resolution The Law Society

**Joint Resolution and Law Society note to family lawyers in England and Wales of practical recommendations in the circumstances of no deal on EU exit**

**January 2019**

## Overview

*The UK leaves the EU at 11 PM on 29 March 2019, as currently scheduled at the date of this note. There is presently, late-January 2019, immense political turmoil and uncertainty as to the circumstances of leaving, and even the possibility that it may be later. But family lawyers must be able to plan for their clients and their cases. It had been hoped that there might be an EU deal whereby undue urgency would be removed. But as no deal looks increasingly likely, it is appropriate for us to provide guidance to practitioners. Our organisations make these recommendations. However this is only in the context of no deal; if there is any EU deal it is virtually certain that EU laws will continue throughout any transition or similar period so this note would not apply as at the end of March 2019. Specifically this note is not legal advice, opinion or guidance, nor represents policy. Practitioners should consider the relevant international laws and national statutory instruments and where applicable take local advice in other relevant jurisdictions.*

## Introduction

If the UK leaves the EU on 29 March 2019, and there is no deal (i.e. no Withdrawal Agreement), EU law will immediately cease to apply at 11 p.m. on 29 March (referred to as "Exit Day" in this paper). There will instead be reliance upon national law and international laws such as the Hague Conventions. The UK government is introducing a series of statutory instruments to apply in the circumstances, of which the most important are set out in the First Schedule (along with the primary international laws referred to in this note). The Jurisdiction and Judgements (Family) (Amendments etc) (EU exit) Regulations 2019 includes important transitional arrangements. These are extensive and substantial, but due to their length we do not set those out in this paper. Nevertheless, practitioners need urgently to know how to deal with cases, particularly those presently already underway. Hence this joint note. It cannot cover every situation or eventuality. It seeks to deal with the most likely situations. More background is set out in schedules in order to make this note shorter and more accessible.

The European Commission has produced guidance for member states dated 18 January 2019 (referred to in the First Schedule), dealing with jurisdiction, recognition and enforcement in civil justice and private international law. That guidance, as understood, is incorporated in this note. In general terms it states that an EU member state will not give effect to a UK order made before Exit Day unless there was also the required registration procedure concluded before Exit Day. This process varies between divorce, finance and children matters.

This note applies only to England and Wales. Whilst it is believed Northern Ireland will be the same or similar readers are advised to make separate inquiries. Scotland is specifically considering separate arrangements. The note is limited to issues which practitioners should consider before Exit Day. It does not seek to cover matters to be taken into account for clients after Exit Day if there is no deal.

Although stated separately within this note, it must be emphasised in this introduction that the crucial importance of obtaining reliable advice from specialist family lawyers in the EU member state on matters of recognition, enforcement or other proceedings. Notwithstanding uniform EU laws across all of the EU and the EU guidance of 18 January 2019, practice, procedure, time periods and access to the courts or enforcement authorities can vary significantly from country to country. Before taking expeditious steps before Exit Day, it will invariably be crucial for practitioners to ascertain the likely position in the EU member state by obtaining local advice. If an urgent application is needed to the family courts of England and Wales, evidence of this local advice may be required as a precondition. For those clients without existing EU lawyers, an association of specialist international family lawyers is IAFL; details can be found at https://www.iafl.com/.

**Divorce forum**

At the moment, where divorce or similar proceedings could be in England and Wales or in another EU member state, forum is decided on where proceedings are first lodged, i.e. lis pendens. On leaving the EU with no deal, the lis pendens rule will end and forum cases involving an EU member state will be decided on the basis of forum non conveniens, so-called closest connection test, as presently prevails with all England and Wales non-EU forum disputes. This is provided for in the SI referred to in the First Schedule. Lawyers may therefore wish to discuss with their clients whether it is more beneficial to lodge proceedings before Exit Day, relying on the lis pendens, or wait until after Exit Day and rely on the closest connection test. However, it is not known how EU member states will respond after Exit Day in the circumstances where e.g. a divorce is lodged first in England and Wales. Advice from the other country should be taken and, subject to any EU guidance, may differ between member states.

**Divorce jurisdiction**

After leaving the EU and with no deal, the existing divorce jurisdiction found in EU law will continue as national law, save that sole domicile would also now be immediately available in all circumstances. Other than noting this, it is not anticipated that practitioners will need to take any different steps in this regard.

**Recognition of UK divorces in EU member states**

This is an area where practitioners may need to take urgent action in a few distinctive cases.

