Joint Resolution and Law Society Note to family lawyers in England and Wales ahead of the end of the Brexit transition period

November 2020

This note replaces our previous joint notes published in January 2019 and March 2019.

It largely covers the position in respect of divorce and finance matters and does not cover private and public children proceedings. Please see the note published by Resolution and the Association of Lawyers for Children.

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. Practitioners should also refer to the Government's published advice on Brexit and family law, and guidance produced by the EU.

Introduction

The UK left the EU on 31 January 2020. But the EU Regulations and CJEU decisions continued to apply for all purposes of law, including family law, throughout the so-called transition period and comes to an end at **11pm on 31 December 2020**. From that point the EU Regulations will immediately cease to apply to all new cases starting thereafter. Instead, reliance will be placed on other existing international instruments, most particularly the various Hague Conventions, and national law where they do not apply. In relation to divorce and maintenance cases, there are notable changes to the position regarding jurisdiction and finance and some points to be aware of regarding recognition and enforcement.

This note focusses on divorce and finance, but it touches on other family law areas too and concerns the position in England and Wales only. Whilst Northern Ireland is similar, there are some differences and Scotland has made distinctively separate arrangements. It is directed to practitioners and therefore intended to be for practice rather than a full exposition which can be found in other places. It sets out the transitional arrangements for cases ongoing as at 31 December 2020 and the position from 1 January 2021. Practitioners must be aware of the position from 1 January 2021 now in order to decide whether to take action to bring their cases within the transitional arrangements.

The central and most urgent issue for all family law practitioners is whether commencement of proceedings should take place in any particular case before 11pm on 31 December 2020 to ensure that Brussels IIa and the Maintenance Regulation apply to ongoing proceedings and orders subsequently made arising out of those proceedings.

The transitional arrangements are set out in the Withdrawal Agreement reached between the UK and EU in October 2019 and enshrined in the European Union (Withdrawal Agreement) Act 2020. Those provisions will apply regardless of whether any trade deal is reached. In summary, provided proceedings in respect of divorce, children and maintenance (needs-based provision) are instituted before 11pm on 31 December 2020, Brussels IIa and the Maintenance Regulation will continue to apply to the orders subsequently made in those proceedings whenever needed for the purpose of recognition or enforcement, perhaps years or even decades later. This joint note therefore emphasises again to practitioners how fundamentally important it is to review all cases now and decide whether to institute proceedings now, this year. Orders already made will be capable of recognition and enforcement around the EU (although not Denmark in certain cases) under the aforementioned EU Regulations. This note is directed to the importance of instituting proceedings where orders are not yet made.

This might arise in the following situations, although there are many more:

a) A client wants to know that their final divorce will be recognised in an EU member state in years to come if, for example, they wish to remarry there. Brussels IIa provides automatic divorce recognition and as long as the proceedings are instituted before the end of the transition period, it will benefit from that automatic recognition, whenever the final decree is pronounced.

b) A client wants a spousal maintenance provision which they think they may need to enforce against the paying party in years to come if they were to be in an EU member state. The Maintenance Regulation provides jurisdiction and *lis pendens* rules to regulate the proceedings and will apply to recognition and enforcement of maintenance orders as long as the proceedings are instituted before the end of the transition period.

Some of these provisions may not need to rely on the current EU Regulations because the Hague Convention alternatives may be considered adequate. But it will be for the practitioner to decide in each particular case whether the EU provisions are far better and more satisfactory and, if so, to ensure proceedings are instituted now so that the order will come within EU laws.

The transitional provisions are found in Articles 67 – 69 of the Withdrawal Agreement, having the force of law from 1 February 2020. Article 67 covers Brussels IIa, divorce and children, and the Maintenance Regulation, maintenance, needs-based provision. It separates jurisdiction, which for these purposes includes forum, and recognition and enforcement. Article 68 covers EU laws on service and taking of evidence. Article 69 covers legal aid. The Withdrawal Agreement deals both with UK proceedings and EU proceedings involving the UK courts.

