# RESOLVING THE PROBLEMS OF JURISDICTION IN FAMILY LAW
# BRUSSELS II AND POINTS WEST

***Janys M. Scott, Advocate***

*"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 henceforth to be part of out law." Bulmer v Bollinger [1974] 3 WLR 202, per Denning MR.*

The European Union has turned its sights to family law. Brussels now tells us where we can raise proceedings in family cases. Council Regulation (EC) No 1347/2000 of 29 May 2000 (known as "Brussels II") applied to matrimonial matters and some children's cases. It came into force on 1 March 2001. That Regulation has in turn been superseded by Council Regulation (EC) No 2201/2003 of 27 November 2003 ("Brussels II bis"). The new Regulation extends to children's cases. The Regulation is directly applicable in Scotland, and the rest of the United Kingdom. It also applies in Belgium, Cyprus, Czech Republic, Germany, Greece, Spain, Estonia, France, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Austria, Poland, Portugal, Slovak Republic, Slovenia, Finland and Sweden, but not Denmark.

**Jurisdiction in divorce**

The rules are now found in Article 3 of Brussels II bis. The same rules apply to actions relating to "legal separation" and "marriage annulment". A court in a member state has jurisdiction to entertain an action for divorce, separation, or nullity where:

- Both spouses are habitually resident there;
- Both spouses were last habitually resident, and one still resides there;
- The defender is habitually resident there;
- The pursuer is habitually resident, and *either* has resided there for at least a year preceding the application *or* is domiciled (or a national) there and has resided there for at least six months preceding the application;
- Both spouses are domiciled (or nationals).

The United Kingdom is a member state with different legal systems applying in different "territorial units". Article 66 of the Regulation provides that a reference to habitual residence, or domicile, in a particular member state relates to residence or domicile in the territorial unit in question. The Regulation therefore applies within the United Kingdom. If, for example, both spouses are habitually resident in Scotland (and nowhere else), the Scottish courts have exclusive jurisdiction under the Regulation. Quite why the EU has taken upon itself to provide rules affecting the internal regulation of cases within the United Kingdom is a mystery. The treaty base for the Regulation, allows measures to be "necessary for the proper functioning of the internal market". It is arguable that the EU have exceeded their powers.

"Habitual residence" is a key concept in Brussels II bis. It is not defined. Habitual residence is a question of fact. It has been said to mean residence which is being enjoyed for the time being and with the settled intention that it should continue for some time (*Dickson v Dickson* 1990 SCLR 692, see also *Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937). At one time it was thought that in order to be habitual, residence should be voluntary, but the Inner House has indicated that residence need not be voluntary to he habitual (*Cameron v Cameron* 1996 SCLR 25). It was also thought that the residence should be lawful, but the House of Lords has decided habitual residence may arise even when a person is resident unlawfully (*Mark v Mark* [2005] 3 WLR 111). The House of Lords in *Mark* went further and held that the term "habitual residence" could have different meanings in different statutory contexts. In Scotland, in the context of international child abduction, the First Division held that a person could only have one habitual residence. In England it was held by the Court of Appeal that for the purposes of jurisdiction a person may have two concurrent habitual residences (*Ikimi v Ikimi* [2001] 2 FLR 1288). The House of Lords in *Mark* confirmed that a person might be habitually resident in more than one place at a time, or might have no habitual residence at all. The European Court of Justice in *Swaddling v Adjudication Officer* [1999] 2 FLR 184 considered that habitual residence referred to the state in which persons habitually resided and where the habitual centre of their interests was to be found. Account required to be taken of the person's family situation, the reasons which led him to move, the length and continuity of residence, the fact of stable employment and intentions as appeared from all the circumstances.

For the purposes of this Regulation 'domicile' is the old common law concept (not the statutory concept found in section 41 of the Civil Jurisdiction and Judgments Act 1982). The House of Lords considered the concept of domicile in *Mark* and held that, in contrast to habitual residence, domicile had to be given the same meaning in whatever context it arose. An adult could acquire a domicile of choice by the combination and coincidence of residence in a country and an intention to make his home in that country permanently or indefinitely. Brussels II bis applies the concept of domicile in relation to the United Kingdom and Ireland. Other EU countries use 'nationality' in place of domicile, so, for example an action could be raised in Italy if both spouses were Italian nationals, regardless of their domicile.

In some states a joint application for divorce is possible, and in that event there is jurisdiction if either spouse is habitually resident. There are two subsidiary rules. Article 4 confers jurisdiction for a 'counterclaim' in respect of matters covered by the Regulation. If there is a divorce proceeding in Scotland in respect of which jurisdiction is based on the Regulation, then a cross-action would probably be covered by Article 4. Article 5 gives jurisdiction for conversion of judicial separation into divorce, in states where such a conversion is possible.