At present as set out in the Second Schedule, civil divorces are recognised throughout the EU by EU law. On leaving with no deal, this will not apply. Instead roughly half of the EU member states are, with the UK, signatories to the 1970 Hague Convention. These states are therefore highly likely to recognise divorces in England and Wales, although local advice should always be taken. But 15 member states are not parties. Again it is difficult to conceive why a civil divorce from England and Wales will not be recognised in these member states which have automatically recognised previously through EU law. But practitioners should take advice from local lawyers in applicable cases to ascertain if there would be any problems with recognition of the decree absolute, as made by a English or Welsh civil court, after the involvement of a respondent by proper service and fully complying with relevant divorce procedure. These are likely to be cases where one of the parties is a national of these 15 member states or for other good reasons likely to require

recognition of their divorce in that country such as intending to live or work subsequently in the country or have real property there. There are distinctive issues with a few EU member states in respect of same-sex divorces.

In any case in which there is a real concern that the divorce granted in England and Wales may not be recognised in the other member state, practitioners should consider obtaining the decree absolute before Exit Day. If a decree nisi has been granted but the timetable for the decree absolute will be after Exit Day, consideration should be given to abridging time. If a Certificate of Entitlement to a decree has been received and the date given for pronouncement of decree nisi would mean the decree absolute would be after Exit Day, consideration should be given to requesting an earlier pronouncement of the decree nisi and/or abridging time for the decree absolute. If an acknowledgement of service has been filed but no application for decree nisi, it should be made immediately, along with an application for an expedited listing of the decree nisi and abridgement of time for the decree absolute. If a petition has been delivered to the court but not yet received and served, practitioners should consider very carefully whether there will be an undefended divorce and if it is possible in the time to seek an expedited process as above. If divorce proceedings have not yet been commenced, it's unlikely that an expedited process for a decree absolute before Exit Day will be possible but it should be discussed with clients.

EU guidance (referred to in the First Schedule) seems to indicate that recognition and enforcement will depend not just on a UK order having been made before the Exit Day but in having also been registered (as per the Third Schedule). It is not presently clear how this applies in the context of a UK divorce judgment which is entitled to recognition without "any special procedure being required". In practice, some member states require a certificate to be filed, to which see the procedure set out in the Third Schedule. Therefore it is at best prudent and probably necessary to obtain not just the decree absolute but completion of the Annex Certificate by the Exit Date; and indeed to file this with the relevant foreign court.

There are present discussions about what family court procedures will be put in place for these urgent applications pertaining to Exit Day and it is anticipated a notification will be made to the profession soon. But at the least, we anticipate a requirement that these will be consent applications and moreover evidence will be needed of the sufficient connection with the EU member state and to demonstrate the adverse impact in that particular case of possible non-recognition. We understand these applications may be dealt with by a limited group of judges and probably in a few central locations.

**Maintenance orders before Exit Day**

On Exit Day with no deal, the EU Maintenance Regulation will come to an end. This will be (almost) immediately replaced, on 1 April 2019, by the 2007 Hague Maintenance Convention between the UK and the EU member states, as set out in more detail in the Fourth Schedule. Specifically it should be remembered that maintenance in this EU context means needs, as distinct from sharing. It might be that in some particular cases and circumstances there will be benefits in having a needs-based, maintenance order made before Exit Day which would be effective under the Maintenance Regulation rather than an order under the 2007 Convention. It is outside the scope of this note to go into any more particularisation, and indeed local advice should be taken in the applicable member state where recognition or enforcement may be sought. EU member states have been given guidance that recognition

and enforcement of a UK maintenance order made before exit day will only occur if it has also been registered, technically exequatured, before exit day. Having a maintenance order alone will seemingly not be sufficient. The time period for this registration process around member states in the EU can vary significantly.

Nevertheless after taking local advice there may be some cases where it will be of significant benefit to have a maintenance order made before Exit Day (although recognition and enforcement may still be available under the 2007 Convention so consideration needs to be given to whether an order needs to be recognised or enforced under the Maintenance Regulation and thus whether any immediate steps are required). In practice almost all financial orders made in the family courts have some element of needs and most are entirely needs-based. Practitioners should therefore consider making an urgent application for the finalisation of a financial order by the court, sealed and dated, before Exit Day. These will be consent orders. If there is no consent, it is highly unlikely that there will be availability for a listing of a contested hearing before Exit Day. When making the application, practitioners should explain the reason for the expedition, setting out why the order is needed before exit day, probably with local advice about implications of enforcement of an order made either before or after Exit Day and the likely timetable for the registration process in the other country. In seeking a maintenance order before Exit Day, practitioners should therefore explain, by reference to the EU guidance, the practical likelihood of obtaining the registration, exequatur, before Exit Day.

This applies to financial applications such as ancillary to a divorce, Part III MFPA, Sch 1 CA and s27 MCA. It would only be intra-EU cases. Moreover, unlike Brussels II, the Maintenance Regulation applies intra-UK. There might therefore be maintenance cases between UK countries which may be more or less beneficial to be commenced before Exit Day; the EU requirements regarding also completing the registration process would not apply intra-UK. This is most likely to be relevant in some Anglo Scottish cases.

