

The International Family Law Practice

Second Edition

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FOREWORD

The International Family Law Practice is a huge and impressive work. Its genesis is David Hodson's very successful *A Practical Guide To International Family Law Practice*, published in 2008. The fact that this follow-up work is: (a) much expanded; and (b) published relatively soon after the original edition, bears testimony to the exponential growth of international family law litigation. Gone are the days when practitioners and indeed scholars and policymakers, could dismiss 'international' family law as an esoteric area that need not concern them. In this regard one is reminded of Holman J's salutary warning in *Re H (Abduction: Habitual Residence: Consent)* [2000] 2 FLR 294 at 304:

'There may be a tendency to think that child abduction is a specialist branch of family law and only to spot it when there has been an obvious "snatch". . . . But, just as every general practitioner must be alert to spot a rare illness even if he does not have the expertise to treat it, so also anyone, whether judge or practitioner, having any involvement with cases concerning children, must always be alert to spot a possible case of international child abduction.'

If that was true of child abduction over a decade ago, how much more relevant is that type of observation now. Family Law has become significantly more 'internationalised', not least by increasing numbers of EU Regulations and Directives affecting all areas, including divorce, maintenance and property as well as children, and there is clearly more to come – witness the imminent UK ratification of the 1996 Hague Convention on the Protection of Children. Furthermore, there are more international families and families with international interests, such as ownership of property, situated abroad. As is well said in the concluding chapter, 'international family law has moved from the mega wealthy couple and into all cases at all levels of society'. To which one might add that it is an area that practitioners might ignore at their legal peril.

So where else to turn to become familiar with this ever expanding field, but *The International Family Law Practice*? The work is squarely aimed at the practitioner and is replete with good practice advice and clarifying flowcharts. It is clearly written by a team of experienced practitioners, principally by David Hodson, who has long been involved in

international practice and has been an ever-present member of the UK's International Family Law Committee. It is no accident, either, that Hodson was awarded the Family Law Readers' Commentary Award in the first ever Family Law Awards held in October 2011.

An impressive feature of this work is its width of coverage. Its 26 chapters cover not just the obvious issues such as Recognition of Foreign Marriages and Divorce, Same-sex and Cohabitation Relationships, Financial Provision after an Overseas Divorce, Enforcement and Registration of Orders, Marital Agreements, Child Abduction, Applications to Take Children Abroad (a particularly 'hot' issue at the moment), and International Adoption but also less obvious, but really useful, topics such as Enforcement and Registration of Orders, Stays in the UK, Europe and Worldwide, Pensions, Trusts, Surrogacy and Forced Marriage. There are also a number of useful practical chapters dealing with Service, Affidavits and Statements of Truth, Evidence, Cross-border Alternative Dispute Resolution and Legal Aid. The book also includes chapters on Islamic Law and Immigration Issues. The work begins with a couple of chapters explaining what international family law is and why practitioners need to know about it and also on Practice and Case Management, including discussion of whether a firm should take on an international case. The interesting concluding chapter looks to the future.

Not to be overlooked are the indispensable Appendices which not only contain the disparate relevant domestic and international legislation, statutory instruments and rules but also various Protocols and international Declarations. Note might also be taken of Appendix 1, 'England Expects . . . Not to be Confused with Scotland! – A Guide to Family Law in the British Isles'.

In short, with its breadth and clarity, *The International Family Law Practice* is clearly destined to become an indispensable part of the practising family lawyer's library and will be a very useful addition to works of reference for the judiciary and the academic community.

Nigel Lowe

Professor of Law and Head of Cardiff Law School

PREFACE

A Practical Guide to International Family Law, the first edition of this book, was published by Jordan Publishing in late spring 2008. As its name made clear, it was explicitly intended as a practical guide for practitioners having to deal with the international aspects of family law cases which were now affecting all practices in all communities across England and Wales. It provided information for the specialist family lawyer without much prior knowledge of international work as well as the increasing number of lawyers with international experience. We were delighted at the reception and success of the first publication.

Whilst some still considered international law an esoteric area of family law practice, many solicitors, barristers and judges now appreciated its impact and importance. This awareness has only increased in the 3 years since the book was published. But international family law is very fast changing. Reforms from Brussels and The Hague have continued at speed. Therefore in late 2010 this second edition was planned, appropriately renamed.

As fundamental as any new law from abroad was the arrival, in April 2011, of the new Family Procedure Rules 2010. They have introduced a complete new procedural code, covering the High Court, county court and family proceedings court. Whilst some of the old rules have been transported directly into the new rules, many are very different. Crucially, the new rules showed awareness of the international elements now within family law with several Parts and Practice Directions specifically dealing with international aspects. It was clear a second edition was needed to cover the new rules.

