate when considering a relocation application.

Since 2014, the Courts have decisively shifted away from placing an undue emphasis on the weight to be given to the reasonable wishes of the custodial parent's desire to relocate overseas. The only fundamental legal principle is that the welfare of the child is paramount, and this principle overrides all other considerations.[32] The primary caregiver's reasonable wish to relocate is merely an important but not an overriding factor which gives rise to a presumption in favour of relocation. It is important and relevant only to the extent that there would be a transference of the relocating parent's insecurity and negative feelings onto the child since it is the child's welfare that lies at the heart of the inquiry and not the interests of the relocating parent.[33]

Where the child and the parent with access enjoy a close, blossoming relationship, the potential loss of relationship between the child and the left behind parent is one factor that would weigh against relocation. Uprooting the children from a stable living environment they currently enjoy is another factor that the Court considers in assessing whether relocation would be in the children's best interests.

The assessment of whether relocation is in the child's best interests is an intensely fact centric exercise and while the factors elucidated in past cases are useful, each case will be decided on its own facts.[34] Some of the facts that the Court takes into consideration for relocation applications include:

a. Reasonable wishes of the primary caregiver to relocate. In particular, whether there would be a transference of the primary caregiver's insecurity and negative feelings to the child given that well-being of the child and that of the primary caregiver are inextricably entwined together.[35]
b. The child's loss of relationship with the 'left behind' parent if relocation is allowed depending on the strength of the relationship between the child and that parent. (i.e. severing a blossoming relationship as opposed to hampering the development of a relationship)
c. Proposed work, care and living arrangements in the country to which relocation is sought including the feasibility of relocation plan. The existence of a family support network in the said country.
d. Connecting factors between child and country to which leave to relocate is sought (i.e. foreign country)

[31] [2002] SGCA 50 at [22]
[32] *BNS v BNT* [2015] SGCA 23 at [19]
[33] *Ibid* at [20] and *TAA v TAB* [2015] SGHCF 1
[34] *UFZ v UFY* [2018] SGHCF 8 at [8]. It is always a question of what is in the welfare of the child. At [17]
[35] *ULA v ULZ* [2018] SGHCF 19 at [43] – [46]

e. Residential/ Immigration status of the primary caregiver in Singapore (ability to remain in Singapore)
f. Whether uprooting the child from Singapore to have him adjust to a new life in the foreign country is in his welfare.[36]
g. Views of the children where they are old enough to express an independent opinion which may be given due weight.
h. How well settled the child is in Singapore which is a fact specific inquiry.[37]

At the end of the day, there is no pre-fixed precedence or hierarchy amongst various factors to be weighed in the overarching inquiry into the child's welfare. Where the factors stand in relation to one another depends on a consideration of all the facts of the case.[38]

Leave to remove applications

Such applications are usually requests to remove a child temporarily from the jurisdiction and often involve requests for greater overseas access (usually of an interim nature) during the child's school holidays. The process for commencement of such applications is identical to that for relocation applications. The Court approaches such applications for leave to bring the child overseas for school holiday access as it would any application for access to the child.

While the welfare of the child remains the paramount consideration, in most cases and in the absence of any extenuating circumstances, the Court would allow the applicant parent to bring the child overseas for holiday as this would be deemed to be in the child's best interests. A parent with custody or care and control of the child does not require the consent of the other parent with access to take the child out of Singapore if the period is for less than one month.[39] If an access order is already in place, this must be complied with.

In certain cases, the application for leave to remove the children temporarily from the jurisdiction of the Singapore Courts is more long term and necessitated due to a child's intention to continue his or her further education overseas. Such applications usually entail a dispute between parents and/or the child over the destination of the child's intended further education and would require the Court's adjudication to make the necessary orders.

[36] *Supra* 33 at [30] The High Court considered this factor but allowed the relocation as being in the children's best interest notwithstanding the children had been residing in Singapore for almost 10 years as the Court found *inter alia* that UK was the home country of the mother, there was a family support network and the children expressed a strong desire to relocate.
[37] *VLO v VLP* [2021] SGHCF 34 at [10]
[38] *Supra* 34 at [24]
[39] Sections 126(3) and 126(4) of the Women's Charter.

In such applications, the applicant's supporting affidavit for the summons application should set out the circumstances for which the parent is of the view that it would be in the child's best interests to further her education overseas, whether the child has been offered a spot at the intended place of study and the other parent's objections to the child furthering her education at the intended institution. Where the child is mature enough to express her own independent views (which would be the case for such applications), the child's views would be considered.

Conclusion

In the final analysis, the recurring theme and principle that undergirds all parenting matters considered by the Courts in Singapore is what is in the child's welfare. The limited exception is for Hague Convention applications where the primary concern is the return of the child to the country of habitual residence. This is grounded on the understanding that the country where the child is habitually resident is best placed to decide on the substantive parenting matters based on the child's welfare.

While general principles and factors are set out to assist the Court in assessing what is in the child's best interests, each case must be decided on its own facts as every family is unique. The Court stands in the role of an adjudicator to make parenting decisions where parents are unable to agree. This does not displace the parental responsibility of the parents and the recognition that barring exceptional circumstances, the parents know their children best and are most suitable to make decisions for their children. The focus at the end of the day is child centric in the overarching inquiry to the child's welfare.

IAFL Bangkok Symposium - Tuesday 30 May 2023

Introduction to International Family Law – Parenting Matters

Simon Bruce

Q1. ***What are the legal principles and bases for making parenting or child care orders in your jurisdiction?***

My answers.

1. The welfare of the child is the guiding principle.
2. Now, this is recognised as children spending time with both parents. Indeed the Children Act contains a presumption that it's in the interests of children to spend time with both parents.
3. Very common indeed now for children to spend more or less equal time with both parents.
4. As equality between women and men has become established, so it has become commonplace for 50/50 split of time with children.
5. A 5/5/2/2 division of time between parents is very common. 5 days with father, then 5 days with mother, then 2 days with father and then 2 days with mother.
6. And equal division of holidays.
7. **Court outcomes are discouraged. The President of the Family Division tells us to avoid court where we can.**
8. **Mediation is the norm**.

Some of the issues you could consider include:

- best interests principle?
- who is a parent: biological and psychological parents
- legitimate vs illegitimate children
- age of majority and duration of the orders
- habitual residence
- wardship
- Judge meeting the child
- separate representation
- welfare report / expert evidence
- joint or sole custody, any favouring of the father or the mother
- typical care arrangements, joint or shared care
- contact/access
- direct judicial communication in international cases
- recognition and enforcement
- mirror orders?
- court waiting time

Q2. **What is the approach in your jurisdiction when a child is abducted by one parent to your jurisdiction where the 1980 Hague Abduction Convention applies?**

- assistance from the Central Authority in locating the child and commencement of proceedings
- is Thailand recognised as a signatory in your jurisdiction eg although Thailand has signed the Hague Convention, and Simon will correct me if I am wrong, I believe that the UK has not been able as yet to enter a treaty with Thailand and therefore the Convention does not apply to abductions from Thailand to England & Wales and vice versa. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/366730/Child_Abduction_-_thailand.pdf
- principles
- defences
- court waiting time

Answer

Explanation of Hague procedure. Making ex parte or short notice application. Application to the Department of Work and Pensions for orders as to the disclosure of addresses of the abductor. Objective to finish cases within say 3 months.

Frequent defence is that the applicant has consented. Oral evidence may then be taken.

The defence that there will be extreme harm to the child if the child is returned to the home country hardly ever succeeds.

For example, a defence that the child should not be returned to Ukraine, which is a war zone, failed.

As have similar cases re return to Israel.

Q3**. What is the approach if the 1980 Hague Convention Abduction Convention does not apply?**

- principles
- defences
- court waiting time

Answer

I finished one of these cases last week, re an abduction of two children to The Philippines by a mother who was having an affair with a paedophile who had been jailed for indecently assaulting a 9 year old girl.

Application for the wardship of the children by the English court.

Statements by both sides.

One day final hearing. It took 5 months to get the final hearing. Establishment of England as their habitual residence. Order for their return.

Q4. **What is the approach in your jurisdiction if one party wishes to relocate permanently with a child (ie seeking leave to remove)**

- principles - best interests?
- relevant factors
- history re access and feasibility going forward

Answer

Welfare of child.

It used to be EASY for a mother to obtain permission to relocate with the children to her home country if she was miserable at the end of the relationship.

It is now DIFFICULT to do so.

Partly because children are now spending so much more time with their fathers.

For example, Zambian mother of a two year old child, father is French, they are living in England when the marriage ends. She is a bad mother and won't let father spend time with the child. Stops phone contact. Etc etc.

She failed with her relocation application as she could not be trusted to promote contact if she returned with the child to Zambia.

11. ESSENTIAL ADDITIONAL ADVICE.

I advise that everyone considers how the system can be made better when we answer each question.

I strongly believe that children law is poisoned by lawyers and parents who set out to fight, rather than putting the children first and setting out to ensure that the children spend a happy time with each parent.

If all parents and lawyers approached the subject of child law, which is much more important than family finance, from that point of view, family life and the lives of children of separated parents would be much much better.

Simon Bruce

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Dads House – Helping Dads be Dads

https://www.dadshouse.org.uk/family-law-blog/an-accomodation

An Accomodation

Aug 4

"~ and I both agreed that something had to change,

but I was still stunned and not a little hurt when I

staggered home one evening to find she'd draped a

net curtain slap bang down the middle of our home.

She said, "I'm over here and you're over there, and

from now on that's how it's going to be". It was a

small house, not much more than a single room,

which made for one or two practical problems".

From An Accommodation, by Simon Armitage.

Sitting next to Simon Armitage, Poet Laureate, at a recent dinner at Trinity College Oxford, I did not then know his poem about separating spouses.

If I had known about it, I would have asked him what triggered the quasi-humorous picture of the literal curtaining of their home midway between them; an absolute 50/50 division.

Where did his metaphors come from?

I've spent my life working with and for people who want a division of capital and income; and, more crudely, a division of their children's time.

In our family law clinic this last year, we have looked after many clients who want to see their children.

I'm thinking now of several parents who have not seen their children, let alone hugged them or spoken to them, for months and months.

And I've observed in some of those cases the building of walls between parents. Walls that you can't look through or over, and cannot peek around.

With the children stuck behind those walls.

It's made me think of children as victims of those parents' separation.

In one of those cases, there was a really co-operative lawyer who worked for my client's wife, and worked hard with me to set up contact between the father and his children at a contact centre. She was truly a facilitator for the children of time spent with our client.

That young lawyer was able to rip away the curtain that separated the parents, and to allow the children go from one side of the room to the other.

And look then at the children benefitting from healthy relationships with both their parents - rather than being victims.

So lawyers get adept at helping our clients to lift that curtain, to scale that wall, even to walk together round the room.

I like having gold standards like this one particular case, and trying to attain those standards in all the cases that we do.

Don't humanity and common sense lead to parents being flexible and generous-hearted, rather than trying to impose a wall between themselves after separating - especially where children are involved?

Don't we family lawyers have a responsibility to open a door and to keep it open, rather than slamming it shut?

Let's go back to Simon Armitage's poem for the optimistic development of the separated relationship.

"And there good times too, sitting side by

side on the old settee, the curtain between us, the

TV in her sector but angled towards me, taking me

into account".

