

Family Law in Gibraltar: Overview

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A Q&A guide to family law in Gibraltar.

The Q&A gives a high-level overview of key issues including jurisdiction and conflict of law; pre- and post-nuptial agreements and matrimonial property regimes; divorce, nullity, and judicial separation; children; surrogacy and adoption; cohabitation; family dispute resolution; civil partnership/same-sex marriage; succession rights on divorce/dissolution; and controversial areas and reform.

This Q&A is part of the global guide to family law.

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Jurisdiction and Conflict of Law

Regulatory Framework

1. What are the primary sources of law in relation to marriage, marital breakdown and the welfare of children and give a brief overview of which courts will have jurisdiction to hear the dispute?

Sources of Law

The primary source of law in relation to the breakdown of marriage and the welfare of children in Gibraltar is statutory. The main statutes governing family law are the:

- *Matrimonial Causes Act* (MCA).
- *Married Women and Civil Partners Act* (MWCPA).
- *Children Act* (CA).
- *Maintenance Act*.

- *Civil Partnership Act* (CPA).

Court System

The court system in Gibraltar for family proceedings comprises the Magistrates' Court, the Supreme Court of Gibraltar (Supreme Court), the Court of Appeal and the Privy Council. There is no separate family court and family proceedings are held in either the:

- Magistrates' Court (where its jurisdiction permits, for example, adoption and maintenance enforcement applications).
- Supreme Court (which has equivalent jurisdiction to the High Court in England and Wales).

Appeals from the Supreme Court are heard in the Court of Appeal, which sits in Gibraltar. Further appeals can also be heard by the Privy Council, which usually sits in London.

Family proceedings are generally conducted in private.

Jurisdiction

2. What are the main requirements for local courts to have jurisdiction in relation to divorce, property and children proceedings?

Divorce

The court has jurisdiction in proceedings for divorce or judicial separation if:

- The spouses are habitually resident in Gibraltar.
- The spouses were last habitually resident in Gibraltar, and one of them still resides there.
- The respondent is habitually resident in Gibraltar.
- The applicant is habitually resident and has resided in Gibraltar for at least one year immediately before the application was made.
- The applicant is domiciled and habitually resident in Gibraltar and has resided there for at least six months immediately before the application was made.
- Both spouses are domiciled in Gibraltar.
- Either spouse is domiciled in Gibraltar.

(Section 4(1), MCA.)

Before the MCA was amended in May 2023, jurisdictional requirements were subject to Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (*Brussels II*).

The requirements for nullity proceedings are set out in section 4(2) of the MCA. The same jurisdictional requirements as for divorce and judicial separation apply, save that the court also has jurisdiction where one spouse died before the application was made and either at death was domiciled in Gibraltar or had been habitually resident in Gibraltar for a year ending with the date of death.

Same-Sex Spouses and Civil Partners

Section 4 of the MCA does not make express reference to same-sex spouses or civil partners.

The jurisdiction provisions in the MCA apply to same-sex couples in the same way as to heterosexual couples. Section 2 of the MCA specifies that "marriage" includes a reference to the marriage of a same sex couple.

The court has jurisdiction in proceedings for a dissolution, nullity or separation order in relation to civil partners if either:

- At least one of the civil partners is domiciled in Gibraltar at the time when proceedings are begun (section 99(a), CPA).
- The two persons concerned registered as civil partners of each other in Gibraltar and it appears to the court to be in the interests of justice to assume jurisdiction in the case (section 99(b), CPA).

Property

In relation to property, jurisdiction is generally founded under the MCA, where the courts have wide discretionary powers, or under the MWCPA. Under the MWCPA, the applicable principles are derived from the law of real property, equity and trusts.

Children

Jurisdictional requirements in relation to children are set out in section 3 of the CA under which a court will have jurisdiction if the applicant, any of the respondents or a child to whom the application relates resides in Gibraltar.

The Supreme Court also has inherent jurisdiction with respect to children.

Part VIIIA of the CA also incorporates into domestic law the HCCH Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children 1996 (*Hague Child Protection Convention*).

Domicile, Nationality and Habitual Residence

3. How do the concepts of domicile, nationality and habitual residence apply in relation to divorce, financial arrangements, and children?

Such concepts in family proceedings are derived from statutory laws, common law and EU decisions. Brussels II applied until May 2023 when the *Civil Jurisdiction and Judgments (Family) (Amendment) (EU Exit) Regulations 2023* came into force.

Domicile

The *Civil Jurisdiction and Judgments Act 2005* (CJJA) makes specific provision for determining domicile for the purposes of the 1968 Convention, the Lugano Convention and the CJJA. An individual is domiciled in Gibraltar if:

- That individual is resident in Gibraltar.
- The nature and circumstances of the residence indicates that the individual has a substantial connection with Gibraltar.

(Section 24(2), CJJA.)

In matrimonial cases, the domicile of an individual is determined according to legal principles derived from English common law and recognised and/or enacted in Gibraltar.

Domicile is the legal relationship between a person and a particular territorial area. Generally, it arises either:

- Through an individual's residence, coupled with the intention of making it a permanent home.
- Through it being or having been the domicile of a person on which the party is legally dependent. In this respect, a legitimate child born in the lifetime of that child's father receives the domicile of their father and an illegitimate child receives the domicile of their mother.

A person cannot have more than one domicile at any time and can acquire a domicile of choice by residing in another country. This is provided that person:

- Has the intention of continuing to reside there for an indefinite period.

- Has the genuine intention of residing there permanently.
- Will not return to reside permanently in the country where that person was previously domiciled or that represents their domicile of origin.

Habitual Residence

There are two different interpretations of habitual residence, one domestic (based on English law) and one based on EU law.

Before Brussels II ceased to apply in Gibraltar:

- EU law applied in relation to Brussels II cases.
- English law applied in non-Brussels II cases.

Following the English law concept, a person is habitually resident in the jurisdiction where they voluntarily live and have settled. A person is not considered habitually resident in Gibraltar unless they have taken up residence and lived in Gibraltar for a considerable time (although there is no specific definition of this).

However, English law cases have largely been shaped by EU case law (before the end of the *Brexit transition period*) and it therefore remains to be seen how matters will develop with reference to the definition of habitual residence post-Brexit and whether there will be a shift away from EU case law.

All relevant factors must be taken into account to establish an individual's centre of interests in Gibraltar including:

- Domicile/nationality.
- Language.
- The time spent in Gibraltar.
- The intention and motivation in being in Gibraltar as well as the length of time spent.
- Where:
 - the immediate family lives;
 - the children attend school;
 - the person works;
 - tax is paid;
 - the person is registered to vote; and
 - the person owns properties or holds principal bank accounts.

The relevance and significance of each factor will vary from case to case.

Nationality

In Gibraltar, the concept of nationality is not applicable in determining jurisdiction in relation to divorce proceedings. Jurisdictional requirements are based on habitual residence (see above, *Habitual Residence*) and domicile (see above, *Domicile*) as distinct from nationality.

Under the MCA, the concept of nationality is only considered in relation to the grounds for recognition for a foreign divorce obtained outside of Gibraltar (see *Question 10*).

Case Law

The local case (although, not a family case) of *Fisher v Small [2005-06] Gib LR 1* provides authority that a category II individual (a high net worth individual for tax purposes) is not considered as domiciled in Gibraltar within the meaning of section 24 of the CJJA, or considered resident in Gibraltar in the absence of evidence of actual residence in Gibraltar.

In the case of *T v T [2010-12 Gib LR]* the court found that the court had jurisdiction under Brussels II in the case of two Gibraltarians as both were domiciled in Gibraltar and Gibraltar was considered part of the UK for the purpose of the ruling. This decision was not appealed.

The issue of jurisdiction in the context of a stay application where there were divorce proceedings in Gibraltar and judicial separation proceedings in Ireland was also recently considered by the Supreme Court in the case of *M v M [2023/GCS/030]* (*M v M*). Brussels II continued to apply by virtue of section 6 of Gibraltar's *European Union (Withdrawal) Act 2019*.

Brussels II still applies to proceedings instituted between 31 December 2020 and 4 May 2023.

In *M v M*, the parties were Irish nationals. The wife had moved to Ireland with the children from Gibraltar in August 2020 but asserted in her petition for divorce in Gibraltar, which was filed on 4 January 2023, that the court had jurisdiction under Article 3(1) of Brussels II on the basis that the husband's habitual residence was in Gibraltar. The husband issued an application in Ireland on 9 February 2023 seeking a declaration of separation or in the alternative a decree of divorce. This application post-dated the issue by the wife of the petition in Gibraltar.

While Gibraltar had maintained the application of the Regulation as a matter of domestic law, Ireland was not bound under Article 20 (*lis pendens*) to decline jurisdiction (once jurisdiction was established in Gibraltar) because Gibraltar is no longer part of the EU. The court had to consider whether to exercise jurisdiction and whether to stay proceedings in favour of the Irish proceedings under section 8 of the MCA and/or its inherent jurisdiction.

