Family Law Disputes Between International Couples in U.S. Courts

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The structure of the American family has changed dramatically over the last several decades. Many couples are cohabiting before marriage or eschewing marriage altogether so more children are born to unmarried parents. More parents are having children when they are older and better educated. And more same-sex couples are living together and marrying. Add to this mix increasing mobility, migration, and rising numbers of international couples—partners that are citizens of different countries, live outside the country of which they are citizens, or move between countries. And recognize that countries around the world are governed by different legal regimes, such as the common law system, civil codes, religious law, and customary law. Finally, consider that many couples are taking legal matters into their own hands by signing premarital and separation agreements, which may contain choice-of-law clauses. How do American courts handle family law disputes that arise between these international couples?

Choosing a Forum

Federal Courts Are Out

Since the founding of the nation, federal courts in the United States have been authorized to hear lawsuits between citizens of a U.S. state and citizens or subjects of a foreign nation. This type of jurisdiction, called alienage jurisdiction, is designed to protect the non-U.S. party from bias and to preserve harmony between the United States and foreign nations. While these goals might well be served by affording international couples a federal forum in which to litigate family law disputes, the Supreme Court has concluded that a domestic relations exception “divests the federal courts of power to issue divorce, alimony, and child custody decrees.” Thus, federal courts are not an option for international couples seeking to resolve their family law disputes in an American court.

Restrictions on State Court Jurisdiction

State courts in the United States may divorce couples that were married abroad even if the cause for the divorce occurred abroad, but only if one of the spouses is domiciled in (or at least a resident of) the forum state at the time the divorce action is commenced. So international couples in which neither spouse is a U.S. citizen or has a green card (and can readily establish a right to remain in the United States indefinitely) may have a problem demonstrating domicile and invoking state court jurisdiction. Even if one of the spouses is domiciled in the state, the court will proceed only if the petitioning spouse can also satisfy the state’s durational residency requirement. These statutory requirements vary by state, but the most common requirement is six...
months. Some states—like New York—impose residency requirements as long as one year, while others—like Washington State—have no residency requirement at all.

Assuming that the petitioning spouse is domiciled in the state and satisfies the durational residency requirement, the jurisdictional analysis shifts to the responding spouse. Must that spouse have the “minimum contacts” with the forum state typically required for assertions of personal jurisdiction? Interestingly, the answer is both no and yes.

No: If the petitioner seeks only to sever the marriage—if she seeks only a divorce and not the resolution of any financial issues—then the court will have jurisdiction even if the responding spouse has no contacts with the forum state. Thus, under the “status exception,” if one partner of an international couple moves to the United States and becomes domiciled here, she may obtain a divorce in the U.S. state in which she is domiciled even if her spouse has never stepped foot in the United States. Realize, however, that she will need to provide notice that satisfies due process to the spouse living abroad.

Yes: If the petitioner is seeking any form of monetary relief—such as alimony, child support, or distribution of marital property—the court will have in personam jurisdiction only if the responding spouse has minimum contacts with the state. In Kulko v. Superior Court of Cal., 436 U.S. 84 (1978), the U.S. Supreme Court interpreted the due process clause to afford parents and partners living outside the forum state substantial protection from state court jurisdiction, even if their children live in the forum state with their permission. The Uniform Interstate Family Support Act (UIFSA), adopted after Kulko, purports to authorize jurisdiction over nonresident parents who resided with their child in the state, who engaged in sexual intercourse that may have resulted in the conception of the child in the state, or whose child resides in the state “as a result of the acts or directives” of the nonresident parent. A Comment to UIFSA acknowledges that “an overly literal construction of the . . . statute [may] overreach due process.”

Many state courts assert in rem jurisdiction to distribute marital property located within the state, relying on the Supreme Court’s statement in Shaffer v. Heitner, 433 U.S. 186 (1977), that, “when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction.”

Choice of Law Regarding the Right to Divorce
Ordinarily, American courts will apply their own domestic law to determine the right to divorce, including the grounds for divorce. A comment to the Second Restatement of Conflicts explains the rationale for this approach by citing “the peculiar interest which a state has in the marriage status of its domiciliaries.”

Division of Property
Assuming that an American court has jurisdiction to entertain a divorce action and to adjudicate financial claims, it must address the complexities that arise when international couples have acquired property under different legal regimes in different countries or states. Courts in the United States do not speak in a single voice on this issue. Some states follow a “total mutability” approach and apply their own law to divide all of the couple’s property, regardless of where or when it was acquired and regardless of where the partner was domiciled at the time of acquisition. The benefit of this approach is that a single state’s law—the forum’s familiar law—governs all of the couple’s property. The downside of this approach is that it may encourage forum shopping and frustrate the parties’ reasonable expectations. Other states follow a “partial mutability” approach and apply the law of the state in which the party who acquired the property was domiciled at the time of acquisition. So if a couple moves from country X to state Y, the court in state Y will apply country X’s law to govern the distribution of the property acquired before the move and state Y’s domestic law to govern the distribution of the property acquired after the move. While this approach may honor the expectations of parties that the law of the state of domicile at the time of acquisition will govern their property rights, it complicates the divorce court’s task by requiring it to apply more than one jurisdiction’s law (including one or more unfamiliar foreign laws) to resolve the property claims of the international couple. Yet other courts apply forum law to govern the distribution of personal property and the law of the situs of real property to govern its distribution. One prominent scholar has suggested that courts should determine parties’ marital property rights in accordance with the law of the last state where the couple shared a primary residence for a specified period of time.