It is still not known whether the EU will agree to the request by the UK to join the 2007 Lugano Convention. The UK is presently a member but this ends on 31 December 2020. The UK will not be a member on 1 January 2021 but might be in subsequent months. If so, this complex international law, which not only covers recognition and enforcement of maintenance orders, will have distinctive provisions as to jurisdiction and forum. Account

should be taken of the likelihood of the UK joining the Lugano Convention but is not covered in this note due to the uncertainty.

As always in any case with a cross-border element, advice should be taken from specialist lawyers in the other country/ies concerned. In particular it is believed that there may be different expectations of practice and interpretation in some EU member states. There will inevitably be some cases from January 2021 where conflicts will arise between the UK and EU member states in circumstances where previously EU law would prevail. For practitioners without existing EU contacts, an association of specialist international family lawyers is IAFL.

Instituting proceedings and practical points

Reference is made in the Withdrawal Agreement to the instituting of proceedings. Unhelpfully this is not defined in either the Withdrawal Agreement or EU family laws which instead refer to lodging or seizing. It might mean a step before the issue of proceedings but practitioners will almost certainly cautiously require proceedings to be issued, and to be notified that they have been issued, before 11pm on 31 December 2020 to be confident that they have ensured that the proceedings have been instituted and brought within the Withdrawal Agreement to avoid the possibility of any competing proceedings.

However, a number of issues then directly arise.

First and foremost, commencing proceedings should not be left until mid or late December. The courts are very busy. There are many Christmas contact applications. The courts are short-staffed. There is in any event a significant amount of work arising from the impact of the pandemic on family courts. Practitioners should not presume that all attempted applications made in mid-December onwards will be issued. It is essential to take action now.

In some instances, it may be wise to issue a precautionary Form A in order to ensure proceedings are instituted in time, but in circumstances where the parties don't seek to invoke the automatic court timetable and requirements. It should be made clear that this step is taken not in an aggressive or hostile form but simply to ensure compliance with the Withdrawal Agreement, probably with a general adjournment of the automatic court timetable.

Attendance at a MIAM is not required in an urgent international case as will almost certainly be the position in any matter where proceedings have to be instituted before the end of December.

In respect of online filing on 31 December 2020, FPR PD5B states that filing after 4:30pm is deemed to be the next working day. We are informed by HMCTS that the Practice Directions supporting both Divorce and Financial Remedy digital cases are to be amended to remove the cut off of 4.30pm so that any case received up to 11pm on 31st December 2020 will be classed as being received (check for all updates to the FPR and accompanying PDs here).

In respect of an online application for a financial consent order, there is technically no Form A issued. It is an application for the consent order. If it is crucial to come within the Withdrawal Agreement, a precautionary Form A might be necessary.

Where it is essential for the proceedings to be issued by a court office, naturally every possible step should be taken to ensure the application form, such as the divorce petition, is technically correct. Court offices undertake a vigorous gatekeeping exercise with strict checklists and application forms will be returned if not compliant. So a practitioner seeking to ensure issuing by a particular date should take steps to ensure there are no technical failures resulting in the return of the documents by the court, for example, after 1 January 2021.

The courts are very busy and therefore applications for expedited issuing or indeed expedited hearings to come within the Withdrawal Agreement will be treated very cautiously by HMCTS. There should be no unnecessary litigation and every attempt to work collaboratively with the court office and court service.

Practitioners and regional groups should find out arrangements in local court offices or divorce centres for particular provisions for any need for issuing of applications in mid and late December.

HMCTS have though created a specific email address for urgent Brexit related divorce petitions and financial applications filed digitally to flag up the urgency. This is onlineDFRjurisdiction@justice.gov.uk (but practitioners are asked not to misuse this email address for other non-Brexit related applications, however urgent they may perceive their application).

Divorce jurisdiction

The existing position continues, based on Brussels IIa, until the end of the year. The existing jurisdiction provisions for divorce continue in respect of divorce proceedings instituted on or before 11pm on 31 December 2020 in line with the terms of the Withdrawal Agreement.