Can we family lawyers be influenced or even moved by this kindness and co-operation?

Simon Bruce - *Supervising Solicitor, London, 19 June 2021*

https://www.dadshouse.org.uk/family-law-blog/an-accomodation

Email: info@dadshouse.org.uk

Neutral Citation: [2023] EWFC 59

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

No. FD22P00491

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 13 March 2023

Before:

MR JUSTICE MACDONALD

(**In Public)**

B E T W E E N :

MARYAM ALLAMI — Applicant

- and -

(1) ALI FAKHER
(2) A CHILD (by their Children's Guardian)

Respondents

MR M BASI (instructed by Dawson Cornwell) appeared on behalf of the Applicant Mother.

THE FIRST RESPONDENT appeared in person, assisted by his McKenzie Friend.

MS PAPAZIAN (instructed by Goodman Ray) appeared on behalf of the Second Respondent.

J U D G M E N T

MR JUSTICE MACDONALD:

1 The substantive proceedings in this matter concern an application for an order under the inherent jurisdiction of the High Court, requiring a return by the father to this jurisdiction of M, born in May 2008, who is 14, and E, born on in May 2012 and now aged 11. M was joined as a party to these proceedings by the order of HHJ Scarratt, sitting as a Deputy High Court Judge on 11 October 2022. He is today represented through his children's guardian.

2 This matter now comes before the court on the mother's application to commit the father of the children for contempt of court for failing to comply with the terms of a series of orders made by Newton J on 18 November 2022, ICC Judge Mullen on 13 December 2022, Moore J on 16 December 2022 and Mr Colton KC on 9 January 2023. That application to commit was issued on 31 January 2023. The mother is represented by Mr Basi of counsel.

3 The mother is an Iranian national who has been living in the United Kingdom since 2022 and holds dual Iranian and British citizenship. Whilst the father was granted legal aid by the court at the outset of these contempt proceedings, the father has appeared unrepresented with the assistance of a McKenzie Friend, Mr Lennard. At the outset of the hearing I gave Mr Lennard permission to advocate on behalf of the father, a task that Mr Lennard performed with conspicuous care and balance. The father also holds dual Iranian and British citizenship. He has lived in the United Kingdom for most of his life but has recently spent more time in Iran. He has a number of aliases.

4 In determining this matter, the court has had the benefit of the evidence contained in the trial bundle that is before the court. In support of her application the mother relied on the concessions by the father that (a) the children remain in the jurisdiction of Iran and have not yet been conveyed into the care of the maternal grandparents nor returned to the jurisdiction of England and Wales, and (b) the father has not provided a notarised document for the consensus of the children travelling from Iran to England, immediately the same was completed. The mother further relies on the recitals in the previous orders made by the court recording the father's stated position that he will not comply with any orders of this court. The father exercised his right to silence and Mr Lennard made submissions on his behalf. I also heard submissions on behalf of M.

5 Given the complexity of the regime put in place by the orders that are the subject of consideration by this court and the potentially penal consequences of allowing the mother's application, I reserved judgment for a short period.

6 Dealing with the background of the matter, the mother and the father met through mutual friends in or around 2006. They married under Sharia law in the UK on 28 July 2007 and had their civil marriage ceremony on 24 January 2008. At that time the father used the name Srio Alimo Fernandez. It was the father's case that he changed his name by deed poll afterwards to Ali Fakher. M was born in the United Kingdom and is a dual British and Iranian citizen, as is E. It is the mother's case that she and the father were jointly responsible for raising the children since their birth, that the father was critical of the fact that she was not a stay at home mother. It is the father's case that he was solely responsible for the children's care before he left for Iran, and also since August 2021 when the children remained in Iran. M has stated that both parents were present and looking after him and his sister when he was young.

7 The mother contends that she suffered emotional and psychological abuse from the father throughout the relationship and that he displayed controlling behaviour. The father contends that there was no evidence of domestic abuse. Both the mother and M allege that the father

was violent to the children and would hit them. The father asserts that such allegations are false.

8 In 2015, following the sad death of his mother, the father began spending more time in Iran. In July 2021, the mother and the children travelled to Iran with return tickets to the United Kingdom for 24 August 2021. It is the mother's case that she and the children travelled to visit the maternal grandparents. By contrast the father asserts the purpose of the trip was to reignite the parents marriage. During the time when the mother and the children were in Iran the father applied to register their marriage in that jurisdiction. The mother contends that as a result she became worried about what would happen to her and the children if the father was successful in registering the marriage, and so decided to cut the trip short and book tickets to return to the United Kingdom on 3 August 2021. The father alleges that the mother had in fact decided to abduct the children from Iran and to travel abroad with them without his knowledge and consent, which was contrary to Iranian law.

9 Within the foregoing context, the mother alleges that when she and the children tried to leave Iran on 3 August 2021 they were told that the father had removed the permission for the children to leave the country. By contrast the father alleges that because the children had arrived in Iran with Iranian passports, the Iranian authorities expected the father's consent before the children could leave Iran with British passports since dual citizenship was not recognised under Iranian law. For reasons I will come to the question of the father's consent to the children leaving Iran has become a central feature of this case, featuring in a number of the orders that are now the subject of this committal application.

10 In the foregoing circumstances the mother alleges that as a result, and fearing that she would also be prohibited from leaving Iran, she left the children in the care of the maternal grandparents and returned to the United Kingdom to seek the children's return from this jurisdiction. It is the father's case that the mother abandoned the children by themselves in the airport in Tehran and boarded the flight instead of seeking the father's consent to the removal of the children from that jurisdiction, or to suspend her travel arrangements. Put in this context the father asserts that he was unaware that the mother had purchased a one way return to the United Kingdom for 3 August 2021, and she made no attempt to seek the father's consent. The father asserts the mother was caught by the authorities in Tehran trying to leave without his consent and that she boarded the aircraft leaving the children behind and thereby placing them at risk. In these circumstances the father alleges that he had to take custody of the children by default. The mother denies that she abandoned the children at Tehran Airport.

11 The mother contacted the authorities upon arriving in the United Kingdom and commenced custody proceedings in Iran. It was the mother's case that she withdrew those proceedings after M contacted her and she became aware that the father had been notified of the proceedings. Thereafter the mother contends that she tried to have the children returned to the United Kingdom by complying with a series of requests made by the father, including:

a. Not to inform the authorities especially the police, not to contest the court proceedings in Iran, and to let the father marry her there in her absence.

b. She started an English divorce claiming that this was (inaudible) law and paid the father's counsel tax bill of £2,200, to return the father's bank cards and identity cards.

c. To put her flat in Iran as a guarantee that she would not go to the police and to making claims about the wrongful retention.

d. To move out of the family home and to return the family's car to him.

It is the father's case that the mother wanted to live a new life without the children in the United Kingdom and has been doing so since August 2021.

12 On 21 July 2022 the mother made an application on Form C66 seeking the return of the children to the United Kingdom. She appeared in person before Judd J on 22 July 2022 at a without notice hearing. Judd J made a passport order against the father on that date. The father travelled to the United Kingdom in August 2022 and had his documents, including his passport, seized by the tipstaff. The father's travel documents have been held by the tipstaff since that date.

13 The father has made his own application to commit the mother for contempt of court issued on 6 January 2023. That application alleges that the mother misled Judd J at the without notice hearing on 22 July 2022. In particular the father alleges that the mother made false statements to the court amounting to an interference with, or having a tendency to interfere with, or obstruct, the due administration of justice. The father alleges that this constitutes a contempt of court within the meaning of Rule 37.3(3) and Rule 37.3(5)(a) of the Family Procedure Rules.

14 In particular the father asserts that:

a. The mother stated that the children had been abducted and the father caused them serious risk of harm, which is untrue.

b. The mother did not inform the court that she had issued proceedings in Iran and abandoned them.

c. The mother did not inform Judd J that she was supposed to attend court in Iran on 3 August 2021 to resolve the issue between the parties in that jurisdiction.

d. The mother did not include in her statement or the exhibits the return tickets purchased with the assistance of the maternal grandfather at the end of August 2021, the date to which the father had consented.

e. The mother abandoned the children in Tehran Airport in Iran on 3 August 2021.
f. The mother did not inform the judge that the children had travelled to Iran on an Iranian passport and that they needed to exit with an Iranian passport.

g. The mother did not tell the judge that whilst in Iran the children are treated under law as Iranians, nor did she provide the court with the published information from the FCDO about the serious legal impediments of seeking the children's return from Iran to the United Kingdom.

15 With respect to the allegations of contempt raised against the mother by the father, the mother contends that the information was not provided to Judd J as it was irrelevant for the purpose of obtaining an emergency order in the circumstances. In any event the mother contends information was disclosed in the subsequent proceedings and considered by all the relevant judges for making orders for the return of the children. The mother further contends that the children's dual citizenship has been known throughout the proceedings and has been considered by the relevant judges in making their orders. The mother further asserts that the court was also aware throughout the proceedings that the mother had commenced proceedings in Iran, which she subsequently withdrew. Within this context the

mother denies that her actions are now an obstruction or interference with the due administration of justice.

16 The father's application to commit was personally served on the mother on 19 January 2023 and the court has before it a certificate of service indicating effective personal service. The application by the father to commit the mother was listed before this court for a final hearing or further directions at the discretion of the judge. I declined to deal with that application alongside the application to commit made by the mother. It is a long established principle that a committal application must be dealt with at a discrete hearing and not alongside other applications. The mother's application was listed for the final hearing and was ready to proceed. If the father seeks still to pursue his committal application in respect of the mother I will give directions for the determination of that matter at a further dispute committal hearing.

17 The children were made wards of court by Newton J on 18 November 2022. At that hearing Newton J made a suite of orders designed to secure the return of the children to England, including an order that the father cause children to return to this jurisdiction in advance of a final hearing so that they could properly participate in it. The order of Newton J contained a penal notice and personal service was dispenses with on the basis that the father attended at the hearing and that he was aware of, and consented to, the contents of that order, agreed to the draft, and was copied into the emails with the court filing the final version.

18 The order of Newton J required the father to cause the children to be returned to the care of the maternal family in Iran until they could return to England for the purposes of the final hearing. The order of Newton J further required the father to cause the children to return to England and Wales no later than 5 December 2022, again for the purposes of attending the final hearing then listed on 8 or 9 December 2022. It is of note that the order of Newton J also contained the following recitals, some of which are in fact expressed in terms of an order:

> "4. The respondent father informed the court that he retained and English driving licence in the name of Ali Fakher, which he required in order to obtain the notarised agreement set out below and which he will lodge with the tipstaff by 4.00 p.m. on 22 November 2022. He confirmed he has no other identity or travel documents."

And:

> "6. The respondent father, who was represented in court through solicitors and counsel has agreed to obtain initialised consent permitting the children to leave the Republic of Iran and travel to England for the purpose of attending the final hearing on 8 and 9 December 2022. That notarised agreement shall state that he unequivocally consents to the children travelling to England and Wales prior to 8 and 9 December 2022."

