

The big 'D'

By Rob Westwater

- an English Lawyer with De Cotta McKenna y Santafé

Here we talk about the big 'D' – Divorce. A potentially prickly subject calling for objective advice, pragmatic realism and cogent compromise. As is ever the case in such delicate areas of practice, the lawyer's job is to enable the client to see the wood for the trees – a focus which all too often can be lost in the thicket and gorse.

Typically, the first question is where to issue your divorce petition - in Spain or say, England? Do you issue where you live, where your spouse lives, where you both last lived, where the matrimonial home is, where the principal assets are situated? Every case is different and needs to be assessed on its own facts and only a lawyer experienced in international divorces will be able to properly advise as to your short, mid and long-term options and strategies.

One thing though for certain, if you are contemplating divorce do NOT, I repeat do NOT, intimate such to your spouse or other third party until you have sought legal advice – as the financial consequences of so doing can be catastrophic and irreversible.

In Spain, divorce can be negotiated by mutual agreement or, in the absence of agreement one spouse can petition for divorce and thereby commence, what we call, contentious proceedings. As you might expect, if both parties agree to divorce and can agree terms of settlement i.e. you keep the house and I'll keep the dog, then the procedure is, or can be, quicker and cheaper than the contentious route. However, it can happen that parties engage in protracted negotiation only to ultimately find agreement impossible due to disagreement over a particular issue - typically the amount of maintenance to be paid, insufficient access to children or even who should keep the dog.

Where parties embark on the mutual agreement route, they can both use the same lawyer – hence, it is cheaper. Also, there is no need for a contested court hearing – hence, the whole process, start to finish, is quicker. However, I tend to advise that using the same lawyer can be false economy as if agreement cannot be reached, all that money and time has been to no avail ergo one party will still need to issue for divorce a la contentious route. Back to square one. Accordingly, where appropriate, I am inclined to

suggest that each party embarks on mutual agreement negotiations with their own Counsel both by their side and in their ear so that realistic advice can be offered throughout.

In either scenario, proceedings are commenced by submitting the divorce petition to the court with draft Terms of Settlement ('Terms'). The Terms set out proposals, agreed or otherwise, as to the division of the assets, contact with the children and maintenance as is to be paid upon divorcing.

Where parties agree, if the court considers the proposals as balanced and fair then the parties need to attend court to formally sign the Terms – although not necessarily at the same time. Thereafter, the court will Order that the parties are divorced as per the Terms so that the divorce can be registered with the material Civil Registry and the transfer of title to the former matrimonial home can be registered etc...

Regardless of whether the divorce is by mutual agreement or the contentious route the parties are obliged to swear a Power of Attorney so that their lawyer and procurador (Court lawyer) can represent him/her/them in court. In contentious divorces, unlike mutual agreement cases, each party is required to instruct their own legal team from the outset.

As stated, if parties cannot agree to divorce or the Terms of such one party, the petitioner, needs to issue a divorce petition with the court which will send it to the other party, the respondent, at his/her last known address wherever that may be. Upon receipt, the respondent has twenty working days to respond with his/her counter-proposals. Upon receiving the respondent's response, the court will set a date for a full hearing. Typically, the hearing date will be some months or so later, although it has to be said that some courts are quicker than others.

At the hearing each party will be asked to explain their proposals and produce the evidence upon which they rely i.e. 'empadronamiento' certificates, bank statements etc., subsequent to which the court will consider its decision and thereafter confirm first, that the parties are divorced and second, the terms of settlement.

Necessarily, the cost of a divorce depends upon how much work is actually entailed. Some couples find agreement relatively easily, whilst others not so easily. As a general rule of thumb, mutual agreements tend to cost less than contested divorces as there isn't as much work involved. It is also true to say that your lawyer's fees are set by reference to tabular rates as fixed by the Law Society and are, in part, dependent upon the value of the matrimonial assets – the bigger the pie, the bigger the slice.

There are also additional fees such as the Power of Attorney, the Procurador, sworn translations and attendant legalisation of marriage and birth certificates. Moreover, where both petitioner and respondent are from the UK, say England, if they proceed by way of a contentious divorce, the Spanish courts are duty bound, on paper at least, to apply the divorce laws of England. Such requires an English lawyer to swear a Certificate of English Law before the British Consulate so as to 'prove' the applicable English Law. Where parties divorce by mutual agreement thereby avoiding contentious proceedings, a Certificate of Law won't be required as parties generally agree to divorce according to Spanish law.

In sum, international divorce law is a minefield for the uninitiated – both for the client as well as the inexperienced lawyer. An experienced lawyer will not only advise as to the countries' laws but also how best to bend them to your will.

If you wish more information on this particular topic or would like to discuss any matter raised therein, contact Rob Westwater or Reyes Gomez Llorente, De Cotta McKenna y Santafe, on 952 527 014. Offices in Mijas Costa, Coín, Nerja, Granada and Tenerife.

De Cotta McKenna y Santafé

Calle Diputación, 6-2º-A

29780 Nerja

Málaga

Spain

Tel.: (+34) 952 52 70 14

Fax: (+34) 952 52 34 28

Email: robwestwater@decottalaw.net

website: www.decottalaw.com