From 1 January 2021, the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 amend the DMPA 1973, Section 5 to provide jurisdiction grounds for divorce in our national law as follows:

(a) *both parties to the marriage are habitually resident in England and Wales;*

(b) both parties to the marriage were last habitually resident in England and Wales and one of them continues to reside there;

(c) the respondent is habitually resident in England and Wales;

(d) the applicant is habitually resident in England and Wales and has resided there for at least one year immediately before the application was made;

(e) the applicant is domiciled and habitually resident in England and Wales and has resided there for at least 6 months immediately before the application was made;

(f) both parties to the marriage are domiciled in England and Wales; or

(g) either of the parties to the marriage is domiciled in England and Wales.

It should be noted that sole domicile is now a primary basis of jurisdiction. Nevertheless, practitioners should take care in relying on this basis if it is anticipated that there may be the need for enforcement abroad of any maintenance orders for example via the 2007 Hague Maintenance Convention or 2007 Lugano Convention (if it were to apply), and local advice should be taken.

The Government's intention is that this new law follows the previous Brussels IIa law. However, it hasn't done so completely, particularly in relation to clauses (d) and (e) in that they require habitual residence on the day of issuing the proceedings together with a period of previous simple residence beforehand. The wording is different to that in Brussels IIa, The interpretation of Article 3 in relation to which there has been a long-standing debate as to whether the period of residence set out should be 'habitual residence' or simple 'residence' (Marinos vs Munro) has not yet been settled by the CJEU.

Divorce forum

At present the forum test and criteria in divorce matters occurring in two EU member states is *lis pendens*, namely the first party to lodge proceedings secures the proceedings in that country. This continues in respect of proceedings instituted on or before 11pm on 31 December 2020. So if a petition is presented in England on 31 December and another in France on 5 January 2021, the English petition has priority and forum will be England – the French petition cannot continue because the Brussels IIa *lis pendens* regime will apply as there are existing proceedings instituted in England (see the Withdrawal Agreement Article 67(1)).

From 1 January 2021, forum from a UK perspective will be decided on closest connection, *forum non conveniens*, as presently prevails between the UK and all non-EU countries (and Denmark).

Practitioners should therefore consider with clients whether it is more beneficial to institute proceedings before the end of the transition period, relying on the *lis pendens* provisions, or wait until 1 January 2021 and rely on the closest connection test.

However, how the courts of each EU member states will respond from 1 January 2021 where a divorce is lodged first (or otherwise) in England will depend on their national law. Advice from the other country should be taken and may differ between member states and it is noted that they may still give priority to the court first seised.

Divorce recognition

At present under Brussels IIa, UK divorce orders, decree absolute of divorce, will be recognised automatically around the EU (with the exception of Denmark), just as the UK recognises divorce orders made by civil courts in the EU. This will continue for UK divorce orders made in respect of proceedings instituted on or before 11pm on 31 December 2020.

For divorce proceedings instituted from 1 January 2021, two different regimes prevail as to both UK divorce orders being recognised around the EU and EU divorce orders being recognised in the UK. Ease and confidence of recognition may be relevant for purposes of remarriage or evidence of status/tax/inheritance etc.

First, the 1970 Hague Divorce Recognition Convention provides for recognition of divorces between signatory states. So a UK divorce order will be recognised in an EU member state which is a 1970 Hague Convention signatory (subject to the requirements of the 1970 Hague Convention being met), just as the UK will recognise divorces from EU member states which are 1970 Hague Convention signatories. This Convention has not been used significantly and practice across the EU may vary and it is therefore wise to check with a lawyer in the other country where recognition is sought. In particular it may be important to check the

requirements of the 1970 Hague Convention, especially that the jurisdictional basis for the divorce will not cause difficulties in the recognition process in the other country pursuant to the 1970 Hague Convention.

