Brexit & Family Law

The UK’s withdrawal from the EU began on 29 March 2017 with the triggering of Article 50 of the Treaty on European Union. The UK Government has now introduced the European Union (Withdrawal) Bill (the “Withdrawal Bill”), containing its proposals for dealing with EU law post-Brexit. The Bill would repeal the European Communities Act 1972, giving effect to the UK’s exit from the EU, while also providing that existing EU law as at the point of Brexit is preserved in domestic law unless and until such time as the UK Parliament (or the relevant devolved legislature) decides otherwise. If the Bill is not enacted, or not enacted in full, there could be significant ramifications for individuals facing the challenges associated with family breakdown.

We have set out below some information for individual clients who may be concerned or affected by potential changes in family law as a consequence of Brexit.

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What aspects of family law will be affected?

It may be presumed that because divorce and child-related matters are largely governed by national law, substantive family law is unlikely to be affected by Brexit. Scotland does have its own rules regarding the care of children and financial provision on divorce. However, certain significant aspects of procedural law will be affected.

These include:

- determining the country which will hear an application for divorce or an application for parental rights or regulating the care of children;
- the recognition and enforcement of Scottish judgements in other EU countries;
- the recognition and enforcement of EU Member State judgements in Scotland;
- the timeframe for dealing with child abduction cases in EU courts; and
- rules on disputes and enforcement in relation to maintenance.

All of these matters are governed by EU Regulations and potentially impacted by Brexit.

How will Brexit affect divorce?

Jurisdiction: where will I divorce post-Brexit?

International relocation is not uncommon for families today. Business needs, family ties and career progression are just some of the factors which lead families to move across international boundaries. The free movement of people within the EU has also meant that there are many Scottish families with roots throughout Europe. When relationships break down in such circumstances, they prompt the question of where proceedings will be raised.

At present, the law governing where a divorce action may be raised is clear and unequivocal. EU Council Regulation 2001/2003, commonly known as Brussels II Bis, deals with jurisdiction in matrimonial matters. It provides a common jurisdiction rule throughout the EU in actions of divorce, separation and nullity of marriage, basing jurisdiction on habitual residence. The court within a Member State where a party is habitually resident therefore has jurisdiction to hear a divorce.
There is a simple, straightforward and efficient rule in place to overcome a conflict if the courts of two different Member States have jurisdiction. The proceedings within the Member State in which the divorce action was first raised will take priority. This is known as the Lis Pendens Rule.

If jurisdiction in divorce actions was no longer governed by Brussels II Bis, the courts in the UK would fall back on the Forum Conveniens rule, under which the court that is best placed in terms of convenience to hear the divorce will have jurisdiction. Deciding which forum is more convenient was, historically, the subject of much litigation. Decision-making in such matters can be costly and slow. Prior to Brussels II Bis, separating couples could find themselves involved in dispute and litigation about where to divorce before the substantive matters of financial provision and childcare even reached the court.

Brussels II Bis provides certainty to separating couples as to where they should divorce, particularly to those who have lived in more than one country within the EU. Clarity and certainty could be lost with Brexit, so replication of Brussels II Bis within UK law is essential to ensure the continuation of this certainty. Nonetheless, there may be difficulty in replicating the same level of co-operation which is currently enjoyed between EU Member States, if no UK-EU agreement on reciprocity can be reached.

The intention of the Withdrawal Bill is to preserve EU law within the UK post-Brexit, therefore retaining the clear and efficient Brussels II Bis rule dealing with jurisdiction on divorce. Habitual residence and Lis Pendens should therefore remain the bases for jurisdiction as far as UK courts are concerned. However, in the absence of a UK-EU agreement on the matter, the courts of other EU Member States may no longer be required to defer to the jurisdiction of UK courts on the same basis as now, meaning that the Forum Conveniens rule could be revived.

Recognition and Enforcement: how will Brexit affect me post-divorce?

Brussels II Bis provides for automatic recognition of divorces concluded in one Member State by other Member States, without the need for further procedure. There is no need for a formal application to be made to a court in another jurisdiction for a divorce to be recognised there. Brexit therefore raises questions about how readily Scottish judgments can be enforced elsewhere in Europe (the Withdrawal Bill should result in EU judgements continuing to be recognised in the UK, unless the view is taken that that rule should be disapplied if not reciprocated).

**How will Brexit affect children involved in adult conflict?**

The ambit of Brussels II Bis is not restricted to adult relationships but also has ramifications for parental responsibilities and rights. Parental responsibilities include custody (known as residence in Scotland), access (contact in Scotland), guardianships and placements in foster or local authority care.

If the UK were to join the EEA (European Economic Area) it would probably join the Lugano Convention, a regime similar but not identical to Brussels II Bis. However, the UK Government’s position is that it will not pursue EEA membership.
Brussels II Bis regulates jurisdiction in relation to matters concerning parental responsibilities in the same way that it does for divorce, though it is the habitual residence of the child that is key. Where more than one Member State would have jurisdiction, Brussels II Bis applies the Lis Pendens rule so that the court in which an action is first raised will hear the case. Again, the Regulation provides certainty and clarity for those with roots in different EU Member States who find themselves in dispute about child-related matters. The issue of which court will hear the case can be answered without delay.