19 The genesis of the recitals concerning the notarised agreement, which thereafter informed the contents of the subsequent orders of ICC Judge Mullen, Moore J and Mr Colton KC, concerning the provision of such notarised agreement is not entirely clear. However, prior to the hearing before Newton J the father had submitted to Peele J on 16 September 2022 that the English court could not have jurisdiction to make orders in respect of the children. Within this context the father prepared a bundle on the question of jurisdiction. Within that

bundle is an extract from the Foreign Commonwealth and Development Office's website entitled, "Guidance: Iran: Child Abduction," dated 21 August 2020. A copy also finds its way into the trial prepared for this hearing. Within that guidance the following is stated:

> "Where parents are unable to reach an amicable agreement regarding any matter concerning their children, these matters shall be decided upon by the Family Court. In Iranian law, a husband is the chief of his household and the relations between married couples are managed and presided over by the husband. A wife and children are bound to live and reside in the house determined by the husband, unless the choice of determining the marital house was given to the wife through legal contracts relating to the marriage.
>
> A husband may require that his wife and children relocate to Iran - and his wife and children, after they arrive in Iran, may no longer leave Iran unless their Iranian father and husband gives them permission by signing documents before a notary public.
>
> Boys and girls under 18 will require their father's permission to leave Iran but may get a passport and leave once they are 18 (for boys, this is so long as they have completed their military service).
>
> For divorced couples, no foreign/UK court orders will be recognised until they have been upheld and confirmed by the Iranian Family Court, to confirm that the foreign court rulings regarding the divorce and custody of the children have been rendered in compliance with the laws of Iran."

20 The father was present in court when the order of Newton J was made on 18 November 2022. There has been no appeal of that order. The application to commit alleges that the father has failed to comply with the terms of the order of Newton J. The mother alleges that the father breached the order of Newton J dated 18 November 2022, requiring him to send a copy of a notarised document consenting to the children travelling from Iran to England, immediately the same had been completed in that this was not provided. Following the hearing the mother alleges the father *immediately* handed to the tipstaff his driving licence, even though he required it to obtain the notarised agreement for the children to travel, thereby disabling himself in being able to provide a notarised agreement as he had agreed to do in circumstances where he had, given the execution of a passport order, no means of identifying himself to the notary.

21 It is further asserted that the father made no other efforts to obtain the notarised certificate, including by way of utilising the children's original birth certificates. With respect of that aspect of the order of Newton J on 18 November 2022, the father concedes that he lodged his driver's licence with the tipstaff at court on that date, rather than waiting until he had obtained the notarised agreement. The father now claims that he surrendered his driving licence before securing the notarised agreement merely because it was more convenient to do so whilst he was at court on 18 November 2022.

22 It is further alleged by the mother that the father is in breach of the order of Newton J, dated 18 November 2022, requiring him to cause the children to be returned to the maternal family in Iran until they were returned to England and Wales for the purpose of physically attending the final hearing on 8 and 9 December 2022 in London, and causing the children to return to the jurisdiction of England and Wales in that fashion. The father concedes that

the children were not conveyed to the maternal grandparents in Iran, nor were they returned to the United Kingdom on 5 December 2022, nor did they attend the final hearing on 8 and 9 December 2022. Rather it is apparent that they remained with the paternal grandfather, which it is alleged is in breach of para.14 and 15 of the order of Newton J to transfer them to the maternal grandparents. The mother contends that when she spoke to the paternal grandfather, he informed her that he had no intention of sending the children to the maternal grandparents because the father did not want him to and he believed that the mother had fabricated the order of Newton J. The father contends that in line with the extract from the FCDO document, "Guidance: Iran: Child Abduction," dated 21 August 2020, the fact that a wife and children are bound to live and reside in the house determined by the husband, prevented him from complying with the order of Newton J.

23 There was a contested final hearing in respect of the children on 8 and 9 December 2022 before ICC Judge Mullen. Following that hearing on 12 December ICC Judge Mullen ordered the children's return to England and Wales by 15 December 2022 and upon return that they be placed in the care of their mother pending further order, ICC Judge Mullen having found that the children's British and Iranian passports were in the father's control despite the father's claims to the contrary.

24 In line with the recital set out in the order of Newton J on 18 December 2022, ICC Judge Mullen also ordered the father to send a copy of a notarised document consenting to the children's travelling from Iran to England, immediately the same be completed. In the order of ICC Mullen, however, that order comprised part of a wider regime. In order for the father to obtain notarised consent he was required to have a means of identifying himself to a relevant notary. In the circumstances, the order of ICC Mullen also provided for the temporary release to the father's solicitor of the driving licence, on condition that the father's solicitors hold the driving licence and not release it to the father, and return it to the tipstaff by a set date. Following the hearing in December ICC Judge Mullen also extended the passport order. The order of ICC Judge Mullen again contained a penal notice and a dispensation of service in light of the father’s attendance.

25 On 12 December 2022, ICC Judge Mullen also made a tagging order requiring the father to be the subject of an electronic tagging in the light of the flight risk he was found to present, it being said that the father has some 18 aliases, convictions for various dishonesty offences, including in relation to forgery and counterfeiting, and having changed his name by deed poll after the passport order was executed in September 2022 and obtained a driving licence dated 15 October 2022.

26 The father was in court when the order of ICC Judge Mullen was made on 12 December 2022. The mother asserts again that the father is in breach of the orders of ICC Judge Mullen of that date. He concedes that the children did not return to England by 15 December 2022. He also accepts that he did not provide a notarised consent for the return of the children by 30 December 2022, as specified in para.15 of the order of ICC Judge Mullen.

27 Having regard to the precise terms of the tagging order, the mother no longer seeks to pursue her committal application for what she alleges was a breach by the father of that order, in circumstances where he did not in the event submit to tagging. However, the father contended that the tagging order prevented him from complying with the order of ICC Judge Mullen in that the tagging company did not attend to provide a tag to him. The father alleges that the tagging company did not attend at the time specified in the order of ICC Judge Mullen, namely 7.00 p.m. on 12 December 2022, or at any other time on 12 and 13 December 2022. The father further alleges that when the tagging company did attend they

attended during a medical emergency that required him to be conveyed to hospital ambulance, and that accordingly he was not able to secure his driving licence from the tipstaff and hence was not able to secure a notarised agreement.

28 Within this context I pause to note at this point that, by contrast with the order subsequently made by Moore J on 16 December 2022 and Mr Colton KC on 9 January 2023, in circumstances where the father's driving licence was to be released to the solicitors for the father, rather than to the father himself, there was no link at all in ICC Judge Mullen's order between the tagging order and the arrangements for the release of the father's driving licence in order to allow him to identify himself to the notary and thereby apply with the order to provide his notarised consent.

29 A further hearing in this matter took place on 16 December 2022 before Moore J. At that hearing Moore J renewed the return order in respect of the children, requiring their return by 6 January 2023. Moore J also again provided for the notarised agreement and included in that order permission for the maternal grandparents to obtain replacement Iranian passports for the children. Moore J also made a further order for the imposition of tagging. Whilst the order of Moore J on 16 December was not sealed until 20 December 2022, the father was again present in court when the order was made on 16 December 2022. By her committal application the mother alleges that the father is also in breach of the order of Moore J of 16 December 2022.

30 Again the father concedes that the children have not returned to the jurisdiction of England and Wales. He further accepts that he has not provided a notarised consent. Once again having regard to the terms of the tagging order, the mother no longer seeks to pursue her committal application to what she alleges was a breach by the father of that order. Once again the father contends that the tagging order prevented him from complying with the other substantive orders of Moore J to return the children and to provide notarised consent.

31 By contrast to the order of ICC Judge Mullen, the order of Moore J *did* create a link between the tagging order and the arrangements for the release of the father's driving licence in order to allow him to identify himself to the notary and thereby comply with the order to provide his notarised consent. The order of Moore J also provided for the temporary release of the father's driving licence to the father, but on condition that that release did not take place until confirmation was received that the electronic tag had been fitted to the father. Within that context the father contends that the tagging order of Moore J prevented him from complying with the order to provide a notarised consent because the tagging company did not attend to tag him at the time specified by the tagging order of Moore J, namely on 16 December 2022 at any time before his curfew began at 10.00 p.m. on that date. Accordingly he was not able to secure his driving licence from the tipstaff and hence was not able to secure a notarised agreement.

32 Following the medical emergency to which I have referred, the father had been discharged from hospital at 11.52 a.m. on 15 December 2022. The records provided by the tagging company, on which the father himself relies, indicate that their representatives attended to place the electronic tag on the father at 10.40 p.m. on 15 December 2022. The father did not answer the door and a contact letter was left at his property. A further attempt was made on 16 December 2022 at 10.54 p.m., i.e. some 54 minutes after the curfew began having regard to the terms of the order of Moore J. A further visit was made by the tagging company on 19 December 2022 at 11.19 p.m. and again there was no answer. The same result was obtained on 20 December 2022 at 10.03 p.m. and 21 December 2022 at 10.00 p.m. Again there was no answer. By contrast the father contended that the tagging company did not attend his home on 15 or 16 December 2022, or on any other date after 18 December 2022.

33 On 9 January 2023 the matter came before Mr Colton KC, sitting as a Deputy High Court Judge. At that hearing the court made a further order against the father, this time requiring the children to return to the jurisdiction of England and Wales by 19 January 2023. Mr Colton KC also made a further order requiring the father to send a copy of a notarised document consenting to the children travelling from Iran to England immediately the same had been completed. Mr Colton KC continued the tagging order made by Moore J. By this stage an application for costs had been made by the mother and the judge awarded costs against the father in the sum of £1,000. The father has not paid that costs order to date.

34 During the course of the hearing, on behalf of the mother, Mr Basi accepted that it was not appropriate to seek to enforce that costs order by way of an application for committal to prison, and that element of the contempt application of the mother is not pursued.

35 The father was present in court when Mr Colton KC made his order on 9 January 2023. Once again the mother asserts that the father is in breach of that order. Again the father concedes that the children have not returned to the jurisdiction of England and Wales. He again further accepts that he has not provided a notarised consent. Once again, having regard to the terms of the tagging order, the mother no longer seeks to pursue her committal application for what she alleges was a breach by the father of that order of Mr Colton KC. Once again the father contends that the tagging order prevented him from complying with the substantive orders of Mr Colton KC to return the children and to provide a notarised consent.

36 Again, by contrast to the order of ICC Judge Mullen, but in line with the orders of Moore J, the orders of Mr Colton KC did create a link between the tagging order and the arrangements for the release of the father's driving licence in order to allow him to identify himself to the notary and thereby comply with the order to provide his notarised consent. As with the order of Moore J, the order of Mr Colton KC also provided for the temporary release of the father's driving licence to the father, on condition that that release did not take place until confirmation was received that the electronic tag had been fitted to the father. In this context, the father again contended that the tagging order of Mr Colton KC prevented him from complying with the order to provide a notarised consent, because the tagging company did not attend to tag him at the time specified by the tagging order of Mr Colton KC; namely on 9 January 2023 between 6.00 p.m. and 9.30 p.m., the curfew to begin at 10.00 p.m. on that date. Accordingly he was not able to secure his driving licence from the tipstaff and hence he was not able to secure a notarised consent.

37 The records from the tagging company, again on which the father relies, record that the tagging company attended at the father's property at 11.29 p.m. on 9 January 2023, i.e. some one hour and 29 minutes after the curfew was due to commence. They received no answer from the father's property and a letter was left. A further attempt was made on 10 January 2023 at 10.09 p.m. with the same results, and again on 11 January 2023 at 11.27 p.m., again with the same result. The father concedes that representatives of the tagging company attended his property twice in the month of January but in the circumstances where they turned up after 10.00 p.m., this is at a time "when it is time for any decent human being to be asleep." The father contends that whilst he tried to ring the number on the letter that was left, there was no answer.