Secondly, for recognition of a UK divorce in EU member states which are not 1970 Hague Convention signatories, and 15 EU member states including several substantial north-west European countries are not members, recognition will depend entirely on their national law. Local advice should be taken in advance. Similarly for the UK, recognising a divorce from an EU non-1970 signatory depends upon UK national laws. In this regard English law is very liberal in its recognition of foreign divorces and it is highly likely that a divorce regularly granted by a civil court in an EU member state will be recognised.

Given that there might be some difficulties in recognition in non-1970 signatory EU member states, this may be a good reason to institute proceedings before the end of the year, to make sure that there can be reliance on the automatic EU wide recognition. This might be for example in a case in which one of the parties is an EU national of a non-1970 signatory state and might therefore have difficulties in having their English divorce recognised in that state.

There may also be distinctive issues with a few EU member states in respect of recognition of same-sex divorces and, again, advice should be taken locally.

Maintenance and financial claims: general

In its laws, the EU distinguishes between maintenance and other financial claims. In this respect maintenance is defined as needs based provision rather than just that of a periodic nature. So maintenance may include pension sharing, lump-sum and provision of accommodation as well as the traditional spousal maintenance and child support. In contrast there are also financial claims which are invariably sharing assets arising during the marriage, the marital property, which are dealt with separately to the provision of maintenance with different criteria and different procedures in many EU countries. Although certainly not a straight delineation, it is akin to the differential between needs and sharing.

The Maintenance Regulation provides rules for jurisdiction and forum in maintenance claims and for recognition and enforcement of maintenance between EU member states and, until the end of the transition period, currently applies in the UK. There is a separate EU Regulation in relation to marital property of which the UK is not a member.

A key aspect of the Maintenance Regulation is the recognition and enforcement of maintenance orders amongst EU member states. Following the end of the transition period, the Maintenance Regulation will not apply and reliance will instead be placed on the 2007 Hague Maintenance Convention or, if the UK joins, the 2007 Lugano Convention. Whilst each have similarities with the EU law, there are some distinct differences and there may be a benefit in being able to rely on the Maintenance Regulation. This may be relevant for many years to come. There might be a child maintenance order for a very young child made now with up to 18 years still to run in which enforcement abroad may be relevant. There may be a joint lives or long-term spousal maintenance order which may have to be enforced in many years hence. There might be an order against a property in the EU for which enforcement may not be appropriate for a few years. To benefit from the provisions of the Maintenance Regulation, proceedings must be instituted this year. Practitioners must consider this carefully with all clients for whom there may be any EU connection and whether the EU laws

would be significantly more beneficial than 2007 Hague Maintenance Convention or, if applicable later, Lugano.

Maintenance: jurisdiction

The Maintenance Regulation sets out specific grounds for jurisdiction for any maintenance claim. Unless this jurisdiction exists, a family court in the EU has no power to make a maintenance order, even if no other EU member state is involved. Jurisdiction is based on the habitual residence of the claimant or defendant (respondent), if separate. There is jurisdiction based on maintenance ancillary to divorce or children proceedings unless those proceedings were based on sole domicile for jurisdiction. There are additional grounds if a party takes part in proceedings, so-called entering an appearance, if there is an agreement (for spousal maintenance only), or if it is a forum of necessity.

The Maintenance Regulation jurisdiction provisions will apply to all existing proceedings instituted before 11pm on 31 December 2020 and the recognition and enforcement provisions will apply to all maintenance orders arising out of proceedings instituted before 11pm on 31 December 2020. So an application for financial provision made on 1 December 2020 with a final financial order made on 1 June 2021 will have the benefit of the Maintenance Regulation provisions as to recognition and enforcement pursuant to the terms of the Withdrawal Agreement.

For maintenance claims commenced from 1 January 2021 in England, jurisdiction depends upon the basis on which the maintenance claim is brought. If ancillary to divorce, it will follow the divorce jurisdiction. There are distinctive jurisdictional provisions for Schedule 1 Children Act 1989 (paragraph 14 of which is amended by SI 2019/836) and for MCA 1973 Section 27 (failure to maintain) and Section 35 (alternation of maintenance agreement) cases, but unfortunately not for Section 31 (variation) cases. There is also provision in Section 15 of the MFPA 1984 ('Part III' cases).

