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Premarital Agreements and Jurisdiction Clauses - Recent Updates

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Why is it that increasing numbers of couples are entering into premarital agreements despite such agreements not being legally binding?

On divorce, premarital agreements can be taken into account as one of the circumstances of the case which, over the years, has left the courts a wide discretion. The trend now is for the judiciary to take more notice of these agreements – but only where the provision is fair.

This was made clear in the recent 2007 case of *Crossley v Crossley*. In that case property developer Stuart Crossley was worth £45million and Susan Crossley, whose fortune was the result of three previous divorces, had £18million. Lord Justice Thorpe confirmed that the potentially long process of deciding spouses' financial claims and the division of assets in court can be "short-circuited" where there is a premarital agreement.

Wealthy individuals are well advised to have a premarital agreement in place upon marriage that specifies in which country claims relating to the marriage should be heard. However, an international life-style may complicate matters! Though the English Courts have followed the jurisdiction specified in a premarital agreement in a number of cases, where a jurisdiction dispute arises between England and a country outside the EU, a cautious approach is advised.

The recent case of *Ella v Ella* was such a cautionary tale. The couple had dual Israeli and British nationality and had strong ties to Israel but they had lived in England for most of the 10 year marriage with their three children. They had a premarital agreement in which they had specified that Israel would be the jurisdiction for any disputes.

Proceedings were issued in both England and Tel Aviv. When the English Court was considering the issue, the Judge held that the election of jurisdiction in the premarital contract was an important circumstance of the case and that Israel was the correct jurisdiction.

Unusual though this was it is not the only case where this has happened. In the case of *S v S* (Divorce: Staying Proceedings) the couple had a premarital agreement which specified New York state as the jurisdiction. The husband's primary home had been in New York whilst the wife's had been in England, though she had previously lived in New York and had spent time with her husband there. The parties had married in England.

The wife petitioned for divorce in England and the husband then, subsequently, did the same in New York. The New York Court then claimed that it had jurisdiction of all matters relating to premarital agreement matters.

The English Court considered the implications of the New York Court having already decided jurisdiction, as well as the fact that the husband would, in all likelihood, not have married without the agreement. Although New York was found to be the correct jurisdiction this was on the basis that the English Court noted that there was financial provision for the wife in the premarital agreement and it felt satisfied that justice would be done in New York.

This approach was also followed in the case of *Bentinck v Bentinck* in which the couple had chosen Switzerland in their premarital agreement. They had lived in Switzerland during the marriage but had a home in England in which the wife remained living with the parties' three children following separation.

It is therefore clear on the case law that a jurisdiction clause in a premarital agreement could be an important and persuasive factor for an English Court considering the appropriate forum for divorce proceedings where the alternative jurisdiction is a non-EU country. It will not, however, necessarily dictate the appropriate forum.

In the circumstances careful consideration should be given to any jurisdiction clause in a premarital agreement. If the agreement has already come into play then anyone wanting to dispute jurisdiction should seek legal advice as soon as possible as an application to stay proceedings in the disputed arena will usually be the appropriate course of action. When considering whether to grant a stay, the English Court will apply a fairness test and will take convenience into account.

When a couple are about to get divorced, a premarital agreement may well be persuasive or even determinative of the jurisdiction where any dispute will be dealt with. Speed is therefore of the essence in these cases as it is clear from the case law that the successful party is usually the one whose proceedings have progressed further in their chosen court. The right advice and swift action will therefore be hugely beneficial. This is even more the case where there is a choice of jurisdiction between two (or more) EU countries as the divorce will go ahead in the jurisdiction where the divorce was issued first (provided there is no delay in that person then proceeding with the legal process).

This “first past the post” system leaves no room for delay and advice should be sought at the earliest opportunity if this is a concern.

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