The judge found that the husband was habitually resident in Gibraltar and that the children and wife were habitually resident in Ireland.

In weighing up the various factors, the judge did not consider that Ireland was any more appropriate a forum than Gibraltar. The husband had not shown that on the balance of fairness proceedings in Ireland had to be disposed of before any further steps were taken in Gibraltar. He accepted that

Gibraltar was clearly an appropriate forum because the parties had lived in Gibraltar for much of their married lives, it was the place where businesses had been established and where the husband remained resident. The judge therefore dismissed the stay application.

Conflict of Law

4. What procedure applies for a party applying to stay proceedings in favour of a foreign jurisdiction? What factors do local courts take into account when determining forum issues?

Procedure

An application for a stay of proceedings can be made under section 8 of the MCA and/or under the court's inherent jurisdiction (see *Question 3, Case Law*).

Factors

The Schedule to the MCA applies where matrimonial proceedings in Gibraltar can be stayed by the court where there are concurrent proceedings elsewhere in respect of the same marriage, but does not prejudice the general power of the court to stay proceedings (section 8, MCA).

The petitioner is under a duty to provide particulars in respect of any matrimonial proceedings they know to be continuing in another country outside of Gibraltar (paragraph 2, Schedule, MCA).

The court can use its discretion to order that proceedings be stayed where before the trial (or the first trial) in any matrimonial proceedings that are continuing in a court in Gibraltar:

- Any proceedings in respect of the marriage in question or capable of affecting its validity or subsistence are continuing in another jurisdiction.
- The balance of fairness (including convenience) between the parties to the marriage means that it is appropriate for the proceedings in that jurisdiction to be disposed of before further steps are taken.

(paragraph 3, Schedule, MCA.)

The court, in considering the balance of convenience and fairness, must have regard to all relevant factors, including the:

- Origins of the parties.
- History of the relationship.

- Convenience of witnesses.
- Delay or expense which may result from the proceedings being stayed.

(paragraph 3(2), Schedule, MCA).

The court also has jurisdiction to stay proceedings under its inherent jurisdiction. The inherent power is exercised by applying the principle of *forum non conveniens*. The court considers whether another available forum is more appropriate for the trial and determines whether a stay should be granted. Where justice requires a stay to be granted, the overall consideration is whether the balance of fairness points to another jurisdiction being the more convenient forum (see *Question 3, Case Law*).

Anti-Suit Injunctions

Historically and while EU law applied in Gibraltar, there were commonly two types of jurisdiction competition in divorce proceedings where proceedings were issued, being:

- Divorce proceedings issued in two EU member states (Gibraltar and another EU jurisdiction).
- In Gibraltar and a non-EU member state.

Given Brexit and Brussels II ceasing to apply, the choice of jurisdiction is only between proceedings issued in Gibraltar and other countries (including both EU and non-EU member states). The Supreme Court of Gibraltar has discretion and it will be open to the respondent to the divorce proceedings issued in Gibraltar to apply for a stay locally subject to section 8 and the Schedule to the MCA.

The Supreme Court will consider the balance of fairness and convenience (including all factors which appear to be relevant (see above, *Factors*)).

The Supreme Court does not have the power to stop the foreign proceedings (that would be extra territorial in nature). However, the Supreme Court can issue an anti-suit injunction known as "a *Hemain injunction*" on the application of one party which orders the opposing party not to pursue the litigation in the foreign proceedings abroad. However, such orders are exceptional and the applicant would have to show that the other party has acted unconscionably, vexatiously or oppressively in delaying the Gibraltar proceedings by the pursuit or issue of the foreign proceedings.

Applicable Law



5. Are foreign nationals treated differently on divorce?

The Gibraltar courts apply the law of Gibraltar. Foreign nationals wishing to divorce in Gibraltar must satisfy the jurisdictional requirements under section 4 of the MCA (see *Question 2, Divorce*).

In financial relief proceedings, the court must have regard to all the circumstances of the case (sections 37(1) and 68(2), MCA).

As demonstrated by the English case of *Radmacher v Granatino [2010] UKSC 42*, it is possible that foreign law issues may prove to be an important factual consideration for the court in deciding what financial orders to make. In *Radmacher*, a pre-nuptial agreement entered into by the parties was expressed to be made under German law. It was held that the pre-nuptial agreement should be given due weight and consideration, and was indicative of the parties' intention that it should be binding on them.

Foreign nationals can also apply for financial relief in accordance with Part XIII of the MCA following an overseas divorce, annulment or judicial separation (see *Question 25, Financial Relief after Foreign Divorce Proceedings*).

Service of Proceedings

6. What are the requirements for service of divorce, financial and children proceedings in your jurisdiction?

Divorce Proceedings

Under the Matrimonial Causes (Family Procedure) Rules 2010 (MC(FP)R), a divorce petition must be served personally or by post on every respondent named along with:

- Form M2, notice of application or proceedings.
- Form M3, acknowledgment for service.
- Form M4, of arrangements for children (if there are children of the family under the age of 16 or under 18 if they remain in education).
- Form M24, notice of intention to divorce.

(Rule 13(1)(a), MC(FP)R.)

An application can be made for leave to substitute the modes of service (such as electronic service), to substitute service by advertisement or to dispense with service altogether (rule 13(6), MC(FP)R). Service of a divorce petition can also be made outside Gibraltar without leave of the court (rule 14(1), MC(FP)R).

Financial Proceedings

Where the party to be served is the petitioner, service can be effected by leaving the originating summons or Form M10 (notice of intention to proceed with an application for financial relief) at the address for service or posting to that address.

Children Proceedings

Service of child-related proceedings can be effected by personal service, registered post to the respondent's last known address, by fax or other electronic means, or by an alternative method ordered by the court (rule 3(1), Supreme Court Rules). "Other electronic means" is believed to include email.

International Conventions for Service

Service can also be undertaken under the HCCH Convention on the *Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965* (Hague Service Convention) (if the foreign court is located outside the EU and in a state party to the Convention). The central authority in Gibraltar is the Registrar of the Supreme Court.

Pre- and Post-nuptial Agreements and Matrimonial Property Regimes

Validity of Pre- and Post-Nuptial Agreements

7. To what extent are pre-nuptial and post-nuptial agreements binding?

Pre- and post-nuptial agreements are binding as financial agreements under the amended MCA and Part VIA of the MCA provided they fall within the definition of a financial agreement in section 31B, section 31C or section 31D.

An agreement constitutes a financial agreement if all of the following apply:

- It is expressed as a financial agreement under section 31B(1) of the MCA.
- The parties contemplating marriage make a written agreement regarding the matters provided in section 31B(2) of the MCA.

- At the time of the agreement, the parties are not bound by any other agreement regarding the matters provided in section 31B(2) of the MCA.

(section 31B(1), MCA.)

Financial Agreements Before Marriage

There is specific statutory provision in Gibraltar governing financial agreements entered into before marriage (section 31B(2), MCA) and the section permits such agreements in relation to the following matters:

- All or any of the property or financial resources of either or both parties, at the time when the agreement is made, or later but before divorce.
- Maintenance for either party during the marriage, after divorce or both.

A financial agreement made under section 31B(1) can:

- Also contain matters incidental or ancillary to those mentioned in section 31B(2) (section 31B(3), MCA).
- Terminate a previous financial agreement, if all the parties to the previous agreement are parties to the new agreement (section 31B(4), MCA).

Financial Agreements During Marriage

Financial agreements can also be made by the parties during the marriage, subject to certain provisions (section 31C, MCA). Such an agreement can deal with the same matters as those of a pre-nuptial agreement. However, the agreement must be expressed to be made under section 31C of the MCA.

Financial agreements can be made before or after the marriage has broken down (section 31C(3), MCA).

Financial Agreements After Decree of Divorce

Financial agreements can also be made after a decree of divorce is granted, whether it has taken effect or not (section 31D, MCA) provided the agreement is expressed to be made under section 31D and the parties are not parties to any other binding financial agreement under sections 31B, 31C or 31D of the MCA.

A financial agreement under section 31D can also terminate a previous financial agreement if all of the parties to the previous agreement are parties to the new agreement.

Implementation of Financial Agreements

A financial agreement that is binding on the parties and relates to how the property or financial resources of the parties will be dealt with in the event of marital breakdown is of no effect until a declaration of separation is made (section 31E(1), MCA) (*see below*)).

The declaration must be signed by both parties to the agreement and it must state that the parties have separated and are living separately at the time of the declaration (section 31E(5), MCA). In practice, a declaration of separation is often inserted as a recital to a financial agreement.

"Separated" means that the parties have separated and continued to live separately and apart immediately preceding the date of the filing of the application for a decree of divorce. The parties can be held to have separated and lived separately and apart even where they have continued to reside in the same residence or where either party has rendered some household services to the other (section 31E(7), MCA).

