THE LATEST FAMILY LAW NEWS FROM EUROPE

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Introduction

[1] Family lawyers have not been particularly engaged with European Union law. We have seen this as the province of our colleagues who work in the field of commercial law. The Court of Justice of the European Union has been the place to discuss minimum pricing of alcohol, not the detail of family relationships. This may have to change.

[2] Given the EU focus on free movement of persons, it was perhaps inevitable that attention would come to be directed towards family law. The pendulum swung this way following the Maastricht Treaty of 1992, when justice and home affairs were added to EU responsibilities. The European Council meeting at Tampere in October 1999 proposed action points to take this forward. The first major step for family lawyers was Council Regulation (EC) No 1347/2000 on jurisdiction, recognition and enforcement in matrimonial matters and matters of parental responsibility for the children of both spouses. This was then replaced by the current Brussels II *bis* Regulation.[1] We also now have the Maintenance Regulation.[2]

[1] Council Regulation (EC) 2201/2003.

The EU has the family law bit firmly between its teeth. The UK has not been an enthusiastic participant in the family law expansion. It has, in particular, resisted any measure that would require a UK court to apply foreign law. For this reason we have not participated in the Rome III regulation which covers applicable law in matrimonial cases, and have stayed out of the Hague Protocol on applicable law on maintenance that applies in other EU states. Our participation is largely restricted to matters of jurisdiction and enforcement. We cannot however avoid the effect on families of the law of other EU member states.

Direct effect of EU law

[3] EU Regulations have direct effect. If there is a conflict between national law and EU law, then EU law prevails. The national law has no effect.[3] This is accepted in the UK.[4] And it is not simply theoretical for the purposes of family law

[4] By way of example, the Irish do not have secure facilities for their most troubled teenagers. They place them in Scotland, in facilities like Kibble, or St Mary's Kenmure. In 2012 the CJEU decided that Council Regulation (EC) 2201/2003 (Brussels II *bis*) applied to these placements.[5] That meant (among other things) that a declaration of enforceability was necessary before these young people could be held in the secure facility in Scotland. However the Court of Session procedure for obtaining a declaration provided for a delay of enforcement for 2 months for appeal rights to be exercised.[6] The CJEU stated in its judgment that in order not to deprive the Regulation of its effectiveness expedition was required and that appeals must not have a suspensive effect. The decision of the CJEU on interpretation of the Regulation had to prevail over the court rules. Declarations of enforceability of Irish secure accommodation orders are now regularly granted with immediate effect, notwithstanding that appeal rights are extant and may be exercised.

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[2] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations.

[3] *Costa v ENEL,* [1968] C.M.L.R. 267, *Amministrazione delle Finanze dello Stato v Simmenthal SpA,* [1978] 3 C.M.L.R. 263.

[4] *Factortame Ltd v Secretary of State for Transport (No 2)* [1991] 1 AC 603.

[5] *Health Service Executive,* Case C-92/12 PPU, 26 April 2012.

[6] RCS 62.70.

Procedure

[5] The reference for the Irish *HSE* case is marked "PPU". This means it went through the court under the urgent procedure established in 2008 (the procédure préjudicielle d'urgence).[7] This allows the CJEU to give preliminary rulings in relation to the area of freedom, security and justice within 60 days. These rulings do not decide the case, but give a binding interpretation of EU law. The procedure has been used in a number of cases relating to children. The referring court can request urgent procedure, or the CJEU can refer the case to this procedure of its own accord.

[6] There is a second development that is useful in children's cases. The Treaty of Lisbon[8] extended the right to make references. Previously the only court that could make a reference was one from whose decisions there was no judicial remedy, ie the last court of appeal. Now any court can refer questions to the CJEU. This means issues of interpretation can be dealt with in the first instance. It is not necessary to wait until there is no further appeal. A sheriff court could make a reference to the CJEU.

Recent case law in the CJEU

[7] Over the last 12 months there have been some interesting decisions emerging in the field of family law. These relate to Council Regulation (EC) 2201/2003 (Brussels II *bis*), including its relationship to the Hague Child Abduction Convention and also to Council Regulation 2009/4 (the Maintenance Regulation). These are cases about jurisdiction and enforcement of judgments in cross-border cases and give binding interpretation of the Regulations.

