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MAINTENANCE MATTERS

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Introduction

[1] The first paragraph in an Initial Writ or a Summons seeking divorce states "This court has jurisdiction." On what basis? The usual basis for jurisdiction for divorce is not now to be found in domestic legislation. The Domicile and Matrimonial Proceedings Act 1973 defers to EU law (where this applies).[1] The rules on jurisdiction are found in Council Regulation (EC) No. 2201/2003, commonly referred to as Brussels II *bis*.[2] When there is jurisdiction in divorce then jurisdiction in ancillary matters usually follows.[3] On 18 June 2011 a new restriction was added to the exercise of ancillary jurisdiction. Section 10(1C) states:

> "(1C) If the application or part of it relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, the Court of Session or a sheriff court may not entertain the application or that part of it unless it has jurisdiction to do so by virtue of that Regulation and that Schedule."

[1] 1973 Act, ss. 7 and 8

[2] There is jurisdiction under art 3 of Brussels II *bis* with the courts of the member state:
(a) in whose territory: the spouses are habitually resident, or the spouses were last habitually resident, insofar as one of them still resides there, or the respondent is habitually resident, or in the event of a joint application, either of the spouses is habitually resident, or the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there;
(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses.
Where none of these conditions apply, the 1973 Act allows jurisdiction based on the domicile of one of the parties.

[3] 1973 Act, s.10(1).

[2] The Maintenance Regulation is Council Regulation (EC) No 4/2009. The terms of the Regulation are adopted into domestic law by the 2011 Regulations.[4] The result is that the usual averment as to jurisdiction needs some more thought, when the matter is one to which the Maintenance Regulation relates. And the Maintenance Regulation will apply in most cases where there is a claim for financial provision.

Maintenance

[3] When proceeding under EU law, we are dealing with autonomous EU concepts. The way in which we view matters under domestic law has to be set aside. "Maintenance" for the purposes of EU law is not a new concept. It was included in the original Brussels Convention of 1968. It was covered by the Civil Jurisdiction and Judgments Act 1982, which among other things allocated jurisdiction within the UK. It was carried forward into Council Regulation (EC) No 44/2001, known as the Brussels I Regulation. It has featured in litigation before the European Court of Justice (as it then was). Maintenance requires to be distinguished from "rights in property arising out of a matrimonial relationship", which are expressly excluded from these instruments.[5] In states where marriage results in a community of property it may be straightforward to decide what is a question relating to ownership or distribution of property as a result of the marriage, as opposed to "maintenance". It can be harder to work out what is a right in property arising out of a matrimonial relationship and what is "maintenance" in jurisdictions like Scotland, where there is no community of property as such during the marriage, but there is a right to share in property at its conclusion.

[4] One of the great benefits of characterising a court order as maintenance, rather than a right to share in property, is that a maintenance order is enforceable in other EU member states. As long ago as 1980 the European Court of Justice held that it did not matter whether a maintenance order was interim or final, it still came within scope of the Convention. Further, the scope of the Convention extended to maintenance obligations under legislation or court order, placed on spouses after divorce. Such orders could include payments intended to compensate, so far as possible, for the disparity which the breakdown of the marriage creates in parties' respective living standards.[6]

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[4] SI 2011/1484.

[5] See *De Cavel v De Cavel* [1979] ECR 1055

[6] *De Cavel v De Cavel (No 2)* [1980] ECR 731.

[5] In 1997 the ECJ was asked to consider an English order in divorce proceedings for payment of a lump sum and transfer of property.[7] The party benefiting from these orders wanted to enforce it in the Netherlands. Enforcement was only possible if the orders were regarded as "maintenance". The court held these orders were capable of being treated as maintenance. Maintenance is not confined to periodic payments. If the purpose of the provision awarded is to enable one spouse to provide for himself or herself, or if the needs and resources of each of the spouses are taken into consideration in the determination of the amount or an award, the decision concerned will relate to maintenance. The judicial reasoning in each individual case should disclose whether the aim of the order is maintenance, or rights in property arising from the matrimonial relationship.

Is financial provision on divorce "maintenance"?