A provision of a financial agreement that relates to maintenance of children of the family is void unless it has been referred to the court and the court has declared that the provision is reasonable and gives appropriate directions (section 31G, MCA). However, it appears that such a clause could be expressed as part of a maintenance agreement as long as it complies with the relevant provisions of Part V of the Maintenance Act in respect of maintenance agreements (that is reviewable by the court in any event).

Setting Aside Financial Agreements

A financial agreement can be set aside if the court is satisfied that:

- The agreement was obtained by fraud (section 31L(1)(a), MCA).
- A party entered into the agreement to defraud or defeat a creditor(s) or with reckless disregard for the interests of a creditor(s) (section 31L(1)(b), MCA).
- The agreement is void, voidable or unenforceable (section 31L(1)(c), MCA).
- There has been a change in circumstances since the agreement was made, making it impractical for the agreement or part of the agreement to be carried out (section 31(1)(d), MCA).
- There has been a material change of circumstances since the agreement was made relating to the welfare and development of a child of the family, meaning that as a result, the child, or if the applicant is the primary carer, a party to the agreement will suffer hardship if the court does not set it aside.
- A party to the agreement engaged in conduct that was in all circumstances unconscionable.

(section 31L(1), MCA.)

There has not been any significant reported Gibraltar case law on pre- or post-nuptial agreements since the MCA was amended in 2009.

8. Do matrimonial regimes exist in your jurisdiction and is there a default matrimonial property regime?

Gibraltar does not have a matrimonial property regime as such and there is no community of property. Marriage does not therefore have a proprietary effect. The UK (and consequently Gibraltar) also opted out of the EU Matrimonial Property Regulation ((EU) 2016/1103). However, the court has wide discretionary powers to make various financial relief orders in the context of divorce proceedings, including property adjustment, lump sum and maintenance orders.

9. How are foreign separation of property agreements and pre-nuptial and post-nuptial agreements treated by the courts in your jurisdiction?

While Gibraltar law applies to any financial relief proceedings, the court must have regard to all of the circumstances of the case (sections 37(1) and 68(2), MCA).

Foreign separation of property agreements and pre- and post-nuptial agreements may be a relative factor for the court to consider, although such agreements are not binding on the court. This is in contrast to pre- or post-nuptial agreements entered into under sections 31B and 31C of the MCA which are binding if they satisfy the requirements under 31I (see [Question 7](#)) and are not challenged.

Divorce, Nullity and Judicial Separation

Recognition of Foreign Marriages/Divorces

10. Are foreign marriages/divorces/civil partnerships recognised in your jurisdiction?

Marriages

Gibraltar law follows English common law in relation to the recognition of foreign marriages. The marriage must be formally valid and the parties must have the capacity to marry.

In determining whether a marriage is formally valid, the most important approach is the *lex loci celebrationis* rule which states that a foreign marriage will only be formally valid and recognised if it complies with the formalities of the country in which it was celebrated.

Capacity to marry is governed by the law of the country of domicile of each of the parties before the marriage took place.

Public policy encourages the recognition of foreign marriages.

Divorces/Annulment

Part IX of the MCA deals with the recognition of foreign divorce and legal separation in Gibraltar. The validity of a divorce or legal separation, obtained in a country outside of Gibraltar, will be recognised if at the date of the institution of the proceedings in the country where it was obtained:

- Either spouse was habitually resident or domiciled in that country.
- Either spouse was a national of that country.

(section 54, MCA.)

The MCA sets out the exceptions to such recognition (section 59, MCA). The validity of a divorce or judicial separation obtained outside Gibraltar can only be denied if:

- It was obtained by one spouse where either:
 - that spouse did not take necessary steps to bring the proceedings to the notice of the other spouse; or
 - the other spouse was not given (for any reason other than lack of notice) an opportunity to take part in the proceedings as that spouse should reasonably have been given.
- Its recognition would manifestly be contrary to public policy.

The recognition of foreign nullity decrees is governed by common law as there is no statutory provision equivalent to those in Part II of the English Family Law Act 1986 for such recognition. A foreign nullity decree will generally be recognised subject to common law rules if one of the following applies:

- The parties were both domiciled or resident in the foreign country at the date the nullity proceedings began.
- There is a real and substantial connection between either party and the foreign country.

- The decree was obtained in the foreign country in circumstances in which the Gibraltar Court (*mutatis mutandis*) would have had jurisdiction in nullity.

Reference should therefore be made to the common law rules in any application for recognition of a nullity decree.

Civil Partnerships

The CPA came into force in Gibraltar on 28 March 2014. Civil partnerships between two parties (whether of the same sex or opposite sexes) are formally recognised in Gibraltar subject to the relevant provisions of the CPA.

There is also jurisdiction and a statutory framework in the CPA for the recognition of foreign civil partnerships and to cater for the dissolution of civil partnerships and associated financial orders on dissolution.

Subject to the provisions of the CPA, it is also possible for civil partners to enter into financial agreements governing property division and maintenance on separation.

Divorce

11. What are the grounds for divorce?

Divorce

A divorce petition can be presented to the Supreme Court by either spouse on the ground that the marriage has broken down irretrievably (section 16, MCA), subject to certain provisions (section 18, MCA).

No petition can be presented within one year from the date of the marriage without the court's permission (section 18, MCA). The court can grant permission on either of the following grounds:

- The case is one of exceptional hardship suffered by the petitioner or exceptional depravity on the part of the respondent (subject to the interests of any child of the family and considering whether there is a reasonable probability of a reconciliation of the parties during the one-year period) (section 18(2)(a), MCA).
- The petitioner is under 16 at the date of the marriage (section 18(2)(b), MCA).

(Section 18(2), MCA.)

To obtain a divorce, the petitioner must prove that the marriage has broken down irretrievably in accordance with the requirements under the MCA.

The Supreme Court can only determine that the marriage has broken down irretrievably if the petitioner has filed with the court a notice of intention to divorce which includes a statement of irretrievable breakdown (section 16(2), MCA). This provision was amended in 2019 by virtue of the Matrimonial Causes (Amendment) Act 2019 (2019 Act) which provides for no-fault divorces and abolished contested divorce.

Previously, the petitioner had to prove adultery, unreasonable behaviour, desertion, two years' separation with consent, or three years' separation to show that the marriage had broken down irretrievably (see also [Question 39](#)).

Dissolution

A dissolution of a civil partnership is granted by the court on the ground that the civil partnership has broken down irretrievably (section 18(1)(a), CPA). To satisfy the court that the marriage has broken down irretrievably, the applicant must prove any one or more of the following facts:

- Unreasonable behaviour by the respondent, whereby the applicant cannot reasonably be expected to live with the respondent (section 25(5)(a), CPA).
- Two years' separation, with the respondent consenting to the dissolution order being made (section 25(5)(b), CPA).
- Three years' separation (section 25(5)(c), CPA).
- Desertion by the respondent for at least two years (section 25(5)(d), CPA).

(Section 25(5) CPA.)

Apart from the omission of adultery, the above facts were those previously relied on for establishing the irretrievable breakdown of a marriage in the context of divorce proceedings, before no-fault divorce was introduced (see [Question 11](#) and [Question 39](#)). To date, the CPA has not been amended to provide for no-fault dissolutions, as in the MCA.

No application for dissolution of a civil partnership can be submitted within three years of the formation of the partnership without the court's permission, and this will only be granted on the grounds of exceptional hardship or the applicant being under 16 at the time of the civil partnership (section 22, CPA).

Nullity

A petition for nullity can be presented to the Supreme Court by either party asking for the marriage to be declared null and void (section 24, MCA). A marriage is void on any of the following grounds:

- It is not valid under the provisions of the MA.

- At the time of the marriage, either party was already lawfully married.
- In the case of a polygamous marriage entered into outside of Gibraltar, either party was domiciled in Gibraltar at the time of the marriage.

A marriage is voidable on any of the following grounds:

- The marriage has not been consummated owing to the incapacity of either party (section 25A(1)(a), MCA).
- The marriage has not been consummated owing to the wilful refusal of the respondent to consummate it (section 25A(1)(b), MCA).
- Either party did not validly consent to the marriage, through duress, mistake, unsoundness of mind or otherwise (section 25A(1)(c), MCA).
- At the time of the marriage, either party, though capable of giving a valid consent, was suffering from a mental disorder within the meaning of section 3 of the Mental Health Act. The mental disorder must be of such that it makes the person unfit for marriage (section 25A(1)(d), MCA).
- At the time of the marriage the respondent was suffering from venereal disease in a communicable form (section 25A(1)(e), MCA).
- At the time of the marriage the respondent was pregnant by a party other than the petitioner (section 25A(1)(f), MCA).

(Section 25(1), MCA.)

Section 25A(1)(a) and (b) do not apply to same sex marriages.

The court must not grant a decree of nullity on the ground that a marriage is voidable if the respondent satisfies the court:

- That the petitioner, with knowledge that it was possible to have the marriage avoided, acted in a way that allowed the respondent to reasonably believe that they would not seek to have the marriage avoided.
- It would be unjust to the respondent to grant the decree.