This lacuna in relation to Section 31 variation cases is notable and will give rise to uncertainty after the end of the transition period. Practitioners with variation cases where there is jurisdiction at present under the Maintenance Regulation will need to consider whether to issue prior to the end of the transition period to avoid any such uncertainty. Conversely, where there is no jurisdiction at present under the Maintenance Regulation but the original order was made in England, practitioners should be aware that it is possible that the English court may consider that it retains an 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 but it has stated that it does not intend to do so.

The only exception to the above in relation to jurisdiction for maintenance cases of which practitioners should be aware is the application of Article 18 of the 2007 Hague Maintenance Convention, which will apply instead of the Maintenance Regulation at the end of the transition period (of which see more below). There are no direct rules of jurisdiction in the 2007 Hague Maintenance 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 apply. The Government has drafted a 'fixing SI' to amend the relevant legislation to 'signpost' the fact that this Article 18 limitation will apply across the board in relation to the

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.

As a result of the overriding Maintenance Regulation provisions falling away and the slight narrowing of jurisdiction provisions for the aforementioned types of cases (where there are any such jurisdiction provisions at all), there may be benefit in instituting certain maintenance proceedings in 2020 in order to come within the jurisdictional provisions of the Maintenance Regulation. For example, jurisdiction under Part III MFPA 1984 will from 1 January 2021 be limited to domicile or one year of habitual residence of either party (at the time of the foreign divorce or the time of the application for leave) or where either has an interest in property that was used as a matrimonial home here. This is narrower than the position at present which can include the habitual residence of the creditor without limit of time (for needs-based claims). So if a client would not qualify under the Part III jurisdiction from January onwards for a long time, proceedings should be instituted, and quite possibly proceedings for the substantive claims with leave granted, before 11pm on 31 December 2020.

Moreover, in relation to Part III, this can be used for the making of pension sharing orders after a foreign divorce in respect of a UK based pension (as an English order is required to share an English pension). In many of these instances, the parties have no ongoing connection with the UK apart from the existence of the pension. Hitherto, reliance has been placed on one of the jurisdictional grounds in the EU law, Article 7 Maintenance Regulation, the forum of necessity. This basis will no longer be available from 1 January 2021 once the Maintenance Regulation no longer applies and it would be thereafter impossible to obtain a pension sharing order of a UK pension unless there is domicile or habitual residence in accordance with the MFPA 1984, Section 15. If a practitioner seeks to obtain a pension sharing order under Part III after a foreign divorce and there are no other connections with the UK, it will be vital for the substantive application to be made before 11pm on 31 December 2020.

At present it is not possible to bring a maintenance based claim if the only connection is sole domicile (i.e. where neither party is resident in England and Wales and only one party is domiciled here). This prohibition ends at the end of the year. If a practitioner seeks to bring a maintenance claim and the only connection is sole domicile, it may be wise to wait until 2021 to institute the proceedings. However considerable caution is needed. There might be a risk of the other party commencing proceedings elsewhere in the EU and therefore establishing prior or competing forum. If the only basis available is sole domicile, there may be some difficulties in enforcing maintenance orders under the 2007 Hague Maintenance Convention (which does not recognise orders based on sole nationality) and particularly the 2007 Lugano Convention and further enquiries should be made urgently as to how the order would be received in the other country concerned before embarking on potentially lengthy and/or expensive proceedings here.

Maintenance: forum

At present, forum for maintenance claims is, like divorce, decided on the basis of *lis pendens rules*, namely the first to lodge proceedings (Article 12 of the Maintenance Regulation). This continues in respect of all proceedings instituted before 11pm on 31 December 2020.

