

A White Paper Presented By

LAURA DALE & ASSOCIATES, P.C.  
ATTORNEYS AND COUNSELORS AT LAW



# International Family Law

Divorce And Custody In A Global Age

For many families, divorce and child custody have global implications. One spouse may live abroad while the other resides in the United States. Both may live on U.S. soil but own real estate in foreign lands. Parents with young children may have roots in multiple nations. The possibilities for international ties are nearly infinite.

Equally infinite are the areas of complexity when it comes to international family law. In fact, it's impossible to overstate the legal complexities that can arise in international family law cases. The most challenging issues affect two types of high-stakes cases: divorce and child custody.

### The Nuts And Bolts Of International Divorce

Navigating divorce is difficult enough. Add to the picture multinational ties, and you are facing even greater challenges.

International divorce is like a jigsaw puzzle. Six interconnected pieces shape the big-picture outcome: jurisdiction, choice of law, service of process, discovery, property division and enforcement. Of course, when minor children are involved, child custody is the seventh foundational piece of the puzzle.

### Items That Determine Outcome In An International Divorce



Each of these puzzle pieces must be identified and addressed, not in isolation, but rather in light of the whole picture.



## Jurisdiction: Which Country Gets To Decide?



Before you reach the legal questions posed by the divorce itself – for example, who gets what – you must address the threshold question of which court gets to decide those issues.

Jurisdiction refers to the extent of a court's authority over your divorce and property rights. There are several facets to this concept:

### Facets That Determine Jurisdiction

1

#### PERSONAL JURISDICTION

Do both parties have sufficient ties with the country where proceedings are held?



2

#### SUBJECT MATTER JURISDICTION

Does the court have authority under the laws of its nation to handle divorce cases and ancillary issues?



3

#### DOMINANT JURISDICTION

If two courts have equal authority to hear the case, which one takes priority?



These questions permeate all phases of the divorce process, from the decree that dissolves the marriage to the court's authority in handling property division to requests for temporary court orders while proceedings are pending.

Yet jurisdiction is not always black and white. Courts in multiple countries may have concurrent jurisdiction to hear your case. In fact, you may end up with multiple divorce proceedings pending in two jurisdictions. In these situations, deciding where to file – or whether to challenge the court's jurisdiction – requires a strategic assessment of your options in light of the applicable law in each country.

## Choice Of Law: Which Country's Family Law Applies?

Family law varies widely from nation to nation. Apart from determining whether a court has *authority* to hear your case, you must also consider which laws will apply – and whether those laws will support your position.

## Important Aspects Of Divorce Law Include



### GROUNDS FOR DIVORCE

Is no-fault divorce available or does the law require fault-based grounds such as adultery or domestic abuse?



### PROPERTY DIVISION

Does the law mandate an equal or fair division of property? Are certain assets nondivisible?



### PRENUPTIAL/ POSTNUPTIAL AGREEMENTS

Will the court honor these contracts? Will it recognize only marital agreements that comply with domestic family law?



### SPOUSAL SUPPORT (ALIMONY)

Is alimony available under the law of the jurisdiction? What elements impact an award of alimony?

A court might have jurisdiction to hear the case, yet still be obligated to apply the law of a foreign country. In the European Union, for example, many courts take a cooperative approach, applying the law of the country where both spouses last resided.<sup>1</sup> This is just one of many ways that jurisdictional questions and choice-of-law issues cross paths.

### **Service Of Process: The Procedural Foundation Of International Divorce**

To begin a divorce action, you must serve the other party with the correct paperwork and legal notices. Laws vary as to acceptable methods of fulfilling this requirement (called service

of process). Without adhering to the right rules, your case might fail before it even gets off the ground.

International treaties outline what constitutes effective service of process in signatory nations. The United States is a party to both the Hague Service Convention<sup>2</sup> and the Inter-American Convention on Letters Rogatory.<sup>3</sup> However, courts among signatory nations differ as to how they interpret specific provisions of these treaties. Your lawyer must be familiar not only with the treaties themselves, but also with the detailed procedural requirements of the foreign and U.S. courts that apply them.



## Discovery: Finding And Gathering Evidence In Other Countries

In the American legal system, *discovery* is a critical phase of litigation that sets the stage for trial. It involves gathering the documentation, witness statements and other evidence necessary to make your case.

In other nations, however, opportunities for discovery may be minimal or nonexistent. Tools that are commonplace in American litigation – such as depositions, interrogatories and subpoenas – may not be available in other countries. Likewise, information that is privileged (protected from compelled disclosure) in U.S. courts may be fair game in other court systems.

