DIVORCE POST-BREXIT

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The impacts of Brexit continue to have an effect throughout life in the UK. The world of divorce is not insulated from this as the severing of ties between the UK and EU has led to significant changes in several key areas, including jurisdiction and maintenance claims, and the ability to share pensions.

Jurisdiction and maintenance claims

Prior to Brexit, EU rules concerning jurisdiction required a party to demonstrate that one of the following criteria applied to commence divorce proceedings with a full suite of financial claims in England and Wales:

1. **Both spouses were habitually resident in England and Wales;**
2. **Both spouses were last habitually resident in England and Wales and one of them continued to reside there;**
3. **The respondent was habitually resident in England and Wales;**
4. **The applicant was habitually resident in England and Wales and had resided there for at least one year before the divorce petition is presented;**
5. **The applicant was domiciled in England and Wales and had been habitually resident in England and Wales for at least six months before the divorce application was made; and**
6. **Both parties were domiciled in England and Wales.**

If none of the above 6 criteria applied and no other court of an EU Member State had jurisdiction, the English courts could be seized on the basis of either party being domiciled in England and Wales, rather than both. However, any application that was based on sole domicile was extremely limited in scope and prevented orders for maintenance being made.

Following Brexit, the provisions to establish jurisdiction under Brussels IIa have been largely replicated in domestic law, but crucially with the addition of sole domicile as a standalone basis to establish jurisdiction.

In turn, the bar on maintenance claims in an action deriving from sole domicile has been lifted and the court has the full range of powers available to it.

This is significant as it regards maintenance, with the courts of England and Wales able to make lifetime awards in appropriate cases, unlike in many other jurisdictions.

Running alongside the jurisdictional criteria within Brussles IIa was the doctrine of lis pendens. This provided that in the event of two related actions being brought in different EU Member States, the first application in time would be determinative in seizing jurisdiction. This frequently led to a jurisdiction race, with parties racing to issue in different countries according to where they might receive a more favourable outcome.

With Brussels IIa no longer applying, the first in time rule falls away, to be replaced by the concept of forum non conveniens, enabling the court to determine which jurisdiction has the closest connection with the divorce. This allows an overseas applicant to make an application to commence divorce proceedings in England even after their spouse has commenced the process elsewhere. This is likely to lead to more litigation as parties fight over which jurisdiction should hear their divorce even before substantive matters are dealt with.

Pension sharing

The UK's departure from the EU has also had a drastic effect on the ability for divorcing spouses to makes claims in respect of pensions following an overseas divorce.

For divorces in England and Wales, pension sharing orders can be used to divide a pension between former spouses. Pension sharing orders cannot generally have an extraterritorial effect and pension funds located in England and Wales will require a court order made here to implement a pension share.

For couples who have divorced in another jurisdiction, this means that any financial order made in that jurisdiction cannot create a share of an English pension.

It is not uncommon for overseas couples to retain pensions in this jurisdiction. This can be because of couples who have always previously lived and worked in England and Wales moving abroad for their own place in the sun, or where someone who was not born and raised in England and Wales comes here to work for a period before moving on to another country.

Following an overseas divorce, a financial order can be made under Part III of the Matrimonial and Family Proceedings Act 1984 (MFPA 1984). This statute was designed to allow the court to make financial orders where insufficient provision has been made overseas and the parties have a connection to England and Wales.

Section 15 of MFPA 1984 sets out that the court has jurisdiction to make such orders where either spouse is:

1. **domiciled;**
2. **habitually resident for a year; OR**
3. **an owner of a matrimonial home in England and Wales.**

Prior to Brexit, overseas parties could also rely on EU law to establish jurisdiction, enabling a needs-based order under MFPA 1984 where proceedings could not be brought elsewhere. This was known as the "necessity" grounds. Given that the vast majority of pension funds need a local order to be made, this test would generally be passed and the court could make a pension sharing order.

Following Brexit, overseas couples without an ongoing connection to England and Wales will be unable to share pension administered in England and Wales. This is likely to frustrate financial settlements or agreements reached following an overseas divorce and could produce unfair results.

It is imperative that overseas parties with pensions in England and Wales should take advice from a family lawyer based in this jurisdiction regarding their ability to share a local pension at an early stage. Divorcing spouses should also be aware that in making an application for a divorce in another country a domicile of choice can be made, thereby losing the ability for an application under MFPA 1984. Advice should therefore be taken early to prevent parties unwittingly making a statement about their domicile that would prevent there being a pension sharing order.