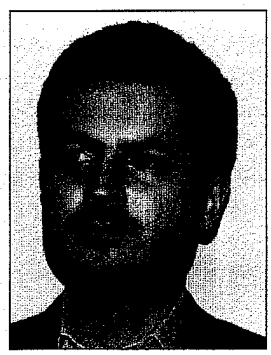
Competing interests

Lucy Marks and Vitaliy Eremin compare and contrast the matrimonial regimes in Russia and England and Wales



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'If a Russian citizen marries outside the Russian Federation in accordance with local laws, the marriage will be recognised as valid in Russia and therefore Russia will have jurisdiction to deal with the divorce, notwithstanding where the parties are living.'

As international marriages increase, many family lawyers may be faced with the prospect of dealing with properties or assets in Russia or the issue of whether it would be more appropriate for either party to issue proceedings in Russia, if they are able to do so. This article provides a summary of the main differences between divorce proceedings in this country and the Russian Federation.

Basics

Russia

Divorce in Russia is regulated by the Family Code of Russian Federation 1995 (FCRF 1995) and also partly by the Civil Code of Russian Federation 1996 (CCRF 1996).

Couples have the right to choose whether to file for divorce in the special government office or in the court. However, pursuant to article 21 of the FCRF 1995, divorce proceedings must be issued in court if there is a disagreement between the parties or if there are children under the age of 18. In addition, an application for divorce cannot be made by the husband if the wife is pregnant or during the first year following the birth of a child.

No formal application is needed to start divorce proceedings in court. Either party (with or without lawyers) can write to the court requesting a divorce. The court will then list a hearing at which the parties are required to explain why they wish to divorce. If one party does not want to divorce a judge can grant the parties a period of time (not more than three months) to consider matters further and attend mediation, before attending a second court hearing. If, at this next hearing, one of the spouses continues to request the divorce, the court will pronounce that the marriage has been annulled. This decision is then sent to the local government office to be registered.

The divorce process in Russia takes a maximum of three to four months via the courts (although quicker through the government office), although, as detailed above, this may take longer if one party does not wish the divorce to proceed. Court costs for divorce proceedings are 400 roubles (approximately £8).

England and Wales

The main legislation provision is the Matrimonial Causes Act 1973 (MCA 1973). There is one ground for divorce, namely the irretrievable breakdown of the marriage (s1(1) MCA 1973). This can be proved by the petitioner by relying on one of five facts: adultery, unreasonable behaviour, desertion, two years' separation with consent or five years' separation (s1(2) MCA 1973). There is a restriction on a petition being presented before the end of a period of one year from the date of the marriage (s3 MCA 1973).

Either party can commence divorce proceedings by issuing a petition. The minimum timeframe from the petition to decree absolute is approximately three to four months. The court fees are £340 (to issue a petition) and £45 for an application for the decree absolute plus legal fees for drafting documents, which vary from between £500 to £1000 plus VAT.

Pre-marital contracts/agreements

Russia

The Russian family code specifies that spouses can choose how they wish their assets to be held legally on marriage, or which matrimonial property regime will apply to the ownership of matrimonial property during the marriage and on divorce. They can do so by entering into a marital contract, before or during the marriage.

There are no specific formalities required for a marital contract to be valid, save that it must be signed by a

notary and will generally be binding, notwithstanding the length of the marriage. There is no requirement for financial disclosure to be provided or for the parties to receive independent legal advice. If no marital contract is entered into the default property regime applied by the court will be joint ownership.

The property regimes, as detailed in article 34 of the FCRF 1995, are as follows:

- Joint ownership: the couple jointly own the marital property in equal shares.
- Shared ownership: the spouses own the marital property in distinct shares (according to their contributions), which they will retain on divorce.
- Separate ownership: the spouses own and retain their own personal property and property acquired during the marriage.

In Russia, spousal maintenance orders are fairly unusual, even for the wealthy.

A marital contract can include provisions for payment of spousal maintenance (or 'alimony'), but provisions in relation to child maintenance cannot be included. There is a time limit of three years for applying to court to divide marital property following divorce (s7, article 38 FCRF 1995).

