



Brexit and family law (2019)

17th September 2019

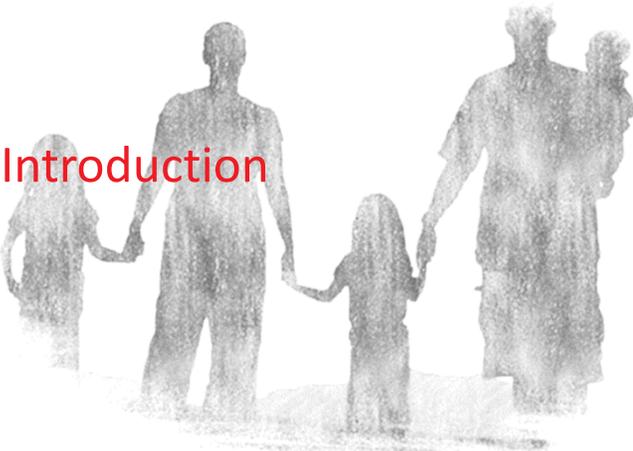
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Brexit and family law (2019)

The law as stated during this webinar is up to date as of **10th September 2019**

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Introduction

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Paul Infield
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36 Group

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All change!

How will Brexit affect family finance law?

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The Current Position

- Brussels IIA/bis/Revised
- Maintenance Regulation

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Possible scenarios

- No Brexit
- Hard Brexit
- EU law immediately ceases to apply
- UK introduced Sis
- See, in particular, The Jurisdiction and Judgements (Family) (Amendments etc) (EU exit) Regulations 2019 re transitional arrangements
- European Commission guidance:
https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_civil_justice_rev1_final.pdf
- Something in-between

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Divorce: Forum

- Currently
 - Lis pendens i.e. where proceedings first lodged
- After Exit Day
 - Forum non conveniens i.e. closest connection test

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Divorce: Jurisdiction

- Same rule but sole domicile immediately available
- Except in same sex divorce/civil partnership dissolution
 - Where it is only a residual ground

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Divorce: Recognition

- Brussels II revised
 - Automatic recognition
- Hague Convention 1970
 - Some EU countries not signatories
- May lead to problems re recognition
 - Do you need to file a certificate?

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Maintenance: Currently

- Maintenance Regulation
 - Automatic recognition
 - Enforcement procedures vary between EU states
 - Require registration process – exequatur
- Means needs based provision – not sharing orders
- Wider than periodical payments

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Maintenance after Exit Day

- Maintenance Regulation ends
- Replaced by the Hague Maintenance Convention 2007
- UK maintenance orders only recognised and enforced in EU states if registered before Exit Day
- Maintenance Reg. applies intra-UK
- Financial claims after foreign decree
- Variation of maintenance

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Pension Sharing Orders

- Can be made under Part II MFPA1984 relying for jurisdiction on elements of domicile or residency
- But if parties have no connection with England & Wales other than pension?
 - Currently use Art 7 Maintenance Reg.
 - That will cease on Exit Day

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Nuptial Agreements

- 'Choice of court' clause
 - See Art 4 Maintenance Reg.
 - But n.b. not clear how EU 27 will treat such clauses
 - But main Brexit SI transitional provisions make such agreements binding in England & Wales even if proceedings commenced post Exit Day

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Schedule 1 Children Act claims

- The Jurisdiction and Judgments (Family) (Amendment etc) (EU Exit) (No 2) Regulations 2019
 - Similar to position under the Maintenance Regulation re jurisdiction

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Still No Certainty

How will Brexit affect children family Law ?

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Introduction

- 2017 House of Lords European Union Committee urged the Government to consider the impact of Brexit on Family Law
- Becoming clearer (at least in terms of no deal Brexit scenario what will happen) but still considerable uncertainty

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The Current Position 1

- Brussels IIA/bis/Revised (Council Regulation No.2201/2003) provides a framework of cross-border cooperation and communication between member states
- BIIR provides rules
 - to decide which member state's court has the power to act (jurisdiction) in matters relating to parents responsibility
 - on recognition and enforcement of judgments as between member states in relation to public, care and supervision orders and and private law child arrangement and special guardianship orders
 - on the return of children wrongfully removed or retained (abduction) in other member states which supplements and and takes priority over (where it applies) the international 1980 Hague Child Abduction Convention (The Hague Convention on the Civil Aspects of International Child Abduction 1980)
 - on cooperation between central authorities (administrative bodies sending and receiving applications and requests between countries) in matters of parental responsibility to assist in dealing with applications and requests between parties in different EU member states

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The Current Position 2

- Brussels IIR came into force in its current form in March 2005
- It is in the process of being recast. On the 25 June 2019 the Council of the EU adopted a revision of the Regulation. New rules will apply 3 years after the publication of the Regulation in the official journal
- Brussels II R is set of private international law rules about procedure. Does not affect the substantive family law in each country. Each UK jurisdiction has always set their own substantive law and only apply their own laws in family cases. Each UK jurisdiction has always applied its own principles to determine child arrangements, when public law orders can be and when to grant protection from domestic violence.
- BIIR sits alongside but (where it applies) takes precedence over older existing instruments such as:-
 - The 1980 Hague Convention on the Civil Aspects of International Child Abduction
 - The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of parental Responsibility and Measures for the Protection of Children

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Leaving the EU

- On exit day BIIR will no longer apply according to the Regulations made in the exercise of powers conferred by s.8(1) of the European Union (Withdrawal) Act 2018
- Jurisdiction and Judgments (Family) (Amendment etc) (EU Exit) Regulations 2019 come into force on exit day
- Regulation 3 revokes BIIR concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility.
- BIIR will become “retained EU law” under the Withdrawal Act but in the absence of any agreement between the EU and the UK on the continued operation of the BIIR post –exit it will cease to operate reciprocally and effectively
- The UK cannot legislate to restore this reciprocity
- Alternative arrangements for the matters covered by BIIR are therefore required post exit.