Moreover, if maintenance proceedings are commenced in England on 30 December 2020 and maintenance proceedings are commenced in for example France on 5 January 2021, the first in time secures jurisdiction even though the latter application is brought after the end of the transition period i.e. when EU law no longer applies in the UK. This is because of the terms of the Withdrawal Agreement (specifically Article 67(1)) which regulates the position regarding ongoing cases. Furthermore, under the Maintenance Regulation, if there are maintenance proceedings in one country and so-called related action proceedings in another country, the courts of the second country retain a discretion to stay or bring an end to their proceedings so that they can all together go ahead in the country where the first set of maintenance proceedings are happening (Article 13 of the Maintenance Regulation). These related action proceedings might be financial claims other than needs-based maintenance claims. So if there were maintenance proceedings instituted in France on 30 December 2020 and proceedings instituted in England for sharing claims on 5 January 2021, the English court would have a discretion, following case law, to stay the sharing claims so that they all went ahead in France. Practitioners should therefore consider carefully when and where proceedings should be commenced both for maintenance and for other financial claims.

Under English law, the divorce petition includes prayers for financial claims. It has never been fully established whether these prayers are sufficient to institute proceedings and therefore claim priority. To avoid any risk, many family lawyers have already been in the practice of making an application in Form A to gain priority. This may be particularly important in light of the EU transitional arrangements. So even if a divorce petition is instituted this year, with prayers, it would also be advisable to issue a Form A in order to remove any arguments about the priority of forum. See notes above on the issue of 'instituting' proceedings and associated practical considerations.

If a practitioner considers that a client may not succeed in the English courts under the closest connection forum criteria with an EU member state then it will be essential to issue proceedings in 2020 first in time to secure forum. Whilst Brussels IIa applies, the country with the closest connection is irrelevant on forum and all that matters is being first to lodge proceedings (as long as there is also jurisdiction to do so).

Maintenance: recognition and enforcement

At present under the Maintenance Regulation, maintenance orders made by courts of an EU member state are recognised around the EU. Enforcement is two-tier depending on whether a country has signed the 2007 Hague Protocol on applicable law. Where enforcement is required of an order from a country which has signed the 2007 Protocol, as do all EU countries apart from the UK and Denmark, enforcement is a streamlined process with no intervening stages of registration. So the UK will automatically enforce a French maintenance order as if it were a UK order. However, where the enforcement is required of an order from a country which did not sign the 2007 Hague Protocol, which for these purposes is only the UK and Denmark, there is a two-stage process. First the order has to be registered in the other country and then it can be enforced. This system of recognition and enforcement will continue in respect of all orders made in or before 2020 and to orders made in respect of proceedings for maintenance instituted on or before 11pm on 31 December 2020 under the terms of Article 67(2) of the Withdrawal Agreement.

For new cases from 1 January 2021, recognition and enforcement of maintenance orders will be pursuant to the 2007 Hague Maintenance Convention, to which all EU member states are signatories as is the UK. This has many similarities with the Maintenance Regulation and indeed some benefits such as the intergovernmental administrative coordination of maintenance claims. But it has some differences and potential disadvantages. It has the two-stage process of registration before enforcement for all countries. Practitioners should consider carefully if they will want to rely on the recognition and enforcement provisions in the Maintenance Regulation, and if so, it will be essential for proceedings to be instituted this year.

Maintenance: choice of court agreements

Choice of court agreements are not covered by the Withdrawal Agreement and there is no provision which will formally recognise choice of court agreements made before the end of the transition period for proceedings brought from 1 January 2021 onwards. Therefore, if practitioners wish to have certainty of being able to rely on a choice of court agreement made in accordance with Article 4 of the Maintenance Regulation, it may well be advisable to issue proceedings before 11pm on 31 December 2020.

The UK has decided – unilaterally – that it will respect choice of court agreements in proceedings brought after the end of the transition period, (so there may still be value in entering into these agreements as if the election is not for England and is instead for an EU member state) this will still fix jurisdiction. The main Brexit SI provides in its transitional provisions (updated in a 'fixing SI' not yet made but expected to come into force) that the English courts will consider that agreement binding. This will mean that the court will not take jurisdiction if the parties elected in favour of an EU member state court. It should be emphasised that the UK has committed to respecting them as above, as a unilateral choice and there is no guarantee that the EU member states will respect such jurisdiction clauses after the end of the transition period. This will be most relevant where such clauses were/are in favour of the UK but the approach that the EU member states will take to jurisdiction clauses in future will be a matter for their own private international law and advice should be taken in the countries concerned.