38 The matter came before Theis J on 24 January 2023. Theis J did not renew the order for electronic tagging of curfew but made an additional order in respect of the return of the children and an order requiring the father to complete the notarised document, with the child's solicitor to accompany him with the driver's licence. It is clear from the recital to the

order made by Theis J on 24 January 2023 that the father informed the court on that date that he did not intend to comply with the directions requiring him to execute a notarised agreement, did not agree to submit to electronic tagging and did not agree to effect the return of the children from Iran. Instead he sought the return of his passport so he could travel to Iran.

39 By the time the matter came before Theis J, the father had sought permission to appeal both the order of ICC Judge Mullen on 12 December 2022 and Moore J's order of 16 December 2022. The father's application for a stay on those orders was refused by the Court of Appeal. On 9 February 2023 the Court of Appeal refused permission to appeal the orders of ICC Judge Mullen and the order of Moore J.

40 Within the context I have described the mother now seeks to commit the father to prison for breaching the orders of the court, which breaches are itemised in the Grounds of Committal document dated 24 January 2023 as follows:

> a. The father is in breach of the order of Newton J dated 18 November 2022, requiring him to send a copy of a notarised document consenting for the children travelling from Iran to England, immediately the same has been completed.
>
> b. The father is in breach of the order of Newton J dated 18 November 2022 requiring him to cause the children to be returned to the maternal family in Iran, until they return to England and Wales for the purpose of physically attending the final hearing on 8 and 9 December 2022 in London.
>
> c. The father is in breach of the order of Newton J dated 18 November 2022 requiring him to cause the children to be returned to the jurisdiction of England and Wales by no later than 5 December 2022.
>
> d. The father is in breach of the order of ICC Judge Mullen dated 12 December 2022, requiring him to return the children to the jurisdiction of England and Wales by 15 December 2022, and upon return place them in the care of their mother pending further order.
>
> e. The father is in breach of the order of ICC Judge Mullen dated 12 December 2022, requiring him to send a copy of a notarised document consenting to the children travelling from Iran to England, immediately the same has been completed.
>
> f. The father is in breach of the order of Moore J dated 16 December 2022 requiring him to return the children to the jurisdiction of England and Wales by 6 January 2023, and upon return place them in the care of their mother pending further order.
>
> g. The father is in breach of the order of Moore J dated 16 December 2022 requiring him to send a copy of a notarised document consenting to the children travelling from Iran to England, immediately the same has been completed.
>
> h. The father is in breach of the order of Mr Colton KC dated 9 January 2023 requiring him to return the children to the jurisdiction of England and Wales by 19 January 2023 and upon return placing them in the care of their mother pending further order.

i. The father is in breach of the order of Mr Colton KC dated 9 January 2023 requiring him to send a copy of a notarised document consenting to the children travelling from Iran to England, immediately the same has been completed.

41 The grounds for committal were personally served on the father by way of a process server on 2 February 2023 at 9.29 a.m. The court has before it a witness statement evidencing that service. There was also in the bundle a Mimecast document indicating that the father downloaded the committal documents. A notice of the hearing at which I heard submissions was issued on 8 February 2023. The matter has been listed in open court and I am satisfied that the father received proper notice of the hearing.

42 As I have noted before Theis J the father stated that he has no intention of complying with any orders of this court, speaking as he does before the jurisdiction. At the hearing, through Mr Lennard, the father repeated that position to this court. In the circumstances I am satisfied that the father will continue to refuse to comply with the orders of this court were he to be given a further opportunity to do so.

43 With respect to the law and procedure the court must apply, the process of committal for contempt is a technical one and of some little complexity. In that context it is important, in circumstances where the liberty of the citizen is at stake, to recall the strict procedural requirements that properly constituted committal hearing that have to be applied with in respect of the local authority's application to commit the parents for contempt. I have in particular borne in mind the following requirements:

a. The committal application must be dealt with at a discrete hearing and not alongside other applications.

b. The alleged contempt must be set out clearly in a notice of application or document, for summons or notice identifying separately and numerically each alleged act of contempt.

c. The application notice of document setting out separately each allege contempt must be proved to have been served on the respondent in accordance with the rules.

d. The respondent must be given the opportunity to secure legal representation as he or she is entitled to.

e. The committal hearing must be listed publicly in accordance with the Lord Chief Justice's Practice Direction, Committal for Contempt of Court, Open Court, 26 March 2015, as amended on 20 August 2020, and should ordinarily be held in open court.

f. Consideration must be given to whether the allocated judge should hear the committal or whether the committal application should be allocated to another judge.

g. The burden of proving any alleged contempt lies on the person or authority alleging the contempt.

h. The respondent is in entitled, subject to the case management powers of the court, to cross-examine witnesses, call evidence and to make submissions of no case to answer.

i. The alleged contempt must be proved to the criminal standard, i.e. beyond reasonable doubt.

j. The respondent must be advised that his or her rights remain silent and informed that he or she is not obliged to give evidence in his or her own defence.

k. Where contempt is found proved on the criminal standard, the committal order must set out the findings made by the court that establishes contempt.

l. Sentencing should proceed as a separate and discrete exercise with a break between the committal decision and the sentencing of the contemnor. The contemnor must be allowed to address the court by way of mitigation or to purge his or her contempt.

m. The court can order imprisonment, immediate or suspended, and/or a fine, or a general consideration of penalty for a fixed period or enlarge the injunction.
n. In sentencing the contemnor the disposal must be proportionate to the seriousness of the contempt, reflect the court's disapproval and be designed to secure compliance in the future. Committal to prison is appropriate only when no reasonable alternative exists, where the sentence is suspended or adjourned and the precise terms for activation must be identified.

o. The court should briefly explain its reasons for the disposal it decides to impose if it finds that the contempt is proved.

In this case I am satisfied that the foregoing procedural imperatives have been met ahead of and during the hearing.

44 Having listened carefully to the submissions made by the parties and having regard in particular to the concessions made by father with respect to (a) the current whereabouts of the children, and (b) the absence of a notarised consent, I am satisfied beyond reasonable doubt that the father has breached the orders of this court. My reasons for so deciding are as follows.

45 The requirement of each of the orders in issue before this court are plain, with respect to the father being required to provide a notarised agreement, providing his consent to the children leaving the jurisdiction of Iran, and with respect to causing the children to be returned to the jurisdiction of England and Wales. Within that context the father does not seek to dispute either that he has failed to provide a notarised agreement or that the children remain in the jurisdiction of Iran. Indeed he has conceded this much before the court. In the circumstances I am satisfied that *prima facie*, and beyond reasonable doubt, that the father has failed to comply with the orders of the court and is in breach of those orders.

46 The father's defence to his failure to comply with the orders of the court is in essence that it has not been possible for him to so comply. In short, the father contends that he has not been in a position to comply with the orders to provide a notarised consent to the children leaving Iran, and hence it has not been possible for him to comply with the orders to cause the children to return to the jurisdiction of England and Wales from Iran.

47 Dealing with the father's defence in more detail, he contends that he was not able to comply with the order to provide a notarised agreement because he did not have available to him his driving licence, which would have allowed him to identify himself to a notary in circumstances where his passport has been seized. With respect to the order of Newton J, the father contends in this regard that this order requires him to surrender his driving licence, which he did on the day of the hearing. With respect to the subsequent orders of

ICC Judge Mullen, Moor J and Mr Colton KC, the father contends that the wording of those orders regarding tagging and the failure on the part of the tagging company meant that he continued to be unable to retrieve his driving licence. I reject each of those contentions.

48 With respect to the order of Newton J, that order allowed the father a number of days in possession of his driving licence in order to secure the notarised agreement, with the father required to surrender his driving licence four days after the hearing on 18 November. As I have noted, the father concedes however that he lodged his driving licence with the tipstaff immediately whilst in court on 18 November rather than waiting until he had obtained the notarised agreement, as the order provided a period of time for him to do. Whilst, as I have recounted, the father now claims that he surrendered his driving licence before securing the notarised consent because it was more convenient for him to do so whilst on court on 18 November 2022, I reject that assertion.

49 I am satisfied that he did so in order to frustrate his own ability to obtain the notarised agreement ordered by Newton J, and hence to frustrate his ability to cause the return of the children to this jurisdiction. The father does not dispute that he did not provide a notarised agreement pursuant to the order of Newton J and did not cause the children to be returned to this jurisdiction pursuant to that order. In all those circumstances he is plainly, and beyond reasonable doubt, in breach of that order.

50 With respect to the order of ICC Judge Mullen, the father contends that the wording of that order, insofar as it concerned tagging, prevented the father from obtaining his driving licence as by the terms of the order he was not permitted to obtain the driving licence until he was tagged. Due to the failure on the part of the tagging company he was never tagged. He was thus unable to secure his driving licence and obtain the notarised agreement.

51 As I have already noted, unlike the subsequent orders of Moore J and Mr Colton KC, there was in fact no link made by the order of ICC Judge Mullen between the father obtaining his driving licence in order to secure the notarised agreement and the operation of the tagging provisions of the order. By contrast with the orders subsequently made by Moore J on 16 December 2022 and Mr Colton KC on 9 January 2023, the father's driving licence was to be released to the *solicitors* for the father rather than to the father himself. There was no link at all in ICC Judge Mullen's orders between the tagging order and the arrangements for the release of the father's driving licence, in order to allow him to identify himself to the notary, and thereby comply with the order to provide the notarised agreement. In the circumstances the fact that the father was not tagged did not, under the terms of ICC Judge Mullen's order prevent him from complying with the latter order. Notwithstanding this the father failed to provide a notarised agreement.

52 The father is correct in his assertion that there *was* a link in both the order of Moore J and the order of Mr Colton KC between the tagging order and the ability of the father to obtain his driving licence in order to identify himself to the notary. Those orders did create a link between the tagging order and the arrangements for the release of the father's driving licence in order to allow him to identify himself to the notary and thereby comply with the order to provide his notarised agreement. They provided for the temporary release of the father's driving licence to the father on condition that that release did not take place until confirmation was received that the electronic tag had been fitted to the father. In these circumstances the father contends that the tagging order of Moore J and Mr Colton KC prevented him from complying with the order to provide a notarised consent, because the tagging company did not attend to tag him at the time specified by the tagging order. I reject the father's contention that it was the conduct of the tagging company that prevented his compliance with the orders.

53 The time specified by the tagging order of Moore J for the father to be tagged was any time before the curfew began at 10.00 p.m. on 16 December 2022. As I have noted, the father had been discharged from hospital following the medical emergency referred to in his judgment at 11.52 a.m. on 15 December 2022. The records provided by the tagging company, again on which the father himself relies and does not dispute, indicate that their representatives attended to place the electronic tag on the father at 10.40 p.m. on 15 December 2022. The father did not answer the door and a contact letter was left at the property. A further attempt was made on 16 December 2022 at 10.54 p.m., and further attempts were made on 19 December 2022 at 11.19 p.m., 20 December at 10.03 p.m. and 23 December at 10.00 p.m. On each occasion there was no answer and on each occasion it was not possible therefore for the tag to be fitted.

