

ENGLAND EXPECTS ...

Not to be confused with Scotland!

A Brief Guide to family law
within the British Isles

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Introduction

Whilst practising in Australia, I have been surprised at how many quite senior solicitors, barristers and judges confuse the various family law jurisdictions in the British Isles. There have been references to cases being transferred to and from the “UK courts”, to a matter being a “British case” and even to a couple, temporarily in Sydney but both from Dublin, being recommended to take local advice - from London lawyers. But given that so many of the differences within the British Isles arrive from history of Roman times onwards, confusion in family law circles about what are the various countries and family law regimes in the British Isles is perhaps understandable.

This guide attempts to summarise some aspects of the various legal jurisdictions. But it is only a brief summary and local advice must always be taken. Just don't tell a Scot that England includes Scotland or say in the Republic of Ireland that Eire is part of the United Kingdom!

A geography and politics lesson

British Isles means the group of islands off north west Europe, including the islands of Great Britain (the countries of England, Scotland and Wales), Ireland (Northern Ireland (NI) and the Republic of Ireland (ROI, also known as Eire)), the Channel Islands (the islands of Jersey, Guernsey, Herm, Sark, Alderney, just off the Cherbourg peninsular of north France), the Isle of Man (in the Irish Sea), and other small bits of rock off shore. It is a geographical term. (However some in the Republic of Ireland would not accept either the term, the “British Isles”, or that it includes their country.)

United Kingdom is the British Isles without Eire, the southern part of Ireland, which is a totally separate sovereign state. In some contexts, it excludes the Channel Islands and the Isle of Man, as they are also separate sovereign states. It is a political term and in some respects (more international than domestic law) a legal term.

Great Britain is the big island, being England, Scotland and Wales. It does not include Northern Ireland. It is a geographical term but is often confused with reference to Britain (arguably the same as Great Britain) or British (which is sometimes based on the UK area i.e. including NI). Moreover England was often referred to as Britain but recent years have seen not only the Scots and Irish resent this (as they have for centuries) but also the English have reasserted their separateness and identity from the rest of the UK.

England, Scotland, Wales and Northern Ireland as well as the Channel Islands and the Isle of Man must always be considered as separate legal entities and jurisdictions, despite the political status within the UK. ROI is wholly separate, legally and politically.

The United Kingdom has a population of approx 60 million, of which England has 50m, Scotland 5m, Wales 3m and NI 2m. ROI has a population of 4m. The newly enlarged European Union has a population of approx 450m. By comparison, Australia has a population of approx 20m. The UK is 245,000 sq kilometres, of which England is 130,000 and Scotland is 78,000. ROI is 70,000 sq km. By comparison, Australia is 7.7m sq km.

The primary language is English save for some parts of Wales and Ireland where Gaelic is used alongside English. Within some immigrant communities' areas, primarily from the Indian subcontinent but also now from some parts of the enlarged EU, other languages are in effect also a primary language. Translators are not unusual in the family courts.

London is the capital of England with a population of approx 9 million, with the other biggest cities being Birmingham (2.5m), Manchester (2.4m) and Leeds (1.6m). The political capital of Scotland is Edinburgh (450,000) although Glasgow is far bigger at 1.2m. The political capital of Wales is Cardiff (325,000) with Swansea having 275,000. The capital of NI is Belfast (280,000). The capital of ROI is Dublin with 1m.

The UK is an unwritten constitutional monarchy governed by the present Queen Elizabeth II via Parliament. This is in London. But Northern Ireland (intermittently), Scotland and Wales have their own regional Parliaments with varying powers, including law making in family law matters (except Wales). Scotland has for a long time had separate laws save as to tax, defence and similar. The London Parliament has two Houses, the lower being the House of Commons with 659 directly elected MPs from across the UK and the upper being the House of Lords which is unelected and presently subject to significant reform and with restrictions on its power to oppose on the House of Commons. The political/legislative House of Lords should not of course be confused with the judicial House of Lords! (The judges in the latter can however sit in the former.)

The Republic of Ireland is a republic with a President separately elected every seven years. Its Parliament is the **Oireachtas** which consists of the President of Ireland and two houses, Dáil Éireann and Seanad Éireann (also known as the Senate). The main power lies in the former, as the lower house. The Prime Minister is known as the **Taoiseach**, **appointed by the President on the recommendation of the lower house**.

The House of Lords is the final appeal court of all UK countries. In ROI it is the Supreme Court, headed by the Chief Justice. In exceptional cases, the national courts can refer a point for determination by the European Court of Justice on interpretation of EU law – it is not a right of appeal and, in practice, very few family cases go to that court. It should be distinguished from the European Court of Human Rights, based in Strasbourg, and which hears complaints, including from members of the public, about breaches of the European Convention of Human Rights. Again few family cases appear before it although a number of cases concerning child care law have featured.

The UK and Eire are separate signatory states of the European Union. ROI has joined the Euro currency but the UK is still debating the issue.

For sporting purposes, some teams have represented GB (which confusingly then often includes NI) or the UK (e.g. Olympics) but increasingly in recent years each country has had its own team. In rugby union, each country in the British Isles has its own team but in rugby league it is the British Lions which then includes ROI. Don't even ask about cricket as of course the representative team abroad is, in name at least, the Marylebone Cricket Club (MCC)!