When is a court seised?

[8] One of the most difficult issues for family lawyers has been the rule in Brussels II *bis* that the court that is first seised has exclusive jurisdiction under article 19. This has led to a "rush to court" when we would have preferred to mediate or negotiate. On 16 July 2015 the CJEU

[7] Amendment to the Rules of Procedure of the Cour of 15 January 2008, [2008] OJ L24/39.
[8] Signed 13 December 2007, effective 1 December 2009.

issued a helpful decision in *P v M*.[9] This case concerned a married couple with two children living in Spain. On 7 July 2011 M issued proceedings in Spain seeking provisional measures prior to divorce and an action relating to parental responsibility, but on 18 July asked for a suspension of the procedure in order to attempt to reach an amicable agreement. M did not meantime serve the action. The negotiation was not successful and on 31 August 2011 P started proceedings in Portugal. The next day M resumed the action in Spain and the Portuguese court refused to hear the case on the basis that the Spanish action came first. This was unwelcome news to P who appealed, until the Portuguese Supreme Court made a reference to the CJEU. The result was first of all an analysis of article 16 of Brussels II *bis* which sets out what is meant by "seising of a court". There are two possible conditions for seizure. One is the filing of a writ or summons with the court and the other is notification or service on the other party. Only one of the two is required to effect seizure, provided the other follows. In this case M had filed in Spain. It did not matter that there was then a delay of nearly 2 months before service. The Spanish court was still seised, and seised first, giving the proceedings there priority. The CJEU approved a comment about the value of "family friendly solutions". There are important implications. First this clarifies that in Scotland the warranting of the initial writ or signeting of the summons should result in seizure. Second, the court is clearly sympathetic to attempts to negotiate or mediate, and a delay in service for this purpose will not mean abandoning priority.

Prorogation of jurisdiction

[9] There is also an interesting line of cases about jurisdiction relating to children. In this respect the recitals to Brussels II *bis* are instructive. Recital 12 states that the grounds of jurisdiction are shaped in the light of the best interests of the child, in particular on the criterion of proximity, hence jurisdiction should lie in the first place with the member state of the child's habitual residence. Article 8 gives jurisdiction in matters of parental responsibility to the courts of a member state where the child is habitually resident. There is however provision in article 12(1) for parties to prorogate the jurisdiction of a court dealing with their divorce. Under article 12(3) parties may also prorogate jurisdiction in a state where the child has a substantial connection, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State, and the jurisdiction of the courts has been accepted

[9] C-507/14.

expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child. Article 15 allows a court to transfer a case to a court in another member state that is better placed to hear the case.

[10] *E v B,*[10] decided on 1 October 2014, involved a Spanish father and British mother. They lived in Spain until November 2009 when the mother brought their only child to England. In July 2010 parties agreed that the mother should have custody and the father should have access. Their agreement was confirmed by the court on 20 October 2010. On 17 December 2010 the mother lodged an application in London seeking to reduce the father's contact. He applied to enforce the contact. The mother agreed that she had prorogated the jurisdiction of the Spanish court under article 12 and tried to get the Spanish action transferred to London under article 15 of Brussels II *bis*. The Spanish court held that the action there had concluded and there was nothing to transfer. The mother went back to the High Court in England, which accepted jurisdiction on the basis that the child was habitually resident in England. The father appealed. The Court of Appeal sought a preliminary ruling. The CJEU held that when there is prorogation of jurisdiction relating to child under article 12(3), that jurisdiction comes to an end when the proceedings conclude, and the court of the child's habitual residence will then have jurisdiction. The effect was to leave jurisdiction with the court in England.

[11] The decision of the CJEU on 12 November 2014 in *L v M*[11] relates to prorogation of jurisdiction in a Czech/Austrian case. A father in the Czech Republic instigated proceedings and retained his children at the end of a contact visit. The mother made an application to the court in the Czech Republic and then an application in Austria where she and the children resided. The issue for the CJEU was whether by raising proceedings in the Czech Republic the mother had agreed that the court there would have jurisdiction. She claimed she had only raised proceedings on advice from the Czech authorities and because she did not know where the children were. Once she was aware of all the facts she did not accept the jurisdiction of the Czech courts. The CJEU held that this was sufficient to avoid prorogation under article 12(3).

