

DIVORCE AND FORUM SHOPPING

If I got married abroad, does it mean my divorce has to be in the same country?

No. English family courts can deal with any issues concerning marriages which took place abroad provided there is sufficient connection with England. This sufficient connection is known as “*jurisdiction*”.

I got married in England but we now have connections with other countries, does it mean my divorce has to be here?

No. The English family courts can deal with any issues concerning the marriage if there is still sufficient connection, known as “*jurisdiction*”, but the courts of other countries may also be able to deal with the divorce and related financial matters. Moreover it may be more advantageous for you for the proceedings to be in that other country. Urgent specialist legal advice should be taken in these circumstances before any decision is made.

What is the jurisdiction for the English family courts to deal with divorce?

There are a number of possible criteria. Most require a period of simple residency and/or the status of habitual residency by one or both spouses in England or joint domicile. In certain circumstances, the English family courts can deal with a divorce if both are non resident but one is domiciled in England. Issues concerning residency and domicile are dealt with in the section on Status. European Union countries have identical divorce jurisdiction laws.

What are the grounds for a divorce in England?

Divorce is only on the basis of irretrievable breakdown. But there are, in reality, five mandatory grounds to show irretrievable breakdown for a divorce in England; adultery, unreasonable behaviour, two years separation with consent, five years separation and desertion. Most divorces are on the basis of the first three. If the divorce is unopposed, it can be concluded as quickly as four months and there is no need for any attendance at court. Defended divorces result in a public hearing, are rare, expensive and are discouraged. The final divorce order is known as the Decree Absolute. This means the marriage is entirely at an end and the parties are free to remarry if they wish. The reason why a marriage has broken down has, invariably, no significance on financial outcomes.

Just because one of us is living in England or we were married in England, does this mean that the divorce should be here?

No. Many international families find at a time of relationship breakdown that two or more countries can deal with issues regarding their family. Whilst the laws about getting a divorce are becoming fairly similar across many countries, the financial outcomes accompanying the divorce can be dramatically different. It is very important to find out which is the best country for you for any proceedings. An outcome in one country may be highly favourable to an applicant, perhaps the wife, alternatively to the paying party, perhaps the husband. There is much unfairness and injustice to international families by the wide disparity of final financial orders made in different countries. Specialist legal advice should be taken at a very early stage in the breakdown of the relationship about where any divorce or other family proceedings should take place.

Disputes about which country should deal with a divorce and related family issues are known as “*forum disputes*”. Taking advice about the best, most advantageous country for a divorce or other family proceedings is known as “*forum shopping*”. These forum disputes can take very many months from commencement of the application to the end of the final hearing and are often very expensive, public and very divisive for future parenting arrangements and resolving other issues. Take care before embarking on a forum dispute. But the differences in outcomes between countries can be substantial even for families of modest wealth.

How do I decide where to issue family court proceedings?

First, it is necessary to ascertain what are the countries in which proceedings could be issued. This includes states in some countries which have a federal basis. This is what is known as the countries with jurisdiction.

Secondly, it is necessary to ascertain the outcomes in those countries with jurisdiction. This includes the final financial settlement, interim financial arrangements, the available injunctions to preserve the assets, the timetable and grounds for obtaining a divorce, any arrangements for children, the legal costs, the personal inconvenience of the proceedings being in that country, the recognition of any orders in other countries in which one spouse may be likely to live or work, opportunities for enforcement of any orders and a number of similar factors.

The outcome, timetable and procedure in the various countries with which an international family may have

connections can be very different indeed. Some countries may seem to favour men and others seem to support women applicants and/or mothers. Some countries can be very slow from the start of the separation or the start of proceedings until the conclusion and outcome. Some countries are perceived as very generous to wives whereas some grant only short term alimony (spousal maintenance) or none at all. Some countries have exceptional powers to obtain full disclosure including finding out about assets offshore or held in the name of third parties and trusts, whereas some countries have very limited disclosure powers and permit easy evasions of full disclosure. Proceedings in some countries can be very expensive in costs although this must be balanced against better outcomes. Whilst many countries now encourage people to act in person in family court proceedings without a lawyer, these international aspects are an area in which specialist legal advice should always be urgently taken before you embark on any action.

How do courts decide which country should deal with our family dispute?

Within the countries of the United Kingdom, there are mandatory rules to determine which country's courts should deal with the divorce or other family proceedings. It is often based on the place of the last residence.

With a forum dispute with a country outside of the European Union, most countries decide on the basis of which country has the closest connection with the family. They take into account many factors. It is not usually decided on the basis of who issues first. In most international families, it is often clear with which country the family has the closest connection. The English court has a discretion in accepting or declining jurisdiction on the basis that England or the other non-EU country has the closer connection.

For the EU, see below.

What sort of factors are considered for closeness of connection?

Nationality, residence, domicile, any agreements about which law or which country should deal with matters concerning the family, location of the wedding, the country with which each had the closest connection before the wedding and during the marriage, where the primary financial assets are situated including pensions, where the children are at school, remedies available in the foreign court, the cultural background of the parties, prospects of enforcement of any orders, existence of marital agreements, the availability of legal aid and other similar factors.

What is the difference within Europe? How is it decided which country will deal with a divorce?

If two European Union countries have jurisdiction e.g. UK and France, it depends only on where the proceedings are issued first. That country's courts will then usually deal with all matters concerning the family including divorce, and ancillary financial matters (although see below about maintenance). It is irrelevant if there is an agreement between the couple about where the divorce should be. It is irrelevant if the country where the divorce proceedings are issued first in time has a lesser connection with the family than another EU country. It is simply who is first to issue proceedings. As the financial outcomes on relationship breakdown between two European countries can be dramatically different i.e. they can benefit one spouse significantly and disadvantage the other, it means that urgent and specialist advice, including advice from abroad, must be taken to decide where to issue and then to issue very fast. This law of first to issue ("*lis pendens*") securing the country to deal with the divorce proceedings is known as Brussels II.

Sadly, this means that often it is very unwise to suggest a negotiated settlement or mediation until proceedings have been issued to secure the more favourable jurisdiction. Even more sadly, it means sometimes that it may be unwise to suggest marriage counselling until proceedings have been issued. As deciding the best country in which to issue often requires advice from lawyers in two countries, which requires private, upfront funding of costs, the financially weaker spouse sometimes loses out badly and often loses the race to issue and so has the disadvantageous financial outcome. These are most unfortunate consequences of this very unsatisfactory law.

There are a few countries outside of Europe which also decide which country should deal with a case on the basis of where the proceedings were issued first. Local advice should always be taken to find out if this occurs.

Can proceedings started in one country be transferred to another?

Yes, the English court can and does sometimes transfer the entire proceedings or part of proceedings to another country if the courts of the other country are better placed to deal with issues e.g. interpretation of local law or practice.

This cannot occur on divorce within the European Union even if the divorce proceedings were in one country because they were issued first in that country and yet another country clearly has the much closer connection and is better

placed to decide issues. Transfers of general financial proceedings between European Union states cannot occur. This is another primary reason why taking urgent advice and action is essential.

However in certain circumstances, it is compulsory for courts to transfer maintenance claims (defined as “needs”) where another country has prior jurisdiction for maintenance or the couple have years previously agreed that the other country should deal with maintenance. Issuing first for divorce in these circumstances does not ensure all the financial issues are resolved in that country.