



ST. MARY'S
CHAMBERS

*Happy New Year?
The end of the transition
period*

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Family Law Specialists

Kerry Cockayne (called in 2002) specialises in children law and accepts instructions in all areas of public and private law children cases, representing local authorities, parents, the Official Solicitor, extended family members and guardians. Kerry has substantial experience in cases covering a wide range of issues , including non-accidental injuries, domestic violence, drug and alcohol abuse, sexual abuse, conflicting medical opinion and jurisdictional issues.

Kerry was appointed a Deputy District Judge to the Midland Circuit in May 2020

The European Union (Withdrawal Agreement) Act 2020 gained Royal Assent on 23 January 2020 (“the Withdrawal Agreement”). Since 1 February 2020, the United Kingdom has withdrawn from the European Union; the transition period ends on 31 December 2020. This article addresses the impact of the Withdrawal Agreement as we come towards the end of the transition period and what you should consider both before and from 1 January 2021 in the context of children law proceedings.

Summary

Until 31 December 2020 EU law in its entirety applies to and in the United Kingdom. After that date, Articles 67 (1) and (2) of the Withdrawal Agreement states that the EU rules on international jurisdiction continue to apply in the United Kingdom and in the Member States in the following situations:

- proceedings or actions commenced before the end of the transition period; or
- proceedings or actions that are related to such legal proceedings, even if such related proceedings or actions are instituted after the end of the transition period. Articles 29 to 31 of the Brussels (Recast) Regulation (No. 1215/2012) contain the Regulation’s *lis pendens* provisions, in particular involving (i) the same cause of action between the same parties (Article 29), (ii) related actions (Article 30); and (iii) actions which come within the exclusive jurisdiction of several courts (Article 31); or
- The recognition and enforcement of judgments handed down in proceedings started before 31 December 2020.

Further, and specifically in the context of children law, and according to Article 67(2) of the Withdrawal Agreement, Regulation (EC) No 2201/2003 (Brussels IIa) is to apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period, and to documents formally drawn up or registered as authentic instruments, and agreements concluded before the end of the transition period.

The Withdrawal agreement does not therefore apply to the treatment of cases that commence after the end of the transition period unless they are “*proceedings or actions that are related to such legal proceedings*”.



Before 1 January 2021

In respect of proceedings instituted before the end of the transition period, the EU rules on international jurisdiction continue to apply at the present time, and will continue to do so if they fall within the Article 67 descriptions set out above.

International parental child abduction

The main provisions of the 1980 Hague Convention on the Civil Aspects of International Child Abduction are incorporated into the law of the UK jurisdictions by the Child Abduction and Custody Act 1985. All EU member states are party to the 1980 Hague Convention and use it with the UK. This provides a summary procedure for children wrongfully removed or retained away from their country of habitual residence to be returned there, so that long-term decisions about the future of the child can be made (abduction includes both wrongful removal and wrongful retention).

Members of the public whose child has been abducted out of England and Wales should contact ICACU (International Child Abduction and Contact Unit) for information on what action to take. If the member of the public believes their child is at risk of abduction in future from any part of the UK, they should contact the charity reunite International Child Abduction Centre for advice and information.

If they believe the child is being wrongfully removed from the UK and is on their way out of the country they should go at once to their nearest police station and ask for warning list action. They should also contact reunite International Child Abduction Centre.

Children cases (parental responsibility, Section 8 Orders)

Article 8 of Brussels IIa provides that jurisdiction in children cases generally rests with the court of the country of the child's habitual residence. Habitual residence is a question of fact which requires consideration of a number of factors. There are also other grounds of jurisdiction which may sometimes be relied upon. For example, under Article 12, the court with jurisdiction where there are divorce etc proceedings also has jurisdiction for proceedings about a child when at least one spouse has parental responsibility for that child and the relevant people agree the court should have jurisdiction.

