

Unwinding Multinational Estate Plans in Divorce

A growing number of families around the world have family members, assets and other connections outside their home countries.¹ Wealthy multinational families have often engaged in sophisticated estate planning designed to protect the family wealth from two major threats: estate/ inheritance taxes and divorce.

While affluent families historically have focused their planning on the former, the latter is becoming an equal, if not greater, threat to family wealth preservation. Once taboo in many countries and religions, divorces are becoming more and more common. As noted in an article in *The Economist*, the growing acceptance of divorce is “a great global change,” with divorce rates in countries like China and South Korea now equaling those in the European Union (EU) and countries in the Organisation for Economic Co-operation and Development (OECD).²

Despite having established clever estate planning structures that work well when all family members live in the same country, affluent families may find that those same structures present unique and unexpected challenges when a member of the family lives abroad and gets divorced. It’s critical that they fully understand the importance and implications of the choice of jurisdiction for a divorce settlement, the typical problems that arise from the mismatch between common cross-border estate plans, and the impact of the laws and practices in different countries.

Choosing Where to File for Divorce

Before examining various planning solutions, it helps to understand the importance of the choice of jurisdiction for a divorce settlement.

The laws and practices of a country — and sometimes even a province or state within a country — can have a major effect on the outcome of a divorce. In many cases, spouses race to start divorce proceedings in the country of their choice rather than allow the other spouse to select the jurisdiction that suits their purposes.

The issues at stake include:

- The length of time needed to complete the divorce
- Valid grounds for divorce
- Privacy
- Child custody
- Legal consistency
- The ability to predict the probable outcome
- The comfort of working in a familiar country with a common language and family members nearby

¹In 2015, two-thirds of the babies born in London had at least one parent born abroad. (“Unhappily Ever After,” *The Economist*, February 18th, 2017). *The Economist* estimates approximately nine million Americans are currently based abroad. (“Transparency v Privacy”, *The Economist*, October 5, 2019).

²“Special Report: Marriage,” *The Economist*, November 25, 2017.

Less affluent spouses tend to favor countries such as England and Wales, where the courts have historically been more generous in awarding maintenance and property settlements in an “equitable” fashion. Conversely, spouses with family wealth will avoid such jurisdictions and, depending on their heritage, may look to certain U.S. states or other countries.³

However, divorcing spouses are not totally free to choose whatever country they wish. They must have sufficient connections (“nexus”) to their chosen location. Depending on the country, this could mean habitual residence, primary place of business, location of significant assets or the more subjective concept of “domicile.”

In the EU, the “Brussels II” treaty states that the country in which divorce proceedings are first started has jurisdiction priority over other EU countries, assuming sufficient nexus.⁴ However, recent changes in multinational agreements such as “Rome III” are adding nuances to this basic tenet.⁵

Challenge 1: Asset Titling and Ownership

The different treatment of forms of ownership from one country to another can yield some surprising results. For instance, some states in the U.S. permit married couples to title real estate (and in a few cases, intangible property) as “tenants by the entireties.” This form of ownership is often used as a will substitute, as it passes outside probate and prevents creditors of only one of the spouses from attaching the property. It is automatically severed upon divorce, so each ex-spouse owns one half as a tenant in common.

However, some jurisdictions, such as the Cayman Islands, do not recognize ownership as tenants by the entireties. Courts in the Caymans will deem property titled in this way to be owned as joint tenants with right of survivorship (JTWROS) instead. Absent proactive planning, such property continues as JTWROS even after divorce, since this type of ownership is not restricted to married couples. This can lead to unpleasant surprises, as in the Florida case of *Eubanks v. Eubanks*, in which one of the ex-spouses died before the Cayman real estate was retitled from JTWROS and the other ex-spouse inherited it all.⁶

This highlights how critical it is to thoroughly explore even seemingly straightforward financial details during the divorce process. It is especially important to involve foreign counsel with expertise in tax and estate planning if there are non-U.S. assets or other foreign connections.

Forms of Community Property (CP) Ownership

- All Community (French origin): Once married, all property is CP.
- Mostly Community (U.S. – California, etc.): Property owned prior to the marriage or received by gift or inheritance during the marriage is separate property; property acquired during the marriage is CP.
- Changing to CP: Separate property depending on title during marriage; after death or divorce, all CP.

What Determines the Form?