Practitioners should note that this UK decision does not protect (from a domestic law perspective) choice of court clauses made in favour of non-EU Lugano Convention countries (made whilst the UK has been a member of the 2007 Lugano Convention by virtue of its EU membership).

Domestic violence

A different situation prevails in two separate respects namely existing proceedings and the law from 2021 onwards.

Under EU law, the EU Protection Measures Regulation provides that domestic protection orders made in any EU member state are automatically recognised and directly enforceable around the EU. This will end on 31 December 2020 and moreover is not covered by the Withdrawal Agreement, Article 67, except where the enforcement certificate is already issued (Article 67(3)). Therefore, to ensure recognition around the EU, it is not a matter of instituting proceedings but the actual domestic protection order and, crucially, the appropriate EU recognition certificate should be completed on or before 11pm 31 December 2020.

From 1 January 2021, the UK has decided, again unilaterally, to put the EU Protection Measures Regulation into national law with modifications (see SI 2019/493) and will recognise and directly enforce any protection order made in EU member states from 1 January 2021 onwards to give protection to the victims of domestic violence seeking help in the UK. So for incoming orders the position will remain the same. However, the EU has not reciprocated, so a practitioner seeking recognition and enforcement of a UK protection order will need to consult lawyers in the other country about what steps have to be taken, which might mean initiation of fresh proceedings and a consequent gap in protection in that country.

Service and taking of evidence

Other EU Regulations currently provide for cross border intergovernmental cooperation on the service of court papers and taking of evidence from another country.

These Regulations will no longer apply after 11pm on 31 December 2020. But as set out in the Withdrawal Agreement, there is continued access to the intergovernmental cooperation on service and taking of evidence if the applicable request is received by the other country on or before 11pm on 31 December 2020. It will therefore be necessary to make sure the request has been fully completed in this country, and is received by the intergovernmental agency in this country in time.

The UK and the EU are members of equivalent Conventions in respect of service and taking of evidence from the Hague. From 2021 onwards reference will be made instead to the 1965 Hague Convention on Service Abroad and the 1970 Convention on Taking Evidence Abroad.

Same-sex marriages and civil partnerships

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 but they maintain that this will make no practical difference in same sex divorce and civil partnership dissolution.

Intra-UK

Currently the Maintenance Regulation jurisdiction and forum provisions apply intra-UK and this was, of course, central to the recent Supreme Court case of *Villiers*. In that case, there were divorce proceedings in Scotland (but no financial proceedings) and failure to maintain proceedings were brought under s27 MCA in England. From 1 January 2021, the Maintenance Regulation will no longer apply at all, let alone intra-UK, which has two main consequences.

First, *forum conveniens* principles will apply to any competing maintenance intra-UK applications (although mandatory stays will continue to apply to competing divorce proceedings between England (and Wales) and Scotland).

Second, practitioners will have to wrestle with the 1950 Maintenance Orders Act which, it is suggested, is not fit for purpose in relation to variation, recognition and enforcement. The problems with this Act are too manifold to set out in this note but by way of example, if an English joint lives spousal maintenance order is registered in the Scottish Sheriff court for the

purpose of enforcement, the debtor can ask the Scottish court to vary this, even though long term maintenance orders are very rare in Scotland. However Scottish law applies very differently and there is no guidance as to how to deal with any such action. Furthermore, a Scottish court has no power to capitalise or terminate maintenance, only vary it to nil.

Conclusion

There have over the past three years been significant discussions by representatives of the UK family law professions with the Government and with judicial initiatives. Guidance to practitioners will continue to be updated, for example, depending on developments relating to the Lugano Convention. 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 time.

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