Notwithstanding the matrimonial property regime, all assets and properties owned prior to the marriage, and inheritance or gifts received during the marriage, will be excluded from the division of 'common property' on divorce. The exception is when one party has invested money into property owned by the other party during the marriage, thereby increasing its value, in which case a claim can be made for a proportion of the increased value of the asset.

England and Wales

Spouses can enter into a pre-nuptial agreement prior to the marriage in order to regulate what will happen to their assets on divorce. However, this will not prevent either party making a claim to the court for a financial order on divorce, as distinct from that agreed within the pre-nuptial agreement. Historically, prenuptial agreements have had little force, although they were taken into account as one of the circumstances to be considered by the court. However, the Supreme Court gave greater weight to pre-nuptial agreements in *Radmacher v Granatino* [2010], and the current state of the law in relation to pre-nuptial agreements can be summarised as follows:

- There is no general distinction between pre-nuptial and post-nuptial agreements (contrary to the Privy Council case of *MacLeod v MacLeod* [2008], which provided that post-nuptial agreements were enforceable but pre-nuptial agreements were not).
- The court should uphold a nuptial agreement which has been entered into freely by each party, having a full understanding of its implications unless it would not be fair to hold the parties to that agreement.
- Nuptial agreements cannot exclude the jurisdiction of the court.

The effect is that nuptial agreements now have 'decisive weight' and will be binding as long as they are fair. Therefore, whether or not a Russian pre-nuptial agreement will be upheld in this jurisdiction depends if it meets the criteria of fairness set out by the Supreme Court. The Law Commission's consultation paper on marital property agreements (Law Com no 198-11 January 2011) suggests that the following formalities should be observed:

- the agreement must be in writing and signed by the parties;
- financial disclosure should be provided;
- both parties should have obtained independent legal advice;
- the agreement should meet contractual requirements to ensure that neither party has entered into the agreement under duress; and
- the agreement should not be enforceable if it fails to meet the needs of the parties or results in either party becoming reliant on state benefits.

Finances

Russia

Within divorce proceedings, either party may make a claim (in writing or orally) for marital property to be divided. As detailed above, this will necessarily exclude any pre-acquired assets or property acquired during the marriage by gift or inheritance, even if these properties or assets have been used by the family during the marriage.

The amount of legal fees will depend on the value of the property which is to be divided (up to a certain limit), which will determined by the judge according to the Tax Code. A general principle is that the division of marital property will not be affected by whether one party alone contributed towards the parties' finances and the other stayed at home, or whether both parties contributed equally to expenses.

The main principle is that the fruits of the marriage should be shared 'fairly' between the parties. There is a presumption of equal sharing, unless there are special circumstances to justify some other division. Article 39 FCRF 1995 provides that the court has the right to depart from the principle of equal sharing of marital property for one of the following reasons:

- the needs of the children; or
- conduct resulting in decrease in value of joint assets.

The general proposition in relation to spousal maintenance is that such payments are not usually provided for on divorce, although this can be included within the marital contract. There are exceptions, as provided for in articles 89-92 of the FCRF 1995, which state that, in the event of a refusal of payment of maintenance, only the following parties may apply to court:

- a disabled spouse;
- a pregnant spouse, or a wife within three years following the birth of a child of the family;
- a spouse looking after a disabled child (until the child reaches the age of 18);
- a needy ex-spouse who has reached pensionable age no later than five years since the dissolution of the marriage if the spouses were married for a long time.

In cases detailed above, the monthly amount will be determined by the court by considering both parties' financial positions. In Russia, spousal maintenance orders are fairly unusual, even for the wealthy, however child maintenance payments cannot be included within a marital contract. The usual formula is: one quarter of the parent's income for one child, one third for two children and half for three or more children. This may be varied by the court taking into account the financial situation of the family.

Within the court process, disclosure of assets must be provided, which can cause practical difficulties. If one spouse refuses to disclose their assets then proving the existence of properties and immovable assets is relatively simple, since ownership of these assets is listed by government authorities. However, ownership of movable assets (including money, works of art and other belongings) is difficult to prove and these are often transferred off-shore. For that reason, prior to commencing the divorce process, spouses are advised to obtain as much information as possible about matrimonial property. If there is a danger that assets may be moved, an application can be made to a judge to freeze assets held by a spouse if there is a danger of assets being moved to another jurisdiction.