Several treaties place limits on how discovery may be conducted. Most prominently, the Hague Discovery Convention establishes standards and procedures for gathering evidence.<sup>4</sup> Many signatory countries have opted out of some of the Convention's provisions, instead adhering to their own laws. In France, for example, conducting illegal discovery (such as depositions) amounts to a crime

punishable by up to six months in prison.<sup>5</sup> Given the high stakes involved, your lawyer must understand which provisions of the Convention apply and to what extent.

## Property Division: A Host Of Concerns

Couples with significant assets must confront a host of concerns when it comes to property division – a key element of the divorce process. Your lawyer must understand the jurisdiction's law regarding important questions. For example:

### PROPERTY DIVISION QUESTIONS A LAWYER MUST CONSIDER AND UNDERSTAND

Must the property be divided equally (50-50) or equitably (in a fair manner)?

What factors will the court consider when deciding equitable division?

Are some types of assets (such as retirement accounts) not subject to division?

How will the property be valued?

What type of evidence is acceptable regarding valuation?

Will the court accept property valuations conducted by foreign attorneys, notaries, specialized firms or other professionals?

Increasingly, internationally mobile couples also face roadblocks when one spouse conceals foreign assets. Identifying and preserving all assets early on in the process is critical for protecting your property rights. Provisional court orders or injunctions may be pivotal in preventing the other party from dissipating or hiding assets.

Yet courts around the world differ as to which types of temporary orders are available – and to what extent they will enforce such orders. British courts, for example, have the power to issue global freezing orders.<sup>6</sup> These orders secure assets anywhere in the world, assuming they are successfully enforced. Collaboration between multiple courts may be a necessary tool for success in these situations.

### **Enforcement: Will Your Country Recognize The Authority Of Another Country's Court?**

Assume a court has jurisdiction under its own laws to hear your case. That doesn't necessarily mean the courts of another country will *recognize* the authority of a foreign jurisdiction.

International law provides guidance on enforcing discrete aspects of divorce.

The Hague Child Support Convention and the Inter-American Convention on Support Obligations outline enforcement of child support, spousal support and other types of family maintenance.<sup>7</sup> These treaties provide some measure of predictability among signatory nations.

Nonetheless, some courts refuse to enforce foreign orders that conflict with internal law. For example, courts in France will not recognize U.S. court orders that divide French retirement accounts. Without teeth behind it, an unenforceable court order becomes essentially worthless. It is thus critical to identify and understand potential enforcement problems *before* pursuing divorce proceedings in one jurisdiction or another.



**A Court Order  
Becomes Essentially  
Worthless If You  
Can't Enforce It.**

## Two Important Aspects Of International Child Custody

**1** Increasingly, families no longer spend their entire lives in their country of origin. Many relocate for work or military service. Many permanently immigrate to other countries while still retaining strong ties with their home countries.

**2** The international dimensions of child custody, like those of divorce, can be highly complex.

### Jurisdiction, Choice Of Law And Enforcement

When your child has ties to multiple nations, you need to know which custody options are available, as well as which court has the power to decide them.

In the U.S., all 50 states have adopted the Uniform Child Custody Jurisdiction Enforcement Act (**UCCJEA**). This law addresses jurisdictional issues in both out-of-state and international cases. It directs

courts to consider fact-specific questions such as:

#### UCCJEA JURISDICTIONAL FACT-SPECIFIC QUESTIONS

Where has the child lived for the past six months?

Does the child have a “home country”?

Have courts in the child’s home country accepted jurisdiction?

Would another jurisdiction that has ties to the child be more appropriate?

Is this an emergency situation requiring swift court action to protect the welfare of the child (for example, due to abuse or abandonment)?

As in divorce cases, jurisdiction in international custody matters is rarely an easy determination. In some cases, for example, the UCCJEA may require a U.S. court to apply foreign custody law or enforce the custody orders of another country. Your lawyer must have a strong grasp of the UCCJEA with all its nuances and exceptions – as well as the foreign child custody law that might apply.



## Forum Shopping: The Problem Of International Parent-Child Abduction

All too often, parents try to skirt custody laws by sneaking their children across international borders. This situation, called parental abduction or kidnapping, is a global problem. In 2013 alone, U.S. courts handled 364 international parental abduction cases involving 518 children taken from their homes and brought to the United States.<sup>8</sup>

A key Hague Convention treaty addresses these challenging situations.<sup>9</sup> Its goal is to streamline the process for returning

abducted children to their rightful parents as quickly as possible. It also deters parents from “forum shopping” – that is, removing children from their homes to take advantage of more favorable custody laws in another country.<sup>10</sup> Nearly 100 nations around the world are signatories, including much of Europe, South America, Central America and the United States.

The taking parent can present evidence to defeat one or all of the three claims made by the left-behind parent. If the taking parent cannot defeat at least one of these facts, then he or she has the burden of establishing a defense.