- Residence (i.e., where an individual lives) at time of marriage
- Domicile (i.e., a subjective determination of an individual’s home base) at time of marriage
- Place of celebration of the marriage

³According to the Pennington Manches International Family Law Report “From Dependency to Self-Sufficiency: The International Spousal Maintenance Barometer” posted on 12/04/2016, Israel, the UAE, Finland, Japan and Russia are the top five countries where ex-spouses are least likely to receive substantial ongoing maintenance.

⁴Brussels II Regulation EC No 2201/2003

⁵For instance, while the March 2011 Brussels II regulation determines which courts should be used, the European Union Divorce Law Pact of 20 December 2010 (Rome III Regulation) dictates which law should be used in cross-border divorces. Rome III enhances cooperation among EU member states, allowing them to establish advanced integration or cooperation.

⁶*Eubanks v Eubanks* — So. 3d – 2016. WL 358867 (Fla. 2d DCA January 29, 2016). Although the couple were Florida residents, and their divorce was settled in Florida, as is customary the real estate was governed by the jurisdiction where it was located — Cayman Islands.

Likewise, CP can involve traps for the unwary. Among the many civil law countries there are various forms of CP. The way of determining what is or is not CP varies (see sidebar). Consequently, courts and practitioners around the world may treat the division of CP in surprisingly different ways.

Once an asset is determined to be CP, it is critical to identify which ownership regime applies and to plan accordingly. It may be possible to alter the form of ownership before the divorce is final. For instance, in most U.S. CP states, spouses can agree to sever or create community property through a process called “transmutation.” It is also important to avoid accidental transmutation, such as funding a joint marital trust with separate property. While this may seem to be a solid estate planning strategy when the marriage is going well, it can backfire if the marriage dissolves and the property is divided in a divorce settlement.

Challenge 2: Cross-Border Assets

Some of the biggest surprises in divorces occur when one or both spouses have trusts and/or other structures that were established in a different country than the one they’re living in at the time of the divorce. While Rome III gives some clarity to which jurisdiction’s laws apply, outcomes are uncertain. Although courts in one country can enforce the legal norms of another country, there must be sufficient nexus and the result can’t be contrary to public policy. For example, a U.K. court did not recognize a Dubai divorce on the grounds that it was obtained without notice and without the opportunity for the wife to participate in the proceedings.⁷

Countries struggle to apply other countries’ unfamiliar laws. This is particularly evident when assets are in trusts and a civil law country is involved. Trusts provide many benefits for multigenerational wealth transfer and have long been a staple in estate planning for clients with family members in multiple countries. Without trust legislation or, in some cases, even the recognition of trusts as separate legal entities, judges and attorneys in civil law jurisdictions may craft divorce settlements that divide trust assets or interests in ways that are contrary to the trust statutes in the country of origin and/or result in punitive taxes to one of the parties or to the trust itself.

For instance, in an effort to divide what they may consider marital assets, European courts may order the unwinding of U.S. *inter vivos*⁸ qualified terminable interest property trusts (QTIPs) that had been settled by citizens of the EU when they and their American spouses were U.S. residents and domiciliaries. Although U.S. tax law requires spouses to be the sole beneficiaries of QTIPs during their lifetimes, this may not be known or relevant to courts in other countries. So if a couple with an existing QTIP moves to Europe and subsequently seeks a divorce, the EU court may split the QTIP, allocating one half of the assets to the ex-spouse and the other half to the children. This could have dire U.S. tax consequences. Assets received by the children would not be covered under the U.S. marital deductions and could incur U.S. gift tax and possibly penalties and interest.

Fortunately, there is a trend in some civil law countries to recognize trusts established in common law countries, particularly if assets are located in the other country. For instance, a French court recently issued a freezing order against the French assets of the singer Johnny Hallyday, who died a California domiciliary. Hallyday left most of his estate to his fourth wife and their two adopted children, disinheriting his older children. Since this was contrary to the French forced heirship regime, the French court prevented the transfer of the assets to a U.S. trust benefiting the surviving wife, pending settlement of his estate. However, the court refrained from interfering with the two California properties,

⁷Radsersesht v. Radservesht — Spain [2017] EWFA 2932 (Fam). Husband tried to obtain a “talaq” divorce, which under Islamic law allows a husband to dissolve a marriage by simply announcing to his wife that he repudiates her.

⁸*Inter vivos*: Also known as a living trust, is a trust created by a living person for the benefit of another person.

which were owned by his California revocable trust.⁹ Similarly, in two recent cases involving French citizens domiciled in California, the French court did not assert forced heirship. Instead, it followed the provisions of the decedents' trust, which benefited only their American wives.¹⁰

Conflicts of laws can be even more extreme when a divorce involves a couple with different religions. While some countries recognize only civil law marriages, others (such as Israel and Saudi Arabia) require only a religious marriage; Spain and England recognize both civil and religious marriages.

