

POLICY NOTE

The Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019

SSI 2019/104

The above instrument was made by the Scottish Ministers in exercise of the powers conferred by paragraphs 1(1) and (3) of schedule 2 and paragraph 21(b) of schedule 7 of the European Union (Withdrawal) Act 2018 and all other powers enabling them to do so.

In accordance with paragraph 4(b) of schedule 2 of the 2018 Act, the Scottish Ministers have consulted with the Secretary of State.

The instrument is subject to the affirmative procedure.

Purpose of the instrument

This instrument is being made to address deficiencies in retained European Union (EU) law in relation to some family cases if the United Kingdom (the UK) leaves the European Union on 29 March 2019 without a negotiated settlement (i.e. without a deal).

Policy Objectives

This instrument relates to EU Council Regulation 2201/2003 (known as “Brussels IIa”) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. Brussels IIa is one of the main EU provisions on family law.

This instrument makes provision on Brussels IIa in the event of the UK leaving the EU without a negotiated settlement. The Scottish Government considers that if the UK leaves the EU without a negotiated settlement, the necessary reciprocity across the EU needed to ensure that Brussels IIa operates effectively would no longer exist and domestic legislation would need to reflect that accordingly.

In addition, the general view is that Brussels IIa does not extend to same sex relationships, given the mixed views in EU Member States on the legal recognition of same sex relationships. As a result, when civil partnership and then same sex marriage were introduced in Scotland, domestic provision was made to mirror, so far as possible, the provisions of Brussels IIa. This domestic provision made specific reference to the Brussels IIa Regulation. As a result, this instrument has to make changes as well to this domestic legislation in the event of the UK leaving the EU without a negotiated settlement.

The Scottish Government’s broad intentions in relation to Brussels IIa if the UK leaves the EU without a negotiated settlement is:

- to rely where possible on international Conventions (The Hague Conventions) on matters such as international recognition of judgments;

- on matters such as the jurisdiction of the Scottish courts, to revert to the position that was in place before there was EU provision in this area and to carry out, in the longer term (i.e. after Brexit), a review of the jurisdiction of the courts in relation to family cases;
- to treat family cases involving same sex relationships in the same way as family cases involving opposite sex relationships, so far as possible.

Explanation of the law being amended by the regulations

As an EU Regulation, Brussels IIa is currently directly applicable in the UK as an EU Member State. Under the 2018 Act, Brussels IIa will become retained EU law on 29 March 2019. The matters covered by Brussels IIa are devolved. Various changes were made to domestic law to ensure that these were in line with Brussels IIa: this instrument removes these changes.

The instrument includes saving and transitional provisions in regulation 6 in relation to the amendments and revocations it makes.

Regulation 3 revokes Brussels IIa, given that the reciprocity needed to operate the EU Regulation effectively will not be in place if the UK leaves the EU without a negotiated settlement.

Schedule 1 of the Regulations amends primary legislation. More details are below.

Amendments are made to section 7 of the Domicile and Matrimonial Proceedings Act 1973 so that the Court of Session has jurisdiction to hear divorce and judicial separation¹ actions if either of the parties to the marriage is domiciled in Scotland on the date when the court action is begun or was habitually resident in Scotland throughout the period of one year ending on the date when the court action is begun. This brings the jurisdiction of the courts in these court actions back to the position before there was EU provision in this area². Amendments are also made to section 8 of the 1973 Act so that the sheriff court has jurisdiction to hear these actions if either of the parties to the marriage is domiciled in Scotland on the date when the court action is begun or was habitually resident in Scotland throughout the period of one year ending on the date when the court action is begun³.

Amendments are made to section 7 of the 1973 Act so that the Court of Session has jurisdiction to hear actions for declarator of nullity of marriage or for a declarator of recognition or non-recognition of a decree of divorce, nullity of marriage or judicial

¹ Judicial separation is formal separation sanctioned by the court. Actions for judicial separation are rare in Scotland.

² Provisions in the 1973 Act on jurisdiction of the courts in matrimonial cases are based on a report by the Scottish Law Commission: <https://www.scotlawcom.gov.uk/files/6012/8014/6135/rep25.pdf>

³ In addition, for the sheriff court to have jurisdiction either party to the marriage has to be resident in the Sheriffdom for 40 days before the court action is begun or had been resident in the Sheriffdom for not less than 40 days ending not more than 40 days before the action is begun and has no known residence in Scotland when the action is begun. These provisions on sheriff court jurisdiction are not being changed by this instrument.

separation granted outwith the UK, the Channel Islands or the Isle of Man⁴ if either of the parties to the marriage:

- is domiciled in Scotland on the date when the court action is begun; or
- was habitually resident in Scotland throughout the period of one year ending on the date when the court action is begun; or
- died before the action was begun and at death was domiciled in Scotland or had been habitually resident in Scotland throughout the period of one year.