The general rule is that judgments in such cases shall be recognised in other member states without any special procedure, under Article 21. This is subject to the exceptions contained in Article 23. An order made in England and Wales is recognised and enforced in other EU member states when accompanied by the relevant certificate, Annex II to Brussels IIa for parental responsibility (court form C60), Annex III for rights of access (court form C61), Annex IV for return of the child (court form C62). An order made in another EU member state is recognised and enforced in England and Wales when accompanied by the relevant certificate as above.



Placement of children (public law proceedings)

Under Brussels IIa, the court hearing public law care proceedings will normally be the court of the country of the child's habitual residence.

If the local authority wishes to propose to the court that the child be placed with a family member in another member state, local authorities are required under the rules in the Brussels IIa Regulation to seek and obtain prior consent from the competent authority in the EU country where they wish to place the child, in cases where that authority is involved in domestic placements.

From the end of the transition period

Brussels IIa will no longer apply in England and Wales after the end of the transition period. As retained EU law it is revoked by the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019.

All EU member states are however party to the 1980 and 1996 Hague Protection of Children Conventions so it is expected that the court of an EU member state in a case with a UK connection will apply the rules of the Hague Conventions to decide whether it has jurisdiction in children cases.

International parental child abduction

The UK and EU member states will continue to use the 1980 Hague Convention in international child abduction cases between them.

Children cases (parental responsibility)

The court will make its decision on whether it has jurisdiction to hear in accordance with the rules of the 1996 Hague Protection of Children Convention.

Amendments to existing legislation made by the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations make provision to enable the court in England and Wales to recognise and enforce orders from EU Member states in the United Kingdom.

The provisions of Brussels IIa could prevent a court in an EU member state using the 1996 Hague Convention to transfer jurisdiction in children cases to the UK after the end of the transition period. The legal position on transfer of cases is not clear. Parties may wish to consider seeking local legal advice in the relevant EU member state if possible.

The guidance from the European Commission states that in some instances international conventions will apply provided that both the EU member state and the United Kingdom are party to the convention.

Public Law

After the end of the transition period, local authorities and social welfare authorities in EU member states will use the rules in the 1996 Hague Protection of Children Convention on placements; under these rules they will need to continue to seek and obtain consent to the placement in every case. Under the 1996 Hague Convention, the court hearing public law care proceedings will normally be the court of the country of the child's habitual residence.



Conclusion

In essence when bringing proceedings or an action after 1st January 2021 check:

- Is it related to proceedings initiated before 31st December 2020? If so, EU Law including Brussels IIa, continues to apply;
- If they are not so related, refer to the Hague Conventions (1980 in the context of Child Abduction; 1996 in the context of private and public law) for the applicable law as to jurisdiction and legal considerations.

The enforceability of UK decisions in the EU after the transition period raises its own questions however. The reciprocity point was highlighted in *R (Miller & anor) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583 where the majority said:

[69] ... Our domestic law will change as a result of the United Kingdom ceasing to be party to [EU Treaties], and rights enjoyed by UK residents granted through EU law will be affected, [namely]...

- (1) Rights capable of replication in UK law;*
- (2) Rights derived by UK citizens from EU law in other member states;*
- (3) Rights of participation in EU institutions that could not be replicated in UK law...*

[71] ... Some rights falling within one category may be closely linked with rights [in] another category. For example, the rights under ["Brussels II Revised"], would be undermined if a domestic judgment governing the residence of a child could not be enforced outside the UK.

The Brussels II regulation promotes close collaboration of courts and national welfare authorities in matters of children and jurisdiction, recognition and enforcement of children orders, child protection and child abduction. Brussels II also provides an automatic system of recognition of contact orders; ensures easier enforcement of child arrangement orders, which decide where a child lives and how much time they spend with each parent; and allows cases to be transferred to the court that is best for the child and the case.

I hope the dawn of 2021 paints a brighter picture than this most unusual 2020 has. However, at the time of writing, the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 is still to be amended to ensure its provisions are consistent with Title VI of the Withdrawal Agreement. In light of a likely no deal Brexit and without this clarity, post 2020 we will necessarily have to fall back on the international arrangements (Hague Conventions) and the common law, which are not as comprehensive or straight forward.



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