[6] Maintenance clearly includes aliment. This is not particularly difficult. Aliment is "an obligation to provide such support as is reasonable in the circumstances" for a spouse, civil partner or child (Family Law (Scotland) Act 1985, section 1), having regard to the matters mentioned in section 4, which include the needs and resources of the parties, their earning capacities and generally all the circumstances of the case. The court may award periodical payments, or alimentary payments of a occasional or special nature (such as "inlying", funeral or educational expenses), but cannot order a lump sum (section 3). The obligation to provide aliment for a spouse ceases on divorce, but post-divorce awards are capable of being characterised as "maintenance".

[7] When it comes to divorce, the emphasis of the Family Law (Scotland) Act 1985 is on dividing the net value of the matrimonial property, under section 9(1)(a). The right to an award under this section might, on one view be one that arises out of a matrimonial relationship and so be excluded from any provision relating to maintenance. The same might be said of an award to take fair account of economic advantage or disadvantage under section 9(1)(b), although that is less clear. When it comes to orders to satisfy the principles in section 9(1)(c), (d) or (e) (ie to share the economic burden of caring for a child under 16, to enable adjustment to loss of support, or to relieve serious financial hardship) then we are clearly moving towards the definition of "maintenance" adopted by the ECJ in *Van den Boogaard*.

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[7] *Van den Boogaard v Laumen* [1997] QB 759

[8] An award of a periodical allowance under section 9(1)(c), (d) or (e) is quite clearly maintenance. The sub-sections themselves indicate that this is so, and this is reinforced by sub-sections 11(3), (4) and (5) which gives the list of criteria for an award, including "needs and resources of the persons". If capital were awarded under one of these sub-sections, then applying *Van den Boogaard* the capital award would be maintenance, as would be transfer of a family home if this was done under one of these principles.

[9] An award of financial provision must to satisfy all the principles in section 9. While section 9(1)(a) is clearly about division of property, an award under this section may also satisfy the other principles, including those in sections 9(1)(c), (d) and (e). A periodical allowance is only available if the general capital award is inappropriate or insufficient to satisfy the requirements of all the principles.[8] A periodical allowance may be limited, or not awarded at all, if sufficient capital is handed over under other subsections to provide the support required by the principles in (c), (d) and (e).[9] That means that an award justified by section 9(1)(a) may be multipurpose. It may represent division of the net value of the matrimonial property, but the recipient may be expected to apply it to meet future needs. All awards of financial provision must in any case be reasonable having regard to resources.[10] So even a section 9(1)(a) award may serve as "maintenance".

[10] This was accepted in *AB v CD* 2007 Fam LR 53, where Lord Brodie found that an award of £1,000,000 was justified under section 9(1)(a), but recognised that a Scottish award of financial provision may have as its justification and aim, or part of its justification or aim, the provision of future maintenance. He was explicit in stating that he attributed £500,000 of the capital sum ordered to maintenance, as that expression was used in the then current EU instrument (the Brussels I Regulation). He explained that this was aimed at providing the pursuer with an income of some £27,500 per annum for the rest of her life. The wife then had half her capital sum which she could try and enforce in other EU member states.

Jurisdiction to deal with maintenance

[11] If the argument thus far is correct, then when an order for financial provision on divorce is sought, we need jurisdiction for the divorce and jurisdiction under the Maintenance Regulation in order to seek any form of financial provision beyond sharing the

[8] Family Law (Scotland) Act 1985, section 13(2).
[9] *McConnell v McConnell (No 2)* 1997 Fam LR 108; *W v W* [2013] CSOH 136, 2013 Fam LR 85.
[10] Family Law (Scotland) Act 1985, section 8(2).

net value of the matrimonial property (and possibly an award based on economic advantage and disadvantage). This is important when there is a non-Scottish element to the case, including an intra-UK issue. The 2011 Regulations[11] adopt the full EU rules on jurisdiction for maintenance between different parts of the UK, including the conflict rules. The Maintenance Regulation thus applies between the different parts of the UK.

[12] The basic rules in the Maintenance Regulation are fairly straightforward. They are:

> "*Article 3*
> **General provisions**
> In matters relating to maintenance obligations in Member States, jurisdiction shall lie with:
> (a) the court for the place where the defendant is habitually resident, or
> (b) the court for the place where the creditor is habitually resident, or
> (c) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or
> (d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties."