54 The time specified in the order of Mr Colton KC for tagging was between 6.00 p.m. and 9.30 p.m. on 9 January 2023. The records from the tagging company indicate that the tagging company attended the father's operation at 11.29 p.m. on 9 January 2023. They received no answer from the property and a letter was left. A further attempt was made on 10 January 2023 at 10.09 with the same results, and again on 11 January at 11.27 p.m. with the same results. The father concedes himself that representatives from the tagging company attended his property twice in the month of January.

55 In the foregoing context, I am satisfied that the father sought to avoid being tagged as a means of frustrating the order of the court. In respect of the order of Moore J, the tagging company had made a prior attempt to tag the father at 10.40 p.m. on 15 December 2022. Within the time that had been set by Moore J and continued to make repeated attempts to do so after that time. With respect to the order of Mr Colton KC, whilst the evidence indicates that the tagging company were late by an hour and an half by reference to the tagging time specified in the order, it would surely be an undesirable counsel of perfection to hold that the order of Mr Colton KC was not able to have been complied with by reason of a tagging company being an hour and a half late. Indeed it would be a charter to frustrate unjustifiably the operation of such orders as I am satisfied the father proceeded to do, particularly in circumstances where the tagging company thereafter made repeated attempts to tag the father, albeit without success.

56 For all these reasons I am satisfied that the father has no defence for his failure to comply with the terms of the orders of Newton J, ICC Judge Mullen, Moore J and Mr Colton KC. The terms of their orders were clear, requiring the father to provide a notarised agreement consenting for the children leaving Iran, and thereafter cause for returning the children to this jurisdiction. The father concedes that he has done neither of these things despite no less than four orders requiring him to do so.

57 In the circumstances I am satisfied that the following findings are made out beyond reasonable doubt:

a. The father has breached the order from Newton J dated 18 November 2022 requiring him to send a copy of a notarised document consenting to the children travelling from Iran to England, immediately the same has been completed.

b. The father has breached the order of Newton J dated 18 November 2022 requiring him to cause the children to be returned to the maternal family in Iran until they return to England and Wales for the purpose of physically attending the final hearing on 8 and 9 December 2022 in London.

c. The father has breached the order of Newton J dated 18 November 2022 requiring him to cause the children to be returned to the jurisdiction of England and Wales by no later than 5 December 2022.

d. The father has breached the order of ICC Judge Mullen dated 12 December 2022 requiring him return the children to the jurisdiction of England and Wales by 15 December 2022 and upon return to place them in the care of their mother pending a further hearing.

e. The father has breached the order of ICC Judge Mullen dated 12 December 2022 requiring him to send a copy of a notarised agreement consenting to the children travelling from Iran to England, and immediately the same has been completed.
f. The father has breached the order of Moore J dated 16 December 2022 requiring him to return the children to the jurisdiction of England and Wales by 6 January 2023, and upon return place them in the care of their mother pending further order.

g. The father has breached the order of Moore J dated 16 December 2022 requiring him to send a copy of a notarised document consenting to the children travelling from Iran to England, and immediately the same can be completed.

h. The father has breached the order of Mr Colton KC dated 9 January 2023 requiring him to return the children to the jurisdiction of England and Wales by 19 January 2023, and on return placing them in the care of mother pending further order.

i. The father breached the order of Mr Colton KC dated 9 January 2023 requiring him to send a copy of a notarised document consenting to the children travelling from Iran to England, immediately the same has been completed.

MR JUSTICE MACDONALD: Mr Lennard, I will now rise to allow you to consider with your client any submission you seek to make in mitigation.

[LATER]

61 Having made findings in respect of contempt of court, I adjourned the case for a short period to permit the father to consider any submissions that he wished to make by way of mitigation.

62 The general legal principles applicable to sentencing of a contemnor are now well established and can be summarised as follows.

a. The court can order imprisonment, immediate or suspended, and/or a fine, or adjourn consideration of penalty for a fixed period or enlarge(?) the injunction.

b. In sentencing the contemnor, the disposal must be proportionate to the seriousness of the contempt, reflect the court's disapproval and be designed to secure compliance in the future.

c. Committal to prison is appropriate only where no reasonable alternative exists.

d. Where the sentence is suspended or adjourned, the period of suspension or adjournment and the precise terms for activation must be specified.

e. Imprisonment is not the starting point and is not the automatic response to a contempt of court.

f. Equally, there is no principle that a sentence of imprisonment could not be imposed on a contemnor who has not previously committed a contempt.

g. In assessing the seriousness of the contempt, it is right to have regard to the purpose for which it was committed and the likelihood of any risk to the process of justice.

h. In circumstances where the disposal chosen must be proportionate to the seriousness of the contempt where an immediate term of imprisonment is appropriate it should be as short as possible, having regard to the gravity of the contempt, and must bear some reasonable relationship to the maximum sentence of two years imprisonment that is available to the court.

i. Where a term of imprisonment is the appropriate sentence, the length of the term should be determined without reference to whether that term is to be suspended or not.

j. Having determined the length of the term of imprisonment, the court should expressly ask itself whether a sentence of imprisonment might be suspended. The power of the Family Court to suspend a sentence is separate from the power of the criminal to suspend the sentence. In particular, in the Family Court, the sentence may be suspended on terms.

k. The court should briefly explain its reasons for the disposal it decides to impose it if finds the contempt proved.

63 As Marcus Smith J made clear in *Patel v Patel & Ors.* [2017] EWHC 3229 (Ch) at [22] and [23] a penalty for contempt has two primary functions. First, it upholds the authority of the court by marking the disapproval of the court and deterring others from engaging in conduct comprising contempt. Secondly, it acts to ensure future compliance. In some cases, therefore, and, in particular, those cases where the contempt arises from a breach of the court order, a penalty with have the primary objective of ensuring future compliance with that order.

64 With respect to the father, I have found as a fact that he is in breach of no less than four court orders made by the High Court that he provide a notarised agreement giving his consent to the children leaving the jurisdiction of Iran and thereafter to cause the children to return to this jurisdiction.

65 With respect to mitigating factors for those breaches, Mr Lennard urges me to take account of the father's age of 57 years and 58 later this year in July, to also take account of the fact that the father has a son and daughter, one of whom is young, and that the children are very sensitive to the outcome of these proceedings. In particular, Mr Lennard invites me to take

account of the fact that M does not wish for his father to go to prison as a result of his continued and contumelious breaches of court orders.

66 Likewise, it is pointed out to me by Mr Lennard, quite correctly, that the mother has indicated at stages in these proceedings that she does not wish to pursue the contempt application to the extent that she seeks the imprisonment of the father.

67 Finally, Mr Lennard urges me to have regard to the fact that certain of the alleged breaches in the committal notice, in particular, those concerned with tagging and costs, were not pursued by the mother at this hearing, thereby reducing the seriousness of all of the breaches before the court. I have, of course, considered very carefully those mitigating factors.

68 However, against this, I am satisfied that in this case there are very significant aggravating factors. The aggravating factors in this case include the repeated breaches of court orders over an extended period of time. The father has deliberately, in my judgment, failed to comply with no less than four orders of the High Court, despite repeated opportunities being given to him by this court to allow compliance. Notwithstanding those repeated opportunities, the father has repeatedly set his face, deliberately, against the compliance with the orders of the High Court.

69 A further aggravating factor in this case is what I am satisfied has been the father's wilful acting in a manner designed to make compliance with the orders difficult or impossible as a result of his own conduct. In particular, his early surrendering of his driving licence under the order of Newton J and his lawful misinterpretation of the order of ICC Judge Mullen with respect to tagging and his repeated avoidance of the representatives of the tagging company when they made repeated attempts to tag him.

70 Finally, I am satisfied that an additional aggravating factor in this case is the father's statements, both to this court and previous courts, that he has absolutely no intention of complying with the orders of the court. Those assertions have been given without caveat. The continued multiple breaches, it must also be noted, have left the children stranded in the jurisdiction of Iran for an extended period.

71 Having regard to the aggravating and mitigating factors in this case, to the principles of sentencing that I have outlined which I have careful regard to and to the function of the sentence in first marking the disapproval of the court and deterring others from engaging in the conduct comprising the contempt and, second, to ensure future compliance, I am satisfied that the starting point in this case for an appropriate sentence for the breach of the orders must be one of custody. I am further satisfied that the appropriate sentence in this case is one of 6 months' imprisonment.

72 I have given some consideration to suspending the sentence of imprisonment with a view to securing the father's compliance with the orders of the court. However, in circumstances where the father has repeated to this court his settled intention not to comply with the orders of the court such a suspension would, in my judgment, serve no purpose, and certainly not serve its intended purpose.

73 In the circumstances, after careful consideration, I do not consider this an appropriate case in which to suspend the sentence of imprisonment that I have passed, and such sentence will therefore be immediate.

74 In addition, I will make a further order under the inherent jurisdiction requiring the father to facilitate the return of the children to the jurisdiction of England and Wales forthwith and provide a notarised agreement in that regard.

75 It will, of course, be open to the father to apply to purge his contempt of court and, hence, to secure his release from custody if the children are returned to the jurisdiction of England and Wales pursuant to the return order. To this end, if the father evinces an intention now to comply with the order to provide a notarised agreement, I intend to direct that the solicitor for the child attend the prison in which the father is held with his driving licence and a notary public in order that that document can now be completed.

76 If the children are not returned to England and Wales in breach of that order, it will be open to the mother to make a further application to commit the father for the breach of that order, at which time he will be liable to a further period of imprisonment if he is once again found in contempt.

77 I advise the father that he is able to apply to purge his contempt, in particular, should the children be returned to the jurisdiction as ordered by the court.

78 That is my judgment. Please, take him down.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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PROPERTY AND FINANCIAL MATTERS

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Admitted as a lawyer in New South Wales in 1992 and in Victoria in 1993 and has practised in family law ever since. Accredited by the Law Institute of Victoria (LIV) as a specialist practitioner in family law in 2003. Joined the specialist family law practice, Kennedy Partners, in 2007, and became a partner of the firm in 2012. Has expertise in all aspects of family law, including parenting and financial matters, and has worked significantly in the area of international family law. An active member of committees of the Family Law Section of the LIV since 2003, including a member of the Executive Committee since 2011 and Chair of the Maintenance and Property Sub-Committee since 2011. Has written or co-authored a number of papers and has presented at continuing legal education seminars (both in Australia and overseas) since 2009. Is a consultant editor for precedents with LexisNexis.

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Kee Lay Lian graduated from the National University of Singapore in 1985 and is called to the bar in 1986.

She has practised as a commercial litigator and her focus has been on family law and trust and succession. She has consistently been named in Doyles Guide.

She is on the panel of associate mediators and the panel of collaborative family lawyers with the Singapore Mediation Centre.

She is on the panel of Parenting Coordinators of the Family Justice Courts.

She is the co-chair of the Law Society of Singapore Family Law Practice Committee as well as the Probate and Succession Practice Committee. She was a facilitator of the Singapore Institute of Legal Education for the Family Law and Wills, Probate and Administration courses for many years.

Lay Lian has been a member of the Legal Information Committee of the Singapore Armed Forces Reservist Association (SAFRA) offering pro bono legal information / advice to the SAFRA members for more than 25 years.