Prenuptial Agreements and Choice-of-Law Clauses
International couples can seek to avoid this uncertainty and potential inconsistency by entering into premarital agreements that spell out their property rights upon divorce. For example, a couple can agree to disclaim rights to alimony or to treat their respective pensions as separate property in the event of divorce. More than half of U.S. states have enacted either the Uniform Premarital Agreements Act (1983) or the Premarital and Marital Agreements Act (2012), under which premarital agreements are enforceable if certain procedural
Aspects of International Child Abduction is that children’s interests are best served when custody decisions are made in the child’s country of “habitual residence.” According to the Supreme Court’s recent decision in Monasky v. Taglieri, 140 S. Ct. 719 (2020), “a child’s habitual residence depends on the particular circumstances of each case” and does not “turn on the existence of an actual agreement” between the parents on where to raise their child. Readers are encouraged to consult the articles by Stephen Cullen and Melissa Kucinski in this issue, which examine the Convention in detail.

Recognition of Foreign Divorces
When an international couple separates, sometimes litigation is commenced by one of the partners in a foreign court, rather than in an American court. Later, if there is litigation between the spouses in the United States, the American court may need to determine the validity of the foreign decree. For example, if the American court concludes that the foreign divorce decree is valid, then it will not entertain a divorce action between the same parties. Likewise, if the foreign decree requires the payment of alimony or child support, an American court will enforce it only if it concludes the decree is entitled to recognition.

First, it is important to note that the Full Faith and Credit Clause of the federal Constitution does not require U.S. courts to recognize foreign divorce decrees; it extends only to judgments rendered by American courts. Second, while most U.S. states have adopted either the Uniform Foreign Money Judgments Recognition Act (1962) or the Uniform Foreign-Country Money Judgments Recognition Act (2005), which direct American courts to recognize money judgments rendered by non-U.S. courts, these Uniform Acts explicitly exclude from their scope foreign judgments for divorce, support, or maintenance.

So, must American courts recognize and enforce foreign divorce decrees? In deciding this issue, American courts apply the doctrine of comity. According to the Supreme Court in the seminal case of Hilton v. Guyot, 159 U.S. 113 (1895), “‘Comity’ . . . is neither a matter of absolute obligation . . . nor of mere courtesy and good will . . . But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of . . . persons who are under the protection of its laws.” Just as American courts entertain divorce actions only if one of the spouses is domiciled in the state, they recognize foreign divorce decrees only if one of the spouses was domiciled in the country whose court issued the divorce at the time the decree was rendered and if the defending spouse was afforded fair notice. Even if those prerequisites are satisfied, American courts will enforce foreign decrees that resolve financial claims only if the foreign court had personal jurisdiction over the defending spouse, the decree was not procured through fraud, and the foreign decree did not

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In an effort to bolster the likelihood that their premarital agreements will be enforced beyond the place of execution, international couples may include a choice-of-law clause specifying the law to govern the validity and enforceability of their premarital agreement. Most American courts enforce choice-of-law clauses as long as the parties choose the law of a jurisdiction that has a substantial relationship to the parties and is not contrary to a fundamental public policy of the forum state.

Child Custody
The central premise of the Hague Convention on the Civil Aspects of International Child Abduction is that children's
Deference to Pending Divorce Actions Filed Abroad and Forum Non Conveniens

If one spouse sues for divorce in a foreign country and the other sues for divorce in the United States, the U.S. court must decide whether to stay its hand and defer to the simultaneous foreign proceeding or whether to move forward. The American court will assess whether it has jurisdiction to proceed—i.e., whether the petitioner is domiciled in the state and the durational residency requirement is satisfied. If it has jurisdiction, the American court may choose to move forward with the domestic divorce action notwithstanding the foreign action (even if both partners are citizens of the foreign nation and the foreign action was commenced first) if it concludes that its interest in the couple is stronger than the foreign court’s interest. The court may conclude its interest is stronger if both spouses are domiciled in the U.S. state and have lived there for some time. Rather than apply a “greater interest” test, some courts will retain jurisdiction and decline to defer to the foreign action if they find that the party domiciled in the U.S. state would be “subject to considerable hardship” if forced to litigate abroad.

Even if no other suit has been filed abroad, a party before the U.S. court may argue that the American suit should be dismissed on forum non conveniens grounds. In other words, because more of the evidence is located abroad, or the documents are in a foreign language, or one (or both) of the spouses is living abroad, or relevant witnesses are living abroad, or for other reasons, the American court should decline to entertain the action. In addition to the range of public interest and private interest factors deemed relevant to the forum non conveniens analysis in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), courts in international divorce cases also consider whether some (or all) of the property at issue is located in the forum and if the forum may properly apply its own law to adjudicate the divorce action.

Conclusion

International couples that present their family law claims in American courts must surpass jurisdictional and choice-of-law hurdles before they even have the opportunity to present the merits of their claims. Thoughtful planning and the execution of premarital agreements with choice-of-law clauses may expedite resolution of these preliminary issues as well as the merits of their claims.