

The Brexit Papers



Family Law

Paper 6



Bar Council Brexit
Working Group
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**THIRD
EDITION**



Brexit Paper 6: Family Law

Summary

Huge numbers of families in which the partners are from different Member States will be affected by Brexit in relation to divorce and children matters. UK citizens have benefitted in particular from two directly applicable EU Regulations:

- Brussels IIa (Regulation 2201/2003) which covers divorce and custody of children, both in disputes between parents and also where local authorities are involved, and
- The Maintenance Regulation (Regulation 4/2009) which covers disputes about family maintenance obligations.

These instruments provide certainty about jurisdiction, helping affected families to determine where issues concerning the welfare of children, divorce and maintenance can be resolved. They also assist with enforcement and cooperation between authorities on the protection of children's welfare.

Other conventions and measures would fill some of the gaps if Brussels IIa were to fall away, but not all, and the international protection of children would be weakened by its loss. The 2007 Hague Convention on maintenance, to which the UK could accede, would to a much lesser extent fill the gap left by the Maintenance Regulation.

- We urge the Government to replace the Brussels IIa and Maintenance Regulations on the same basis as the Recast Brussels Regulation and to ensure that the agreement in relation to the Brussels IIa Regulation will apply equally to the proposed Recast Brussels IIa Regulation when that comes into force.
- We also urge the Government to ensure that the new agreements will come into force seamlessly on Brexit in order to protect the welfare of children and the stability of families.

The Impact of Brexit on Family Law

1. English family law is particularly affected by two directly effective EU Regulations:
 - 1.1. Regulation 2201/2003, known to English family lawyers as 'Brussels IIa'. This Regulation establishes the jurisdictional framework (a) for divorce and (b) for issues about children, both in the private law sphere (disputes between parents and other family members); and also in public law cases where local authorities are involved. This Regulation also has provisions which reinforce the 1980 Hague Convention on international abduction of children.
 - 1.2. Regulation 4/2009, known as the 'Maintenance Regulation'. This establishes the jurisdictional framework for all disputes about family maintenance obligations.
2. Both these Regulations have the same origin as the 'Recast Brussels Regulation' and they share many features with it. In particular they have similar provisions for:
 - 2.1. Recognition and enforcement in other Member States
 - 2.2. Protective measures
 - 2.3. Jurisdictional rules
 - 2.4. In the case of the Maintenance Regulation (but not Brussels IIa) the right to enter into exclusive jurisdiction clauses, and
 - 2.5. 'First in time' rules, so that where proceedings have been commenced in one Member State, the courts of other Member States are required to stay any subsequent equivalent proceedings until the jurisdiction of the first court has been established.
3. One feature of both Brussels IIa and the Maintenance Regulation is that each Member State is required to designate a Central Authority. The Central Authorities have roles both in cross-border enforcement of orders and (in Brussels IIa) in the exchange of information and general cooperation in matters concerning the welfare of children.
4. The Brussels IIa Regulation is currently undergoing a revision process similar to that which led to the Recast Brussels Regulation. The UK Government opted into the negotiations about this process in October 2016. It is expected that the 'Recast Brussels IIa Regulation' will come into force at some point in 2019.
5. Both Brussels IIa and the Maintenance Regulation have presented some difficulties since they respectively came into force. The interaction between them is sometimes obscure. However, they have been shown to have enormous advantages which far outweigh these difficulties. For example:
 - 5.1. Certainty about jurisdiction. The millions of couples who are of different nationalities and/or live in a Member State other than their own can readily find out where issues concerning the welfare of children, divorce and/or maintenance can and should be resolved.

- 5.2. Ease of enforcement. Orders concerning arrangements about children and also about maintenance must be recognised and enforced in other Member States.
- 5.3. Cooperation between Central Authorities is a valuable bulwark for the protection of children's welfare.
- 5.4. Protective measures pending resolution of disputes are also a valuable tool for the protection of children's welfare.
6. If either Brussels IIa or the Maintenance Regulation were to cease to have effect in the UK without a replacement framework being in place, there are other international instruments which would or could help to fill the gaps:
 - 6.1. The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (which the UK has already ratified) would significantly (but not entirely) fill the gap left by the children aspects of Brussels IIa. The international protection of children would be weakened by the loss of Brussels IIa.
 - 6.2. The 2007 Hague Convention on maintenance would to a much lesser extent fill the gap left by the Maintenance Regulation. The 2007 Convention does not contain jurisdictional rules. The UK is currently bound by the 2007 Convention as a result of membership of the EU. Once the UK leaves the EU, it will need to accede to the 2007 Convention on its own account. The EU will then be required to accept the UK's accession, but there may be a risk of a hiatus before that happens.
 - 6.3. If the UK were to ratify the Lugano II Convention post-Brexit, this would fill the gap left by the Maintenance Regulation to a much greater extent.
7. There would nevertheless be major gaps if the two Regulations fell away, including:
 - 7.1. The jurisdictional rules for divorce in Brussels IIa, together with the 'first in time' rule summarised above.
 - 7.2. Unless the UK ratifies the Lugano II Convention, the jurisdictional rules (and first in time rule) in the Maintenance Regulation.
8. The loss of the first in time rules would have an important practical consequence. At present when competing divorce and/or financial proceedings are issued in England and in a country which is not a Member State, the English court will decide whether England or the other country provides the *forum conveniens*, i.e. the place where the issues can more suitably be tried. This is a very fair system, but it is slow, expensive, and places additional demands on court time. If the first in time rules in the EU Regulations fell away, *forum conveniens* principles would be applied as between England and the continuing Member States (as they used to be before the Regulations came into force).
9. The legal systems of different Member States in relation to matrimonial finance provide very different outcomes. Many spouses would have an incentive to argue about which country was the *forum conveniens*. In view of the number of couples who have a

substantial connection both with England and with another Member State, there would be likely to be a large increase in the number of disputes of this kind, placing a major additional burden on the already overstretched family court system.

Recommendations

10. The UK Government should:

- Enter into agreements to replace the Brussels IIa and Maintenance Regulations on the same basis as the agreement recommended in relation to the Recast Brussels Regulation.
- Ensure that the agreement in relation to the Brussels IIa Regulation will apply equally to the proposed Recast Brussels IIa Regulation when that comes into force.
- Ensure that the new agreements will come into force seamlessly on Brexit in order to protect the welfare of children and the stability of families.

Anticipating other EU developments that could affect English family law

11. This paper would not be complete without a mention of other EU activities that may soon affect family law in England and Wales.

12. In July of this year, the EU adopted Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union. This regulation will do away with the need for authentication and translation of a range of civil status documents, including marriage and divorce certificates, adoption certificates etc, when persons are moving from one state to another. Its value added is clear. The main elements are due to enter into force in February 2019, which may well precede formal Brexit.

13. Having received several petitions, including complaints against UK authorities, the European Parliament is pressing for EU action on cross-border and forced adoptions.

14. These are just two examples of further family law-related EU developments that may become live, and the merits of which will therefore need to be addressed, while the Brexit process is underway.

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