

SILENT PARTNER

SHOULD I GET A DIVORCE OVERSEAS?

INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question.

* * *

Introduction

Many legal assistance clients want to know whether they can - or should - get a divorce in a foreign country. There is no easy answer to this question. In fact, the best answer to the sample question, "Should I get divorced here in Germany?" is to say to the client, "It depends. Here - take this yellow pad and let's list the PRO's and CON's."

That's exactly what is done in the table below. It's a summary of information that you need to gather to give competent and ethical advice to your client so he or she can make the right decisions. It's based on the assumption (which applies in the majority of cases) that the husband is the military member, the wife is not in the military, she is either not employed or earns less than her husband, and that there are children of the marriage. Depending on the context of the question and answer, several other assumptions may apply. For example, some parts of the custody section presume that the wife is a homemaker, that she is the primary custodian for the children, and that she intends to stay overseas with them. These assumptions are for convenience and ease of writing only; they are not meant to imply anything about real-life clients.

Another point is that this table is intended to be "all-inclusive." It's supposed to cover just about every conceivable situation. And it's written for both types of clients - mothers and fathers, husbands and wives. Not all of your clients, of course, will have children or will want alimony. Simply skip over the issues that don't apply to your client.

How to Use the Table

When you encounter one of these cases, print a copy for you and one for your client. Take your time in filling this out, and use one of these tables for each of your clients who need to know this information. Save your copy, but feel free to give a copy to your client. To be really safe and protect yourself, fill out your copy on the computer and save it there in your "Clients" directory using this particular client's name (and also on a back-up disk or tape). "Make a record" is some of the most important advice that can be given to the LAA. Just as doctors back up their diagnoses, treatments and prognoses with clinical notes, so legal assistance attorneys need to keep track of what they say, what they hear and how they advise their clients in a format that's portable and permanent - usually on hard drive and floppy disk. This is to be sure that there's a record of these items down the line when/if a client decides to register a complaint, be it grievance or malpractice claim.

Be sure to ask questions. This is not “easy stuff.” You can often get the answers on local national law from the Army’s overseas host nation attorneys - they are usually located at division-level offices or higher (and sometimes at law centers). The stateside answers will require you to do some phoning or e-mailing; it’s unlikely that the kind of answers you’re looking for will come from an outline, a book or similar sources.

Also do some extra “hand-holding” and helping for your clients, especially the foreign-born spouses. They often need extra assistance in getting a stateside attorney, reading legal papers, understanding them, and dealing with the problems of separation and divorce. Some of these clients would be more likely to walk on the dark side of the moon than to select a stateside attorney, pay a retainer, keep the lines of communication open, etc. Some spouses just want to “walk away” from a dead-end marriage, not realizing that there are still important issues (financial and otherwise) to be resolved. Due to cultural differences (or simply client personalities), you may need to be more proactive with a foreign spouse than would be the case with a “typical” American client. For example, sometimes you’ll have to dial the phone while the client is in the office; otherwise, giving her the phone number and advising her to call almost always means that nothing will get done!

Conclusion

After reading this, you’ll easily see how much trouble a client encounters with a foreign divorce. Go the extra mile and get the word out on what problems these can be. And, when confronted with one that’s already taken place, contact competent civilian counsel immediately to try to repair the damage! For more information, see the Silent Partner on “Counseling on Foreign Divorce.”