She is also a member of the Society of Trusts and Estate Practitioners.

KETURAH SAGEMAN

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Keturah Sageman is an Accredited Family Law Specialist and Senior Partner at Nicholes Family Lawyers, Melbourne Australia, with experience in all aspects of family law.
Her expertise includes complex divorce and financial disputes, international proceedings (including child relocation/ Hague abduction matters), complex children's cases, appeals, emergency procedures, child support, surrogacy, adoption and parentage orders for same sex partnerships.
Keturah is a fellow of the International Academy of Family Lawyers (IAFL) and a member of Law Asia. She serves as a Committee Member of the Family Law Executive Committee of the Law Institute of Victoria.
As to family law seminars, most recently Keturah was a panel member for AP Hour (IAFL), "Is joint custody/shared parenting coming or going?" (April 2023): a comparison of Japanese and Australian family law reforms. Keturah presented at the annual 2021 Family Law Conference (FLC) in Singapore on the topic "Relocation v Hague: Fight or Flight". She has also presented to Leo Cussen Centre for Law on drafting complex agreements and orders. Keturah has been an active speaker and host in the Nicholes Family Lawyers Podcast Series, including podcast and webinar discussions on cryptocurrency, insolvency, and international family law matters as it relates to COVID-19. Keturah was also a consultant for the Wolters Kluwer-CCH publications "Australian Family Law & Practice" and "Australian Master Family Law Guide" 2021 to update chapters on Child Abduction and Major Long Term Children's Issues.

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Steven K. Yoda is a partner at Walzer Melcher & Yoda LLP in Los Angeles, where he specializes in handling complex family law disputes. He frequently represents entrepreneurs, professional athletes, and celebrities. He is a Fellow of the International Academy of Family Lawyers and certified by the State Bar of California as a Family Law Specialist. He currently serves on the Executive Committee of the Family Law Section of the Los Angeles County Bar Association and on the Editorial Board of Family Advocate, the American Bar Association's family law magazine. Prior to family law, Steve worked for 10 years as a commercial litigator at some of California's most prestigious law firms, where he represented corporate and individual clients, in both state and federal court, in a wide array of cases relating to business torts, insurance recovery, intellectual property, antitrust, and real estate. Steve is a graduate of Stanford University, where he received both his Bachelor's and Masters degrees in History, and UC Berkeley School of Law. From 2004 to 2005, he served as a law clerk to the Honorable James Ware (ret.), United States District Judge, Northern District of California.

RITA KU

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Having practiced family law for about 2 decades, Rita has vast experience and knowledge in dealing with a wide range of family disputes concerning jurisdiction, divorce, children, ancillary relief, etc for successful people or their spouses. She also specializes in resolving other life issues of her clients, such as mental health-related applications, contentious probate, and trust.

Her landmark case ML v YJ [2010] HKEC 1924 went to the Court of Final Appeal which subsequently changed the law in Hong Kong concerning a party's ability to apply for financial provision following a foreign decree. Many of her cases have also become important precedents and have been relied upon by the legal industry.

Rita is also keen on non-contentious work. She understands the needs of different family dynamics and often advises established families in Hong Kong to preserve and/or protect their wealth for family harmony. She is the only Hong Kong practitioner being shortlisted by STEP as the "People's Choice – Trusted Adviser of the Year" in 2021. She is also one of the finalists of the Woman Lawyer of the Year of ALB Hong Kong Law Awards 2021.

Introduction to International Family Law Conference, Bangkok, Thailand

Section Three:

PROPERTY AND FINANCIAL MATTERS

Moderator: John Spender (Australia)

Presenters:
Rita Ku (Hong Kong)
Kee Lay Lian (Singapore)
Keturah Sageman (Australia)
Steven K. Yoda (California, USA)

1

Topic One – Part A

Jurisdictional requirements

Does the relief sought need to be linked to an application for divorce?

2

Kee Lay Lian (Singapore)

3

Jurisdiction

Section 93 of the Women's Charter 1961

93.—(1) Subject to subsection (2), the court has jurisdiction to hear proceedings for divorce, presumption of death and divorce, judicial separation or nullity of marriage **only if either of the parties** to the marriage is —

(a) **domiciled in Singapore** at the time of the commencement of the proceedings; or

(b) **habitually resident in Singapore** for a period of 3 years immediately preceding the commencement of the proceedings.

(2) In proceedings for nullity of marriage on the ground that the marriage is void or voidable, the court may, even though the requirements in subsection (1) are not fulfilled, grant the relief sought where both parties to the marriage reside in Singapore at the time of the commencement of the proceedings.

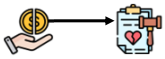
(3) For the purposes of proceedings for nullity of marriage, "marriage" includes a marriage which is not valid by virtue of any of the provisions of this Act.

4

Jurisdiction

- Singapore family courts have **ancillary powers** to determine property and financial affairs upon the breakdown of a relationship.

Relief sought for **division of matrimonial assets**



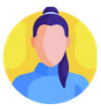
must be linked either to a divorce application commenced in Singapore, or to an overseas divorce which is entitled to be recognised as valid in Singapore under Singapore law (Section 112(1) and Section 121B of the Women's Charter).

Relief sought for **maintenance** (for a wife, incapacitated husband, or a child)

need not be linked to an application for divorce, and may be sought even when the parties are married (Section 69 and 113 of the Women's Charter).

5

Jurisdiction



☑ Commencing party

☑ Satisfy jurisdictional requirements

☒ Commencing party

☒ Satisfy jurisdictional requirements

- The party commencing divorce proceedings or an application for financial relief pursuant to a foreign divorce must satisfy jurisdictional requirements prescribed in the **Women's Charter**, either of domicile or of habitual residence (Section 93(1) and Section 121C of the Women's Charter).
- The other spouse **need not** satisfy such jurisdictional requirements.

6

Jurisdiction

- Singapore Courts have the power to make orders affecting ownership of overseas assets, and such orders are made against the individual party (i.e., *in personam*).
- The Singapore Courts have recognised that it is **"best for a single forum" to deal with all issues**, rather than to have these issues decided in separate courts simply because the assets are in another jurisdiction (*Sanjeev Sharma s/o Shir Sarvjeet Sharma v Surbi Ahuja d/o Sh Virendra Kumar Ahuja* [2015] SGHC 104).

7

Rita Ku (Hong Kong)

8

Jurisdictional requirements

1. Husband or Wife is domiciled in Hong Kong at the date of the Divorce Petition;
2. Husband or Wife has been habitually resident in Hong Kong for three years immediately before the Divorce; or
3. Husband or Wife has a substantial connection with Hong Kong at the date of the Divorce Petition
   - JQ v CLH

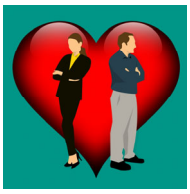
Facts: W filed a divorce petition against H because of H's extramarital affair; H sought to dismiss the petition on the ground of want of jurisdiction.
The question is whether the H had a "substantial" connection with Hong Kong as at the date of the petition.

Held: H had a substantial connection with Hong Kong on the grounds of: H maintained a consistent economic and social presence in Hong Kong; his main business and finances have been based in Hong Kong; he frequently traveled to Hong Kong for business meetings; he purchased several properties in Hong Kong.

9

Does the relief sought need to be linked to an application for divorce?

- Only possible to file for ancillary relief upon a divorce or judicial separation
- Without a divorce, one can make financial claim under Guardianship of Minors Ordinance. But it is only limited to children's maintenance



10

Keturah Sageman (Australia)

11

JURISDICTION

- Australian family courts have jurisdiction to determine property settlements between all married and de facto couples where there has been a relationship breakdown
- Parties must satisfy Australian residency requirements prescribed in the *Family Law Act* 1975
- An application for division of assets is separate from an application for divorce
- Parties who are not married will need to establish that they were in a "de facto relationship" pursuant to the *Family Law Act* 1975
- The Federal Circuit and Family Court of Australia (FCFCOA) exercises federal jurisdiction in matrimonial causes. Western Australia is the only Australian state with its own Family Court.

12

Steven K. Yoda (California, USA)

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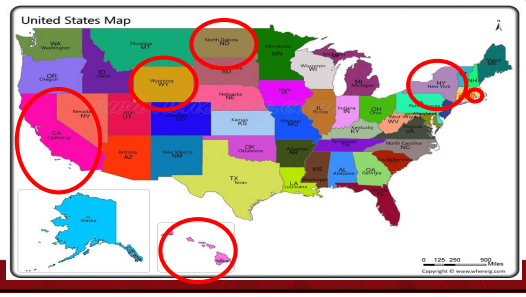
JURISDICTIONAL REQUIREMENTS

14

First Principles

The United States is divided into 50 states.



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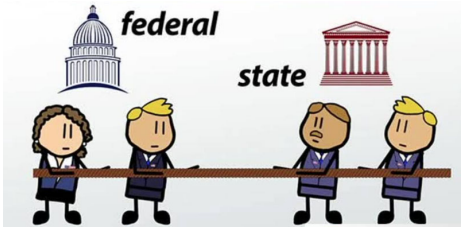
First Principles

The United States is also a federal system of government.



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First Principles

The United States is also a federal system of government.

17

First Principles

Federal law is supreme.

"This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any . . . Laws of any State to the Contrary notwithstanding."

- United States Constitution, article VI, clause 2

18

First Principles

The federal government is a *limited* form of government.

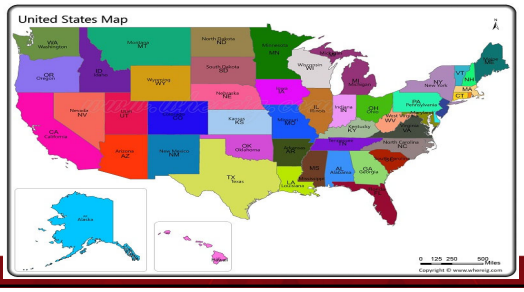
"The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively . . . ."

- United States Constitution, 10th Amendment

19

First Principles

Family law is governed by the 50 states.



20

Jurisdiction Over Financial Matters

- Property division
- Spousal support (alimony)
- Child support

21

Personal Jurisdiction

- Also known as "in personam" jurisdiction
- The power to render binding judgments and orders on a defendant, which impose *personal* obligations on the defendant or affect the defendant's *personal* rights

22

Personal Jurisdiction

- Physically present in state when first served with divorce papers
- Domiciled in state
- Consent to state's jurisdiction
- "Minimum contacts"

23

Minimum Contacts

"The inquiry whether a forum State may assert specific [minimum contacts] jurisdiction over a nonresident defendant 'focuses on the relationship among the defendant, the forum, and the litigation.' . . . For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State."

Walden v. Fiore, 571 U.S. 277, 284 (2014)

24

Minimum Contacts Test

- The out-of-state defendant "purposefully availed" himself/herself of the privilege of conducting activities in the state;
- There is a "nexus" (connection) between the defendant's activities, the lawsuit, and the state; and
- It is "reasonable" and "fair" to require the defendant to answer the lawsuit in the state at issue.

25

Sufficient Minimum Contacts

Marriage of Lontos, 89 Cal. App. 3d 61 (1979) (although H was in New Mexico, he had a long history of domicile in California, owned a home in California, had a California driver's license, had a California vehicle registration, and had a California bank account; also, H abandoned W in New Mexico, which caused her to return to California and seek financial support from California).

