

# Legal Week

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## PRIVATE CLIENT

With more and more couples marrying across jurisdictions, the problems that arise when such unions break down are diverse. Even the ability of spouses to contractually regulate the dissolution of their ties varies between countries, as [Joshua Rubenstein](#) observes

# Marriage Guidance

For better or for worse, all marriages end. Even within the same jurisdiction, the rights and obligations attendant to the termination of a marriage vary, depending upon whether the union ends by reason of divorce or death. Planning for the termination of a marriage, by either cause, requires the knowledge of both matrimonial and estate laws, and of how these intersect.

By definition, the ending of a marriage by divorce is almost always contested. Increasingly, the termination of a marriage by death is becoming contested as well. The ability to use agreements — before, during or after marriage — to plan for the termination of one's union varies widely from jurisdiction to jurisdiction.

For international couples — couples of different nationalities, or who have residences, other property or children in more than one jurisdiction — the process is all the more complicated. One must consider the different treatment in each applicable jurisdiction of such complex issues as taxation of property settlements, alimony and child support, estate-planning opportunities incident to divorce and forum shopping.

Other problems that can arise in this context include immigration marriage fraud and international parental kidnapping. Cross-border unions often also create issues around subject matter jurisdiction, the efficacy of discovery procedures (for example, as against assets held in offshore trusts), security for post-marital obligations, the enforceability of foreign judgments and upholding secular aspects of religious law.

For example, the UK, France and the US represent three different legal and societal approaches to the ability of parties to contractually regulate their marriages. In the UK, pre-marital agreements have historically been unenforceable. While this continues to be so, in appropriate circumstances the courts are beginning to look at pre-nuptial agreements as a guide on how to exercise their inherent discretion — including whether or not to assume jurisdiction over an international marriage in the first instance.

Trusts are largely disregarded in resolving issues of support, maintenance and property settlements. Those created within three years of marriage may be assumed to be fraudulent in this regard.

In France, couples can select the type of separate or community property regime that will regulate their marriage. Separate property is best for divorce, but may leave no flexibility in terms of tax planning at death. Community property, which is the default regime, will result in an even division of property upon both divorce and death.

Electing universal community property affords complete tax protection upon death, but requires all of one's property go to one's spouse upon divorce. Parties may change regimes during marriage, but only with court approval. Divorce itself must be decided by the courts.

In the US, pre- and post-nuptial agreements are commonly used and generally enforceable. There is no requirement that spouses be separately represented, although separate representation will bolster an agreement against subsequent challenge. The extent to which asset disclosure is required for a pre-nuptial agreement varies widely from state to state, although virtually all states require asset disclosure for post-nuptial agreements.

Generally, these agreements need not be witnessed and need only be signed and in writing — although those between non-married couples may be oral and even implied. Agreements may provide for property settlement and for reasonable limitations upon spousal support. They can provide, or waive, testamentary obligations, but cannot fix child support.

In respect of UK inheritance disputes, family dependency and inheritance laws permit the rewriting of a will that fails to provide for the reasonable support of a testator's spouse and minor children. Indeed, in the case of a surviving spouse, the test is gravitating from that of 'needs' to one of 'fairness'.

In France, holographic wills are valid but readily subject to contest, whereas wills executed before a notaire are much harder to dispute.

A spouse's entitlement is typically dictated by the marital regime, and one cannot disinherit one's children with respect to one's disposable property.

In the US, only Louisiana has forced heirship. A spouse's testamentary share is usually a fixed percentage, without reference to actual support needs. The percentage and the asset base against which the spousal share applies vary between states and can be an intestate share in the absence of a will, an elective share against a will (which may or may not be avoidable through testamentary substitutes and may or may not be satisfiable with a trust), as contrasted with community property or equitable distribution upon divorce.

Typically, wills can be only be contested on grounds of improper execution, lack of testamentary capacity and fraud, mistake or duress (e.g., undue influence). However, agree-

ments such as pre-nuptial, separation and even shareholder and partnership agreements supercede wills. In *terrorem* clauses are effective in many states, but never to defeat an elective share. Whether or not, and how, to plan for the termination of a marriage requires an economic and legal analysis of the comparative rights and obligations of marriage in each applicable jurisdiction. Due to the increase in world population, the rise of the global economy, growing international travel and, of course, the internet, international marriages are on the up and up.

Dealing with the aftermath of cross-border marriages, however they end, is a problem that advisers will encounter increasingly frequently in years to come.

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