(Section 25B, MCA.)

The court must not grant a decree of nullity:

- On the grounds in paragraph 25A(c) to (f) (*see above*) unless it is satisfied that proceedings were issued within three years from the date of the marriage or leave for the institution of proceedings has been granted after the expiration of that period.
- On the grounds in paragraphs 25A(1)(e) and (f) (*see above*) unless it is satisfied the petitioner was ignorant of the alleged fact.

The court cannot grant permission to institute proceedings for nullity after three years of marriage unless it is satisfied the petitioner has at some time during that period suffered from a mental disorder within the meaning in section 1(3) of the Mental Health Act and considers that, in all the circumstances of the case, it would be just to grant leave to institute nullity proceedings.

Judicial Separation

A petition for judicial separation can be presented to the Supreme Court by either party to the marriage (section 30, MCA).

Since the enactment of the 2019 Act, there are no longer any grounds for judicial separation. The petitioner need only file at court a notice of intention to judicially separate in Form M25 (notice of intention of judicial separation). There is no minimum requirement for the parties to have been married for one year before the presentation of a petition for judicial separation.

12. What is the procedure and timeline for divorce?

Divorce

The divorce procedure usually takes about seven to nine months to complete, however financial disputes or disputes in relation to children will not necessarily be resolved or adjudicated on by the court within this timeframe.

The procedure is as follows:

- The petitioner files a divorce petition accompanied by Form M24 and other required documents including Form M4 (if applicable). The petition is then issued by the Supreme Court and served on the respondent.
- Following service, the respondent must file and serve an acknowledgment of service (Form M3) within a prescribed time frame.
- The matter is then fixed for a preliminary hearing which the parties must attend in person.
- At the hearing, if the court is satisfied that the relevant procedural requirements have been complied with, it fixes a subsequent date for the pronouncement of the decree nisi (conditional order for divorce), typically within one month of the preliminary hearing.
- The marriage does not legally come to an end until after the court has granted the decree absolute (the final order for divorce).
- The decree absolute can only be applied for by the petitioner six months after the date of the decree nisi (unless there are exceptional circumstances).

- The six-month period is to give the parties a "cooling off" period after the pronouncement of the decree nisi.
- It is also open to the respondent to apply for the decree absolute if the petitioner does not apply for it within nine months of the issue of the decree nisi.

Nullity

Undefended nullity proceedings follow the same procedure and timeline as divorce proceedings.

Where a respondent wishes to defend a nullity petition, the respondent must file an answer to the petition within 14 days after the time for giving notice to defend expires.

A petitioner can file a reply to an answer within 14 days of being served with a copy of the answer.

Directions are then listed for trial, to determine whether a decree of nullity should be granted.

Judicial Separation

Judicial separation largely follows the same procedure as divorce, save that a petition for judicial separation and Form M25 are filed and served on the respondent.

At the preliminary hearing, the court will grant a decree of judicial separation. Since the parties do not need to wait for the pronouncement of a decree nisi or decree absolute, the process for judicial separation is much shorter and takes about one to two months.

Religious Marriage and Divorce

13. Are customary and religious marriages and divorces recognised in your jurisdiction?

Religious marriages which do not comply with the formalities of the MA are not recognised by the court in Gibraltar. However, a marriage can be solemnised in a place of worship, combining the elements of a civil and religious ceremony (sections 4 and 21, MA).

Religious divorces are not recognised in Gibraltar, since only proceedings instituted in the Supreme Court are regarded as validly dissolving a marriage (section 23(1), MCA).

Foreign religious marriages are only recognised in Gibraltar if they also meet the legal requirements of the country in question.

Foreign religious divorces are only recognised in Gibraltar if:

- They were obtained by foreign judicial or other proceedings.
- They are effective under the law of the country in question

(Section 53, MCA.)

The validity of a foreign divorce will be recognised if at the date of the institution of the proceedings in the country in question:

- Either spouse:
 - was habitually resident or domiciled in that country; or
 - was a national of that country.

(Section 54 MCA.)

- The parties were not habitually resident in Gibraltar in the year immediately preceding the institution of the proceedings in the foreign country (section 23(2), MCA).

Finances/Division of Assets

14. What powers do the courts have to allocate financial resources and property on the breakdown of marriage?

The Supreme Court has wide discretionary powers under the MCA to allocate financial resources and property in divorce, judicial separation and nullity proceedings. These include the powers to:

- Make orders for:
 - periodical payments in favour of a party to a marriage (section 34(1)(b) or 40(6)(b)) or a child of the family (section 34(1)(f), (2)(4) or section 40(6)(f));
 - secured periodical payments in favour of a party to a marriage or a child of the family;
 - a lump sum provision in favour of a party to a marriage (section 34(1)(c) or section 40(6)(c)) or a child of the family (section 34(1)(f), (2)(4) or section 40(6)(f)).

- Make a property adjustment order, including an order for the transfer and/or settlement of property.
- Order maintenance pending suit.
- Make pension sharing orders (although the relevant procedural rule relating to pension sharing orders has yet to be enacted and this remedy no longer features in the M10 form which is used to make financial applications).
- Vary nuptial settlements, although under the current provisions of the amended MCA, the power to vary is limited as for the benefit of children of the family (section 35(1)(c)).

(Part VII, MCA.)

The MCA does not provide a specific definition of property. The court must therefore take into account all property and other financial resources which each of the parties has or is likely to have in the foreseeable future (section 37(2)(a), MCA).

Trust, company or other assets which are not held in the legal name of either of the parties can be taken into account as a financial resource if the court is satisfied that one or both parties has a beneficial interest that property.

The extent to which such assets are factored in depends on consideration of the relevant facts and the exercise of the court's discretion in accordance with established principles. For example, if a party to a financial application is entitled to receive income from a trust of which they are a beneficiary, that income will be taken into account as part of that person's resources.

In *Caruana v Caruana* 2003–04 *Gib LR* 149 (*Caruana*), the Court of Appeal approved the approach in the English case of *Thomas v Thomas* 1995 2 *FLR* 668, where the court set out general principles to be applied in the category of cases concerning discretionary trusts. In applying the general principles, the court must look at the reality of the situation and to ensure that no improper pressure is put on trustees to exercise any discretion for the benefit of a particular party to divorce proceedings in the context of any contemplated financial order.

15. What factors are relevant to the exercise of the court's powers?

It is the duty of the court to decide whether to exercise its powers under section 34 to 36 of the MCA (section 37(1), MCA). In giving first consideration to the welfare of any child of the family (under the age of 18) and making financial provisions for a party of a marriage, the court can consider the following factors:

- The income, earning capacity, property and other financial resources that each of the parties to the marriage has or is likely to have. This includes any earning capacity or potential

for the party to increase that earning capacity which in the opinion of the court would be reasonable for them to take steps to acquire.

- The financial needs, obligations and responsibilities that each of the parties to the marriage has or is likely to have.
- The standard of living enjoyed by the family before the breakdown of the marriage.
- The age of each party to the marriage and the duration of the marriage.
- Any physical or mental disability of either of the parties to the marriage.
- The contributions that each of the parties has made, or is likely to make, to the welfare of the family, including any contribution by looking after the home or caring for the family.
- Any conduct of each of the parties that it would be inequitable for the court to disregard.
- The value to each of the parties of any benefit that, by dissolution or annulment of the marriage, the party will lose the chance of acquiring.

(Section 37(2), MCA.)

16. What is the court's current position on the division of assets?

In most cases, the exercise of the court's discretion under section 37 of the MCA is likely to be dominated by the needs of the parties and those of the children, given limited available resources.

The *Caruana* case (see [Question 15](#)) followed and approved the approach adopted by the House of Lords in the English case of *White v White* 3 WLR 1571 and used this case as the starting point for the division of assets. The first instance decision and approach adopted by the Chief Justice was approved by the local Court of Appeal.

The court's objective is to achieve a fair outcome when exercising its discretion under section 37. Equal division is an appropriate starting point, although there are circumstances where it may be appropriate to depart from equality. There is some debate whether the starting point should be equality of division or whether the latter should be a yardstick against which any tentative view of a judge as to the appropriate award is to be measured.

Examples of the types of situations where there has been a departure from equality of division include:

- **The needs of the parties.** The needs of the resident parent may require a departure from equality to meet the basic needs of that parent and the children if there are insufficient assets to meet such needs.

- **Non-marital property.** The existence of pre-marital wealth or non-marital property may provide a justification for departing from equality of division. This was recognised by the court locally in *B v B (DDM No 66 of 2016)*. Similarly, acquiring assets after separation may also provide a reason to depart from equality. If the parties are relatively wealthy and there are enough assets to meet the respective needs of each party, the party who brought the larger proportion of assets (pre-marital assets) into the marriage may seek a departure from equality to reflect this.
- **Inheritance or third-party contribution.** The existence of inherited assets or third-party contribution may provide a reason for departing from equality of division.
- **Extraordinary contribution.** Where one party (such as an exceptional business person) has contributed exceptionally to the couple's wealth, which justifies a departure from equality.