There can be no prorogation of jurisdiction in matters of divorce. A state either has jurisdiction, or it does not have jurisdiction. If the court does not have jurisdiction it is bound to declare of its own motion that this is the case (article 17). A person who is habitually resident in the EU, or is domiciled in the United Kingdom or Ireland, or a national of another member state cannot be sued for divorce, save in accordance with the Regulation (Article 6).

The Regulation is given domestic effect by the Domicile and Matrimonial Proceedings Act 1973, as amended by the European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005 (SSI 2005/42). The Court of Session has jurisdiction in divorce if:

a) there is jurisdiction under the Regulation, or
b)
- there is no court of a member state with jurisdiction under the

Regulation; and

- the defender is not domiciled in Ireland and not a national of another EU state; and
- either of the parties is domiciled in Scotland on the date the action is commenced

In the sheriff court there is an additional 40 day residence requirement, which may be fulfilled by either party (1973 Act, s12(5), s7(2A), s8(2)).

Who can raise divorce proceedings where in the following cases?

1. Amy and Bill have been living in France. They separate and Amy returns home to Scotland. Bill stays in France.
2. Christina and Dino have been living in France. They separate. Christina returns home to Scotland and Dino returns home to Spain.
3. Esther and Frederic have been living in France. They separate. Esther returns home to Scotland and Frederic returns home to Switzerland.
4. Gina and Huberto are Italian nationals living in France. They separate and Gina comes to Scotland, while Huberto goes to live in Spain.

**Conflicts of jurisdiction in divorce proceedings - Europe and the world**

Article 19 of Brussels II bis provides:

"1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different member states, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court…"

Brussels II bis applies the principle of *lis pendens*, or 'first come, first served' to actions raised in two different member states. This provision does not relate to actions brought in different parts of the same state. It is relevant only to actions in

different member states. There is no discretion. The rule is absolute. The courts in the place second seised must decline jurisdiction.

The time of seisure depends on whether the first step in an action is to lodge a document instituting proceedings in court, or to serve the document. If the document requires to be lodged first, then the time of lodging is the moment the court is seised, provided the document is then served. If service comes first, then service represents the seizure of the court, provided the document is then lodged (article 16). The effect of Brussels II has not been altogether helpful. It means that in EU cases, there may be a rush to commence proceedings, in order to secure the application of what are perceived to be the most helpful rules on divorce or ancillary matters.

Article 20 allows a court to take provisional, including protective, measures in respect of persons or assets, even where the courts of another member state have jurisdiction as to the substance. This may not be broadly construed. In *Wermuth v Wermuth* [2003] 1 WLR 942 a divorce action was commenced in Germany. Before the German court had considered whether it was first seised, the wife applied to the English court for maintenance pending suit (equivalent of interim aliment), and was awarded £150,000 pa. The German court did in fact assume jurisdiction and the husband appealed the English order. His appeal was allowed. The Court of Appeal held that the order to pay a sum for an indefinite period was an unwarranted invasion of the proper function of the German judge, who was the judge first seised.

The seisure of a court means that the court will apply its own rules to the divorce, and to any 'ancillary' matters. In Scotland this means that Scots law will be applied. Scots law relating to ancillary orders on divorce is not at present in a particularly happy state. The Domicile and Matrimonial Proceedings Act 1973, section 10 provides that a court with jurisdiction to entertain a divorce may grant ancillary orders. The orders the court might make were helpfully listed in schedule 2. The Children (Scotland) Act 1995 amended section 10 to confer a broad jurisdiction in relation to children. The amendment is misprinted in the Parliament House Book version of the 1973 Act. Taking the accurate version of the amendment from schedule 4 of the Children Act 1995, it can be seen that section 10 does not now refer to schedule 2, which is left 'hanging'. It is unlikely that Parliament in the 1995 Act

intended to limit the powers of the court in financial matters. All orders for financial provision on divorce should therefore be available in divorce proceedings, wherever the parties' property may be situated.

Not all EU countries apply domestic law on divorce. Some have rules of private international law, which require application of the law of the parties' nationality, or may allow parties to specify the applicable law. The Commission has now turned its attention to the question of applicable law. From Brussels II bis, we are advancing to "Rome III", which involves proposals for harmonisation of applicable law rules. This would mean that member states of the EU would be bound by Regulation to apply a particular law to the divorce, and possibly ancillary matters. It might, but need not, be the local law. It could be a law of the parties' choice, or the law of closest connection to the parties or the marriage. This is currently under discussion.

Where there are competing actions in Scotland and one of the places to which Brussels II bis does not apply, then the Scottish court may be invited to sist the Scottish action under paragraph 9 of schedule 3 to the Domicile and Matrimonial Proceedings Act 1973. The test for a sist is "the balance of fairness (including convenience) as between the parties to the marriage". The court is obliged to have regard to all the factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being sisted, or not being sisted. The relevant authorities are *De Dampierre v De Dampierre* 1988 AC 92 and *Mitchell v Mitchell* 1992 SC 372.