[10] Case C-436/13.
[11] Case C-656/13.

Child abduction

[12] Matters can become quite convoluted when there are allegations of wrongful removal or retention of a child under the Hague Convention on the Civil Aspects of International Child Abduction. The concepts involved are so intricately tied up with the concepts in Brussels II *bis* that the CJEU has found itself pronouncing on the Hague Convention, in the context of preliminary rulings on the EU legislation. A removal or retention is "wrongful" under the Hague Convention when it is in breach of rights of custody attributed to a person or institution under the law of the state where the child is habitually resident. If a child has been wrongfully removed or retained, then the court will generally order the child's rapid return to the place of habitual residence. If return is refused on one of the grounds in article 13 of the Hague Convention (which involve an exercise of discretion, following a wrongful removal), then article 11 of Brussels II *bis* gives a second bite at the cherry to the courts of the place where the child was habitually resident at the time of the removal or retention. The courts there may make a substantive decision on parental responsibility and order return of the child. That order will then be enforced in the place to which the child was taken.

[13] In *C v M*[12] decided on 9 October 2014 the father was French and the mother British. They were divorced in France on 2 April 2012 and the mother was permitted to take their child to Ireland. The father appealed, but was refused a stay of enforceability of the judgment pending the hearing of his appeal. On 12 July 2012 the mother left with the child. In March 2013 the appeal court in France overturned the original decision and ordered that the child should live with the father. He sought enforcement of that decision, but the mother appealed in France. The father then invoked the Hague Convention in Ireland. The child had clearly been removed lawfully from France as the French court had allowed this. The issue was whether he had then been retained wrongfully in Ireland when the French appeal court overturned the original decision. The CJEU directed that the Irish court would have to decide for the purposes of both the Hague Convention and article 11 of Brussels II *bis* where the child was habitually resident at the time of the decision in the French appeal. There was already guidance on deciding on habitual residence in the cases of *A*[13]and

[12] C-376/14 PPU.
[13] C-523/07.

Mercredi[14]. Habitual residence is a question of fact. A child's habitual residence corresponds to the place which reflects some degree of integration in a social and family environment. Presence in that place should not be temporary or intermittent. It was relevant that the judgment permitting relocation was provisional and the mother could not be certain that her stay in Ireland was not temporary. Even if the child was habitually resident in Ireland and could not be returned under the Hague Convention and the French court had no further jurisdiction under article 11, that still left the potential to enforce the French court's decision in the original proceedings. The cynic might add that the Irish court would then be asked to make a rapid decision that would supersede the original French decision, thus preventing enforcement.[15]

[14] *Bradbrooke v Aleksandrowicz*[16] was decided at the beginning of 2015, on 9 January. It is another case of convoluted sets of proceedings concerning a child called Antoni, whose mother was Polish and his father British, but who lived in Belgium with his mother and had regular contact with his father. Mother vanished to Poland and father raised proceedings in Belgium, but the court there did not order the return of the child. Father appealed and at the same time invoked the Hague Convention in Poland, where the court agreed that there had been a wrongful removal but refused return. The Belgium court then started to deal with parental responsibility under article 11 of Brussels II *bis*. The mother tried to start further proceedings in Poland, but the Polish courts held that the Belgium courts were first seised and declined jurisdiction. The Belgium courts were not clear whether they should be proceeding with the original action or the proceedings under article 11 and referred this to the CJEU. Read broadly the CJEU said how a reference under art 11(7) and (8) is dealt with is a matter for national courts, provided the child's rights under article 24 of the EU Charter of Fundamental Rights to protection and care and expression of views were observed and the procedures were expeditious.

Enforcement of contact

[14] C-497/10 PPU.
[15] See Brussels II *bis,* article 23.
[16] Case C-498/14 PPU

[15] The most recent case of interest concerns a fine for failure to obtemper an order relating to contact. In *Bohez v Wiertz*[17] the Court in Belgium made a contact order in respect of two children living with their mother in Finland. It added a penalty of EUR 1,000 per child per day of non-appearance at contact, up to a maximum of EUR 25,000. The mother did not obtemper the order and the father applied for payment. On 9 September 2015 the CJEU held that this was an ancillary measure which served to protect a right of access under Brussels II *bis,* in consequence the penalty was enforceable in Finland under that Regulation, but the father had to obtain a document from the originating court in Belgium quantifying the amount due.