For declarators of nullity, this again brings the jurisdiction of the courts in these court actions back to the position before there was EU provision in this area. Provisions on declarators for recognition or non-recognition of relevant foreign decrees were added to the 1973 Act by section 37 of the Family Law (Scotland) Act 2006. This instrument ensures the jurisdiction of the courts in these court actions is in line with the jurisdiction of the courts in other matrimonial actions before EU provision was in place.

The instrument removes section 11(2) and section 12(5)(b) to (d) as these are in place as a consequence of Brussels IIa.

Paragraph 1(7) of schedule 1 of the instrument makes amendments to domestic provisions put in place in relation to same sex marriage. Paragraph 4 of schedule 1 makes similar provision in respect of civil partnership⁵ (this also covers overseas relationships recognised as civil partnerships in Scotland by virtue of the provisions in Chapter 2 of Part 5 of the Civil Partnership Act 2004). These provisions refer to the Brussels IIa regulation and so need to be amended. As outlined above, the general view is that Brussels IIa does not extend to same sex relationships, given the mixed views in EU Member States on the legal recognition of same sex relationships. As a result, when civil partnership and then same sex marriage were introduced in Scotland, domestic provision was made to mirror, so far as possible, the provisions of Brussels IIa.

Under the amendments made by this instrument:

- The power for the Scottish Ministers to make provision by regulations for same sex marriage and civil partnership which corresponds to Brussels IIa are removed. Paragraphs 2 and 4 of schedule 2 of this instrument revoke the existing regulations (SSI 2005/629 and 2014/362) made under these powers.
- Provision is made so that the Scottish courts have jurisdiction⁶ to hear actions for divorce and judicial separation in relation to same sex marriage and dissolution and separation of civil partnership if either of the parties is domiciled in Scotland on the

⁴ The reference to the UK, the Channel Islands or the Isle of Man reflects that section 44 of the Family Law Act 1986 provides recognition across the UK of divorces, judicial separations and annulments granted in the British Islands (“the British Islands” are defined by the Interpretation Act 1978 to mean the UK, the Channel Islands or the Isle of Man).

⁵ The Scottish Government has consulted on potential changes to civil partnership: <https://consult.gov.scot/family-law/the-future-of-civil-partnership-in-scotland/> This consultation closed on 21 December 2018 and the Scottish Government is considering next steps in the light of the consultation responses. At the moment, however, civil partnership is only available to same sex couples.

⁶ For the sheriff court, additional provision is retained on residence in the Sheriffdom for 40 days.

date when court proceedings are begun or was habitually resident in Scotland throughout the period of one year ending on the date when the court proceedings are begun⁷.

- Provision is made so that the Scottish courts have jurisdiction to hear declarator of nullity actions in relation to both same sex marriage and civil partnership if either of the parties is domiciled in Scotland on the date when court proceedings are begun or was habitually resident in Scotland throughout the period of one year ending on the date when the court proceedings are begun or died before that date and at death was either domiciled in Scotland or had been habitually resident in Scotland for a year⁸.
- Provision is made so that the Scottish courts have jurisdiction to hear actions for declarator of recognition, or non-recognition, of decrees of divorce, separation or nullity granted outwith the UK, the Channel Islands and the Isle of Man in relation to same sex marriage if either of the parties is domiciled in Scotland on the date when court proceedings are begun or was habitually resident in Scotland throughout the period of one year ending on the date when the court proceedings are begun or died before that date and at death was either domiciled in Scotland or had been habitually resident in Scotland for a year.
- A reference in paragraph 7(2) of schedule 1B of the 1973 Act to regulations on same sex marriage made under paragraph 2 of schedule 1B is removed.

Paragraphs 2 and 3 of schedule 1 makes amendments to the Family Law Act 1986 and to the Children (Scotland) Act 1995 to remove references to Brussels IIa.

Paragraph 4(4) and (5) of schedule 1 remove references in section 227 and 234 of the Civil Partnership Act 2004 to regulations made under section 219 of the 2004 Act. Section 219 and regulations made under it are being removed by this instrument.

Schedule 2 of the instrument revokes and amends secondary legislation.

The European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005 (SSI 2005/42), which made changes to domestic law to help implement Brussels IIa, is revoked. The Regulations made under section 219 of the Civil Partnership Act 2004 and under schedule 1B of the Domicile and Matrimonial Proceedings Act 1973 are also revoked.

References to Brussels IIa have been removed from the Parental Responsibility and Measures for the Protection of Children (International Obligations) (Scotland) Regulations 2010 (SSI 2010/213).