Assuming the Withdrawal Bill replicates Brussels II Bis on Brexit, the UK courts will continue to apply the Lis Pendens rule in these cases. However, whether EU Member State courts will continue to defer to UK courts on the same basis will again depend on whether an agreement can be reached to that effect.

The loss of the Lis Pendens rule would be particularly significant in cases involving children. Time is often of the essence for parents trying to re-establish contact with their children and, of course, for the children themselves, who may find themselves in the midst of adult conflict.

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Enforcement

Brussels II Bis provides certainty in relation to the enforcement of judgements concerning children throughout the EU. Brexit therefore raises a question about how easy Scottish judgements will be to enforce throughout the EU, and vice versa. Again, this is particularly important in cases involving children. A court’s decision might require to be implemented elsewhere in the EU in furtherance of the child’s welfare. If no agreement on continued reciprocity is reached then Brexit could result in complex barriers to enforcement where, at present, there are none.

The 1996 Hague Convention deals with parental responsibility and the protection of children, and will not be affected by Brexit. This may plug part of any gap left by the disapplication of Brussels II Bis, but if co-operation between Member States in relation to the enforcement and recognition of judgements were to be lost or reduced, there could be a potentially negative impact on the welfare of children.

International child abduction and Brexit


The UK and all EU Member States ratified the 1980 Hague Convention, with the UK’s signature to the 1980 Hague Convention entirely separate from its EU membership. Accordingly, the Convention will continue to apply post-Brexit.

However, Brussels II Bis supplements certain provisions of the Hague Convention on international child abduction, in particular by imposing a fairly stringent time limit of six weeks between the inception of a child abduction case and the court's decision. This measure has significant benefits for the abducted child and the parent who has been left behind.

In 2015, the Scottish Government processed 41 Hague Convention applications, 25 of which were incoming (i.e. dealing with children abducted to Scotland) and 16 of which were outgoing (i.e. children removed from this country). 11 had been removed to the EU and five to other parts of the world. In 2016 the Scottish Government processed 13 incoming cases, of which eight were from the EU, and 20 were outgoing cases, including 12 from the EU.
Enforcement of maintenance

The EU Maintenance Regulation (Council Regulation 4/2009) provides clear rules about which Member States have jurisdiction to hear cases concerning maintenance. This Regulation facilitates the enforcement of maintenance orders throughout the EU, permitting an individual to obtain a maintenance order in one Member State and enforce it easily in another. The Regulation also permits a couple to agree where a maintenance dispute can be heard in future before separation is contemplated, providing certainty and autonomy. Couples can enter into a prenuptial agreement in which they agree, in advance, the country in which any application for maintenance should be determined. The Withdrawal Bill should ensure the continuing validity of such agreements in the UK. However, where UK nationals have agreed that an application should be made in another EU Member State, there may be question marks over whether that Member State will accept jurisdiction in the absence of a UK-EU agreement requiring them to do so.

Any deficit which might exist on Brexit could perhaps be addressed by the 2007 Hague Convention. However, this would require independent accession to this Convention, as the UK is currently bound only by virtue of its EU membership. In any event, the Convention has no rules on jurisdiction and its provisions in relation to enforcement are limited.

Key features of the 2007 Hague

- an efficient and responsive system of co-operation between Contracting States in the processing of international applications;
- a requirement that Contracting States make available applications for establishment and modification, as well as for recognition and enforcement, of maintenance decisions;
- provisions which ensure effective access to cross-border maintenance procedures;
- a broadly-based system for the recognition and enforcement of maintenance decisions made in Contracting States;
- expedited and simplified procedures for recognition and enforcement; and
- a requirement of prompt and effective enforcement.

Brexit and Family Law - Brodies Brexit guide. Discover more at brodies.com/brexit-group
Looking to the future

The Withdrawal Bill should avoid the creation of a vacuum in UK family law, by preserving those EU rules that currently deal with the issues set out above. However, there is a pressing requirement to reach agreement with the EU in relation to questions of jurisdiction, recognition and enforcement. Agreeing to preserve the current Brussels II Bis rules in UK law would hopefully increase the likelihood that negotiations on reciprocity would be successful, though the EU may also expect the UK to agree to implement future changes to the regime.

A re-negotiation of Brussels II Bis is currently under way, intended to provide a stronger and more modern Regulation. The revamped Regulation will further harmonise rules and relations between EU Member States. In the absence of agreement the UK would be excluded from that harmonisation, with a negative effect on co-operation and enforcement throughout Europe.

At a time when international relocation is commonplace, it can be of some comfort to separating couples to be clear on where they can raise divorce actions and to know that orders will be enforceable throughout the EU. The terms of the Withdrawal Bill should avoid a post-Brexit vacuum in the domestic UK laws on jurisdiction and judgements, and the UK should continue to have obligations under the relevant Hague Conventions. However, an agreement with the EU on common jurisdiction rules, and the mutual recognition and enforcement of orders, will be needed to avoid a gap in the landscape and a reduction in the longstanding spirit of co-operation between EU Member States that has benefited families.

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