The dilemma of Shirin Musa, a long-time resident of the Netherlands who was originally from Pakistan, is an example of how confusing this can become. After Shirin and her husband were granted a divorce in the Netherlands, her then ex-husband refused to grant an Islamic divorce. This would have been devastating if Shirin wished to remarry in the Muslim faith. She was eventually saved by a decision in the Dutch courts to fine the husband up to \$295 per day as long as he refused to cooperate.

Challenge 3: Third-Party Trusts

One of the most controversial issues in divorce is how to treat assets in trusts that have been set up by third parties to benefit one or both spouses. In decisions about both property settlements and maintenance, outcomes vary from complete inclusion in the marital pot to no inclusion whatsoever.

Australia

As in many other jurisdictions, Australia's family law legislation is the legal basis on which rulings by family law courts may impact trusts.¹¹ First, the court must determine if trust assets are a "property interest" to which a party or parties are entitled and that may be directly exposed to division by a court order or are deemed merely a "financial resource" to be considered along with other relevant items.

Australian courts have interpreted the definition of "property" quite broadly. Typically, fixed interests are considered property. Increasingly, interests in discretionary trusts are also being caught in the web, though the terms of the trust and how it has been administered continue to play a large role.

Determination of Third-Party Trusts as Marital Property: Key Criteria

- Are one or both spouses' beneficiaries, and if so, are they identified by name or just one of a class of beneficiaries?
- If a spouse is a beneficiary, what is their interest: Is it a fixed, specific amount that they may withdraw, or do they receive all income but nothing more; under what circumstances could they receive principal distributions?
- If one or more spouses are beneficiaries, are their interests vested or contingent?
- Is a spouse a trustee, trust protector or other office holder with some control over trust funds, and/or a director or shareholder in the trust company that is trustee?
- How and by whom have past distributions and other important decisions been made?
- Was the trust established by one or both of the spouses, or by a third party? If the latter, what is the relationship of that party to the spouse(s)?
- Was the trust funded before or during the marriage, and whose property was contributed?
- Is there a letter of wishes and if so, does it address a beneficiary ex-spouse's access to trust funds?

⁹ "Johnny Hallyday: court freezes assets in inheritance dispute," The Guardian, April 13, 2018.

¹⁰ Estate of Maurice Jarre, Paris Court of Appeals Case No. 14/26247, May 11, 2016. Also Judgement No. 16-17, 198, French Supreme Court (Cour de Cassation), Sep 25, 2017.

¹¹ The Family Law Act 1975 (Cth) (FLA).

As in many countries, Australia has key cases that illustrate some of the conditions under which trust funds are considered marital property and must be included in the property division.¹² There are also cases where trusts were deemed “financial resources” of one spouse, and so impacted the settlement, but were not accessed directly.¹³

United Kingdom, Crown Colonies and Overseas Territories

England has historically been the most highly sought-after jurisdiction for less- monied spouses as English judges are most likely to consider trusts as “nuptial agreements” and have vast statutory power to vary them when seeking equity between divorcing couples.¹⁴ Courts in some former British colonies tend to follow this trend, as evidenced by a decision by the Hong Kong Court of Final Appeal.¹⁵

However, many English judges have moved away from granting what has been criticized as “a meal ticket for life.” This is in keeping with the global trend for courts to expect both ex-spouses to become financially independent as quickly as possible, even if this means dialing back lifestyles and seeking employment despite not having been recently employed.^{16 17}

Canada

While Canadian courts lean towards including trust interests as marital assets, there is some variation among the different provinces and territories. British Columbia is typically the most liberal in awarding funds to the less-monied spouse, having passed legislation expressly providing that the increase in the value of a beneficiary’s interest in a third-party discretionary trust is subject to property division in divorce.¹⁸ Further, there have been various attempts to value interests in discretionary trusts, including a rather novel theory of “value to owner.”¹⁹

Switzerland

Switzerland’s unusual treatment of trusts in divorce situations illustrates the traps for those who are unaware of divergent laws and practices among nations. While including the assets in trusts settled during a marriage in the marital pot is quite typical, in Switzerland the assets are included at their value at the time they were placed into the trust, regardless of the amount they had appreciated since then. This can result in some large discrepancies that would be considered unfair in other countries.²⁰

¹² Kennon v Spry [2008] HCA 56, Dillon & Dillon [2012] FamCA 310.

¹³ Essex & Essex (No 2) [2007] FamCA 639.