Family law

Apart from the fact that in all instances Wales is included with England, the countries of the UK are separate family law jurisdictions. (Hence a case cannot be transferred generally to the UK.) Each develops their own family law themselves and have separate court structures save for the House of Lord being the highest internal court. They have separate legal professions. Apart from rights of audience via the EU, lawyers in one country have are no automatic rights in other UK courts.

Scotland is the most separate from the others, being historically much more based on French law

rather than English law. Although it has some similarities with English family law, this is more due to general international trends than any strong, direct influence. Financial provision law and procedure and the grounds for divorce are very different from England e.g. with Scotland having very restricted term maintenance orders, a quasi community of property regime, binding marriage agreements, no fault divorce etc, although children law is more similar. Scotland employs very distinctive and unusual legal expressions. Until quite recently, only the Edinburgh courts had family law jurisdiction. It is now more spread but despite its smaller size than Glasgow, Edinburgh tends to deal with many family law cases and especially those with an international background.

Northern Ireland family law, procedure and practice is quite similar to England, with some legislative or case law changes following a few years behind England.

The Channel Islands borrow extensively from England, with London based judges and lawyers going across on some bigger local cases, but it has some very distinctive French influences due to its geographical and demographic closeness. The two main islands, Jersey and Guernsey, have separate courts. The Channel Islands are significant banking and tax jurisdictions – they do not like to be referred to as tax havens. There is a small resident population but it is very expensive for a non Islander to buy real property – there are two pricings based on residency status. Invariably therefore the Islands more often feature internationally in injunction and/or enforcement proceedings rather than being the forum for the main proceedings.

The Isle of Man is close to England and Northern Ireland in law save there are some significant differences where banking laws intrude into family law.

Most family lawyers practising on mainland Britain with an international practice have only occasional dealings with the Channel Islands or the Isle of Man and local advice is essential at an early stage.

As stated, each country, England (including Wales), Scotland, NI, CI, IOM, is a separate legal jurisdiction. It is not possible to refer to the UK having jurisdiction in a case or a case being transferred to the UK. A freezing (Mareva) order made in one country will not bind assets or holding organisations e.g. banks, in other UK countries. This is especially vital with CI and IOM. So a freezing or disclosure order against HSBC in England will not bind the “same” named bank in Jersey. But pension/super companies in Scotland, where many are based, will in practice follow an English court order.

Within the UK, there is one combined law dealing with forum if there are family proceedings in two UK countries. It is a mandatory criteria, not discretionary. It is primarily based on last joint residency so a case with proceedings in both England and Scotland has fixed rules as to which takes jurisdiction.

However as far as forum with other EU states and Brussels I and II is concerned, the UK is just one signatory state. So under BII, the family law forum race is between the UK state (e.g. Scotland) and the other EU state. If it was three way e.g. England, Scotland and France all had possible jurisdiction, then forum between England and Scotland would be determined by the UK mandatory forum laws and then forum between the “successful jurisdiction” of the two and France is then mandatory under the first to issue principle of Brussels II.

But as far as forum with non EU states, e.g. Australia, is concerned, each UK country must be separately considered. Naturally it is important to know whether the separate UK countries have jurisdiction and what would be the outcome in each country. Some times there can be very different outcomes, especially between England and Scotland. So an Australia/Scotland case may be better off for a client taking place in Scotland but on the same facts an Australia/England case may be better off in Australia.

The UK countries are separate Hague Convention signatories in respect to child abduction, with separate

Central Authorities who should be contacted direct and not via London if not England.

There are cross UK laws on recognition of marriages, divorces, family court orders.

The Republic of Ireland is strongly Catholic in its legal tradition and, in 1997, was one of the last countries to allow divorce. Before then, a number of Irish citizens came across to England, gained jurisdiction before the family courts based on 12 months residency and then got divorced from their Irish spouse, sometimes without her/his approval. Having done so, some remarried whilst in England (sometimes having brought their Irish fiancée with them), returning to live with the new bride in ROI. To the whole world, save for ROI, this new union was a legally valid and recognised marriage. Within ROI, it was not recognised, leaving a limping marriage and a very dissatisfied abandoned spouse. It is relevant to be aware of this practice as it can affect international lawyers looking at the family affairs or estates of those from ROI. But since the reforms of the mid 1990s, the Republic of Ireland has seized family law reform and is now viewed as an advanced jurisdiction. It considers English family law (due to geographical closeness etc) e.g. adopting the principles in the White finance cases, but then develops the law itself. It is a separate EU state.

Local advice should always be obtained. The best starting point, apart from personally known contacts, is the International Academy of Matrimonial Lawyers (www.iaml.org) whose self elected members are specialists in international aspects of family law cases. Some specialise mostly in finance and forum cases and Reunite (www.reunite.org) has a list of child abduction lawyers. The primary organisations of solicitors for contact are the Solicitors Family Law Association (Eng) (www.sfla.org.uk), The Family Law Association of Scotland (www.fla-scotland.co.uk), the Association of Family Lawyers for Children in NI (sineadlarkin@hhdsolicitors.com), Family Lawyers Association (ROI) (no web address available) as well as local law societies.

An article on English family law web resources for can be found on the information pages at www.davidhodson.com

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