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

Further considerations

March 2019

Introduction

This note supplements our joint note published in January 2019.

Again, 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.

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). It is possible that Exit Day may be pushed back and if so, references to 'Exit Day' should be read as such later date as may be set.

After Exit Day, instead of using EU law, we will rely upon national law and international instruments such as the Hague Conventions. The UK government has been introducing a series of statutory instruments to apply in the circumstances, of which the most important are set out in the First Schedule to our previous joint note.

The most significant is The Jurisdiction and Judgements (Family) (Amendments etc) (EU exit) Regulations 2019 ('the main Brexit SI') which include important transitional arrangements. Some immediate concerns and action points arising from this SI were set out in our previous joint note. This note does not repeat those points and deals only with further developments and considerations which have come to light since. The main issues are:

- The difference in the jurisdictional grounds for same-sex divorces and civil partnership dissolutions
- The update regarding jurisdiction for Schedule 1 claims
- The need to consider carefully the difference in the bases of jurisdiction for various types of application post-exit consequent upon the repeal of the Maintenance Regulation (our previous note had focussed more on recognition and enforcement of maintenance orders).

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 (once again) is mainly 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. It remains the case that under the transitional provisions in the main Brexit SI, ongoing proceedings in England and Wales will continue to apply the EU regulations but there can be no guarantee as to whether cases which are underway in other EU member states on exit day will also continue to apply the EU regulations where the UK courts or UK nationals are involved. Practitioners must consider taking local advice in the other country concerned.

Same-sex marriages and civil partnerships

Our previous note made reference to the jurisdictional grounds that will apply for petitions for divorce and civil partnership dissolutions. In the main Brexit SI, the Government has elevated sole domicile to a primary ground of jurisdiction but it seems that in making the relevant changes to our domestic legislation via the main Brexit SI, sole domicile remains a *residual* rather than primary ground of jurisdiction for same sex divorce and civil partnership dissolution. This has been raised with the Government and it is hoped that steps will be taken to fix this apparent omission. Practitioners who have clients who would have wished to rely on the sole domicile ground as the basis of jurisdiction for a same-sex divorce or civil partnership dissolution after Exit Day will now need to wait until this is remedied.

Schedule 1 jurisdiction

The Government has recently laid a further draft SI in respect of Schedule 1 of the Children Act, namely The Jurisdiction and Judgments (Family) (Amendment etc) (EU Exit) (No 2) Regulations 2019. This new SI allays the concerns that practitioners had raised and more or less replicates the position under the Maintenance Regulation in respect of jurisdiction for Schedule 1 claims. This is a welcome development and ensures that all forms of remedies can be sought for children, whether they live here or abroad and there will be specific provision in Schedule 1 setting out the jurisdictional bases, removing the uncertainty following the loss of the Maintenance Regulation. It means that there need perhaps not be the rush to issue Schedule 1 proceedings prior to Exit Day as had previously been considered.

Different jurisdictional bases

Maintenance consequent upon divorce

It is assumed, but not confirmed explicitly in the amendments due to be made to the DMPA 1973 and MCA 1973, that the jurisdiction for maintenance as part of financial remedies sought alongside a divorce will be based on the jurisdiction for the divorce. By way of reminder, these grounds are the same as those in Brussels IIa Article 3 but 'joint applications' are removed (as procedurally this is not possible under our rules) and 'sole domicile' is a primary ground alongside the other grounds, rather than a residual option.

Practitioners should also be mindful that any maintenance orders based on a divorce using the 'sole domicile' ground of jurisdiction will not be recognisable and enforceable under the 2007 Hague Convention, which does not recognise 'domicile' as a connecting factor required to use that Convention to recognise and enforce decisions (see Article 20). At present under the Maintenance Regulation, there is no jurisdiction for maintenance based on sole domicile alone (see our previous note) so whilst that restriction will end when the Maintenance Regulation no longer applies, you should be aware that there may still subsequently be problems for recognition and enforcement.