Ultimately, the Supreme Court has wide discretion under the MCA and there is no one fixed overall objective set out in the statute, although it is generally accepted that the overarching objective is to achieve objective fairness. However, the concept of fairness is illusory and it is possible for different judges to interpret facts differently and to reach different conclusions (albeit on a sound basis) when exercising judicial discretion. As Lord Nicholls commented in the English case of *White*, "fairness, like beauty, lies in the eye of the beholder." See also *B v B* above.

Finances/Spousal Maintenance (Alimony)

17. How does ongoing spousal maintenance operate following marital breakdown? Is maintenance awarded for a fixed term or on an open-ended basis? Is there a set formula or do judges have discretion over quantum and term?

Spousal Maintenance

Spousal maintenance is generally payable where one party is financially weaker than the other and requires ongoing financial support. Maintenance is typically paid on a monthly basis but it can also be paid annually or quarterly.

An award for spousal maintenance will depend on a number of factors, including the:

- Duration of the marriage.
- Age of the parties.
- Employment prospects of the person seeking maintenance.
- Earning capacity of respective parties.

- Respective financial circumstances of each party.
- Needs of the parties.

Basis for Award

When determining spousal maintenance, both the quantum and term payable will be considered by the court.

- A court can order maintenance to be awarded:
- For a fixed term: this allows for maintenance to be paid for a specific length of time, sometimes reducing year on year over that period with the objective of achieving financial independence between the parties at the end of the fixed term.
- On a joint lives basis: this is an obligation on the payer to pay maintenance until the recipient remarries, the payer or payee dies or the court makes a further order.

Both quantum and term are largely determined by the above factors. The courts appear to be moving away from joint lives orders towards fixed term orders where an immediate clean break is not possible. However, each case turns on its own specific facts and the main consideration is overall fairness and the needs of the parties. If a party is able to work and meet their own needs then they are unlikely to be granted a maintenance order in their favour.

Any order for spousal maintenance:

- Is automatically terminated on the remarriage or death of the recipient party (section 41, MCA).
- Is subject to variation in the event of a material change of circumstances.

Fixed Formula or Court Discretion

There is no fixed formula for calculating spousal maintenance.

The court has wide discretion in calculating the amount payable taking into account factors including the:

- Standard of living during the marriage.
- Ages of the parties.
- Earning capacity of either party.
- Ability of the recipient party to become self-sufficient and retrain or find employment.
- Respective needs of the parties.

- Capital division and the possibility of a clean break.

18. Is it common for maintenance to be awarded on marital breakdown?

It is relatively common for maintenance to be awarded on marital breakdown, subject to the circumstances of the case.

It is the court's duty to consider the practicality of a clean break between the parties (section 38(1), MCA).

Whether ongoing maintenance is awarded will depend on the facts of each individual case and the relevant considerations (see [Question 17](#)). If the court considers that no ongoing maintenance provision should be made, it can dismiss any such application and direct that the applicant is not entitled to make any further application (section 38(3), MCA).

19. What is the court's current position on maintenance on marital breakdown?

The court's approach to maintenance is illustrated by a local case that was the subject of an appeal to the Court of Appeal (of *Gonzalez v Gonzalez D & M 15 [2004]*). The Court of Appeal approved the approach adopted by the Supreme Court and gave appropriate weight to the factors set out in section 37(1) of the MCA (previously section 32(1), MCA) including the:

- Parties' respective incomes, earning capacity, property and other financial resources.
- Parties' financial needs.
- Age of the parties.
- Duration of the marriage.

In practice, the court is likely to look at the reasonable needs of the respective parties and to try to determine a fair award based on the relevant facts and circumstances. There is no fixed formula for the calculation.

Finances/Child Support

20. What financial claims are available to parents on behalf of children within or outside of the marriage?

Under the MCA and the CPA, the following financial provision orders are available in respect of children of the family:

- An order for periodical payments.
- An order for secured periodical payments.
- An order for lump sum provision.

(Section 34, MCA; section 65(1) CPA.)

A "child of the family" is defined as a child of both the parties to the marriage, or any other child (except a foster child under the CA), who has been treated by the spouses as a child of their family (section 2, MCA). The CPA also adopts the same definition in the context of civil partnerships (section 2, CPA). The latter extends to biological children born to one party of the marriage/civil partnership or any children that were adopted by either one or both parties of the marriage/civil partnership.

The court also has power to make the following orders:

- The transfer of specified property by a party to the marriage/civil partnership to the other party, any child of the family or any specified person.
- Settlement of property.
- Variation of any pre-nuptial or post-nuptial settlement (including one made by will or codicil) made by the parties to the marriage/civil partnership for the benefit of the children of the family.

(Section 35, MCA; section 69, CPA.)

In respect of children generally and outside the context of divorce proceedings (as may apply to unmarried couples), claims for maintenance are usually brought under the Maintenance Act or the CA.

A maintenance order can also contain provision for periodical payments and/or a lump sum. The application for maintenance can be brought by any party with parental responsibility for the child, the Care Agency or the child (section 34, Maintenance Act).

Under the CA, the court can make orders for:

- Periodical payments.
- Secured periodical payments.
- Payment of a lump sum.
- Transfer to the applicant for the benefit of the child or to the child themselves of property to which the parent or the parents are entitled to either in possession or reversion.

(Section 48(2), CA.)

21. On what basis is child maintenance calculated?

There is no prescribed formula for calculating child maintenance. The court can consider the following (non-exhaustive) factors (section 37(3), MCA):

- The financial needs of the child.
- The income, earning capacity (if any), property and other financial resources of the child.
- Any physical or mental disability of the child.
- How the child was being educated and how the parties expected the child to be educated or trained.
- The considerations in relation to the parties (see [Question 19](#)).

The Magistrates Court also has the power to award maintenance under the provisions of the Maintenance Act.

22. What is the duration of a child maintenance order (up to the age of 18 years or otherwise)?

The term to be applied in a child maintenance order can begin with the date of the application for child maintenance and usually lasts until the child reaches the age of 18 years unless either:

- The child remains in education.

- There are special circumstances which justify the making of an order for a longer period.

(Section 42, MCA.)

Child orders therefore can extend to a child's tertiary education. However, such orders are usually limited to one undergraduate degree and do not extend beyond the age of 21.

23. Can a child (whether of legal maturity or otherwise) make a claim directly against their parents?

Under the MCA, it is not possible for a child to make a direct claim direct against their parents. This is because the Act provides for applications to be made by the parties to the marriage, including applications for child maintenance. This only applies to children of married parents.

A person of 18 or over can apply for periodical payments or a lump sum under section 49(2) of the CA, unless a periodical payments order was in force with respect to the child immediately before they reached the age of 16 (section 49(3), CA) or the child's parents are living together in the same household at the time of the application (section 49(4), CA).

A child can also make an application for maintenance under section 34 of the Maintenance Act.

Enforcement of Financial Orders

24. What are the main methods of enforcement to ensure compliance with financial orders following divorce/dissolution in your jurisdiction?

An attachment of earnings order is available under both the MCA and the Maintenance Act, where the paying party's employer or pension administrator is ordered to deduct child or spousal maintenance payments from their salary at source.

The MCA also provides various other enforcement methods including:

- Secured periodical payments: a maintenance order is secured against a specified capital asset.

- Orders for the sale of property: following the making of a secured periodical payments order, lump sum order, or property adjustment order, the court can make a further order for the sale of property to enable the proceeds of sale to be applied to satisfy the judgment debt.
- Signing of documents: in relation to a secured periodical payments or property adjustment order, the court can order that the Registrar of the Supreme Court execute documents (such as a deed of assignment).

Other general] enforcement methods under the Civil Procedure Rules include:

- A writ of control: an enforcement agent is ordered to seize and sell at auction the debtor's goods to satisfy the judgment debt.
- A third-party debt order: sums owed to the debtor that are in the hands of a third party (for example, a bank with whom the debtor has a bank account) are frozen and seized for the creditor's benefit.
- A committal order: an order committing a person to prison for disobeying an order or judgment.
- A charging order: secures payment due by imposing a charge over the debtor's land or shares, so that the property cannot be sold without satisfying the judgment debt.
- Injunctive relief.

25. What is the legal position on the reciprocal enforcement of financial orders?

The Brussels I Regulation ((EU) 1215/2012) and the EFTA Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988 (Lugano Convention) apply to Gibraltar through the *Civil Jurisdiction and Judgments (Amendment Act) 2005* (CJJA) (subject to the consequences of Brexit).

See also *Brexit: implications for civil justice and judicial co-operation*.

An application for the registration of a maintenance order in appropriate circumstances is made to the Magistrates Court.

The *Maintenance Orders (Reciprocal Enforcement) Act* is the domestic statutory mechanism for enforcing maintenance orders from reciprocating countries and territories (British Columbia, Malta, Nova Scotia, Ontario, the UK and Australia (for certain maintenance orders)).