The EU has not slowed down in its law reform programme. In June 2011, Brussels I which governed maintenance obligations, with maintenance meaning needs, was entirely replaced for family law purposes by the EU Maintenance Regulation. This is on any basis an exceptionally complex piece of legislation yet very important internationally. There are new bases of jurisdiction, priority to agreements, separation between some countries dealing with needs claims and others dealing with property sharing, different procedures for enforcement between applicable law and non-applicable law countries and the much-loathed first to issue from Brussels II. It has a wide-ranging impact on jurisdiction of claims for

financial orders and financial remedies. Even as this book was being finalised, in late October, new procedures in Practice Directions were being published.

The Supreme Court has also made its contribution. *Agbaje* was the first MFPA, Part III case to reach the Supreme Court since the legislation in 1984 allowing an application for financial provision in England and Wales after a foreign divorce. Yet the international family law landscape has changed dramatically since the mid-1980s. It was an excellent judgment in many ways, allowing opportunities for just and fair outcomes for those spouses having inadequate provision abroad. Yet it is internationally confrontational in that the English courts were in effect acting as the Court of Appeal on decisions of other competent family courts abroad. *Radmacher* was an international marital agreement by a couple from abroad in circumstances where the agreement was binding in their own countries yet being implemented in a jurisdiction, England, which had hitherto set its face against any possibility of being bound or highly influenced by agreements. The Supreme Court recognised the very different cultural circumstances in which marital agreements are entered into abroad. It is one of the fault lines between common law and civil law, with English lawyers putting the greater emphasis on overcoming prejudice and duress to women, the financially weaker party, of these agreements by independent legal advice and disclosure. The Supreme Court has also handed down several fundamental judgments in the international context regarding jurisdiction in children cases.

The battle lines have been primarily in respect of the attempts by the EU to impose applicable law on the UK, and some other EU countries. Very belatedly and most reluctantly, Brussels has seemed to accept the major disadvantages for families in the first to issue, *lis pendens*, of Brussels II on divorce, discouraging mediation, reconciliation and negotiation in advance of issuing proceedings first. Their answer is applicable law: it does not matter where proceedings are issued first if it is known which law will be applied. This of course ignores the well-known fact that a particular law is often applied very differently in foreign countries than it is in its home country. But with the civil law-centric policy of Brussels, they tried to introduce applicable law in draft legislation known as Rome III, which was resisted by the UK and so most EU countries have entered into their own self-contained law in respect of applicable law. But when Brussels I in respect of maintenance obligations was being replaced, the EU tried again to impose applicable law and it was only after much political positioning and negotiations that a compromise was reached. These issues have been to the fore since the first edition and will continue.

With so many international families, movement of parents after parental separation has increased and with it the requests to relocate with the child. But English case-law has been dogged in its determination to give the emphasis to the primary carer in *Payne* and subsequent cases, rather

than a more balanced test focusing on the impact on the child of the proposed move. Very belatedly however the tide is turning with the Court of Appeal decision in *MK v CK* in spring 2011 putting the emphasis back again on to the welfare of the child.

Areas of practice at the time of the first edition which were only then in their relative genesis have increased in importance. England has led the way in the fight against forced marriages. Legislation, case-law and government units have worked through both legal action and education to eradicate this practice. English law has been significant in its worldwide reach. England has also led the way in legislation in respect of same-sex relationships with recognition of foreign same-sex registered relationships, even if the foreign relationship is of a different form and status than in England, with opportunities for financial claims after a foreign dissolution and dissolution here of a foreign registered partnership. This last aspect has been controversial because on dissolution one party is entitled to the claims as if on dissolution of civil partnership in England even if those claims were not available on the dissolution abroad. Forum shopping is equally beneficial in the same-sex community as on divorce. Surrogacy has increased internationally with a good number of putative parents from England seeking assistance abroad and with some countries specifically encouraging surrogacy arrangements. In a series of recent cases since the first edition, the English court has had to balance the best interests of the child already born with disapproval of commercial surrogacy for profit.

Procedure is sometimes as important as substantive law. Despite criticisms of the overpowering approach of Brussels, good developments have arrived from the EU in respect of service, evidence abroad, legal aid and other areas.

In addition to these changes, case-law has continued to develop, balancing with colossal difficulty the retention of traditional English family law concepts, laws and practices with endeavouring as much as possible to recognise, engage and draw us closer to our civil law neighbours. It has not been easy. Knowing where to draw the line in the sand has required much wisdom, caution and sensitivity.