Maintenance and parental responsibility

[16] We also have a decision about the relationship between proceedings relating to divorce, parental responsibility and maintenance in *A v B*[18] decided on 16 July 2015. There were legal separation proceedings in Milan, but the children were habitually resident in England, where there was an action relating to parental responsibility. Article 3 of the Maintenance Regulation allows for jurisdiction in the court dealing with status if the matter relating to maintenance is ancillary to those proceedings, or the court which has jurisdiction to entertain proceedings concerning parental responsibility. The Italian court held it could deal with maintenance for the spouse, but not the children and this was challenged. The CJEU held that an application relating to maintenance for minor children is intrinsically linked to proceedings concerning matters of parental responsibility and insisted that in interpreting the rules on jurisdiction in the Maintenance Regulation it was vital to take into account the best interests of the child. In these circumstances the application was ancillary only to the parental responsibility proceedings and not the matrimonial proceedings.

Pending cases

[17] There is more to come. There are pending cases on whether Brussels II *bis* extends to the right to agree to issue of a passport, to annulment of a bigamous marriage and in relation

[17] Case C-4/14
[18] Case C-184/14.

to the law of succession. There is also a pending case on refusal of recognition of a judgment where jurisdiction was wrongly based on an article 15 transfer.

Recasting of Brussels II *bis*

[18] In the meantime the Regulation itself is under scrutiny and there is likely to be a "recast" version. The Commission has tried to consult on this, but the response to consultation was frankly poor. There were less than 200 responses from the whole of Europe. An expert group have been meeting, but the time commitment is such that most members of this group are academics. In so far as it is possible to predict what changes may be made, there may be provision for parties to choose the jurisdiction for a divorce. The interrelationship between the Hague Abduction Convention and article 11 may be considered too complicated and the additional provision for cases where return is refused to be referred back to the original country of habitual residence may be removed. There is a strong move to make all judgments directly enforceable. Currently this applies only to access orders and orders made after a refusal of return under the Hague Convention. We will have to wait and see.

Free movement and names

[19] It is not actually necessary to look solely at the measures that are directly associated with family law to find the influence of the EU. Article 21 of the Treaty on the Functioning of the European Union (formerly article 18 of the EC Treaty) provides that every citizen of the Union shall have the right to move and reside freely within the territory of the member states. The Court of Justice has applied this to the naming of children. To give just one example, in *Garcia Avello v Belgium*[19] a Spanish national (Mr Garcia Avello) and his Belgian wife (Ms Weber) had two children with dual nationality, Esmeralda and Diego. The Belgian Registrar of Births, Marriages and Deaths entered on their birth certificates the name "Garcia Avello". The parents asked that the name be changed to "Garcia Weber", in accordance with the Spanish law that children of a married couple have the surname of their father, followed by the surname of their mother. This was refused. The CJEU recognised that the surname was relevant to free movement between the states where they were nationals and

[19] Case C-148/02.

held that Belgium were infringing the right to free movement. Further the children were suffering discrimination on the grounds of nationality in regard to the rules applied by Belgium in relation to their surname.

Matrimonial Property Regimes

[20] The rest of Europe is moving towards a final version of two regulations. One of these concerns matrimonial property regimes (COM/2011/126 final – CNS 2011/0059) and the other concerns equivalent property consequences of registered partnerships (COM(2011) 127 – CNS 2011/0058). Broadly speaking, and within certain constraints these Regulations will allow spouses to choose the law applicable to their property regime. There will be default provisions in the absence of choice. In the case of partnerships the initial proposal was that law of the state where the partnership was registered would generally apply to the property consequences of the partnership, but there have been moves to allow partners to choose the applicable law. Again the UK has not opted in. It is however of vital importance if advising a Scots couple proposing to live elsewhere in Europe to know what a matrimonial property regime actually is. We do not have such a regime.

[21] This is nothing to do with "matrimonial property" as defined in the Family Law (Scotland) Act 1985, section 10(4). That section focuses on a single day. What Scots law understands as matrimonial property is property belonging to the parties on the last date they lived together or the date of service of the summons, provided it was acquired during the marriage, otherwise than by way of inheritance or donation from a third party.