<u>QUESTIONS</u>	<u>TOPIC NOTES</u>	<u>YOUR NOTES</u>
DIVORCE		
Does my client want a divorce?	If NO, then your client will need advice on how to contest a divorce. The host nation attorney should give this advice.	
Can my client get a divorce here in Germany [Italy, Japan, etc.]?	<p>There is no simple answer for overseas jurisdictions as to when and whether one can get a divorce there. As to whether an American court will recognize an overseas divorce, the answer basically this. If one of the parties is domiciled in the jurisdiction that grants the divorce, and there is proper service and notice, then the court has the power to adjudicate the marital dissolution. If no one is domiciled there, then it's "asking for trouble." We usually advise clients against suing for divorce in Nevada, Mexico or the Dominican Republic, for example, because the parties to the marriage are almost never domiciled in these "divorce mill" jurisdictions and the client risks ending up with a fancy piece of paper that's worthless, rather than a valid divorce. For more information, see:</p> <p><i>Williams v. North Carolina</i>, 325 U.S. 226 (1945); Hemingway, <i>Foreign Divorces and the Military: Traversing the "You're No Longer Mine"</i> <i>Field, Army Law.</i>, Mar. 1987, 17-20; Annot., 13 A.L.R.3d 1419 (1967).</p>	
Can my client get a divorce here even if neither party is domiciled here?	<p>The answer is a definite MAYBE. If both of the parties want to get divorced in Germany, for example, and if both participate actively in the process, then <u>probably</u> they will both be barred from challenging the divorce later on the grounds of equitable estoppel. That doesn't mean it's a valid divorce - it may be a void or voidable one, but neither party would be allowed to later contest its validity. Is that a good idea? Probably not, unless there's <u>absolutely</u> nothing that could go wrong in the future (and who can ever say that?) regarding the parties and this "questionable divorce." So - best to advise against this and, once again, <u>make a record</u> of this advice!</p>	
Will my client lose military benefits upon divorce?	<p>The non-military spouse may lose certain benefits, such as PX/BX access, medical care and the military dependent's ID card, and this should be discussed with her or him. <u>The Army Lawyer</u> has published in the past a complete table containing a listing of benefits and eligibility requirements. Also advise about certain theater-specific benefits, such as the privilege of tax-free use of an overseas commissary or exchange when the sponsor is no longer present in the theater.</p>	

<u>QUESTIONS</u>	<u>TOPIC NOTES</u>	<u>YOUR NOTES</u>
<p>Will my client, the wife, be allowed to resume use of her maiden name upon divorce?</p>	<p>This depends on the law of the place where the divorce occurs, so contact the host nation attorney for an answer. All American states allow this in connection with (or subsequent to) a divorce or dissolution. Even if everything is done overseas, she can still probably do this in her state of domicile, but it'll be quite a bit more complicated when it's bifurcated like this.</p>	
<p>Will the court here handle all matters regarding the marriage when hearing the divorce case (i.e., child support, custody, alimony, property division, etc.)?</p>	<p>This depends on the law of the forum where the divorce occurs, so check with the host nation attorney for more information. In the U.S., the states are divided as to whether the divorce case encompasses all matters pertaining to the marriage (New York and Wisconsin use this approach) or whether each claim may be asserted separately (North Carolina and Delaware do it this way).</p>	

<u>QUESTIONS</u>	<u>TOPIC NOTES</u>	<u>YOUR NOTES</u>
ALIMONY/SPOUSAL SUPPORT		
What if my client needs alimony?	Then you'll need to decide what court can award alimony and where the award will be enforceable.	
Will she be eligible to receive it here in court?	Check with your local host nation attorney on this.	
How much will she get here?	Same answer as above.	
Could she get alimony stateside and, if so, would she likely get more money?	Could be – but you'll only know the answer if you do some phoning around or e-mailing to attorneys, Reservists or military bases back in the U.S. Some states even have guidelines for alimony (also called maintenance or spousal support). If she's thinking about returning to the States, check with an attorney in the place to which she's returning to find out the answers for her. Use the ABA Family Law Section's "Operation Stand-By" on JAGCNET for a list of attorneys in all 50 states who will help answer your questions for free and take referrals.	
What if we get an alimony order her and the husband stops paying when he returns to the States? Will this order be enforceable upon his return to the U.S.A.?	This depends on whether the state to which he returns will recognize the foreign judgment. And you simply don't know, in most cases, where he'll be going unless he's about to retire and return to his home state or else he has a set of orders for his next post, camp or station. States are bound to recognize each other's judgments under the "Full Faith and Credit" clause of the U.S. Constitution, and states <u>may</u> recognize foreign country decrees under principles of comity. See the section below on enforcement of child support for further information.	
PENSION DIVISION		
Is my client entitled to a share of her husband's military pension?	Unless the wife is not interested in sharing her husband's military pension rights upon his retirement, she has waived this in writing, or the marital interest is so small as to be insignificant (such as a one-year marriage), the answer here is YES. Except for Puerto Rico, every territory and state allows for the division at divorce of the pension rights of spouses, although a very few states require that these rights be "vested" in order to be divided. For a full and current listing, see the JAG School's "State-by State Analysis of the Divisibility of Military Retired Pay."	
Can the court here award pension division?	The court may be able to award pension division for those pensions that are set up and maintained in the foreign country – for example, the wife's pension rights with Deutchesbank in Heidelberg, where she works, can be divided by a German	