Variation of maintenance

Whilst Schedule 1 applications (see above) and the other types of application that follow below (Part III, failure to maintain and alteration of maintenance agreements) will have the jurisdictional bases set out in their respective statutes (as amended by the main Brexit SI), MCA 1973 section 31 which deals with variation of maintenance does not set out the basis upon which the court will have jurisdiction to exercise its powers. This is a notable lacuna and will give rise to uncertainty after Exit Day. Practitioners with variation cases where there is jurisdiction at present under the Maintenance Regulation will need to consider whether to issue prior to Exit Day to avoid any such uncertainty. Conversely, where there is no jurisdiction at present under the Maintenance Regulation but the original order was made by the English court, practitioners should be aware that it is possible that the English court may regain its previous inherent power to vary is own orders. The Government has been invited to consider legislating for this lacuna, as it has done with Schedule 1 claims.

The only exception to the above of which practitioners should be aware is the application of Article 18 of the 2007 Hague Convention. If we leave without a deal, given the UK has already ratified the 2007 Convention, it will apply post-Exit. There are no direct rules of jurisdiction in the 2007 Convention save for Article 18, which provides for a limitation on bringing variation proceedings: if the creditor remains habitually resident in the state where the decision was made, modification proceedings cannot be brought elsewhere unless certain criteria are apply. It is understood that this Article 18 limitation will apply across the board in relation to modification of *any* maintenance proceedings. This is the same as the current situation under Article 8 of the Maintenance Regulation but is noted as an important

point for practitioners to consider in relation to jurisdiction in future in light of the suggestions made in this document.

Financial Claims After a Foreign Divorce

These claims (which include orders for pension sharing) are brought under Part III of MFPA 1984. The courts of England and Wales have jurisdiction if either party is domiciled in England and Wales, or has been habitually resident there for a year, on the date of the application for leave or the date of the foreign divorce (or where either/both has an interest in a property which was at some time the matrimonial home). At present, in matters of maintenance, the provisions of the Maintenance Regulation apply in addition to give jurisdiction where the creditor or defendant (respondent) is habitually resident i.e. without limit of time. After Exit Day, we will lose the Maintenance Regulation overlay. Therefore, if you have a client who has been habitually resident in England and Wales for less than a year and is not domiciled here (or whose former spouse has been habitually resident in England and Wales for less than a year and is not domiciled here), consideration should be given as to whether they should bring their claim under Part III before Exit Day.

Furthermore, if you have a client who wishes to rely on Art 7 of the Maintenance Regulation (whether for a pension sharing order or otherwise), which provides for a so-called "forum of necessity", this will cease to be available on Exit Day if there is no deal. Where reliance is required on Art 7, urgent applications should be considered before Exit Day.

Failure to maintain proceedings

These proceedings are brought under section 27 of the MCA 1973 and can be utilised, for example, if another jurisdiction has been seised of the divorce but not under the Maintenance Regulation, as in the case of *Villiers v Villiers*[2018] EWCA Civ 1120 where Scotland was seised of the divorce but no maintenance claim had been made. After Exit Day it will only be possible for an applicant (unless they or their spouse are domiciled here or their spouse is resident here) to bring such a claim if they have been habitually resident in England and Wales for 12 months. If the applicant cannot satisfy that time criteria, that could mean several months of financial hardship. Therefore where a claimant has not been habitually resident in England for 12 months and is not domiciled here, and the respondent is abroad and not domiciled here, practitioners will need to consider whether to issue the claim before Exit Day.

Alteration of maintenance agreements

Whilst perhaps rarely used, MCA 1973 section 35 provides for the alteration of maintenance agreements. At present jurisdiction for such applications is based on the provisions of the Maintenance Regulation but after Exit Day, an application will be able to be made where both parties are domiciled or where both parties are resident (note not 'habitually resident'). Therefore if you have situation where only one of the two parties is habitually resident in England and Wales (and both parties are not domiciled in England and Wales) then you may wish to consider an application before Exit Day if the creditor or defendant (respondent) is habitually resident here under Art 3(a) or (b) of the Maintenance Regulation because otherwise, after Exit Day, you would need *both* to be resident or domiciled here.

Nuptial Agreements

For those practitioners in the middle of drafting nuptial agreements with an international aspect, consideration may wish to be given to your client formally entering into a 'choice of court' agreement (in accordance with Art 4) in respect of claims under the Maintenance Regulation before Exit Day. It is not clear as to how the remaining EU 27 will treat such an agreement if there is an election for England and Wales but the main Brexit SI provides in its transitional provisions that the English and Welsh Courts will consider that agreement binding, even if proceedings are commenced post Exit Day.

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