26

Sufficient Minimum Contacts

McGlothen v. Superior Court, 121 Cal. App. 3d 106 (1981) (H and W first met in California and lived together in California prior to and briefly after marriage; H then moved to Illinois and convinced W to move to Louisiana; H then abandoned W while she was in Louisiana, which caused her to return to California to live with her parents and seek financial support from California).

27

Sufficient Minimum Contacts

Khan v. Superior Court, 204 Cal. App. 3d 1168 (1988) (although H was in Saudi Arabia, he and W settled in California shortly after marriage; two of their children were born in California; they owned real property in California; H had a bank account in California; and H had a California driver's license).

28

Insufficient Minimum Contacts

Kulko v. Superior Court, 436 U.S. 84 (1978) (H and wife divorced in New York; later, at daughter's request, H allowed daughter to live with W in California).

29

Insufficient Minimum Contacts

Judd v. Superior Court, 436 U.S. 84 (1978) (H, in New York, sent support payments to W in California, spoke to W and children via telephone while they were in California, wrote letters to W and children while they were in California, infrequently visited the children in California, conducted some business in California, but never resided in California).

30

Insufficient Minimum Contacts

Modlin v. Superior Court, 176 Cal. App. 3d 1176 (1986) (H, in New York, had a California medical license but only visited California occasionally to attend medical conferences and visit his daughter in California).

31

Topic One – Part B

Forum disputes when more than one country may have jurisdiction

32

Kee Lay Lian (Singapore)

33

Jurisdiction > Overseas and Forum Disputes

- A party may challenge the jurisdiction of the Singapore Courts (Rule 325 of the Family Justice Rules).
- The Court will apply the ***Spiliada* test** to consider if Singapore is the appropriate forum (*BDA v BDB* [2013] 1 SLR 607).

Stage 1: A party contesting jurisdiction must show **there is another available forum** which is **clearly or distinctly more appropriate** than Singapore to determine the dispute.

→

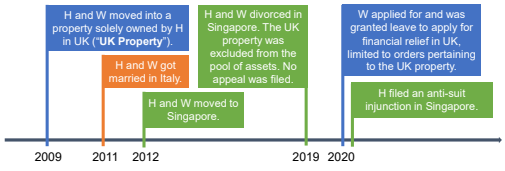
Stage 2: The Court will consider whether **special circumstances exist** such that its discretion ought to be exercised to refuse a stay.

- Singapore Courts have a **statutory duty** to consider if Singapore is the appropriate forum in an application for financial relief pursuant to a foreign divorce (Section 121F of the Women's Charter).

34

Jurisdiction > Case Study

- ***VEW v VEV* [2022] SGCA 34**



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Jurisdiction > Case Study

- The Court of Appeal **set aside the anti-suit injunction** granted by the Family Court (which was affirmed by the High Court).
- In so doing, the Court of Appeal considered (amongst other reasons) that **there had been no re-litigation of the issue of the UK Property, and that W's unsuccessful claim in respect of the UK Property in Singapore did not bar her from pursuing financial relief in the UK.**
- To rationalise this, the Court of Appeal considered (amongst others) that:
  - The Family Court held that the UK Property was an **excluded asset** which could not have been divided between H and W in Singapore.
  - The **question of division** of the UK Property therefore **never arose** and was not considered by the Singapore Courts.

36

Rita Ku (Hong Kong)

37

Forum disputes when more than one country may have jurisdiction

CN v YTW

- Whether there is some other available, competent and appropriate forum
- The applicant has to establish that HK is not the natural/appropriate forum, and that there is another more appropriate forum than HK
- The plaintiff has to show that s/he will be deprived of a legitimate personal or juridical advantage
- The Court has to balance the advantages of the alternative forum with the disadvantages that the plaintiff may suffer

38

Keturah Sageman (Australia)

39

OVERSEAS AND FORUM DISPUTES

- Australian Courts have the power to make orders affecting the ownership of overseas assets
- Parties should consider which jurisdiction will be the most advantageous/appropriate for their case
- Where property is owned overseas, the Courts will consider whether Australia is a "clearly inappropriate forum" to determine property interests
- If Australia is considered a "clearly inappropriate forum" a stay (hold) will be placed on Australian proceedings
- Proceedings for the adjustment of property rights are in personam (made against the individual party)

40

Case Summary: *Abati v Cole [2015]*

- Could the Family Court of Australia make an order restraining the husband from prosecuting proceedings in Indonesia with respect to the wife's separate Indonesian properties protected under an Australian BFA/pre-nuptial agreement?
- Husband issued proceedings in Indonesian court, seeking to restrain the wife from dealing with the separate Indonesian properties, claiming they were jointly owned;
- Wife applied to (then) Family Court of Australia for urgent interim orders to restrain the husband from seeking relief against her in the Indonesian court;
- Trial judge ordered that the husband be restrained from seeking relief in the Indonesian court or any other court in Indonesia with respect to all or any of the wife's separate property
- Husband unsuccessfully appealed against the trial judge's orders, held that there is little scope for the application of principles of comity in cases where one party threatens to engage in conduct which is in clear breach of contract (*CSR v Cigna* [396])

41

Steven K. Yoda (California, USA)

42

Forum Disputes

"Within the time permitted to file a response, the respondent may move to quash the proceeding, in whole or part, for any of the following reasons: . . . Another action pending between the same parties for the same cause . . . ."

- California Rule of Court 5.63(b)(2)

43

Forum Disputes

Forum Non Conveniens

- Is there a "suitable" alternative forum?
- Balance "private interest" factors.
- Balance "public interest" factors.

44

Forum Disputes

"Suitable" Alternative Forum

- The defendant is subject to jurisdiction in the alternative forum.
- The law of the alternative forum provides a remedy to the defendant.
- No statutes of limitation in the alternative forum bars any claims.

45

Forum Disputes

"Private Interest" Factors

- Access to parties, witnesses, and physical evidence.
- The cost of obtaining the attendance of witnesses.
- Ability to compel the attendance of unwilling witnesses.

46

Forum Disputes

"Public Interest" Factors

- Avoid overburdening local courts.
- Weighing the competing interests of the state and the alternative forum.

47

Does the relief sought need to be linked to an application for divorce?

48

Topic Two

The property regime(s) prevailing each jurisdiction

49

Rita Ku (Hong Kong)

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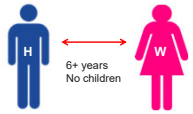
The property regime prevailing in Hong Kong

Separation of property

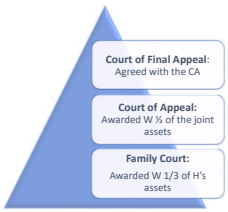
51

Current State of the Law regarding Financial Orders: *LKW v DD* – Court of Final Appeal



- Mid-40s
- A businessman
- Sole proprietor of a company
- Shareholder and director of 2 other companies
- $$$

- Mid-40s
- A graduate
- Stopped work after marriage, but resumed work after 2 years
- Started company after separation



52

LKW v DD – 4 Principles

The 4 Principles

- If assets were insufficient to cater for the needs of both parties, the exercise will not progress beyond consideration of their needs
- After seeing the parties' needs, guidelines may be considered to distribute the remaining surplus assets

53

LKW v DD – CFA: 5 Steps of s.7 MPPO Exercise

1. Ascertain the financial resources of each of the parties calculated as at the date of hearing: - income, earning capacity, property and other financial resources
2. Assess parties' financial needs, to be generously interpreted: - needs, obligations and responsibilities
3. After catering for the parties' needs, if there are remaining assets, then apply the sharing principle to the parties' total assets, leaving the "needs" question to be dealt with under that principle
4. Whether good reasons existed for departing from the principle of equal division (i.e. source of assets, unilateral assets, conduct, needs, duration of the marriage, special contributions, compensations)
5. Decide the outcome

54

Kee Lay Lian (Singapore)

55

Property Regime in Singapore

- In Singapore, there is a **deferred community of property** and the Singapore Courts are entitled to make orders of property irrespective of the legal ownership **so long as they are matrimonial assets** (Section 112(10) of the Women's Charter).

"Matrimonial assets" are property / assets which both parties **acquire in the course of the marriage**.

Gifts (intended for one party), **inheritance**, and **pre-marital assets** which the other party or both parties **had not substantially improved on or ordinarily used** WOULD NOT be considered ordinarily as matrimonial assets.

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Property Division

- The Courts will consider the parties **direct and indirect financial contributions**, **and non-financial contributions** when determining the apportionment of matrimonial assets that a party receives when a divorce is granted (*ANJ v ANK* [2015] SGCA 34).

	Husband	Wife
Direct financial contributions (100%)		
Indirect financial and non-financial contributions (100%)		
Total (200%)		

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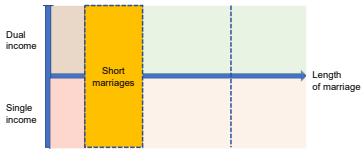
Property Division > Applying the Singapore Approach

Exception #1: Short marriages

- Indirect contributions are **more limited** and hence **more insignificant.**
- The Singapore Courts may ascribe a **higher weightage** to the parties' direct contributions as opposed to indirect contributions (*USB v USA* [2020] SGCA 57).



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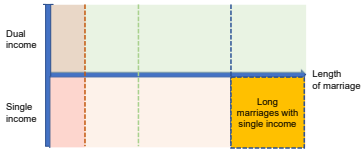
Property Division > Applying the Singapore Approach

Exception #2: Long marriages with single income

- The Singapore Courts recognise that the general approach would unduly favour a working spouse over the non-working spouse.
- Courts tend towards **equal division** of matrimonial assets (*TNL v* TNK [2017] SGCA 15).



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PROPERTY REGIMES

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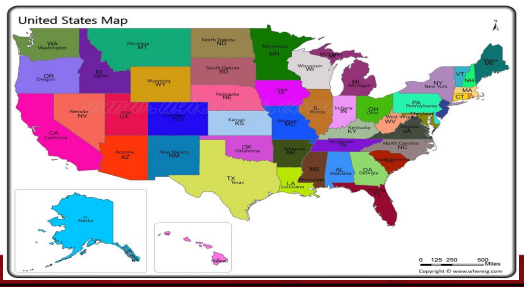
"Community Property" vs. "Equitable Distribution"



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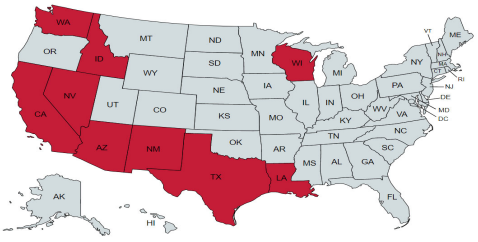
Community property states: Arizona; California; Idaho; Louisiana; Nevada; New Mexico; Texas; Washington; and Wisconsin.

Equitable distribution states: Everyone else (plus Washington, DC).



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Community Property

- The court determines which assets are "separate property" and which assets are "community property" and then automatically divides the community property 50/50.

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Equitable Distribution

- The court will divide property in manner that it believes is "equitable" (fair). That may be 50/50, but it may not necessarily be 50/50.