<u>QUESTIONS</u>	<u>TOPIC NOTES</u>	<u>YOUR NOTES</u>
	court. But a German court cannot divide U.S. pensions, as a general rule. Civilian U.S. pensions can only be divided by a “Qualified Domestic Relations Order” under federal law, and this usually means a stateside court order.	
Will DFAS honor a military pension division order from this court?	No. DFAS will not honor a foreign nation’s military pension division order. The decree must be from the court of a U.S. possession, state or territory.	
What if my client wants to avoid pension division?	In this case, then by all means have the foreign court exercise jurisdiction (if it thinks it can) over the client’s military pension, since a foreign court cannot divide a military pension and obtain direct payments from DFAS. While this cannot guarantee that the pension will not be divisible in a state court, it will be the best argument he can make against pension division under the circumstances – that the foreign court, in adjudicating the divorce, exercised jurisdiction over the member’s military retirement rights and therefore another court cannot do so again.	
OTHER PROPERTY DIVISION		
Is there any property to divide?	If NO, then move on to Custody/Visitation below. If YES, go to the next question.	
If so, has it already been divided?	If it has, then it is best to memorialize that agreement on division by means of a separation agreement or property division agreement. Without this, there can still be disputes about who gets what.	
Is there a valid separation agreement in place that provides for property division and waives division in court?	If so, then all issues of “other property division” have probably been settled, so long as the possession of the property has been changed to the proper person (and, if applicable, the titles as well).	
What if my client wants property division?	Try to do this by separation agreement rather than in a contested hearing overseas or stateside.	
Does the court have jurisdiction over the marital or community property of the parties?	As a general rule, the court will have jurisdiction over property within the territorial jurisdiction of the court. Asking the German court, for example, to exercise jurisdiction over an Illinois bank account may cause major problems. Will the Illinois bank honor the German court order? For an answer, check with both the host-nation attorney and also an attorney in Illinois.	
CUSTODY/ VISITATION		
Will the children remain with my client in	If YES, then the client will never have to worry about the enforcement of a German	

<u>QUESTIONS</u>	<u>TOPIC NOTES</u>	<u>YOUR NOTES</u>
Germany till they're all 18 and never go outside the country with the other parent?	custody/visitation order elsewhere. You may not even need a custody order. If NO, go to the next question.	
Does my client want protection for the return of the children in case they go overseas to visit dad?	Since no one can possibly say what the future will bring, you will need to counsel your client about the enforceability of a foreign custody order in the U.S. She will be facing some risks in turning over the kids to the other parent without a valid U.S. order. What will happen if dad has visitation and decides to keep the children when it comes time to return them? See the International Child Abduction Remedies Act, 42 U.S.C. 11601, the Hague Convention on the Civil Aspects of International Child Abduction, and the <u>Silent Partner</u> on "Custody Enforcement – International" for more detailed information on civil remedies. Your client will probably want an American court order to help with an return or enforcement issues, although you <u>must</u> advise the client that such a court order cannot <u>guarantee</u> the kids' return – only help with enforcement if they are not returned. There is <u>no way</u> that anyone can promise that the children will be returned from an overseas visit to dad – that kind of security doesn't exist in this world!	
Will a state have jurisdiction to enter a custody order?	Perhaps. A state can only exercise jurisdiction over child custody if accordance with the Parental Kidnapping Prevention Act (28 USC 1738A) and the relevant state statute, usually the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) or the older Uniform Child Custody Jurisdiction Act (UCCJA).	
What's the basis for jurisdiction over custody under these statutes?	The priority basis for jurisdiction under these statutes is the "home state test." This means that "the State is the home State of the child on the date of the commencement of the proceeding, or was the home State of the child within six months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State."	
What if there is no state the can exercise "home state" jurisdiction?	The secondary test for jurisdiction is "(A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with the state other than mere physical presence; and (B) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships."	