**Financial applications proceeding on sole domicile jurisdiction**

At present, EU law doesn't allow maintenance orders based on sole domicile so courts in England and Wales have no power by EU law to make such orders. More details are in the Fifth Schedule. Power is then in effect limited to making sharing type orders. This restriction will end on Exit Day if there is no deal. Therefore practitioners who have existing, ongoing, sole domicile cases where their client would want to make needs-based claims should give consideration to adjournments until after Exit Day when the court would be able to make needs-based orders. This may be cases subject to the automatic directions on the making of a Form A where completion of the Form E may be different if there are needs-based claims available. It will include an imminent First Appointment where there may be different directions if any consideration of needs claims. It will certainly include any imminent FDR and final hearing where the judge must know the extent of his or her powers i.e. availability of making needs-based orders. Applications for adjournment are unlikely to be by consent. So a realistic time estimate must be given. If a judge is reserved, he or she should be consulted as to whether the reservation should continue or (more likely) the application should be referred to one of the judges dealing with these categories of "Exit Day" cases. Given the costs of preparation for an FDR or final hearing including timetable for briefs, this must be considered urgently.

This is not just intra-EU cases. As the EU restriction applies to all cases, this could be cases with non-EU countries and with no EU involvement.

**Pension sharing after a foreign pension sharing order or agreement**

These orders occur under Part III MFPA and rely for jurisdiction on elements of domicile or residency. But sometimes this jurisdiction is not available, simply because the parties have no ongoing UK connection apart from the existence of a pension here. Accordingly, reliance is made on Art 7 EU Maintenance Regulation, which provides for a so-called "forum of necessity". This will cease to be available on Exit Day if there is no deal. Representations are being made urgently to government for it to be retained in national law. If this doesn't happen, and where reliance is required on Art 7, urgent applications should be made for orders to be made before Exit Day.

**Children**

The position in respect of children orders made in England and Wales before Exit Day is also governed by the EU guidance. How it operates may depend upon the nature of the order. Brussels II allows contact orders and orders for the return of a child to be directly enforced provided there is an Annex III and IV Certificate respectively. The exequatur procedure does not apply to these orders. Obtaining the Certificate is similar to that for a divorce, referred to in the Third Schedule. However the exequatur, registration, process applies to other children orders including e.g. residence or similar type orders. Any consideration of the benefit of expediting the making of a child order before Exit Day must take account of the likelihood of being able also to obtain these different forms of registration or certification. As throughout, it is insufficient to initiate these registration proceedings before Exit Day. They must be concluded before Exit Day. It is anticipated that courts in England and Wales will assist in ensuring the Certificates are issued and sealed as expeditiously as possible before Exit Day, where required.

In considering whether to make any expeditious applications before Exit Day, practitioners will need to consider the respective substantive laws and procedural requirements under Brussels II and 1996 Hague. This is true in respect of both outgoing and incoming cases from the EU.

If there is a present pending request to a relevant Central Authority in relation to a child, it may be wise to check on progress and to ensure that all steps necessary are undertaken before Exit Day, and what is anticipated if not completed before Exit Day.

This note does not cover distinctive issues in respect of public law matters.

**Conclusion**

This has been a rapidly developing area with significant discussions by representatives of the family law professions with government and with judicial initiatives. Guidance to practitioners is likely to be regularly updated. It is also repeated that this is not legal advice or opinion and practitioners must consider each of their cases individually including with advice from lawyers abroad where applicable. Nevertheless it is the hope and intention of this note from our respective organisations to help and assist practitioners at this uncertain time.

*This note has been prepared by David Hodson OBE (dh@davidhodson.com) for the Law Society and Daniel Eames (Daniel.Eames@clarkewillmott.com) for Resolution, with thanks to Maria Wright of Resolution's Brexit Working Party for her input on children law cases.*

**First Schedule**

**Main SIs and international instruments referred to in this note**

The primary statutory instrument in respect of family law arrangements on leaving the EU is The Jurisdiction and Judgements (Family) (Amendments etc) (EU exit) Regulations 2019. It is still passing through Parliament. It covers the primary areas where changes are made to statutes and statutory instruments including transition arrangements for existing cases and it should be considered carefully. Details can be found here: http://www.legislation.gov.uk/ukdsi/2019/9780111176610

Brussels II is EC Council Regulation No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility. It covers jurisdiction and mutual recognition of divorce, judicial separation and similar orders. It covers child abduction. It covers mutual recognition and enforcement of children orders. It can be found here: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF

The Maintenance Regulation is EC Council Regulation No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. It covers the jurisdiction for all EU courts for making maintenance (needs based) orders and agreements and their mutual recognition and enforcement. It can be found here: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:007:0001:0079:EN:PDF