[22] These proposed regulations are about the property relationship between the parties during their marriage or registered partnership. They cover "the set of rules relating to the economic relations of the spouses between them and vis-à-vis third parties." There is a range of regimes. At one extreme parties may have "full" community of property, that is they both own all the property, but in this case they may well both be liable for all the debts. Third parties to whom money is owed may claim from either or both parties to the marriage

or partnership. The main alternative is separation of property, in which case each spouse or partner keeps his or her own assets and is liable for his or her own debts.

[23] Our European cousins find our lack of any regime difficult to understand. This has been known to result in the attribution of a separate property regime or a 'default' community regime. Either may have disastrous consequences. If there is community of property then one spouse may find him or herself liable for unforeseen debts. If there is separate property, the spouses may leave a marriage on divorce simply with their own property, no more and no less, a least in terms of capital, although there may be a claim for maintenance, which may be capitalised. There will be no "redistribution" of wealth, as such.[20] Such an outcome probably shocks the English more than the Scots, but it is still different from the Scottish approach which involves claims made on divorce or dissolution of civil partnership.

[24] Scottish couples moving to another European country should not wait until their relationship is in difficulties before seeking legal advice, particularly when the new regulations come into force. We should not be surprised if nationals from other member states divorcing in Scotland are mystified by our system of financial provision. We may also be faced with a degree of (expensive) "forum shopping". The solution may be greater use of pre-nuptial contracts, which will need to be informed by the Regulations that are on the way.

The Succession Regulation

[25] Regulation (EU) No 650/2012 came into force on 17 August 2015. It was apparently one of the most difficult dossiers in the area of judicial co-operation in civil matters ever to be negotiated in Brussels.[21] The UK has chosen not to participate. Ireland is in the same position and the Regulation does not apply to Denmark. So why bother?

[20] See *Anglo-French entente cordiale: a bilingual approach,* Rein-Lescastereyres, Amos and Bennett, March [2015] IFL, p23.
[21] *The New EU Succession Regulation in a nutshell,* Fuchs, ERA Forum (2015) 16:119-124.

[26] Any change in the legal landscape may affect the finances of international families. This one raises all sorts of questions. To give just one example, the different countries of Europe have different provisions relating to intestacy and to protection of the rights of family members. Some are similar to Scotland in giving the children and a surviving spouse a share of the estate. The rules relating that share are however different in different states.

[27] The new Succession Regulation has a chapter devoted to applicable law. Article 20 states that any law specified by the Regulation shall be applied whether or not it is the law of a member state. According to article 21 the law to be applied to the succession as a whole shall be the law of the state in which the deceased had his habitual residence at the time of death. By way of exception, if the deceased was more closely connected with another state, the law applicable to the succession shall be the law of that other state. There is a limited choice of law provision in article 22. A person may opt for the law of his nationality at the time of the choice, or the time of death. The UK has been reluctant to accept any measure that requires the application of foreign law. The Succession Regulation is no exception.

[28] So, supposing a Dutchman with property in the Netherlands dies intestate while habitually resident in Scotland. He is not domiciled in Scotland so Scots law will not apply to his moveable estate. His heritable property is not in Scotland, so Scots law will not apply to that. He is not habitually resident in an EU state that participates in the Succession Regulation, so there is no assistance from article 21(1), and he has not chosen any particular law, although that would probably not be relevant in Scotland in any case. What law will apply to the distribution of his estate and the protection of his family?

[29] And what is the use of a clause in a Separation Agreement that says:

"*The Parties hereby renounce and discharge for all time coming their legal rights of jus relicti and jus relictae and also any prior rights and other rights of succession which may arise on the death of the other Party and under the Succession (Scotland) Act 1964 or any amendment or re-enactment thereof…*" ?

Conclusion

[30] Just over 40 years ago in *H. P. Bulmer Ltd. and Another v J. Bollinger S.A. and Others*[22] Lord Denning prophesied:

"But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law."

EU waters are now washing into family law. Unless Parliament halts the flow family lawyers will have to learn to swim.

[22] [1974] Ch. 401.