### To Make A Case For Wrongful International Child Abduction, The Parent Left Behind Must Prove All Three Of The Following Facts:

1

#### HABITUAL RESIDENCE

The child must have been habitually residing in the country he or she was taken from.



2

#### RIGHT OF CUSTODY

The left-behind parent must have legitimate custody or parental rights under the laws of the *country from which the child was taken*.



3

#### EXERCISE OF PARENTAL RIGHTS

It's not enough for the left-behind parent to have custody or parental rights; he or she must also have been *exercising* those rights, at least to a minimal degree.



## The Hague Convention Provides Only Four Viable Defenses

1

### **NOT ACTUALLY EXERCISING RIGHTS OF CUSTODY**

The taking parent must show that the left-behind parent was not actually exercising any right of custody, even to a minimal degree.

2

### **CONSENT**

The taking parent must show that the left-behind parent consented (agreed in advance) to the move.

3

### **ACQUIESCENCE**

The taking parent must show that the left-behind parent acquiesced (subsequently agreed) to the move.

4

### **GRAVE RISK**

The taking parent must prove that the child would face a grave risk of harm if he or she were returned – for example, due to child abuse, domestic violence or extreme political strife.

In addition, even if the taking parent fails to successfully raise a defense, the court may still refuse to return a mature child who does not wish to return. The age of maturity may vary from jurisdiction to jurisdiction. In Texas, for example, the age of maturity is 15 years old.

Finally, a suit under the Hague Convention for the return of a child must be brought within one year of the taking. Beyond this one-year timeframe, the taking parent can argue

to the court that the child has become acclimated to his or her new country. This argument is not permitted if the Hague suit is brought within a year. Even when allowed, it may still be rebutted by the left-behind parent. For example, if the taking parent moves from jurisdiction to jurisdiction every few months, the argument that the child is acclimated will most likely fail.

Swift action is extremely important in these cases. Once the child becomes settled in the new country, you may be powerless to get him or her back.



## A Final Word: The Importance Of Choosing The Right Lawyer

Family law, on its own, is a complicated subject that may have far-reaching ramifications for your life. International issues heighten the stakes even more.

The most important decision you can make is to hire the right lawyer.

When you can rely on the professional guidance of an attorney with specialized knowledge and proven experience handling international family law issues, you can face the future with greater security and confidence.

# Give Yourself Every Advantage With These Three Tips

1

## CHOOSE YOUR ATTORNEY WITH CARE

Don't make the mistake of entrusting your divorce case to a "generic" family law attorney. You need a lawyer with extensive experience handling not only domestic family law cases, but also the nuances and intricacies of international divorce and custody.



2

## GET STARTED SOONER RATHER THAN LATER

Time is of the essence in family law cases. Sorting through all the complex legal issues – not to mention practical concerns such as translating documents – takes time. Waiting too long to get started may cost you important rights and opportunities.



3

## GATHER KEY DOCUMENTS AND EVIDENCE

Documents like passports, birth certificates, financial data, school records and tax forms may become critical evidence during your divorce or custody proceedings. Take steps to gather and preserve these documents as soon as you can.



## Contact Us

Visit our site: [www.dalefamilylaw.com](http://www.dalefamilylaw.com)

Call our firm: 888-572-6059

Share the white paper



The content of this paper is provided for informational purposes only and does not constitute legal advice.

© 2015 Laura Dale & Associates, P.C. All rights reserved. Design and editorial services by FindLaw, part of Thomson Reuters.

## Sources

<sup>1</sup>Ann Laquer Estin, International Divorce: Litigating Marital Property and Support Rights, 45 Fam. L.Q. 293, 304 (2011)

<sup>2</sup>Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361 (1965).

<sup>3</sup>Inter-American Convention on Letters Rogatory, S. Treaty Doc. No. 98-27, 1438 U.N.T.S. 287 (1984); Inter-American Convention on Letters Rogatory, Additional Protocol, S. Treaty Doc. No. 98-27, 1438 U.N.T.S. 287 (1984).

<sup>4</sup>The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, T.I.A.S. No. 7444, 23 U.S.T. 2555 (1970).

<sup>5</sup>French Penal Law No. 80-538, art. 3 (July 16, 1980).

<sup>6</sup>Estin, supra note 1, at 307.

<sup>7</sup>Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, S. Treaty Doc. No. 110-21 (2007).

<sup>8</sup>U.S. Department of State, Bureau of Consular Affairs, 2013 New Reported Incoming Cases, <http://travel.state.gov/content/dam/childabduction/statistics/CY2013%20-New%20Reported%20Incoming%20Cases.pdf>

<sup>9</sup>Hague Convention on the Civil Aspects of International Child Abduction, T.I.A.S. No. 11, at 1670, 1343 U.N.T.S. 89 (1983).

<sup>10</sup>Id., art. 1.