The *Judgments (Reciprocal Enforcement) Act* also applies. This provides for the enforcement of foreign judgments in Gibraltar and is equivalent to the English *Foreign Judgments (Reciprocal Enforcement) Act 1933*.

Lump sum and costs orders made by a recognised foreign court may be capable of enforcement, provided the judgments are final and conclusive between the judgment creditor and judgment debtor and a sum of money is made payable.

However, foreign maintenance orders fall outside the scope of this Act on the basis that they can be varied. The judgment cannot be registered unless pronounced within six years before the application for registration.

In the absence of reciprocal enforcement provisions, a judgment or order of a competent foreign court will be enforceable in Gibraltar at common law by an action *in personam* on the judgment debt if both the:

- Foreign judgment is for a definite sum of money.
- Foreign judgment is final and conclusive.

A foreign judgment for costs or a lump sum can therefore be enforced at common law.

Financial Relief after Foreign Divorce Proceedings

26. What powers are available to the court to make orders following a foreign divorce? If such a power exists, what is the legal basis for making such an application?

Following the enactment of the 2019 Act (see *Question 11, Divorce*), the court can make financial orders following an overseas divorce, annulment or legal/judicial separation under Part XII of the MCA.

Leave of the court must first be obtained by the applicant. Leave will not be granted unless the court considers that there is a substantial ground for making an application for financial relief (section 63(1), MCA). The court can also:

- Grant leave to order financial relief even where an order has been made by a foreign court for payments or transfers of property to the applicant or child of the family (section 63(2), MCA).
- Order interim maintenance when leave is granted (section 64(1), MCA) in domestic matters.

The court has jurisdiction to hear an application for financial relief following a foreign divorce where:

- Either party was domiciled in Gibraltar on the date of the application for leave or the date of the foreign divorce, annulment or legal separation.
- Either party was habitually resident in Gibraltar for one year before the application or date of the foreign divorce, annulment or legal separation.
- Either or both parties had at the date of the application a beneficial interest in a dwelling house in Gibraltar which was the matrimonial home at some time during the marriage.

(section 65, MCA).

If the court is not satisfied that it is appropriate to make an order in Gibraltar, it will dismiss the application (section 66(1), MCA).

The court will consider the:

- Connection which the parties have with:
 - Gibraltar;
 - the country where the marriage was dissolved or annulled or where they were legally separated;
 - any other country.
- Financial benefit which the applicant or a child of the family has received (or is likely to receive) following the divorce, annulment or legal separation in the foreign country.
- Extent to which an order for financial relief made in a foreign country has been complied with, or is likely to be complied with.
- Right which an applicant has (or has had) to apply for financial relief under the law of any country outside of Gibraltar.
- Availability of any property in Gibraltar.
- Extent to which any order in Gibraltar is likely to be enforceable.
- Length of time which has elapsed since the date of the divorce, annulment or legal separation.

If leave is granted under, the court must consider the factors set out in section 68(2) and (3), which are similar to those considered in a domestic divorce and application for financial relief under section 37 of the MCA (see [Question 11](#)).

If a foreign divorce or annulment has been granted, the court can make any of the orders under Part VII of the MCA in relation to financial provision, property adjustment and pension sharing (see [Question 14](#)) (section 67(2) MCA) provided that there is a dwelling house in Gibraltar which was a matrimonial home of the parties.

The Part VII orders are:

- A lump sum order payable to a party of the marriage (section 69(2)(a), MCA), or in favour of a child of the family (section 69(2)(b), MCA).
- The power to make a property adjustment order, including an order for the transfer and/or settlement of property to either a party to the marriage, or in favour of a child of the family (section 69(2)(c)-(e), MCA).

Unlike in domestic divorces, however, there are restrictions on the amount to be ordered by way of a lump sum order (section 69(3) and (4), MCA).

Children

Custody/Parental Responsibility

27. What is the legal position in relation to custody/parental responsibility following the breakdown of a relationship or marriage? Do local courts in your jurisdiction recognise parenthood that has been established in another jurisdiction for the purposes of custody/parental responsibility, maintenance and so on?

General Position for Custody/Parental Responsibility

Under section 11(1) of the CA, each parent has parental responsibility for a child if the parties were married at the time of the child's birth.

For couples who marry after the child's birth, parental responsibility vests in the mother and the father by virtue of section 11(2) and the child becomes legitimate as a result of section 3 of the Legitimacy Act.

For unmarried parents, the mother has automatic parental responsibility under section 11(2) and a father also has parental responsibility by virtue of section 13(1), provided one of the following applies:

- He is registered as the child's father under the Births and Deaths Registration Act.
- There is a parental responsibility agreement in place between the parties.
- There is a court order granting parental responsibility.

Parental have equal rights, subject to any court order or agreement, which are:

- The right to have the child living with them or to regulate that child's residence.
- The right to control, direct or guide the child's upbringing, in a manner appropriate to the stage of the development of the child.
- If the child is not living with the parent concerned, the right to maintain a personal relationship with the child and to have direct regular contact with the child.
- The right to act as the child's legal representative.

(Section 10, CA.)

The legal position after the breakdown of the marriage is usually determined by agreement between the parents or by court order. The court's first and paramount consideration is the child's welfare in determining any issues relating to the upbringing of the child or to the administration of the child's property or any income arising from such property.

The court does not have to make an order, unless it considers that making an order would be better for the child than making no order at all (no order principle (section 4(5), CA).

The types of order that can be made are:

- Residence orders.
- Contact orders.
- Prohibited steps orders.
- Specific issue orders.
- Special guardianship orders.

(Section 25, CA.)

The court can also make order for financial relief under section 48 of the CA.

Parenthood Established in Another Jurisdiction

The *Adoption Act 1951* is silent on the recognition of parenthood established in another jurisdiction.

Under the revised *Adoption Act 2023* (AA 2023) (not yet in force, see [Question 32](#)), an adopted person must be treated as if they are the child of the adopter(s) (section 62, AA 2023). "Adoption" under the AA 2023 includes:

- Adoption by an adoption order under the AA 2023.
- An adoption effected under the law of a country outside Gibraltar where the *HCCH Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993* (Hague Adoption Convention) is in force, and certified under Article 23(1).

- An overseas adoption.
- An adoption recognised by Gibraltar law and effected under the law of any other country.

(Section 61, AA 2023.)

Gibraltar residents are prohibited from bringing a child into Gibraltar who is habitually resident elsewhere:

- For the purpose of adoption in Gibraltar.
- Within 12 months of an external non-Convention adoption order being made.

(Section 75, AA 2023.)

In these cases, a Gibraltar resident must first apply to the Care Agency (social services) for an assessment of their suitability to adopt the child and provide any information it may require for such an assessment (section 75(5), AA 2023). Failing to do so will constitute a criminal offence (section 75(8), AA 2023).

As stated, the AA 2023 however, is not yet in force. To date, no indication has been given as to when this occur and until such time, the Adoption Act 1951 (see [Question 32](#)) applies.

Despite this, it would be advisable (although not strictly necessary) to contact the Care Agency with the requirements of the AA 2023 in mind where adopting parents wish to seek to have parenthood established in another jurisdiction recognised in Gibraltar.

28. What is the legal position in relation to access/contact/visitation following the breakdown of a relationship or marriage?

Statutory parental rights are equal under the CA (see [Question 27](#)).

If the parties cannot reach agreement concerning contact following the breakdown of a relationship, then subject to the "no order principle", it is open to the non-resident parent to apply for a contact order (section 25, CA). When the court determines any question in relation to the upbringing of a child, including the issue of contact, the child's welfare will be the court's first and paramount consideration (section 4, CA).

The court will have regard to the following when deciding whether to make a contact order (or any other order under section 25):

- The ascertainable wishes and feelings of the child concerned (in the light of their age and understanding).

- The child's physical, emotional and educational needs.
- The likely effect of any change in circumstances on the child.
- The child's age, sex, background and any characteristics which the court considers relevant.
- Any harm which the child has suffered or is at risk of suffering.
- How capable each of the parents, and any other person in relation to whom the court considers the question to be relevant, is to meet the child's needs.
- The range of powers available to the court under the CA in relation to the proceedings in question.

(Section 4(3), CA.)

Under section 4(2) of the CA, the court must also consider the general principle that any delay in determining the question is likely to prejudice the welfare of the child and that a child's welfare is best promoted by a continuing relationship with both parents, provided it is safe to do so.

International Abduction

29. What is the legal position on international abduction?

The *International Child Abduction Act 2010* extends the application of the *HCCH Convention on the Civil Aspects of International Child Abduction 1980* (Hague Child Abduction Convention) to Gibraltar. However, at the time of writing, the Act was not yet in force.

However, it is an offence under section 184(1) of the *Crimes Act 2011* (Crimes Act) for a person, including a parent, to take a child under the age of 18 out of Gibraltar without appropriate consent. The appropriate consent includes the consent of the other parent, provided that parent has parental responsibility.