England and Wales

The MCA 1973 sets out the orders that may be made by the court on divorce as follows:

- spousal maintenance (s23 MCA 1973);
- lump sum payment (s23 MCA 1973);
- property transfer order (s24 MCA 1973);
- sale of property (s24A MCA 1973);
- pension sharing orders (s24B MCA 1973);
- pension attachment orders (ss25B and 25C MCA 1973); and
- maintenance, lump sum and property settlement in favour of the children (ss23-24 MCA 1973).

Spousal maintenance orders are commonplace, particularly if one party has been supported by the other during the marriage and if one of the parties, for example, has given up work to care for the children of the family. The court can determine whether the spousal maintenance will be for a term or during the joint lives of the parties. A joint lives maintenance order may be appropriate after a long marriage, particularly where there are young children of the family.

However, pursuant to s25A MCA 1973, the court is under a duty to consider whether a clean break would be appropriate. In order to effect a clean break, the court may order a payment of a lump sum in lieu of future maintenance payments.

The main statutory principles applied by the court in determining the division of assets on divorce are encompassed in s25 MCA 1973. These include:

- financial resources of the parties;
- financial needs, obligations and responsibilities of each of the parties of the marriage;
- standard of living enjoyed before the breakdown of the marriage;
- age of each party to the marriage and duration of the marriage;
- physical or mental disability of parties to the marriage;
- contributions by each of the parties to the marriage; and
- conduct of each of the parties.

How much weight is attributable to each of the above depends on the circumstances of the case. The court's powers are discretionary.

Generally, assets acquired prior to the marriage will be taken into account on divorce. If inherited assets have not 'mingled' with matrimonial assets, this may be used to support an argument that these funds are to be treated distinctly from other assets and should be kept separate. However, this will depend on the parties' needs and those of the children of the family.

Jurisdiction

Russia

In Russia, the court's jurisdiction to entertain divorce is based on either spouse's citizenship. If a Russian citizen marries outside the Russian Federation in accordance with local laws, the marriage will be recognised as valid in Russia and therefore Russia will have jurisdiction to deal with the divorce, notwithstanding where the parties are living.

In addition, irrespective of citizenship, if one of the spouses is living in Russia at the commencement of the divorce, the Russian court will be able to entertain the divorce proceedings. According to article 160 FCRF 1995, the court can have jurisdiction even if both parties live outside Russia (so long as one is a Russian citizen). The court will also have jurisdiction if either party is domiciled in Russia (article 402 FCRF 1995).

England and Wales

Jurisdiction for divorce in England is governed by European Union law, namely Brussels II regulation (now revised and sometimes known as Brussels II bis or Brussels IIA). Pursuant to article 3(1) Brussels II bis, the court will have jurisdiction if one of more of the following are established:

- the spouses are both habitually resident in England and Wales;
- the spouses were last habitually resident in England and Wales and one of them still resides there;
- the respondent is habitually resident in England and Wales;
- the petitioner is habitually resident in England and Wales and has resided there for at least one year;
- the petitioner is domiciled and habitually resident in England and Wales and has resided there for six months; or
- both parties are domiciled in England and Wales.

If none of the above applies, there is the option of using either the petitioner's or the respondent's domicile if no 'contracting state' has jurisdiction. A contracting state is a European Union state that has signed Brussels II bis – all EU states are contracting states except Denmark.

Conclusion

Where a party has the option of issuing either in this jurisdiction or in Russsia, careful consideration should be given to the advantages and disadvantages of both jurisdictions. A favourable marital agreement may, for example, make Russia the more attractive option for a wealthy spouse, whereas a financially weaker spouse may seek instead the more generous financial provision regime (particularly as to maintenance) in England and Wales. ■

MacLeod v MacLeod
[2008] UKPC 64
Radmacher v Granatino
[2010] UKSC 42