**Jurisdiction in relation to parental responsibility**

Then original Brussels II Regulation covered matters of parental responsibility in the limited sphere of matrimonial proceedings between the parents. Brussels II bis now extends the European rules of jurisdiction to matters of parental responsibility generally. The Regulation covers cases of attribution, exercise, delegation, restriction or termination of parental responsibility (article 1). There is not however an exact match with Scottish notions of the matters covered by the concept of parental responsibility. The Regulation expressly extends to:

- rights of custody and rights of access

- guardianship, curatorship and similar institutions
- the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child
- the placement of the child in a foster family or in institutional care
- measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

It does not however cover:

- the establishment or contesting of a parent-child relationship
- decisions on adoption, measures preparatory to adoption or the annulment or revocation of adoption
- the name and forenames of the child
- emancipation
- maintenance obligations
- trusts or succession
- measures taken as a result of criminal offences committed by children.

The principal rule is that the courts of a member state have jurisdiction in respect of a child who is habitually resident in that state (article 8). There are significant complexities in working out where a child is habitually resident. The habitual residence of children is generally treated as being dependent upon that of the persons with parental responsibility for the child. There is a full summary or the law relating to habitual residence in *International Movement of Children* by Lowe, Everall and Nicholls.

Article 66 applies in children's cases. This is the article that relates to member states where there are two or more systems of law. Any reference to habitual residence in the member state "shall refer to habitual residence in a territorial unit". This implies that jurisdiction lies with the courts of the territorial unit in which the child is habitually resident. Such an interpretation would be consistent with the provisions relating to divorce. On this view, Brussels II bis governs the distribution of cases within the United Kingdom, as well as distribution between EU member states.

There are particular rules relating to children who move from one state to another lawfully (article 9). In those cases the courts of the place where the child was habitually resident retain jurisdiction for three months for the purpose of modifying a judgment on access rights, provided the holder of those rights continues to be habitually resident there. The courts of the place to which the child has moved may deal with all matters, including access, if the holder of the access rights accepts jurisdiction by participating in the proceedings in the child's new state of habitual residence.

If a child is moved from one state to another unlawfully then there are significant hurdles to overcome before the courts of the new state of habitual residence will have jurisdiction. The Regulation is designed to reinforce discouragement of international child abduction. Article 11 attaches extra provisions to the Hague Convention on the Civil Aspects of International Child Abduction, as between member states. Article 10 prevents any change in jurisdiction from the courts of the child's original habitual residence, to the new habitual residence until each person, institution or other body having 'rights of custody' has acquiesced in the removal of the child or the child's retention, or that the child has resided in the other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

> (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;
>
> (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);
>
> (iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

There is some scope for prorogation of jurisdiction. If a child has a substantial connection with a member state and all parties accept jurisdiction of the courts of that state, provided acceptance of jurisdiction is in the best interests of the child, the case may proceed there (article 12(3)). A child may have a substantial connection with a member state if one of the holders of parental responsibility is habitually resident there, or the child is a national of that state.

If a court is exercising jurisdiction in divorce, legal separation or marriage annulment, by virtue of the Regulation, then that court may also exercise jurisdiction in a matter relating to parental responsibility where at least one of the spouses has parental responsibility and jurisdiction is accepted by the spouses and the holders of parental responsibility, and is in the "superior" interests of the child (article 12(1)). The new Regulation (unlike the original Brussels II) covers stepchildren. The reference to "superior" interests is a simple error. It should have read "best" interests. Jurisdiction lasts until decree in relation to the matrimonial case, or until judgment in relation to the children (if later).

Where a child's habitual residence cannot be established, and jurisdiction is not prorogated, then the courts of a member state may exercise jurisdiction on the basis of the child's presence, under article 13. If no court of a member state has jurisdiction under the Regulation, then each member state may apply its own law (article 14).

Under Brussels II bis, once the courts of a particular member state are seised of a particular cause of action in relation to a particular child, no court in another member state can exercise jurisdiction (article 19). This rule applies between member states, not between courts in different territorial units in the same member state.

There is an emergency jurisdiction under article 20. The Regulation does not prevent a court in any member state taking provisional, including protective measures in

respect of persons or assets. These measures cease to apply once the court with general jurisdiction has taken the measures it considers appropriate.

The court does however have the power to transfer cases, or parts of cases, relating to parental responsibility to courts of another member state with which the child has a particular connection, if the other court would be better placed to hear the case, or that part of the case (article 15). The original court may either sist the case and invite parties to apply elsewhere, or may make a direct request to a court of another member state to assume jurisdiction. This can happen on the motion of one of the parties, or *ex proprio motu*, or on application from a court in another member state with which the child has a particular connection. Before the transfer can be made at the instigation of a court, at least one of the parties must accept the transfer. The original court must set a time limit for the other court to take over the case, which failing the original court should continue to exercise jurisdiction. There is a new Chapter 88 in the Court of Session rules which governs transfers under article 15.

