

Justice Committee

Brexit and family law

Written submission from Lucia Clark, Morton Fraser LLP¹

Size of issue

There are approximately 140,000 international divorces and 1,800 cases of child abduction within the EU each year. Family law is not top of the legislative priority list, but it affects matters at the heart of the lives of a large number of adults and children.

Aim

Families dealing with international disputes need clarity in terms of which court will deal with their dispute, and how any decision of that court will be recognised and enforced by the court of another country.

Current situation

The EU does not affect the internal law applied by the courts in Scotland on family matters (such as how to decide contact between separated parents, or how assets should be divided upon divorce). It does affect matters of **jurisdiction** (which national court should decide which issue), **recognition** (if a court of another EU country will recognise a decision of a Scottish court, and vice versa) and **enforcement**. The EU (Withdrawal) Bill will change that.

The main Regulations affecting family law are:

Brussels IIa (Council Regulation 2201/2003), which deals with jurisdiction for divorce; and jurisdiction, recognition and enforcement of matters relating to children. The child matters cover private disputes between parents; cases where local authorities seek child protection measures; and child abduction.

The Maintenance Regulation (Council Regulation 4/2009), which deals with jurisdiction and enforcement for cases relating to maintenance between adults and for children.

Options

There are several options for dealing with family law matters on Brexit:

Option 1 - Replicate the EU instruments in our own domestic law

- This is the effect of the EU (Withdrawal) Bill as it stands.

¹ I have been put forward by the Family Law Committee of the Law Society of Scotland for this round table evidence session. I would also note that I am a member of the International Committee of Resolution (the English Family Law Association). I would however wish to make clear that the views expressed in this paper and at the round table session are my own personal views, rather than being representative of the Law Society of Scotland, or Resolution, or Morton Fraser LLP.

- Cons: This would be extremely problematic for certain areas of family law, particularly jurisdiction on divorce. The current Regulation list 7 different connecting factors between an EU state (or territorial unit for Scotland/England/NI) and a divorcing couple, and a party seeking divorce can select which of these he/she wishes to rely upon. The court where divorce proceedings are raised first "wins". The EU rules work because there is reciprocity - in terms of the Bill, the UK would continue to apply EU family law, but other EU states would not be obliged to enforce UK decisions. Under the Bill, if a German/Scottish couple were divorcing, a Scottish court would be obliged to let German divorce proceedings go ahead, if these were validly raised first. The German court would have no such obligation to let Scottish proceedings go ahead, even if raised first, as the rules would apply in a one-sided way. There may be two sets of court proceedings about the same divorce, with irreconcilable judgments.

Option 2 - Replicate the EU instruments in our own domestic law and maintain a reciprocal arrangement between the UK/Scotland and other member states

- This is an attempt to maintain the current system. It would involve a negotiation with the EU to continue to apply the Regulations on a reciprocal basis.
- This is the option which has been suggested as the best way forward jointly by Resolution, the International Academy of Family Lawyers and the Family Law Bar Association, and subsequently endorsed by the Scottish Advocates Family Law Association. The proposal is that the CJEU will continue to provide decisions binding on the UK in this area, and the UK will continue to have input on future changes to these EU Regulations. See the paper here: <http://www.advocates.org.uk/media/2609/brexit-and-family-law.pdf>
- Pros: The current EU system does provide clarity. We would keep the benefit of reciprocal provisions.
- Cons: It is uncertain whether the UK remaining bound by the CJEU, or having input on future changes, will be possible to negotiate. Without the latter, there is a risk that the UK would be bound by future changes to EU Regulations with no veto or input on these changes. An alternative is for the UK to be bound by EU law frozen as at March 2019, while the EU gradually changes the provisions that apply between EU member states. There will be an update later today on transitional arrangements, but the EU position (per press release of 29 Jan 18) that EU law will continue to apply during the transitional period, together with any changes to that law, with no participation in decision-making from the UK.
- There are also aspects of the current EU law which don't work well for UK families - for divorce cases, the race to be first to raise proceedings discourages mediation, and can favour those wealthy enough to take advice. The Maintenance Regulation can result in cases being heard in courts in two different countries, with the court in one country dealing with divorce and another with maintenance. The Maintenance Regulation has also caused problems with getting jurisdiction for maintenance in Scotland, where both

spouses are expats living outwith the EU, but who still have sufficient links to Scotland to divorce here.

Option 3: Negotiate an alternative bespoke arrangement with the EU

- Pros: The opportunity to select the parts of the EU Regulations that work well for Scottish and UK families, and lose the others (as briefly summarised above).
- Cons: It would likely take a long time to consider, negotiate and put into place - longer than early 2019, given other Government priorities. It also relies on the EU being willing to enter into such negotiations.

Option 4: Do not replicate EU law into UK law; rely on other international treaties or existing Scots law

- This will work well for some areas, where the Hague Conference has an international Convention; there are some areas where this will not work well; and some work to be done to ensure the "fallback" provisions are in place.
- *Child abduction* - Provisions in Brussels Ila are based on the 1980 Hague Convention on Child Abduction, with some differences. Would fill the gap.
- *Parental and child (actions for contact and residence)* - Provisions in Brussels Ila are based on the 1996 Hague Convention, with some differences. Would largely fill the gap. Needs UK legislation to ensure this will continue to apply.
- *Maintenance* - has similarities to the 2007 Hague Maintenance Convention. Would fill many of the gaps left by the enforcement provisions of the EU Maintenance Regulation. The 2007 Hague Convention has no jurisdiction provisions; it was also ratified by the EU, so clarification needed as to the process for the UK to ensure this can remain in place.
- *Recognition of divorce* - 1970 Hague Convention is not a complete substitute, as it has not been ratified by many countries. Unless the rest of the EU ratifies this, would be relying the internal law of other EU countries to recognise Scottish decrees of divorce.
- *Jurisdiction for divorce* - No international convention. Would rely on Scots law as it currently applies to conflicts between the Scotland and elsewhere in the world (same law applies between England and rest of world). This is "forum non conveniens", where the Scottish court makes a discretionary decision as to whether it is best placed to hear the case or not. Expensive, time-consuming, and lacks clarity - including no guarantee that the court of the other country will respect the decision of the Scottish court.

Option 5: combination of 2, 3 and 4

- Agree a continuation of EU law (option 2) for a transitional period - perhaps 2 or 3 years. Use that time to consider and negotiate a bespoke treaty in the

areas where that is needed (e.g. divorce jurisdiction) and rely on other international treaties (Hague Conventions) where this is not.

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