

# Being strategic – how to be 'Brexit Ready' in divorce and family law

11 JULY 2019

Brett Frankle

PARTNER | UK

**CATEGORY:**  
ARTICLE



There remains lots of uncertainty surrounding Brexit. Will the UK leave without a deal? If there is a deal, what will it look like, when will it come and will there then be a further referendum to ratify its terms?

Yet whilst politics appears to stand-still with politicians going back and forth pushing agendas and seemingly seeking to score political points, life goes on for families. At this time it does so without clarity as to what the future will hold.

Brexit (particularly a no-deal Brexit) has potentially enormous implications for international families. For some, the post-Brexit landscape is potentially more favourable. For example, under current law the grounds under which the court has jurisdiction to deal with the divorce can impact on the potential remedies available. Where the court only has jurisdiction as a result of the parties' domicile rather than their habitual residence, the court cannot make orders for maintenance. Post-Brexit that may change.

For others, however, expediting the process is the right way forward – recognition and enforcement is likely (at least in the short term and certainly in the event of no deal) to become trickier post Brexit. For example, where individuals want to ensure that their divorce is recognised in another Member State they need to make progress as soon as they can.

## Pre-nuptial agreements

Uncertainty over Brexit is also impacting couples looking to marry. Pre-nuptial agreements are a good way for parties to achieve clarity as to asset division in the event of divorce, but with Brexit comes confusion. Attempts to control which country has jurisdiction to deal with a divorce and which laws will be applied are essential for certainty. Whilst we do not know what reciprocal arrangements will be in place between the UK and the EU yet, we do know the relevant rules, as between other EU Member States, and so we can ensure that our pre-nuptial agreements are drafted with that in mind.

## Securing jurisdiction

On Brexit, the grounds for jurisdiction for divorce should remain the same, so it is likely to be the case that where either party is habitually resident here, the English court will have jurisdiction to hear the divorce. The complication, however, is where an EU Member State also has jurisdiction. Where-as previously we could have secured the jurisdiction of the English court by issuing here first; that is likely to no longer be the case. Instead it will be as it was pre-EU membership, and the court will have to determine which jurisdiction is the more appropriate forum to hear the divorce, which will depend on how closely connected the parties are to this country. If the other party issues in an EU member state, the court in that country need not, as now, stay the proceedings pending determination here. It is therefore more likely that there will be concurrent proceedings.

## Hague Conventions

With the withdrawal from Europe, EU Regulations will no longer be applicable and the various Hague Conventions will come to the fore. Significantly, the 1980 Hague Convention concerning the abduction of children, which ensures their immediate return in the case of wrongful removal or retention will continue to be binding.

Similarly the 1996 Hague Convention will continue to apply, which provides a structure for the resolution, recognition and enforcement of issues of custody and contact which may arise when parents are separated and living in different countries (to which the Convention applies). However,

there may be advantages to starting proceedings now before Exit Day if the equivalent EU regulation is advantageous to them. For example the 1996 Convention applies to children until the age of 18, the 1980 Convention until they are 16 and under EU regulations it depends on the national law of the contracting state.

For other Hague Conventions we are a signatory as an EU member and so the extent to which it will still apply will depend on whether the UK becomes a signatory post-Brexit. It seems likely that we will be and so an understanding of the 1970 Hague Convention on the Recognition of Divorces, the 2005 Convention on Choice of Court and the 2007 Convention on recovery of Child Support and other forms of family maintenance is essential to be able to advise on possible options.

Keeping informed of developments (particularly in relation to the terms of any withdrawal agreement) and understanding the Conventions, legislation and practices that will inevitably be relevant post-Brexit, are the most important ways of ensuring that despite uncertainty, we all continue to make the right strategic decisions.

# Authors

Brett Frankle

PARTNER | LONDON

Divorce and family

 +44 20 7597 6222

 [brett.frankle@withersworldwide.com](mailto:brett.frankle@withersworldwide.com)