<u>QUESTIONS</u>	<u>TOPIC NOTES</u>	<u>YOUR NOTES</u>
	<p>To get the answers, you'll have to do some research into the UCCJEA or the UCCJA (depending on which act the state has passed) and the PKPA to see whether your client qualifies under this alternate test, in addition to checking with local counsel stateside. It's even possible that NO state will have the authority to enter a child custody order regarding the child involved, especially if he or she has been overseas since birth! In that case, the foreign order would be the only protection for the client.</p>	
<p>Yes, but is that much protection?</p>	<p>Perhaps. The principle of comity is reflected in Section 105 of the UCCJEA, which states that:</p> <p>“(a) A court of this State shall treat a foreign country as if it were a State of the United States for the purpose of applying [Articles] 1 and 2.</p> <p>(b) Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this [Act] must be recognized and enforced under [Article] 3.</p> <p>(c) A court of this State need not apply this [Act] if the child custody law of a foreign country violates fundamental principles of human rights.”</p>	
CHILD SUPPORT		
<p>How much child support will my client pay?</p> <p>How would I know what child support is due under the guidelines for Illinois?</p> <p>How binding are the guidelines?</p>	<p>You'll need to check with the host-nation attorney regarding child support rules, laws or guidelines in the country involved. Germany, for example, uses the <i>Dusseldorf Tabelle</i> (“Dusseldorf Chart”) to determine child support. Each of the states has its own guidelines for the setting of child support. Compare the guideline amount for, say, Illinois to the amount that the German court would set to get an idea of where your client would fare best.</p> <p>Easy. Just go to www.supportguidelines.com, click on “Resources” and you'll find a link to the child support guidelines of all 50 states plus Washington, D.C.</p> <p>Please remember that these are the default calculations for guideline child support; there is a presumption that the guideline amount is fair and correct, but a party can contest this and put on proof that more (or less) is needed for child support. Of course, this would necessitate a hearing in court.</p>	
<p>Will the award be enforceable when dad</p>	<p>Let's see. There are 5 possibilities for US court enforcement - -</p>	

<u>QUESTIONS</u>	<u>TOPIC NOTES</u>	<u>YOUR NOTES</u>
<p>moves back to the States?</p>	<p>>The court always has the discretion to enforce foreign decrees under the principle of comity. This is the recognition and enforcement of a foreign judgment when the decree is final, it was entered under principles of basic fairness [i.e., notice, opportunity to be heard, impartial tribunal, etc.] and the enforcement would not be contrary to public policy.</p> <p>>Another source of law is international treaties and agreements, but the U.S. has not ratified any of the four major international treaties regarding international support enforcement.</p> <p>>The Uniform Foreign Money-Judgments Recognition Act (UFMJRA) is a potential source of enforcement power if the state which is involved has passed this statute and has made it applicable to foreign support orders, as opposed to simple money judgments in non-domestic cases. Although 28 states have passed the UFMJRA, only Florida, Iowa and Michigan have made this latter change in the Act.</p> <p>>Title IV-D of the Social Security Act, Section 459A, allows the US (or individual states) to enter into reciprocal agreements with foreign countries to enforce support obligations. Only Ireland, the Slovak Republic and the Canadian province of Nova Scotia have been so recognized.</p> <p>>And finally - UIFSA!! Yes, that statute that you thought dealt only with interstate support enforcement actually has a large role in the international enforcement of family support. Under UIFSA, a foreign nation is treated as a “state” if it has enacted a law or set up procedures for the issuance and enforcement of support orders which are substantially similar to those under UIFSA or URESA. There are 19 countries which qualify, including Germany, United Kingdom, France, Mexico, Czech Republic, Australia, Austria, Canada, Hungary and South Africa. A complete list is available at the IV-D Agency (child support enforcement office) for each state.</p> <p>So... don't despair. There is some (but not much) good news regarding foreign court orders and American court enforcement. Remember to advise your clients that it's ALWAYS easier to obtain enforcement of a U.S. court order than a foreign one. And be sure to do your research, contact an attorney in the state where your client (or the other party) will be located upon return to the U.S.</p>	

[rev. 1/24/08]

* * *

SILENT PARTNER IS PREPARED BY COL MARK E. SULLIVAN (USAR, RET.). FOR REVISIONS, COMMENTS OR CORRECTIONS, CONTACT HIM AT 2626 GLENWOOD AVENUE, STE. 195, RALEIGH, N.C. 27608 [919-832-8507]; E-MAIL – MARK.SULLIVAN@NCFAMILYLAW.COM.