

# **STEP JOURNAL**

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## **Carving up marital assets**

In this comparative article, the authors provide an overview of the financial consequences of divorce, prenuptial agreements and the death of a spouse in England and Wales, France and New York.

# England and Wales

## Capital and maintenance on divorce

There is no matrimonial property regime in England and Wales. On divorce, the parties have to make full disclosure of all their assets, wherever and however held. Section 25 of the *Matrimonial Causes Act 1973* (as amended) lists 'matters to which the court is to have regard in deciding how to exercise its powers' and first consideration is to be given to the welfare of the children of the family. The court has wide discretion to make whatever order is fair and possesses extensive powers to distribute all assets of the parties, including premarital assets, inherited assets, assets held in trust, offshore assets, business assets, pensions and bonuses. It can make orders for the payment of a lump sum, transfer of property, maintenance (known as periodical payments) for a spouse (these can be for a term or joint lives orders) and children (although the Child Maintenance Service has a role here), and orders for the variation of trusts classified as nuptial settlements.

In the case of *Miller and McFarlane* [2006] UKHL 24, the House of Lords identified three strands of fairness: needs (of the parties and the children), sharing (of assets) and compensation (of relationship-generated disadvantages). In most cases, the assets do not exceed the needs, in which case needs will be the determining factor and the other strands of fairness will be irrelevant.

## Pre-nuptial agreements

For those keen to lessen the magnitude of an award in this jurisdiction, where the starting point for division is 50:50 (unless there are good reasons otherwise), a pre-nuptial agreement (PNA) is becoming an increasingly popular option.

While PNAs are not enforceable as a contract, the attitude of the English and Welsh courts towards them has changed considerably over the years and, following the Supreme Court decision in *Radmacher v Granatino* [2010] UKSC 42, great weight will now be given to a PNA, unless the terms are manifestly unfair. For the PNA to have the best chance of being upheld, there should be proper disclosure, independent legal advice for both parties and suitable provision for a spouse and any children of the marriage. Supply of signatures at least 28 days prior to the wedding is also advised. In terms of the provision made, contracting out of the sharing concept of fairness is more likely to be acceptable than contracting out of the strands of needs and compensation. Catering for needs means providing appropriate accommodation, the right level of income (or capitalised income) or pension provision, if appropriate. This will be influenced by the standard of living enjoyed during the marriage.

## Succession

In England and Wales, there is freedom of testation and there are no reserved/mandatory portions for surviving spouses.

In case of intestacy, the spouse will inherit according to s46 *Administration of Estates Act 1925*. The exact claim depends on whether the deceased leaves children ('issue') and/or a parent, a whole-blood sibling, or issue of a whole-blood sibling.

Irrespective of whether there is a will or not, the surviving spouse can make a claim against the estate of the deceased for such financial provision as is determined by the court under the *Inheritance (Provision for Family and Dependents) Act 1975*.

## **New York**

### **Capital and maintenance on divorce**

Spouses must provide full disclosure of their financial positions. Assets held before the marriage are not part of the marital estate. Assets acquired during the course of a marriage, up to the point of the execution of a separation agreement or the commencement of a matrimonial action, are subject to an 'equitable division' upon divorce, regardless of the form in which title is held. If the asset is acquired during the marriage, with a few exceptions, such as an inheritance or personal gift, it is classified as 'marital' and subject to division. Equitable division does not necessarily mean 50:50; rather it refers to what the court believes is a fair distribution given the various circumstances, with reference to a list of 13 factors, such as duration of the marriage, economic and non-economic contributions to a spouse's career or career potential, and wasteful dissipation of marital assets.

Non-marital or separate property includes assets acquired prior to marriage, as well as certain gifts and inheritances acquired during marriage, and personal injury compensation. However, separate property may transmute into marital property in a variety of ways, such as being put in joint name or into a joint account. Also, the appreciation of separate property during the marriage may well be deemed marital if marital effort caused it. The New York courts have adopted an unusually broad definition of what constitutes a marital asset, including intangible assets such as professional licences, educational degrees and the enhanced earning capacity therefrom.

Maintenance in New York is referred to as spousal support (formerly alimony). Temporary support is now governed by a statutory formula. Post-divorce maintenance may be for a set period or life, depending on several statutory factors a court must consider. Among other things, maintenance is meant to offer one spouse rehabilitative support while they retrain to work. The amount and duration of maintenance is discretionary and based on 20 factors. There is a wide disparity in maintenance awards, as to both amount and duration. The court will also determine child support when the parties have dependent children. A formula is meant to determine basic child support, while 'add-ons', such as education or childcare, are determined by such factors as the ratio of incomes.

## **Prenuptial agreements**

*Domestic Relations Law* (DRL), s236B(3) provides that PNAs are required to be 'in writing, subscribed by the parties and acknowledged or proven in the manner required to entitle a deed to be recorded'. PNAs are enforceable as contracts and are accorded the same presumption of legality. However, such agreements can be challenged on the grounds of fraud and duress and, in terms of maintenance, if not 'fair and reasonable' at the time the agreement was made, or if 'unconscionable' when the final judgment of divorce is entered. The spouse seeking to set an agreement aside has the burden of proof.

PNAs can also define which assets are and are not classed as marital property, which is helpful in the light of the previously mentioned broad definition of marital assets adopted by New York courts.