Regulation 6 of the Instrument makes saving and transitional provisions. The broad effect is to make provision so that cases started before “exit day” under Brussels IIa or under the equivalent domestic provisions in respect of same sex marriage and civil partnership can continue. “Exit day” is defined under section 20(2) of the European Union (Withdrawal) Act 2018 and means 29 March 2019 at 11 pm. In drawing up the transitional provisions, the

⁷ For both divorce and judicial separation of same sex marriage and dissolution and separation of civil partners, a “jurisdiction of last resort” is maintained if the parties married or entered their civil partnership in Scotland; no court has, or is recognised as having, jurisdiction and it appears to the Scottish court to be in the interests of justice to assume jurisdiction.

⁸ Again, a “jurisdiction of last resort” is maintained.

Scottish Government has taken account of a notice to stakeholders issued by the European Commission on 18 January 2019. This notice relates to the withdrawal of the UK from the EU and EU rules in the field of civil justice and private international law. It has been issued by the Commission to remind interested parties about legal repercussions which need to be considered when the UK becomes a third country (i.e. not a member of the EU)⁹.

Reasons for and effect of the proposed change or changes on retained EU law

Under the 2018 Act, Brussels IIa would become UK domestic retained law on 29 March 2019. If there should be a no-deal Brexit, the arrangements which currently exist in terms of this EU Regulation between EU Member States and the UK in relation to areas such as which courts should have jurisdiction in family cases and mutual recognition of family judgments would no longer be appropriate as they require reciprocity to operate effectively.

The Scottish Government have considered what changes to legislation are needed as a result, if the UK should leave the EU without a deal. In broad terms, the approach taken by the Scottish Government is to:

- Make use of international (The Hague) Conventions where possible.
- Make provision so that the jurisdiction of the courts in matrimonial cases (eg divorce) reverts to the position before there was any EU provision in this area. This reflects the approach taken by a Scottish Law Commission report in 1972. In the longer term, the Scottish Government intends to review jurisdiction in matrimonial cases but this review will take some time and cannot be completed in time for 29 March 2019.
- To treat same sex relationships, such as same sex marriage and civil partnership, in the same way as opposite sex relationships, so far as possible. This is in line with the Scottish Government's commitment to equality.

In practical terms, this means:

- Recognition in Scotland of overseas divorces will be based on the existing provision in part II of the Family Law Act 1986. (The instrument makes some minor amendments to the 1986 Act, to remove references to Brussels IIa). The 1986 Act provides wide recognition in Scotland of overseas divorces (whether from the EU or from elsewhere)¹⁰. These provisions are based on a Hague Convention on divorce¹¹.
- Recognition in Scotland of overseas dissolutions of civil partnership will be based on the existing provision in sections 234 to 238 of the Civil Partnership Act 2004. The instrument makes some minor amendments to relevant provisions of the 2004 Act to remove references to regulations made under section 219 of the 2004 Act. Section 219 and regulations made under it are being removed by this instrument. The 2004 Act provides wide recognition in Scotland of overseas dissolutions (whether from the EU or from elsewhere).

⁹ The notice to stakeholders issued by the European Commission on 18 January 2019 is at https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_civil_justice_rev1_final.pdf

¹⁰ This includes recognition in Scotland of divorces overseas of same sex marriages. Section 4 of the Marriage and Civil Partnership (Scotland) Act 2014 makes provision so that the term "marriage" and related expression in enactments includes same sex marriage.

¹¹ The Hague Convention on divorce is at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=80>

- Recognition in Scotland of overseas judgments on parental responsibility will be based on a Hague Convention Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children¹². As a result, there would no longer be any reliance on Brussels IIa and the instrument revokes Brussels IIa.
- On child abduction we would rely on a Hague Convention on the civil aspects of international child abduction¹³.

This instrument does not specifically deal with child abduction as that has already been dealt with by an SI which has been laid at Westminster. The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 was notified to the Scottish Parliament on 26 November 2018.¹⁴ The Justice Committee was content for the Scottish Ministers to give its consent for the UK Ministers to lay an SI at Westminster including provision within the legislative competence of the Scottish Parliament.

On child abduction, the Westminster SI repeals for Scotland the provisions within the Child Abduction and Custody Act 1985 which provide for Article 60 of Brussels IIa to take precedence over the Hague Convention on international child abduction. This is known as the “child abduction override”. The override allows a court in the country of a child’s habitual residence to make an order for return which will prevail over the refusal of a court in another EU Member State to order the return of the child under the Hague Convention. This revocation means that the Hague Convention remains in force in the UK but from exit day without the Brussels IIa override for EU Member States. Non-return decisions will instead be subject to appeal but not override.