The CA also contains provisions giving effect to the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (1996 Hague Convention)

In the event of abduction to a non-convention or non-EU state, the appropriate course of action is to obtain declaratory relief to the effect that the removal was unlawful and to then seek the summary return of the child from the relevant jurisdiction. This is likely to be in the context of commencing wardship proceedings in Gibraltar.

Leave to Remove/Applications to Take a Child Out of the Jurisdiction

30. What is the legal position on leave to remove/applications to take a child out of the jurisdiction? Under what circumstances can a parent apply to remove their child from the jurisdiction against the wishes of the other parent?

An application to remove a child from Gibraltar is generally made under the CA.

A person with a residence order in place can take the child out of Gibraltar for up to one month at a time, with no limit on the number of occasions and without the need for the consent of any other holders of parental responsibility.

Where the removal is for more than one month however, the written consent of every person who has parental responsibility of the child is required.

(Section 30, CA.)

A child can also be removed from Gibraltar by a person with a contact order during the period stated in that order, unless the child is a ward of court, or subject to a care, supervision or emergency protection order, in which case leave must be sought to remove the child (section 30(4), CA).

Permission is therefore generally required to remove a child from the jurisdiction permanently or temporarily if the removal is against the wishes of the other parent or anyone else with parental responsibility for the child.

The application for permission is made under the CA.

The first and paramount consideration for the court is the child's welfare which is considered to be best promoted through a continuing relationship with both parents, provided this is safe (section 4(2), CA).

In deciding whether leave should be granted for permanent removal, the court also considers whether:

- The application is genuine and not motivated by a selfish desire to exclude the other parent from the child's life.
- The proposed plans are realistic, researched, investigated and in the best interest and welfare of the child.

If the court is satisfied that the plans are *bona fide* and well researched, it then considers the position of the other parent to see if they are motivated by a genuine concern for the child's welfare or a more selfish motive.

The wishes of the child can also, in appropriate circumstances, be taken into account. The factors considered by the court include those under section 4(3) of the CA as set out in *Question 28*.

In considering a temporary visit, the court will weigh the benefit to the child of the proposed visit against the risk that the child may not be returned and, depending on the relevant facts, appropriate safeguards may need to be built into any order granting temporary removal.

The custodial parent must therefore still seek the permission of the court to remove a child out of the jurisdiction permanently in the absence of consent from the non-custodial parent (or anyone else with parental responsibility).

Surrogacy and Adoption

Surrogacy Agreements

31. What is the legal position on surrogacy agreements in your jurisdiction? Is surrogacy available to individuals and cohabiting couples (both heterosexual and same-sex)?

The Surrogacy Act 2021 (SA) came into force on 9 February 2021. The objective of the SA is to:

- Regulate surrogacy arrangements in Gibraltar.
- Establish the legal parenthood of those participating in assisted reproduction arrangements.
- Provide for Parental Orders to confer legal parenthood and transfer parental responsibility to the applicants.

The SA provides a legislative framework for non-commercial, altruistic surrogacy arrangements in Gibraltar, where the surrogate mother does not receive payment for carrying the child.

Surrogacy arrangements on a commercial basis are prohibited and are a criminal offence under the SA, include advertising **for such services**. However, a permitted surrogacy arrangement can cover a surrogate mother's reasonable expenses incurred during the arrangement. Such expenses will be considered by the court when determining an application for a parental order.

In common with other arrangements, the intended parents and the surrogate may decide or wish to record how they want the surrogacy arrangement to work by entering into a surrogacy agreement. However, such agreements are not enforceable under Gibraltar law even if the parties have signed a document with the surrogate mother and have paid her reasonable expenses.

For the commissioning parent(s) to extinguish the status of the surrogate mother (and her spouse or civil partner, if applicable) and to obtain parental responsibility and legal parenthood over a surrogate child, an application for a Parental Order must be made before the Supreme Court by one or two applicants.

The applicants must satisfy the court that:

- The child has been carried by a woman who is not one of the applicants.
- At least one of the commissioning parents has provided either their eggs or sperm used to bring about the creation of the embryo.
- The surrogate mother (and her spouse or civil partner, if applicable), have given their free and unconditional consent to the making of the Parental Order, with a full understanding of its implications. However, this requirement may be dispensed by the court where the said person(s) cannot be found (for example, where an anonymous egg or sperm donor have been used), or are incapable of giving their consent.
- No payment has been made or received by any of the parties, other than the reasonable expenses incurred for the benefit of the surrogate mother; in other words, that it was not a commercial surrogacy arrangement which constitutes a criminal offence.

The commissioning parents must also be:

- Married, in a civil partnership or e living as partners in an enduring family relationship who are not within prohibited degrees of relationship in the case of an application made by two applicants. The SA does not contain a definition of an "enduring family relationship".
- Aged 18 or over.

Further, the child's home must be with the applicants, and at least one of the applicants must be domiciled in Gibraltar.

Adoption

32. What is the legal position in relation to adoption? Is adoption available to individuals and cohabiting couples (both heterosexual and same-sex)?

Adoption in Gibraltar is governed by the Adoption Act 1951 (AA). Jurisdiction to make adoption orders is vested in the Magistrates Court and the Supreme Court. An application for an adoption order can be made by:

- An individual, resident or person domiciled in Gibraltar who is the mother or father of the minor.
- A relative of the minor (grandfather, brother, sister, uncle or aunt) who is at least 21 years old.
- An individual applicant who is over 25 years old.

(Section 5, AA.)

An application can be made jointly by two spouses or two civil partners, provided one is the mother or father of the minor and the other is over 21 (section 5(2), AA)). It is specifically prohibited for an adoption order to be made authorising more than one person to adopt a minor (section 5(3), AA) unless the application is made by two joint spouses (section 5(2), AA).

This aspect of the legislation was successfully challenged in *P v HM Attorney General for Gibraltar (judgment of Dudley C.J. [10 April 2013]) (unreported)* where the Supreme Court held that the provisions of the AA that excluded a same-sex couple from jointly applying for adoption violated the Gibraltar Constitution. Section 5(2) of the CA was amended to permit the application to be brought on behalf of two civil partners (subject to one of them being the mother or father of the minor).

The AA sets out the requirements for making an adoption order:

- The applicant(s) must be eligible to make an application.
- The child must have been in the care and custody of the applicant for the probationary period (at least three consecutive months immediately preceding the date of the order).
- A welfare officer must have been put on notice of the intention to adopt (section 7, AA).
- The requisite consents (that is, of every parent or guardian of the child) must have been given unless dispensed with by the court on recognised statutory grounds (sections 6 and 8, AA).
- The court must be satisfied that if the order is made:
 - it will be for the welfare of the child;
 - the applicant has not received or agreed to receive any payment as reward or consideration for the adoption except for any payment that the court sanctions (section 8(1)(c), AA).

(Section 5, AA.)

- Revised legislation in the form of the AA 2023 received assent on 25 January 2023, but at the time of writing had not yet come into force.

Cohabitation

33. What legislation (if any) governs division of property and financial claims for unmarried couples on the breakdown of the relationship?

There is no specific legislation in place in Gibraltar. The division of property for unmarried couples is governed by trust and equitable principles as well as contractual principles (where applicable).

Family Dispute Resolution

Mediation, Collaborative Law and Arbitration

34. What non-court-based processes exist to resolve disputes? Is alternative dispute resolution mandatory? What is the current status of agreements reached through mediation, collaborative law and arbitration?

The most popular non-court based alternative dispute process is family mediation. Alternative dispute resolution is not mandatory or a pre-requisite to commencing proceedings. However, a court can direct parties to first attempt mediation or a reconciliation meeting, and stay the proceedings as necessary.

Mediation

Family mediation is a voluntary process and the parties enter into a mediation agreement with the mediator to try and resolve the matters in dispute. Family mediation is encouraged in appropriate situations.

Arbitration

Arbitration can be used subject to the agreement of the parties, however, an arbitration award cannot oust the jurisdiction of the court.

Collaborative Law

Collaborative law is not currently in family practice in Gibraltar and the authors are not aware of any locally-trained collaborative lawyers.

35. What is the statutory basis (if any), for mediation, collaborative law and arbitration?

Arbitration is governed by the Arbitration Act.

Mediation is encouraged, where appropriate, in the context of furthering the overriding objective by active case management (rule 4(6)(b), *Family Proceedings (Matrimonial Causes) Rules 2010*).

There is no statutory requirement for the parties to attempt a family dispute resolution before instituting legal proceedings or in advance of any final hearing in relation to financial applications.

Civil Partnership/Same-Sex Marriage

36. What is the status of civil partnership/same-sex marriage? What legislation governs civil partnership/same-sex marriage?

Same-sex marriage has been lawful in Gibraltar since 15 December 2016, following the enactment of the *Civil Marriage Amendment Act* (CMAA). The CMAA amended the definition of the parties to a marriage under section 2 of the MA to extend to same-sex couples (section 2(2)(c), CMAA).