Domestic legislation takes effect subject to Brussels II bis, and has been amended by statutory instrument to confirm that this is the case (SSI 2005/42). The Children (Scotland) Act contains a new section 14(5) and section 86A. This confirms that jurisdiction in applications relating to the administration of children's property and parental responsibilities and rights (sections 9, 11 and 14) must conform to Brussels II bis. The Regulation also governs applications for a parental responsibilities order under section 86 (ie. it supersedes to some extent the decision of the Court in *Glasgow City Council v M* 2001 SLT 396). While there is no express mention of Brussels II bis in relation to the children's hearing, the jurisdiction of the hearing is affected in cases where a child may be placed in a foster home or institutional care.

There should generally be no particular problem about satisfying the rules of jurisdiction in Brussels II bis and the domestic rules. The provisions for ancillary orders in divorce, found in section 10 of the Domicile and Matrimonial Proceedings Act 1973 are expressly subject to Brussels II bis, as are the rules of jurisdiction in the Family Law Act 1986. Part I of the 1986 Act applies to freestanding proceedings with respect to residence, custody, care or control of a child, contact, access, education or upbringing, subject to certain exceptions (section 1). For the most part

the rules in the 1986 Act are consistent with Brussels II bis. There is emergency jurisdiction to make immediate orders for the protection of the child (section 12). The primary ground of jurisdiction in section 9 is based on habitual residence of the child. If the child is not habitually resident in the United Kingdom, then the court may exercise jurisdiction if the child is present in Scotland (section 10).

Jurisdiction in the sheriff court is further confined. The sheriff has emergency jurisdiction when a child is present in the sheriffdom (section 12(a)). There is general jurisdiction in the sheriff court if the child is habitually resident in the sheriffdom (section 9(b)). If the sheriff is exercising jurisdiction under section 10 based on the presence of the child in Scotland, then either the pursuer or the defender must be habitually resident in the sheriffdom (section 10(b)).

There are potential problems in cases where there have been divorce proceedings in another part of the United Kingdom. Neither the Court of Session, nor the sheriff court, can exercise jurisdiction under the 1986 Act in freestanding proceedings, if there are matrimonial proceedings "continuing" in another court in the United Kingdom (section 11). Divorce proceedings in England, Wales and Northern Ireland continue until a child attains 18, and in Scotland until the child attains 16 (section 42(2) and (3)). This could give rise to a problem. If a child's parents divorce in England, and the child then becomes habitually resident in Scotland, article 8 of Brussels II bis, read with article 66 means that Scotland has principal jurisdiction. There is no continuing article 12(1) jurisdiction in England after divorce has been pronounced and any judgment given in respect of the child. An English court could not exercise jurisdiction unless there is prorogation under article 12(3). The sheriff is limited by the extra conditions of jurisdiction in the 1986 Act. Section 11 prevents a court exercising jurisdiction under the 1986 Act. The case may have to be raised in the Court of Session, relying directly on the provisions of Brussels II bis.

Brussels II bis does not apply to decisions about competing proceedings within the United Kingdom, and between a court in the United Kingdom and a non-EU state. Decisions in such cases are based on the 1986 Act. A Scottish court may decline jurisdiction in matrimonial proceedings, under section 13(6) if another court in Scotland or the United Kingdom is prevented from exercising jurisdiction by the

existence of the proceedings. The court may sist proceedings in Scotland under section 14(2) if there are proceedings elsewhere in Scotland or another part of the United Kingdom or the world, or there are likely to be proceedings elsewhere. The test for sist is based on the principle of *forum conveniens* (see *B v B* 1998 SLT 1245). The welfare of the children is an important factor, but not the paramount consideration. The court will consider habitual residence of the children at the time of the application, the location of witnesses, issues of cost and expeditiousness and thoroughness of the proceedings, together with any other matters depending on the circumstances of the case.

Isabella is the child of Juan and Katriona. She lived with her parents in Spain and has dual Spanish and British nationality. When her parents separated, the Spanish courts decided that she should live with Katriona, and stay with Juan every other weekend. Juan agreed that Katriona could take Isabella home to live in Scotland. There was no modification of his contact rights before they left. Which courts have jurisdiction to determine matters of residence and contact:

1. One week after Isabella leaves Spain?

2. Four months after Isabella and Katriona arrive in Scotland?

What difference would it make if Katriona brought Isabella to Scotland without securing Juan's consent or the leave of the Spanish court?

*This paper was originally delivered on 26 October 2005 at a Conference organised by* ***CLT Scotland****, and is reproduced with their kind permission.*