KCBA KING COUNTY BAR ASSOCIATION

International Move Means Connecting the Legal Dots

By Marguerite (Maggie) Smith

Your client comes into your office to seek advice on setting up satellites for his closely held U.S. business. The satellites will be located in Germany and England. You have been advising him for years. He trusts you.

“We are only going to live there for about a year at most,” he says. His wife, who’s German, will like it. “I’ll just go over to England every now and again. I don’t think we will have to move the family there. Best not to disrupt the kids too much.”

You, as his business attorney, draft the necessary paperwork, along with tax counsel, to set up the satellites and you refer him to German and English counsel for the transactional work in Germany and England. You learn that he has not updated his will and send him to the estate planning department in your firm.

You mention to your colleague that the client will be living out of the country for a year. He dutifully updates the will to address newly acquired assets and advises the client to consult with German and English attorneys on the enforceability of his will as to his assets in Germany and England. The tax attorney and all of you in the firm assume that his domicile will remain in the U.S. because that is what your client believes.

Both of the above attorneys think that they have represented the client well. But did they? Unfortunately, they missed several key issues in their advice to him.

As it turned out in this instance, after the couple spent only a few months in Germany, the English satellite required more of the

client's time than anticipated. The family therefore relocated to England. After several more months, their relationship started to go south. Nonetheless, the couple bought a house in England and the kids started school there. Some time later, the wife decided to stay in England, where she filed for divorce.

Your client calls you. You refer him to international counsel in Washington. He files for dissolution here in Washington. The Washington court defers to England to make the decision as to jurisdiction of the case. The English Court concludes that England is the habitual residence of the children under the Hague Convention, effectively terminating your client's efforts to get the parenting plan heard in the U.S. Unfortunately, the court also decides that it should assume jurisdiction of the entire case despite your client's desperate efforts to convince it to bifurcate.

Most regrettably for your client, no one told him that matrimonial law in England is heavily stacked in favor of the non-earning spouse. He is horrified to learn that even his separate property is up for grabs. (While all community and separate property is before the court in Washington, the English courts will more likely divide it.) Worst of all, the English court concludes that the children should stay with their mother in England.

Your client comes back to visit you. He is shell shocked. He is now considering moving to England himself, leaving all of his other relatives here in Washington. The business in the U.S. will have to be sold. He cannot visualize traveling back and forth between countries to see his children.

Now you tell him that if he moves to another jurisdiction, thus changing his domicile, the business, tax and estate planning your firm did for him may no longer apply and will have to be reviewed in light of the law in his new proposed country of domicile.

It is a shame that someone did not discuss the problems of international relocation with him before he moved. What he thought of as a temporary move turned out to be permanent. It never occurred to him (nor to you it seems) that his business and life plans would be dictated not by business and tax law, but by international and foreign domestic laws related to children.

Even had the mother stayed in Germany, this would not have helped his situation. We family law attorneys in the U.S. are

having considerable problems with the German courts. It is very difficult to get children returned from Germany, even under the Hague Convention (a concern of which the German courts are aware). If they had relocated to a non-Hague country, then his chances of recovering the children back to the U.S. could be next to non-existent, depending on the country.

The moral of the story is obvious: We need to put our clients on notice of the potential pitfalls of what they consider to be temporary relocation. We all, in our separate fields, need to send them to the right people to provide them — to the greatest extent possible — strategies to avoid these unanticipated, life-changing events.

What specifically can you do to avoid such a situation?

- Warn about international travel in general. It is not just the business owner who is at risk — client employees are sent overseas for temporary assignments.
- Advise that the client consult with an international family law attorney if you do not have sufficient knowledge in this area. This attorney will inform her about how best to plan the relocation to help to avoid the children's "habitual residence" trap, whether the Hague Convention applies and what to do if it does not.
- Suggest to your client that she (or the family law attorney) will likely need to consult with attorneys in the foreign jurisdiction (this is almost certainly what a good international family law attorney will suggest).

Your client should have a post- or — much better — a prenuptial agreement, which would deal with how assets/debts/maintenance are to be dealt with. Choice of laws and venue also may be included, and in some cases child-related issues.

Make your client aware that in some countries all or some of the terms of a prenuptial may not work to her advantage. Choice of laws can be a problem in a country that does not have a history of freely applying foreign laws (England), whereas others will more readily do so (Spain).

You could try to include parenting issues in the pre- and post-nuptial plans, although these are even more likely to be subject to challenge (the best interests of the children may not be supported

by upholding your agreement and the facts of a case may be contrary to your designation of habitual residence). “Mirror Agreements” (agreements with corresponding terms drafted by attorneys in different jurisdictions) are advisable. As long as the client appreciates that there are risks, it is worth a try.

There is a growing tendency to uphold prenuptials in the courts of various (not all) jurisdictions (England now views them as evidence of the parties’ intent rather than a binding agreement, although there is growing support to change this). Post-nuptials may be subject to more or less scrutiny than prenuptials depending on the jurisdiction.

Your client may not want to enter a pre/post-nuptial. It is unpleasant to deal with these before marriage and more so after. However, at least your client will know that there is risk and, after consultation with U.S. and foreign family law counsel, will know the options.

If the client decides to take the risk by doing nothing to protect herself, so be it. It is not a risk you, as her advisor, should *assume* that she wants to take.

Marguerite (Maggie) Smith practices local, interstate and international family law in Seattle. She is chair of the KCBA International Law Section and vice chair of the ABA International Family Law Committee of the International Law Section. Smith is scheduled to speak on asset protection strategies in international cases at the ABA meeting in Brussels, Belgium later this month. She can be reached at margsmith@earthlink.net.