Under the MA, same-sex couples are treated in the same way as opposite-sex couples, in that they are able to marry by means of a special licence (section 13 MA). The only exception for same-sex couples is that a religious organisation cannot be compelled to conduct the marriage of a same-sex couple (section 6A, MA).

For the recognition of Civil Partnerships, see *Question 10, Civil partnerships*.

The *Gibraltar Constitution Order 2006* provides protection against discrimination (direct or indirect) and recognises the right to family life. This was recognised in the case of *P v HM Attorney General for Gibraltar [2013]* where the Supreme Court held that the provisions of the AA excluding same-sex couples from jointly applying for adoption, violated section 7 (the right to family life) and section 14 (discrimination) of the Gibraltar Constitution (see *Question 22*).

Media Access and Transparency

37. What is the position regarding media access to and press reporting of family law cases?

Family cases are usually held in private, and consequently, they are not subject to media reporting locally. Members of the press do not have access to proceedings, which are held in private. Where the hearing is held in public, the media do have access.

Reporting of family proceedings under the MCA is restricted and it is an offence under section 474 of the Crimes Act 2011 to print or publish any particulars other than:

- The names and occupations of the parties and witnesses.
- A concise statement of the charges, defences and counter-charges in support of which evidence has been given.
- Submissions on any point of law arising in the course of the proceedings and the decision of the court on them.
- The judgment of the court and observations made by a judge in giving judgment.

It is a contempt of court to publish information relating to proceedings before any court sitting in private if the proceedings:

- Relate to the exercise of the inherent jurisdiction of the Supreme Court with respect to minors.
- Are brought under the Children Act.
- Otherwise relate wholly or mainly to the maintenance or upbringing of a minor.

(Section 475(1)(a), Crimes Act).

Succession Rights on Divorce/Dissolution

38. How does divorce impact succession and estate planning in your jurisdiction?

The court can order that, on the granting of a decree absolute, neither party will be entitled on the death of the other to claim against the other's estate under section 4 of the *Inheritance (Provision for Family and Dependants) Act 1975* (section 46, MCA).

Such an order will usually be made where the former spouses have achieved both an income and capital clean break as part of the terms of their financial settlement or any order of the court.

If a will had already been made by either party to a marriage, in the absence of a contrary intention expressed in the will, from the date of the decree absolute:

- Any appointment of a former spouse as an executor or trustee or any conferment of a power of appointment on the former spouse takes effect as if the former spouse had died on the date on which the marriage is dissolved or annulled.
- Any property comprising or included as a gift to the former spouse passes as if the former spouse had died on that date.

If a former spouse dies intestate without having prepared a will, then similarly, the surviving spouse will not benefit from the deceased's spouse's estate in accordance with the rules of intestacy in the *Administration of Estates Act 1933*.

Controversial Areas and Reform

39. What areas of the law (if any) are currently undergoing major change? Which areas of law are considered to be particularly controversial?

Divorce. On 15 August 2019, the Matrimonial Causes (Amendment) Act 2019 came into force. The Act provides a further major overhaul in divorce legislation providing, among other things, for "no-fault divorce" and permitting divorce after 12 months of marriage (see *Question 11, Divorce*).

The major amendments to the MCA include:

- Section 16: irretrievable breakdown of the marriage will now be presumed by the petitioner filing a notice of intention to divorce with the court instead of having to prove adultery, unreasonable behaviour, two years separation by consent and so on.

- Section 18: enabling petitions to be brought for divorce after one year of marriage (instead of three years).
- Section 26: extending the period between the decree nisi and the decree absolute to six months from six weeks.
- Similar amendments in respect of nullity proceedings and judicial separation.
- A new section XII entitled "Financial Relief after an overseas divorce" and consequent provisions for an application for such financial relief applications subject to the court having jurisdiction and granting permission for such an application to be made (see [Question 26](#)).

Civil partners. The Civil Partnership has yet to be amended in line with the amendments made to the MCA (*see above*). It is hoped that such amendments will be made in due course to equalise the position between divorcing spouses and civil partners.

Surrogacy. The Surrogacy Act also came into force in 2021, making provision for surrogacy arrangements and parental orders for the first time in Gibraltar (see [Question 31](#)).

Domestic abuse. More recently, the Domestic Abuse Act 2023 came into force in July 2023, save for sections 8 to 36, 49 and schedule 1. The legislation has provided a complete overhaul and reform of previous domestic abuse legislation in Gibraltar.

In particular, the 2023 Act:

- Provides a statutory definition of domestic abuse, to include:
 - physical or sexual abuse;
 - violent or threatening behaviour;
 - controlling or coercive behaviour;
 - economic abuse;
 - psychological, emotional or other abuse.
- Introduces the criminal offence of "controlling or coercive behaviour" in intimate or family relationships.
- Widens the scope of who is considered a victim of domestic abuse to include:
 - spouses and former spouses;
 - civil partners and former civil partners;
 - two persons who have entered into a civil partnership agreement (to register as civil partners in Gibraltar).
 - fiancés/fiancées;

- those in an intimate personal relationship with one another;
 - those who have or have had a parental relationship in relation to the same child (a parent or person with parental responsibility); and
 - relatives.
- Creates the offences of:
 - threatening to disclose private sexual photographs and films;
 - non-fatal strangulation.
 - Provides for domestic abuse protection orders notices and orders.

The offence of coercive and controlling behaviour under section 4 of the 2023 Act covers any such behaviour which takes place outside of Gibraltar, if committed by a Gibraltarian/Gibraltar resident.

There has been speculation whether such a provision could open the floodgates of litigation locally in relation to any such claims alleged to have taken place outside of Gibraltar, and whether generally, there may be an increase in applications for domestic abuse protection notices and orders in the context of family proceedings as a means to (for example) evacuate one spouse/civil partner/cohabitee from the family home/matrimonial home.

No such litigation has been noted by the authors to date.

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Professional qualifications. Admission to the Bar in England & Wales (Middle Temple), 1996; admission to the Gibraltar Bar, 1997; admission as English solicitor, 2003; associate member of Gatehouse Chambers, Gray's Inn, London

Areas of practice. Family; trust and private client disputes; commercial litigation including interim remedies and insolvency.

Non-professional qualifications. BA (Hons) English, University of Birmingham, 1993; CPE Dip Law, University of Westminster, 1995; Inns of Court School of Law, Bar Vocational Course, 1995

Recent cases

- Acting on behalf of a client in relation to financial proceedings which concerned non- matrimonial and matrimonial assets.
- Acting in relation to ultra-high net worth (UHNW) family dispute in relation to the division and re arrangement of family trusts.
- Acting on behalf of the liquidator of an insolvent insurance company.
- Acting on behalf of an insurance cover holder in proceedings brought by an underwriter.
- Acting for a UHNW individual in relation to divorce proceedings and dissolution of family office.
- Advising and acting for an estate in relation to an underlying significant value trust dispute.
- Acting on behalf of a Greek family in proceedings against a French bank (claim in excess of USD10 million).
- Acting on behalf of a private client in relation to the defence of a high value claim in tort.
- Acting on behalf of a HNW private client in defence of a high value fraudulent trading and misfeasance claim commenced by liquidator of local company.
- Acting on behalf of a major creditor in relation to the liquidation of a local law firm.
- Acting on behalf of the ex-partner of a UHNW individual in relation to Gibraltar proceedings commenced for interim remedies in aid of high value substantive proceedings in England.

Professional associations/memberships. Middle Temple (England), ACTAPS, Gibraltar Law Council, Law Society/SRA (England), Association of European Lawyers, Globalaw, MCC Resolution.

Publications

- *Gibraltar Chapter in International Trust Disputes, Edited by Collins, Kempster, McMillan and Meek, Oxford University Press, 2012 (First Edition) and also, Second Edition, 2020.*
- *Family Law: Jurisdictional Comparisons, Gibraltar Chapter in first second and third editions of European Lawyer Reference, Editor James Steward, Thomson Reuters.*

- *Author of Gibraltar Chapter in the Asset Tracing and Recovery Review.*
- *Author of Gibraltar Chapter in the International Relocation of Children – A Global Guide from Practical Law/Thomson Reuters.*
- *Author of Gibraltar Chapter in Litigation and Enforcement in Gibraltar: overview – A Global Guide from Practical Law/Thomson Reuters.*

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Areas of practice. Divorce and financial remedies, pre-nuptial and post-nuptial agreements, child contact, residence and adoption.

Non-professional qualifications. BA (Hons) English Literature and History, University of Liverpool, 2013; Graduate Diploma in Law, BPP Law School, 2015; Legal Practice Course, BPP Law School, 2016

Recent cases

- Acting on behalf of a client in relation to financial proceedings which concerned non- matrimonial and matrimonial assets.
- **Languages.** English, Spanish

Professional associations/memberships. Gibraltar Law Council, Resolution.

Publications

- *Family Law in Gibraltar: overview, Gibraltar Chapter in 2020 comparative guide, Thomson Reuters.*

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