Foreign marital agreements may be recognised and enforced like New York agreements. In the case of a PNA for a same-sex couple, care needs to be taken that the agreement, if drafted in New York, will be enforceable in other states, including those where same-sex marriage is not legally recognised.

## **Succession**

Property is distributed according to a will or the laws of intestate succession. The laws of more than one state may apply to one estate. For personal property, the law of the deceased's domicile governs distribution. However, for real property, the law of the state in which the property is located governs distribution. Arguably, New York has the most complicated law of descent or distribution.

A surviving spouse may elect against a will and receive a third of the net estate. When there is no valid will, s4.1-1 of the New York *Estates, Powers and Trusts Law* provides that a surviving spouse with no issue will receive 100 per cent of the estate. If there are issue, the spouse will receive a monetary sum and half of the estate, and the issue will receive the remainder.

## **France**

### **Capital and maintenance on divorce**

The division of assets upon divorce depends on the marital regime adopted by the spouses. Article 1387 of the French *Civil Code* (CC) sets out the principle of the freedom of spouses with regard to the arrangement of their marital relations, and the parties can organise a marriage contract, as long as it conforms to public policy. The contract must be drawn up by a notary and the marriage certificate itself must indicate whether a contract has been entered into and the name and address of the witnessing notary. The parties are free to insert special clauses in relation to the winding up of the matrimonial estate in the event of a divorce or upon death.

If the separation of assets regime (*la séparation des biens*) is adopted, whether the assets have been acquired before or during the marriage, they will remain clearly separated.

If the parties do not enter into a marriage contract, the community of property regime will apply. In this instance, assets acquired by either or both spouses after the marriage are joint (*les acquêts*). However, assets already owned by either spouse on the day of the wedding or acquired through gift, legacy or inheritance are owned separately (*les biens propres*). Spousal assets are deemed joint if it is not proven that they are owned separately. On divorce, each spouse retakes possession of their separate property, and the common property, which is made up of the difference between *les acquêts* and the debts contracted during the marriage, is divided equally between them.

Upon separation and until divorce, maintenance is awarded to the financially weaker party and may be decreased or increased proportionately to each party's income and needs if circumstances change. Upon dissolution of the marriage, the CC provides for a compensatory payment (*prestation compensatoire*), which aims to compensate, as much as possible, for the disparity created by the breakdown of the marriage. This is generally paid in capital and in one lump sum, or it can be paid by instalments or take the form of goods or a life interest. In practice, a compensatory payment is rarely awarded because commonly both spouses work and have similar incomes, and, in the majority of cases, there are insufficient means, in which case state benefits may be available.

Lifetime maintenance orders are very rare and mainly are made in favour of elderly wives who are unable to work, although they do not permit the previous standard of living to be maintained.

The CC provides that every parent has a duty to provide for their children's needs in proportion to their resources. The court will take state benefits and the parents' available income into account after deducting compulsory expenses, and the support awarded is based upon living costs.

## **Prenuptial agreements**

There is no concept in French law akin to the common-law PNA, whereby the spouses may contractually provide for the financial consequences of their divorce in advance. Despite this, French law recognises the freedom of spouses to conclude such agreements that aim to organise the matrimonial regime of the spouses, as long as they conform to public policy. Under the right conditions, a PNA with the aim of selecting a matrimonial regime would be recognised and enforced in France. The separation of property regime is often the most appropriate in the case of international PNAs, as it is the regime that affords the maximum protection to a party wishing to ring-fence pre-acquired wealth.

## **Succession**

Under French succession law, the distinction between moveable property (furniture, bank accounts and the like) and immoveable property (buildings and land) is important (article 3 CC). The succession

to moveable property is governed by the law of the place of the deceased's domicile at the date of death and the law also applies to immoveable property situated in France, regardless of the deceased's nationality or place of domicile at the time of death.

Any property governed by French succession law cannot be freely disposed of by will. There are two classes of heir with an inalienable right to a proportion of the property (known collectively as *les héritiers réservataires*): the surviving descendants and the surviving spouse. The proportion of the property inherited as of right by *les héritiers réservataires* is known as *la réserve légale*. The size of this reserved portion varies according to the number of heirs. Once the size has been established, the remainder of the estate can be disposed of by will. If the deceased dies intestate, the estate will dissolve in accordance with the intestacy rules, whereby the children or their descendants and the surviving spouse are the beneficiaries.

## Conclusion

As common-law jurisdictions, England and Wales and New York have more similarities than either has with France in terms of succession law and the division of assets and maintenance on divorce. Although the tide is perhaps turning in England and Wales, the widely held belief that the English and Welsh divorce courts are the most generous (or fair, depending on your stance) in the world is probably still accurate. Nevertheless, in situations where the parties have a choice of jurisdiction as to the forum in which to issue divorce proceedings, bespoke advice from each jurisdiction will be essential.

New York and France have been at the vanguard of nuptial agreements, but there is every indication the English and Welsh courts are moving closer to the European and North American position, whereby properly drafted PNAs are more or less determinative on divorce. The final hurdle is for such agreements to be given legislative force, as recommended, in February 2014, by the Law Commission of England and Wales (Tracey Dargan, 'Separation anxiety', *STEP Journal*, May 2014, page 77).

It is certainly the case that, in today's global village, there is increasing demand for international PNAs capable of being upheld in a selection of jurisdictions.

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