[13] Article 4 allows parties to choose jurisdiction in certain circumstances. Article 5 provides for jurisdiction if the defendant enters an appearance (unless he or she is doing this to contest jurisdiction). In the absence of other bases for jurisdiction then the common nationality of the parties will do. Finally there is a *forum necessitatis* provision in article 7, which applies where there is no other basis for jurisdiction, or proceedings cannot reasonably be brought or concluded in a third state and the dispute has a sufficient connection with the member state of the court seised. Most states of the EU use nationality as a connecting factor. In the UK and Ireland domicile is generally used in place of nationality, therefore in these countries the Regulation is read with "domicile" replacing "nationality".[12]

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[11] SI 2011/1484.
[12] Article 2(3).

[14] Once a decision on maintenance has been given it may be varied, but if the decision is given in the place the maintenance creditor is habitually resident, then generally if can only be varied in that state.[13]

Conflicts of jurisdiction for maintenance

[15] As can be seen, there is often a choice of jurisdiction for maintenance. This gives rise to the possibility that actions are raised in more than one state. The Maintenance Regulation solves this problem by decreeing that the state first seised has jurisdiction.[14] The court in any other state must of its own motion stay proceedings until the jurisdiction of the court first seised is established. Once that happens any other court must decline jurisdiction. If there are "related actions" in different member states, then any court other than the court first seised may stay its proceedings.[15] It is open to one of the parties to apply to any court other than the one first seised to decline jurisdiction, if the actions may be consolidated in the court first seised. Actions are related when so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

[16] The way this works can be illustrated by the English case of *Moore v Moore* [2007] EWCA Civ 361. A couple emigrated from England to Spain, where their marriage broke down. The husband filed for divorce in Spain. The wife issued a divorce petition in England. Her petition was second in time and was stayed (under Council Regulation (EC) 1347/2000, now superseded by Brussels II *bis*). The husband asked the Spanish court to deal with financial aspects of the divorce, but it refused. He appealed and at the material time his appeal was still pending. The wife went back to London to ask for financial provision after an overseas divorce under the Matrimonial and Family Proceedings Act 1984. The husband challenged that. The wife argued that the Spanish action related to division of wealth, whereas she was applying to the court in England for "maintenance". She was allowed to proceed with her application. The ratio of this decision was that the Spanish action did not have priority over the English action because it was not for "maintenance".

[17] Matters were more difficult in *EA v AP* [2013] EWHC 2344. There the parties were Italian but lived in England. When the marriage broke down the husband started

[13] Article 8.
[14] Article 12
[15] Article 13.

proceedings in Milan, and the wife filed an action in England seeking financial provision for herself and the two children. The Italian court held it had jurisdiction in relation to the marriage and maintenance for the wife, but not for matters relating to the children. The wife applied for a maintenance assessment. The husband challenged the Italian court's refusal to deal with child maintenance. The wife asked the English court to decide the application she had made under the Children Act 1989 for financial provision for the children. With obvious reluctance the English High Court stayed the proceedings relating to the children. The aim of the Maintenance Regulation was to prevent irreconcilable judgments. The Italian proceedings started first and their refusal to accept jurisdiction was subject to a challenge that had not been resolved. Despite hardship and injustice to the wife, the English court could not even exercise interim jurisdiction in these circumstances.

Prorogation of jurisdiction

[18] There is one other issue to feed into the debate, and that relates to prorogation. If parties agree on jurisdiction in relation to maintenance, and article 4 applies, that jurisdiction is exclusive unless the parties have agreed otherwise. Certain conditions must apply before a choice of court agreement is binding under the Maintenance Regulation. These conditions may be present either at the time the agreement is concluded, or at the time the court is seised. The court chosen must be in the state where one of the parties is habitually resident, or one is a national (or in the case of the UK or Ireland domiciled), or in the case of maintenance obligations between spouses or former spouses the court concerned has jurisdiction to settle their matrimonial dispute or is the court of the state which was the spouses last common habitual residence for at least one year. The choice of court agreement must be in writing or some form of electronic communication which provides a durable record of the agreement. Parties cannot prorogue jurisdiction in respect of maintenance for a child under 18. If there is a valid choice of court agreement, that excludes the jurisdiction of any other court.