Moreover, whilst so much of the clamour and din of law reform has come from within Europe, England still has incredibly strong family law connections across the world, particularly common law but also other jurisdictions. It is too easy in the European debate to lose sight of these valuable, historic and recent ties. We have massive family law traffic with the US, former and existing Commonwealth countries as well as areas such as the Middle East, Russia and the Far East. Just as the UK now finds itself economically and politically struggling to decide whether its future lies aligned very largely within Europe or as a continuing world player with alliances not only with Europe but elsewhere in the world, so

English family law is in a similar position. Because of the free movement of peoples across Europe, we have very many family law cases with other EU states. But also because we are probably the world's most cosmopolitan and multinational nation, with international families spread across the whole country rather than just a few major cities, our family law cases spread far and wide across the globe. We must never lose sight of our very diverse international ties and close family connections in our development of our law.

There has been a further dramatic development since the first edition. No longer are solicitors, barristers and judges conducting cases on a generalised knowledge of international family law principles. They are now arguing in court, through correspondence and in the mediation room the actual wording and precise content of international Regulations and Conventions. It was realised that there was no one source of the primary international family law materials in one place. Yet this is what practitioners needed. It was simply unfeasible to include this additional material in the Red Book. Hence the decision to include it in this publication, 'The Grey Book'. Appendix 4 onwards contains domestic legislation, legislation from the EU and The Hague and other important material. It is now available in one place for the practitioner. It is shown as, for example 'see **App 7**'. Clients do not present with a discrete narrow legal problem. Their cases crossover into other aspects of international family law. Therefore cross-referencing is extensive throughout the book to assist practitioners, for example 'see **9.4.2**'.

In the first edition I had the considerable benefit of three contributors on very specialist areas, Katherine Landells on same-sex relationships, Nazia Rashid on Islamic aspects and Nadine Finch on immigration issues. I have been very grateful to them for continuing their contribution in this second edition. I also asked specialists in other areas to contribute to the second edition. I am very grateful to the additional contributors, building on the content in the first edition, namely David Salter on marital agreements and on pensions, Helen Blackburn on international adoption and on legal aid, Ann Thomas on child relocation and on general international children issues, Louise McCallum on forced marriages, Louisa Ghevaert on surrogacy and Carolynn Usher on child abduction. The expertise and specialisation of the contributors has added hugely to this publication.

I have been grateful to others who have commented on and assisted in respect of specific chapters including Helen Blackburn (general international children issues and surrogacy), Tim Amos QC, Gavin Smith and Melanie Barnes (EU Maintenance Regulation), Denise Carter OBE (mediation) and Hayley Trim of Jordan Publishing on a variety of topics where she has been so helpful. I am particularly grateful to my colleagues at iFLG who have undertaken research including Hannah Budd, Jenny Green, Lucy Loizou, Mandeep Gill, Carmel Brown, Katie Harris and

Michael Allum. I have also been grateful to Professor Patrick Parkinson and Justin Dowd and others at Watts McCray, our associate firm in Australia, for their insights, information and input from an Australian perspective. I have been honoured by Professor Nigel Lowe who has written the Foreword.

I have been exceedingly grateful for the support throughout of my editor at Jordan Publishing, Greg Woodgate, along with Kate Hather. I am very grateful to Hugh Logue who invited me to write a weekly opinion piece for Jordan Publishing's electronic newsletter on international family law matters which has made me keep up to date. Supremely, I have continued in the debt of Liz Walsh, the stalwart of family law reporting and editing, in this area of our work.

Book writing is a solitary experience yet for a lawyer in private practice having to continue with client work and other professional commitments, it can only be teamwork. Therefore I am so very grateful to all of my colleagues at The International Family Law Group LLP (iFLG). My team, our associate solicitor, Hannah Budd, and my PA, Catherine Evans, have been superb and very patient and understanding.

When Ann Thomas and I set up the practice in April 2007 with only four people we were certain there was a fundamental need in the market for a law practice primarily looking after the needs of international families and their children. Yet we did not anticipate the extent of the demand: iFLG now has over 25 people which is testimony to the growth of this area of work. Most of all I am grateful to Ann Thomas for all her support and encouragement throughout this process in the writing and editing of the second edition. I came back from our honeymoon to plunge immediately into the depths of recognition of foreign marriages, international surrogacy and piercing the veil of offshore trusts. I could not have accomplished it without her and I am exceedingly grateful.

David Hodson

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