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PROPERTY REGIME

- In Australia, there is no automatic co-ownership of property that arises from marriage or a de facto relationship
- The separate property doctrine provides that property remains in the hands of its legal owner
- The Courts have a broad discretion to adjust a party's interests in property

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PROPERTY DIVISION

THE COURTS 5 STEP APPROACH TO PROPERTY DIVISION

The Courts take the following approach:

1. Determine whether it is just and equitable to alter the existing legal interests of the parties;
2. Ascertain the net asset pool (parties must give full and frank disclosure);
3. Consider the respective contributions of each party to the property;
4. Consider any adjustments for the parties future needs and financial resources;
5. Consider whether the proposed orders are just and equitable.

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Topic Three

Valuation and discovery issues, including whether there is a duty to make disclosure

69

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DISCLOSURE, DISCOVERY, AND VALUATION

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Disclosure

- Typically, there is a duty for each party to disclose all assets, debts, income, and expenses.

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Discovery

- Parties have the right to discover financial information through various discovery methods, including: interrogatories; requests for admission; requests for production; depositions; and subpoenas.

73

Valuation

- If the parties disagree on the value of an asset, they have the right to hire independent appraisers to value the asset.

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Valuation and Disclosure

To determine the property pool for division, it is necessary to value the assets, if value is not agreed.

- Valuations are obtained by single expert valuers appointed by both parties
- Each party has a duty to the court and each other to give full and frank disclosure of their financial circumstances:
  - It is an ongoing obligation of disclosure;
  - Parties must disclose such documents as:
    - tax returns for each party and any company or trust in which they have an interest;
    - bank statements;
    - superannuation statements
    - Documents relevant to an issue in dispute

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Valuation and Disclosure

- To determine the property pool for division, it is necessary to value the assets, if value is not agreed.
- The Singapore Courts are increasingly appointing joint valuers for the purposes of assessing properties of disputed values. **Panel of Financial Experts (POFE)** is an initiative by the Singapore Courts to streamline the process of appointing financial experts with the necessary qualifications to value assets.
- It is also common for parties to avail to online resources, e.g. property websites, Amazon, amongst others to obtain an indicative value of such assets.

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Valuation and discovery issues

Discovery	Valuation
• Full, frank and clear disclosure of all financial information within his/her knowledge • Form E, Questionnaire and Answer, Specific Discovery Application, Third Party Discovery.	Obtain information from: • Public records • Single Joint Expert - experts

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Topic Four

Dealing with assets overseas

81

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4. Valuation and Disclosure

- There is a duty on parties to give **full and frank disclosure** of all their assets (*BG v BF* [2007] SGCA 32), **including overseas assets**, regardless of whether they are matrimonial assets or otherwise.
- Where full and frank disclosure is not provided by a party, the Court may make an adverse inference against that party. The Court may either notionally include the value of that asset (if identifiable) into the pool of matrimonial asset, or order a higher proportion of the known assets to be given ot the other party (***BPC v BPB* [2019] 1 SLR 608**).

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Dealing with assets overseas

- Parties are required to disclose ALL assets situated anywhere in the world and in any forms;
- HK Court can make financial orders in relation to overseas assets – sale of property, transfer of property;
- HK Court makes order in personam – enforceable against the person;
- Mirror order to ensure due enforcements;
- Cap. 639 Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance – commenced in February 2022

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Dealing with assets overseas

- Parties have a duty to make full and frank disclosure of ALL assets owned and controlled, including those outside Australia;
- Parties must produce documentary evidence of ALL assets (e.g., copies of property records, certificates of title, or title searches, in Australia and overseas);
- Australian Courts have jurisdiction to make property adjustment orders in relation to overseas assets;
- Australia has *in personam* jurisdiction- orders are made against the person
- Superannuation splitting (to divide superannuation interests) can only be ordered for Australian funds;
- If a foreign court has already issued an order regarding certain assets, Australian courts will not have jurisdiction to issue conflicting orders pertaining to the same assets;

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Community Property States

- Treated just as community property.
- Quasi-community property.

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Equitable Distribution States

- Divided equitably along with the parties' other assets.

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Topic Five

Is it possible to have pre-nuptial agreements in the jurisdiction of the panellist? If not, what is the next best thing one can do?

Is it possible to have cross-jurisdictional agreements in the jurisdiction of the panellist?

Requirements for a valid pre-nuptial agreement

Limitations of pre-nuptial agreements, including grounds to set them aside or declare them to not be binding

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Is it possible to have PNA in Hong Kong?

- Recent Court decisions in England and Hong Kong – PNA can be upheld by the Court
- But not binding on the Court. Still retains its discretion to make a fair decision.
- Leading case in Hong Kong - **SA v SPH**
- Recent case - **LCYP v JEK & Anor**
- Facts:
- The parties entered into PNA when married
- Terms of PNA: W's entitlement to financial provision would be confined; lack of provision for children; did not provide for the situation where W had given up her career to be a full-time home-maker
- Held:
- The court took into account that PNA but did not give full weight
- The overriding consideration is fairness
- The couple were young at the time of entering the PNA and circumstances had changed

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Is it possible to have cross-jurisdictional agreements in Hong Kong?

Choice of Jurisdiction is Key!

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Requirements for a valid pre-nuptial agreement

- Procedurally and substantively fair?
- Fair terms when enforced?
- Independent legal advice before the agreement?
- Full and frank disclosure?
- Inequality of bargaining power?
- Undue pressure or duress?
- How close before the marriage and the agreement?
- The existence of a child?
- The passage of time since the agreement?
- Any important changes in circumstances?

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Limitations of pre-nuptial agreements

- Not enforceable and Court retains jurisdiction and discretion over the matter
- Not comprehensive – children issues are usually not covered
- Imbalance of power?
- Erosion of time

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Singapore's Treatment of Pre-Nuptial Agreements

- Pre-Nuptial Agreements ("**PNAs**") **cannot be enforced in and of itself in Singapore**, and remain under scrutiny of the Singapore Courts.
- It is **one out of the many factors which the Court will consider** when determining the just and equitable division of matrimonial assets.
- As such, little, significant, or even conclusive weight may be placed by the Singapore terms on the terms of the PNAs depending on the circumstances (*TQ v TR* [2009] SGCA 6).
- **Foreign PNAs** entered into by foreign nationals and governed by (and is valid according to) foreign law may be afforded **significant** weight.

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Singapore's Treatment of Pre-Nuptial Agreements > Cross-Jurisdictional Agreements

- PNAs are commonly done for cross jurisdictions and the **lawyers of those jurisdictions will usually collaborate** to ensure that the PNA will minimise the chances of being held invalid.
- The **choice of law is essential** to ensure that the PNA will not offend the law of the country chosen and to afford the clients the better forum.

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Singapore's Treatment of Pre-Nuptial Agreements > Cross-Jurisdictional Agreements

- PNAs ought to comply with the **requirements of common law** pertaining to validity of contracts **or** which are **valid by their proper law** (*TQ v TR* [2009] SGCA 6).

Types of PNAs	Treatment of such PNAs
Matrimonial assets	PNAs may be given conclusive weight, depending on the facts of the case.
Maintenance for Wife	Courts will scrutinise PNAs to ensure that adequate maintenance has been provided.
Maintenance for Children	Presumed unenforceable unless it is demonstrated that the PNA is in the best interests of the Children.
Care arrangements for Children	Courts will be slow to enforce agreements not in the best interests of the Children.

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Singapore's Treatment of Pre-Nuptial Agreements > Requirements

- PNAs may be given **little weight** or may be **void *ab initio*** if:

  (a) there has been **clear fraud**;
  (b) there are indications of **unconscionability**; or
  (c) it is **repugnant to the public policies** of Singapore to enforce such PNAs

  (*TQ v TR* [2009] SGCA 6).

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All 50 states recognize premarital agreements.

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Cross-jurisdictional issues

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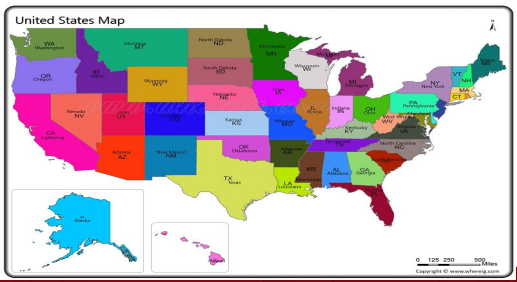
The 50-State Problem:



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The 50-State Problem:

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Typical Requirements:

- In writing
- Voluntary
- No duress
- No coercion
- No undue influence
- Full and fair financial disclosure

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Beware of differences:

- Timing requirements
- Independent counsel (recommended)
- Waiver of financial disclosure
- Waiver of spousal support
- Unconscionability: second look-back

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PRE-NUPTIAL AGREEMENTS

- A Binding Financial Agreement (BFA) (or "pre-nup") allows parties to contract out of the general provisions for property settlement
- BFA's can be entered into before or during marriage, or after separation or divorce
- BFA's can also be entered into by parties to a de-facto relationship
- BFA's allow parties to segregate their assets from the asset pool available for division in the event of divorce or separation
- Family Courts have the power to enforce Binding Financial Agreements

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Requirements of Binding Financial Agreements

A Binding Financial Agreement will only be binding if:

1. It has been signed by both parties
2. Prior to signing the BFA, each party was provided with independent legal advice
3. Each party is provided with a signed statement evidencing legal advice was provided
4. Each party is given a copy of the signed statement; and
5. The BFA has not been terminated or set aside by the Court

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Termination of Binding Financial Agreements

A Binding Financial Agreement can only be terminated by:

1. Creating a subsequent Binding Financial Agreement which includes a provision that the former agreement be terminated; or
2. Parties making a Termination Agreement

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Setting Aside Binding Financial Agreements

A Binding Financial Agreement may be set aside where:

1. It does not comply with the legislative requirements for execution
2. The agreement was obtained by way of fraud or duress, or in the event of non-disclosure
3. The agreement is void, voidable or unenforceable
4. Circumstances have arisen that make the agreement impracticable to be carried out
5. A child or party to the agreement will suffer hardship if it is not set aside
6. Either party engaged in unconscionable conduct

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Cross Jurisdictional Agreements

- Binding Financial Agreements can contain a provision for the parties to abide by its terms if they are residents of another country
- If parties separate and another country has jurisdiction over the matter, a mirror agreement can be made in a separate jurisdiction, which is valid under that country's law
- If a foreign pre-nuptial agreement does not meet the statutory requirements under the *Family Law Act,* the foreign agreement will not oust the jurisdiction of the Australian Court

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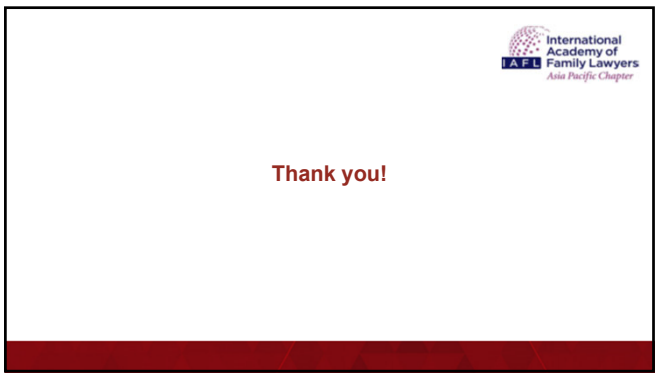
International Academy of Family Lawyers
Asia Pacific Chapter
Thank you!

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