¹⁴ Antonia Felix and Peter Steen, “Balancing Act ; The Family Lawyer’s Perspective”, STEP Journal May 2017.

¹⁵ In Kan Lai Kwan v Poon Lok To Otto [2014] HKFLR 329, a standard discretionary trust was deemed available as a potential financial asset in divorce proceedings. However, it is important to note that the settlor was also a beneficiary, and there was no pre or post nuptial agreement.

¹⁶ James Stewart, Pennington Manches International Family Law Report “From Dependency to Self-Sufficiency: The International Spousal Maintenance Barometer”, April 12, 2016.

¹⁷ In Waggott v Waggot [2018] EWCA Civ 727, the court dismissed the ex-wife’s request for an increased share of the marital assets. The opinion provided detailed guidance on the post-divorce sharing of “earning capacity”, noting that an ex-spouses’ future ability to earn money is not a marital asset and that the ex-wife was provided with sufficient funds in the property settlement to amply sustain her lifestyle.

¹⁸ Family Law Act (British Columbia), March 2013.

¹⁹ Margaret O’Sullivan, “Where Trust Law Meets Family Law”, STEP Canada National Conference, June 11–12, 2017.

²⁰ Rybolovlev v Rybolovlev, Geneva Court of Appeals, 2015.

Challenge 4: Trustee Participation

In cross-border divorces, the trustee often faces serious decisions and dilemmas, making the choice of trustee critically important. This is often overlooked by settlors when naming their current and future fiduciaries.

When the divorce proceedings are taking place in a country other than where the trust is based, should the trustee participate, and if so, to what extent? Does participating mean submitting to the jurisdiction of a foreign court? There are both dangers and advantages to being involved.

First of all, a trustee may not have a choice in this matter. If subpoenaed, a trustee will find it difficult to stay out of the proceedings. Further, having trust assets abroad may mean a trustee has no choice but to participate. If all or even a significant portion of the assets are in the foreign country where the divorce is, the trustee may have a fiduciary duty to join in the proceedings. A trustee may also determine that it's in the best interests of the beneficiaries to become involved. For instance, trustees with information that would be helpful to the beneficiaries, or who need to have current and complete knowledge of the proceedings (such as when there's a charge of misappropriation of trust funds), may have a duty to participate.

However, there are risks to submitting to the jurisdiction of a foreign court. It may be difficult to keep matters that were previously confidential out of the public record. Trust documents, correspondence and work papers may be made public. Further, the trustee's participation may not be in the best interests of all the beneficiaries, which is particularly likely if there is litigation among them.

There is uncertainty in any litigation and the outcome of a cross-border dispute is no exception. An unpleasant outcome could negatively affect some or all beneficiaries, and potentially even expose the trustee to personal liability. For instance, under the doctrine of "telescoping," family law courts in the U.K. may ignore intermediate entities such as trusts and order settlements requiring liquidity that is only available from trust funds; thus, the assets of the trust would be exposed.

And finally, the trustee may end up being stuck between the proverbial rock and a hard place, as the local law of the trust jurisdiction may contain firewall provisions that prevent the recognition or enforcement of a foreign court's judgment. However, the trustee as a participant is bound by the order of the foreign court. This is particularly dangerous for a global fiduciary with offices in both countries.

Trustees may try to follow a middle path. They may want to monitor proceedings and even hope to participate without submitting to the jurisdiction of the foreign court. Presumably, in this way, they could avoid being bound by the foreign court's ruling. To succeed, the trustee will need legal guidance. At a minimum, they must constantly reaffirm that they are not submitting to the foreign jurisdiction by virtue of their communications and/or participation. In the U.K., at least, this appears to be possible.²¹ Trustees may also want to get the approval of their local court and/or of all beneficiaries before submitting to foreign jurisdiction.

²¹STEP Journal, May 2017. www.step.org/journal quote from Mr. Justice Mostyn: "Overseas trustees... may prefer to keep their powder dry and wait to see what judgment emerges before deciding whether or not to resist enforcement proceedings in their local court... I find it hard to see why participation by the trustees in a helpful or meaningful way... could be construed as a submission to the jurisdiction."

Challenge 5: Family Companies

In countries other than the U.S., it is very common to use multiple companies as vehicles to own various assets in addition to or instead of owning an operating business. Frequently, for reasons ranging from tax planning to privacy and creditor protection, families will have various companies with overlapping ownership. Oftentimes, little attention is paid during the planning process to the protection, or lack thereof, afforded by corporate structures when companies come under attack in divorce courts. In a divorce, the treatment of privately held companies is no more certain than that of trusts. In the same way that courts may look through trusts to ultimate beneficiaries, the legal separation created by tiered corporate structures is not always respected when a divorce enters the picture.