[19] The prorogation provisions of the Maintenance Regulation are not new. They simply re-enact the preceding law found in Brussels I, article 23. Much of Brussels I, and its predecessor article 17 of the Brussels Convention, were given effect between different parts of the UK by the Civil Jurisdiction and Judgments Act 1982. The domestic provisions did not however provide for parties to confer exclusive jurisdiction on the courts of a particular

part of the UK. The Civil Jurisdiction and Judgments (Maintenance) Regulations 2011[16] go further than the preceding legislation, by importing the terms of article 4 of the Maintenance Regulation in their entirety, including the provision for exclusivity. One of the difficulties is that, while jurisdiction for maintenance can be agreed, there is no equivalent provision allowing parties to choose jurisdiction for divorce, and hence for determination of their rights in property arising out of their matrimonial relationship.

UK issues in relation to divorce and financial provision

[20] Where there is a jurisdictional basis for divorce, there will usually be jurisdiction to consider maintenance, but this is not always the case. There is a particular problem in intra-UK cases. Within the UK, if divorce proceedings are commenced in courts in two different parts of the country then the general rule is:

> "Where before the beginning of the proof in any action for divorce which is continuing in the Court of Session or in the Sheriff Court it appears to the Court concerned on the application of a party to the marriage—
>
> (a) that in respect of the same marriage proceedings for divorce or nullity of marriage are continuing in a related jurisdiction; and
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> (b) that the parties to the marriage have resided together after the marriage was contracted; and
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> (c) that the place where they resided together when the action in the Court was begun or, if they did not then reside together, where they last resided together before the date on which that action was begun is in that jurisdiction; and
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> (d) that either of the said parties was habitually resident in that jurisdiction throughout the year ending with the date on which they last resided together before the date on which that action was begun;
>
> it shall be the duty of the Court … to sist the action before it."[17]

If these conditions do not apply then the court has a discretion whether to sist or stay, operating on a *forum conveniens* basis.[18]

[21] The Civil Jurisdiction and Judgments (Maintenance) Regulations 2011[19] results in a different conflicts rule being applied to maintenance. They apply the terms of the Maintenance Regulation intra-UK. That includes the conflict rule of *lis pendens* and the rule that confers exclusive jurisdiction on the court chosen by the parties. This is giving rise to some very interesting dilemma.

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[16] SI 2011/1484.

[17] 1973 Act s.11 and sch 3 para 8, but see also s.5 and sch 1 para 8.

[18] 1973 Act sch 3 para 9, but see also s.5 and sch 1 para 9; see *De Dampierre v De Dampierre* [1988] 1 AC 92; *Mitchell v Mitchell* 1992 SC 372.

[19] SI 2011/1484.

- Suppose a married couple live together in Scotland, but on separation the wife goes off to England and after a year there applies for divorce and ancillary relief (ie financial orders). The husband can commence divorce proceedings in Scotland. Those proceedings will have priority under the conflict rules of the 1973 Act. He can secure a stay (sist) of his wife's divorce in England. The Scottish court could not however deal with "maintenance" so long as the English action was continuing, because the English proceedings started first.

- If the couple were domiciled Scots, living together in France, but the wife headed for London on the breakdown of the marriage and established a habitual residence there she could commence maintenance (aliment) proceedings quite quickly, but would have to wait for a year before she could start an action for divorce in England. The husband could start divorce proceedings in Scotland right away because both parties are domiciled in Scotland. He could ask for orders for financial provision, but would this prevent the wife seeking "maintenance" in London?

- In a case where there is a prenuptial agreement dating from 2005 parties may have agreed that if their marriage broke down the Scottish courts would have jurisdiction to deal with all aspects of the breakdown. They were living in Scotland when the agreement was made but in 2010 they moved to Manchester. In 2014 their marriage broke down. The husband moved back to Scotland. The wife stayed in Manchester. What now? Manchester has priority for the divorce, but the court there cannot deal with "maintenance".

Conclusions

[22] When drafting an Initial Writ or a Summons in a divorce action where there is a claim for financial provision it would be worth pausing at the jurisdiction clause to think whether there is jurisdiction under the Maintenance Regulation. The same applies when answering such an action. For family lawyers advising on pre-nuptial agreements choice of jurisdiction is now something that should be considered having regard to the exclusive effect of prorogation. When clients are tempted to go "forum shopping" there might need to be some fresh warnings. Such a course could result in complexity. That may well prove expensive.