The re-cast of Brussels IIa

Brussels IIa is currently being re-cast (re-negotiated). However, the re-cast is not expected to be in force until 2022. As a result, it appears that the re-cast will not apply to Scotland unless any transitional period following the UK’s departure from the EU extends to 2022 or there is a longer-term agreement between the UK and the EU on civil justice co-operation.

Statements required by European Union (Withdrawal) Act 2018

Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate

The Minister for Community Safety, Ash Denham, has made the following statement:

“ In my view, the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 do no more than is appropriate. This is because the Regulations revoke Brussels IIa; remove references to Brussels IIa in domestic legislation; make changes to legislation on same sex relationships

¹² The Hague Convention on parental responsibility is at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>

¹³ The Hague Convention on international child abduction is at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>

¹⁴ The notification of the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 is at http://www.parliament.scot/S5_Delegated_Powers/20181126SINotification.pdf

as a result of that legislation referring to Brussels IIa and make necessary provision on jurisdiction of the courts in matrimonial cases.”

Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action

The Minister for Community Safety, Ash Denham, has made the following statement:

“ In my view, there are good reasons for the provisions in the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 and I have concluded they are a reasonable course of action. If the UK leaves the EU without a deal, the Scottish Government has to ensure that appropriate devolved legislative provisions are in place. In that scenario, and in this area, the Scottish Government considers it reasonable to rely on international (the Hague) Conventions and to base jurisdiction of the courts on the position prior to Brussels IIa which was based on a report prepared by the Scottish Law Commission”.

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

The Minister for Community Safety, Ash Denham, has made the following statement:

“ In my view, the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts”.

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

The Minister for Community Safety, Ash Denham, has made the following statement:

“ In my view, the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples) (Amendment etc.) (EU Exit) (Scotland) Regulations 2019, the Scottish Ministers have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare

This is not applicable as these regulations have no impact on the environment or on animal welfare.

Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

These regulations have no effect on the rights and duties relating to employment and health and safety and matters relating to consumer protection.

An indication of how the regulations should be categorised in relation to the significance of the change proposed

Medium. These amendments impact on one of the main EU provisions on family law. However, many family law court cases in Scotland are not affected by EU law because the cases are purely domestic and EU provision has not had much effect on the substance of family law: instead, it has concentrated on areas such as the mutual recognition of judgments across the EU and on jurisdiction of the courts. In a number of areas, Hague Conventions make provision in relation to international matters.

Statement setting out the Scottish Ministers' reasons for their choice of procedure

Affirmative. There are significant amendments to primary legislation. However, the mandatory affirmative procedure in terms of paragraph 1(2) of Schedule 7 to the 2018 Act does not apply as the instrument is removing, rather than creating or amending, powers to make secondary legislation.

Further information

Consultation

There has been no specific consultation on this SSI, other than with the Secretary of State, as required by paragraph 4(b) of schedule 2 of the 2018 Act.

However, the Scottish Government did carry out a consultation in 2018 on Brexit and Family Law and Civil Law¹⁵ and has taken account of the responses to that consultation when preparing this SSI.

Impact Assessments

In relation to Impact Assessments:

- The Scottish Government has prepared for these Regulations, and is publishing on its website, a Business and Regulatory Impact Assessment (BRIA).
- The Scottish Government has prepared for these Regulations, and is publishing on its website, a Child Rights and Wellbeing Impact Assessment (CRWIA).
- The Scottish Government has prepared for these Regulations, and is publishing on its website, an Equality Impact Assessment (EQIA).

¹⁵ The consultation and the responses are at <https://www2.gov.scot/Topics/Justice/law/17867/brexit>

- Data Protection Impact Assessment (DPIA). This is not required. There is no impact on data protection as the courts will handle personal information in the same way as now.
- Strategic Environmental Assessment. This is not required. These Regulations have no impact on the environment.
- Fairer Scotland Duty Assessment. This is not required. These Regulations have no impact on low income, low wealth, and area deprivation.
- Islands Communities Impact Assessment. This is not required. These Regulations have no differential impact on the islands.

Financial Effects

There is no financial impact on business.

There may be some financial impact on persons raising and defending relevant court actions. Some of those responding to the 2018 consultation on Brexit and Family Law and Civil Law noted that costs of enforcement may be higher under Hague provisions than under EU provisions¹⁶.

**Scottish Government
Family Law Unit, Civil Law Division
Justice Directorate**

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¹⁶ Please see, for example, the third page of the Faculty of Advocates' response to the consultation: <http://www.advocates.org.uk/media/2892/final-faculty-response-16-august-2018.pdf>