Courts in England, Wales and Hong Kong appear to be leading the way in “lifting, as opposed to piercing the corporate veil.”²² Increasingly they are focusing on identifying the beneficial owner. In the U.K., courts can and will access company assets to satisfy personal liability. In the landmark case *Prest v. Petrodel* the U.K. Supreme Court ordered companies owned by the husband to transfer valuable U.K. properties to the wife, finding that the companies were merely fronts for the husband.²³ Following this, U.K. courts have often deemed companies to be the equivalent of “nuptial settlements,” the assets of which could be divided in a divorce.²⁴

It is dangerous to assume that a corporate structure, even if it is offshore, will protect assets from being drawn into the marital estate upon divorce. In *Akhmedov v. Akhmedova*, the English judge issued orders to aid the wife in enforcing a judgment outside of the U.K.²⁵ He explained that this was necessary given the husband’s “continuing campaign to defeat [his ex-wife] by concealing his assets in a web of offshore companies,” including Dubai, where he had placed his yacht, possibly presuming Dubai was out of reach of the English courts. Although the English court’s order had to be taken to Dubai to be enforced, legal experts commented that courts in the Dubai International Financial Center “apply common law and the principles of comity towards the enforcement of foreign judgments and can be used as a conduit to enforcement in the courts of ‘onshore’ Dubai itself.”²⁶ It was also noted that this issue should be governed by English law since it stemmed from the need to enforce an English order.

The choice of jurisdiction, both for organizing a company and for filing for divorce, is critical. The potential interaction among documents created for the ongoing business needs, those for business succession and those related to personal affairs is also important. If a partner dies without a formal agreement as to the ongoing division and/or termination of the partnership, the family and the business associates may end up in conflict. Similarly, if there is a desire for a business to pass to future generations, it is critical to have the necessary provisions in the will or trust as well as similar language in the partnership agreement and/or corporate documents.

²² Marcus Dearle, “Untying the Knot”, STEP Journal, February 2018+.

²³ *Prest v Petrodel Resources Ltd & Others* [2013] UKSC 34.

²⁴ A leading case is *DR v GR and Others* [2013] EWHC 1196 (Fam) in which three layers of companies were pierced. Similarly, in *Chai v Peng and Others* [2017] EWHC 792 (Fam) valuable U.K. real estate held in a complex company structure established by the husband, were made available to the wife as part of a property settlement as well as for the future income stream that could support her. The courts deemed the structure akin to the properties being held on trust for the husband, thus being a nuptial arrangement.

²⁵ *Akhmedov v Akhmedova* [2018] EWFC 23 (Fam).

²⁶ “Ex-husband used corporate structures to conceal wealth”, Pinsent Masons LLP

This is exacerbated if there are cross-border ownerships, as the rules differ among countries. Relying on default or boilerplate language in corporate documents may result in outcomes entirely different from the owner's intent. For instance, Scottish law may require a partnership to terminate if there is no formal succession agreement in place at a partner's death. Further, in Scotland a beneficiary is entitled to receive an inheritance outright at age 16 if there is no will or trust providing otherwise. Clearly, outcomes such as these could severely impair the business, which in turn could have a significant effect on divorce court decisions regarding maintenance and property division.

Conclusion

Enforcing family court orders across national borders is often costly and protracted. In practice it may even be impossible, particularly for families of more modest means. However, wealthy families also face significant challenges if their planning has not provided for the possibility of a cross-border divorce.

There is no easy, one-size-fits-all solution to protecting trusts or other business or wealth planning entities in the event of divorce, particularly when there are cross-border issues. With the continually expanding reach of the family courts, assessing whether such assets will be impacted directly, indirectly or not at all is challenging. When crafting wealth planning documents, it is increasingly important to seek strategies to protect the assets in the event of a divorce.

Professional advisors need to be aware of the danger of creating structures that can be "nuptialized," or deemed part of the marital assets. Limiting control by a trust beneficiary or limited partner is an important first step to limiting the risk that the divorcing family member's interest will be considered "property." Care must also be taken to reduce the opportunity for family law courts to find ways to access assets in fully discretionary family trusts and family companies with independent trustees and directors. Families, estate planners and business advisors must work together to integrate the business structures with those created for estate planning. Oftentimes, mitigating risk may go beyond the drafting stage and focus more on the administration and operation of the entities.

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