The Hague 1970 Divorce Recognition Convention is the Convention of 1 June 1970 on the recognition of divorces and legal separations. It covers mutual recognition of divorce orders. It can be found here: https://www.hcch.net/en/instruments/conventions/full-text/?cid=80

The Hague 2007 Maintenance Convention is the Convention of 23 November 2007 on the International recovery of child support and other forms of family maintenance. It covers mutual recognition and enforcement of child support and other forms of family-based maintenance arrangements. It does not provide jurisdictional rules. It can be found here: https://www.hcch.net/en/instruments/conventions/full-text/?cid=131

The Hague 1996 Child Protection Convention is the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children. It covers mutual recognition and enforcement of children orders. It can be found here: https://www.hcch.net/en/instruments/conventions/full-text/?cid=70

The European Commission guidance of 18 January 2019 on the withdrawal of the UK and EU rules in the field of civil justice in private international law can be found here: https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_civil_justice_rev1_final.pdf

**Second Schedule**

**Recognition of UK divorces in EU member states**

By Brussels II, all divorces, judicial separations and similar pronounced by civil courts (hence reference to civil divorce) in a member state are automatically recognised by all other member states, with only very narrow public policy exceptions. This will end on exit day if there is no deal.

The 1970 Hague Convention covers recognition of foreign divorces. About half of EU member states are signatories in their own right including the UK. But some are not: these are Austria, Belgium, Bulgaria, Croatia, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, Romania, Slovenia and Spain. There can be distinctive issues e.g. with recognition in Ireland if a UK divorce is obtained and the parties remain domiciled in Ireland, hence the importance always of local advice on the particular circumstances of a case.

**Third Schedule**

**Divorce registration**

Where a party wishes to have their Decree Absolute recognised in another EU Member State they should complete and file two copies of the certificate at Annex I of Brussels II (see Article 39 of Brussels II), attaching a copy of the relevant Decree Absolute to each copy of the annex, with the court which made the Decree Absolute. The court should then sign/seal the annex and certify that the Decree Absolute which is attached to the annex is a true copy of the original. Once sealed/signed, one annex and certified Decree Absolute should be returned to the applicant and the other should be retained on the court file. It is understood that a fee of £10 applies in relation to each document the court is required to certify (i.e. £20 in total). If the Respondent failed to complete the Acknowledgment of Service in the divorce proceedings, evidence that the Respondent was served with or accepted the divorce proceedings should also be attached to the annex (see Article 37(2) Brussels II). Invariably this annex certificate would then be sent to the other court in the EU. Practitioners should take into account that this procedure to obtain the certified annex can ordinarily take at least 2-3 weeks and sometimes more, varying between courts around the country.

**Fourth Schedule**

**Recognition and Enforcement of maintenance orders**

The EU Maintenance Regulation provides for the automatic recognition and enforcement of maintenance orders around the EU. The exact procedure for enforcement varies, dependent

upon the country which made the original maintenance order. Recognition and enforcement of UK orders in any EU member state requires a preliminary registration process known as exequatur. Under EU law, maintenance means needs-based provision. It is specifically wider than periodical payments maintenance. It is needs orders as distinct from sharing orders. Requests for recognition and enforcement around the EU can be direct in the member state or via central authorities. The EU has stated that enforcement requires not only the making of a final order but all steps for its registration before exit day. Practitioners should take local advice on what may be required and likely timetable for registration.

The Hague 2007 Maintenance Convention is similar to the EU Maintenance Regulation although does not have the jurisdiction elements. The UK is presently a party as a member of the EU but on leaving the EU with no deal will on 1 April 2019 be a signatory in its own right. The UK will therefore have direct relationship with EU member states under this Convention. Maintenance orders will be recognised and enforced although with a slightly different procedure. More detail is beyond the scope of this note. Practitioners should take local advice on whether and how maintenance orders made in the UK will be recognised and enforced if made after exit day and on the recognition and enforcement process using the 2007 Convention.

## Fifth Schedule

## EU Maintenance Regulation jurisdiction

The EU Maintenance Regulation, as part of UK domestic law, sets out jurisdiction in all family law cases for the making of maintenance orders. Under EU law, maintenance means needs i.e. needs-based provision as distinct from sharing. This jurisdiction for the making of maintenance orders applies in all cases and is specifically not limited to intra-EU cases. Fundamentally it provides that family courts have no power to make needs-based orders if the only jurisdiction, connection, is sole domicile (or sole nationality in all EU member states apart from the UK and Ireland). Therefore if the only basis of jurisdiction of the UK family court e.g. following a divorce as the basis of the Form A, is sole domicile then the court has no power to make needs-based orders. This will end on exit day if there is no deal. Naturally it follows that if the applicant in the existing proceedings wants needs-based orders, it is in their interest for the matter to be dealt with after exit day (if no deal) when the restriction is removed.