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What if no alternative arrangements are put in place? The No Deal Scenario

- The existing instruments
 - The 1980 Hague Convention
 - The 1996 Hague Convention
- Would remain applicable between the UK and member states and will go some way to fill the legislative vacuum that Brexit will create

BUT

- Existing instruments will not fill the gap entirely and will be problematic to implement
- The Government’s view (not shared by many family lawyers) is that where there are Hague Conventions they provide an alternative to the EU legislation and as they are already operated with with non-EU contracting states courts and practitioners are familiar with them.

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Problems with relying on the Remaining Instruments (1)
 1996 Hague Convention Parental Responsibility and Protection of Children

- The 1996 Hague Convention came into force in the UK after significant delay 1 November 2012
- All EU member states have now ratified it
- It does not offer the automatic enforcement of contact orders that BIIR offers
- Consequence is the potential necessity for mirror orders in the other member state
- Member States will not be as familiar with the recognition process under Hague as they are under BIIR so delays likely
- Could not be used for protective measures for unborn children Art 4
- No overarching body like the CJEU in respect of the Convention. Each country has to apply the Convention as best it can giving rise to lack of uniformity
- No corresponding provision to Art 9 BIIR under Hague 1996 – continuing jurisdiction for 3 months after a move from one country to another
- The Art 7 Hague 1996 retention of jurisdiction over a child wrongfully removed mirrors Art 10BIIR but there is no so called “second bite of the cherry”

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Problems with relying on the Remaining Instruments (2)
 The 1980 Hague Convention on Child Abduction

- The 1980 Hague Convention on Child Abduction was introduced into the law of England and Wales by the Child Abduction and Custody Act 1985
- The EU provisions significantly enhance the 1980 Hague provisions on child abduction.
 - Stricter timetable
 - Back up mechanism in BIIR that provides for the child’s home country to make a final determination about what is best for the child
- Again the unfamiliar process when dealing with cases concerning the UK and the remaining EU member states will cause delay

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Ongoing Cases

- The Jurisdiction And Judgments (Family)(Amendment Etc.) (EU Exit) Regulations 2019
- Regulation 8 provided that the amendments and revocations made by the Regulations do not apply to matters arising before Exit day
- So the BIIR will still apply to ongoing cases where the court (UK or other Member State) was seised of the matter ie. when the application is lodged with the court Art. 8 (2)

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Alternatives to the No New Arrangements Scenario

- UK - try to retain full full reciprocity
 - Problem is that the UK cannot simply legislate to do this. The UK would be a non-member state and therefore the EU instruments would need to be amended with the cooperation of the remaining member states in order to implement this option.
 - An advantage (depending on viewpoint) UK would remain subject to the CJEU providing a central arbiter about the interpretation of the provisions so that there is consistency between the UK and remaining Member States.
- Domestication without full reciprocity
 - This option is extremely problematic. Many of the provisions of BIIR require reciprocity. In effect a "one way street"
- Bespoke arrangement
 - This will take a very long time to consider, negotiate and implement
- At present EU Regulations have a direct effect. We would need to copy them into UK domestic law in order to retain.

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Other EU Instruments apart from BIR which UK will lose or potentially lose on Brexit and other consequences

- Domestic Violence
 - Regulation on mutual recognition of protection measures in civil matters (606/2013)
 - Measures to protect those at risk of domestic violence or harassment
- European Judicial Network in Civil and Commercial Matters (2001/470/EC)
 - Sharing Information – The European Judicial Network
- The Court of Justice of the European Union
 - Role of the CJEU post Brexit

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Conclusion

- Whatever happens in the event of Brexit the consequence is likely to be that the potential for complex, protracted and expensive litigation is greatly enhanced
- Not in the interests of the families and particularly the children of those families we seek to serve

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Upcoming Family webinars

- Cohabitants – law and civil procedure (2019) – **2nd July 2019**
- Financial provision update (2019) – **23rd July 2019**
- Recent developments in public children (2019) – **13th December 2019**
- Family Law – End of year round-up 2019 – **11th December 2019**



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On Demand Family webinars

- Pensions for family lawyers – Available until 16th February 2020
- Divorce procedure: including service of proceedings and jurisdictional issues – Available until 9th March 2020
- Financial provision update – Available until 22nd June 2020
- Evidence and disclosure in family proceedings – Available until 29th June 2020
- Private children update – Available until 4th July 2020
- Vulnerable witnesses in care proceedings – Available until 9th July 2020
- Public children update – Available until 10th July 2020
- Civil Procedure Rules for family lawyers – Available until 21st September 2020
- Dealing with offshore assets (including trusts) in financial remedies – Available until 19th October 2020
- Issues in surrogacy – Available until 16th November 2020
- Financial provision after overseas divorce (under Part III of the Matrimonial and Family Proceedings Act 1984) – Available until 29th November 2020
- Recent developments in financial procedure (2019) – Available until 30th January 2020
- Advising the family business: love, leadership and loss (2019) – Available until 13th March 2021
- Vulnerable witnesses in family proceedings – Available until 2nd April 2021
- Recent developments in private children (2019) – Available until 1st May 2021
- Cohabitants – law and civil procedure (2019) – Available until 2nd July 2021

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