INTERNATIONAL SOCIETY OF FAMILY LAW

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PRESIDENT'S MESSAGE:

Dear Friends in Family Law,

I just finished reading a set of essays written by young American students as part of their applications to attend a college or university. The essays were published in the New York Times, which each year puts out "a call for college application essays about money, work and social class" and publishes a handful of those submitted. This year, the *Times* published seven essays. What fascinated me about these pieces is that, despite the call for essays about "money, work, and social class," only one of the seven winning essays was not, at least in part, about family. Indeed, four of the seven focused almost exclusively on some aspect of family life.

Family life is powerful. For some of these young essayists, a parental example or push had provided the key to exiting poverty. For others, parental experience was what best captured the concrete hardships of poverty or of ensuring a life free from it. But across the board, family was the medium through which values and attitudes toward the larger world were formed.

Social science researchers have repeatedly concluded that early home experience is one of the most powerful predictors of adult life. Exposure to parental violence, conflict, and poor parenting are all correlated with negative effects on adult health, behavior, and happiness. For example, in one of the longest and best known studies of adult development (the Grant Harvard Study), "at age 53, more than a third of the 23 men with bleak childhoods, the Loveless, already suffered from a chronic illnesses like hypertension, diabetes, and heart disease; 4 had died. Among the 23 men with the warmest childhoods, the Cherished, all were living and only 2 were chronically ill." The association between being cherished and health did dissipate over time, and, by age 75, "there was little relationship between the quality of childhood and objective physical health"; genes and luck do also play powerful roles in determining health and longevity. But on other dimensions, childhood experience continued to predict outcome until the end of life. Loveless children "were more likely to be labeled mentally ill." They also "found it difficult to play, . . . trusted neither their emotions nor the universe[, and were] . . . often relatively friendless for all of their lives." Indeed, the "Cherished were three times as likely at age 70 to enjoy wide social supports." Even with respect to success in the world, "emotional riches" were "far more important" outcome predictors than income: "Good mental health, good coping both as children and adults, warm friendships, admired fathers, and loving mothers predicted high income."

This is not to say that poverty and social class are unimportant; in the Grant Harvard study, the adult IQs, incomes, and prestige value of both educations and jobs were, on average,

markedly lower among the Inner City men who were studied than among the Harvard men. Moreover, "the physical health of the 70-year-old Inner City men was as poor as that of the Harvard men at 80."

But the negative effects of class and income deficits can be ameliorated by parental guidance of the sort described by the *Times* essayists; indeed, in the Harvard study, the health of the *college-educated* Inner City men at 70 "was as good as that of the Harvard men at 70."[1]

The challenge for family policy is to provide parents with tools to help them in these important tasks. A growing body of evidence shows that early interventions in family life can achieve highly positive results. One well-known example is the Nurse Family Partnership Program (NFPP), which has been intensively studied, using rigorous evaluation criteria, for more than three decades. NFPP has demonstrated positive results on a wide range of outcomes, including prenatal health, child maltreatment and injuries, school readiness, maternal employment and welfare dependence, subsequent pregnancies, and even the mortality of mothers and children.[2] Similarly, the High/Scope Perry Preschool Project (Perry), which coupled high-quality early education with weekly home visits by well-qualified teachers, has produced a stunning array of enduring positive results. Even when child participants were reassessed at age 40, program participation was associated with significantly—often dramatically—better outcomes in education, economic performance, crime prevention, family relationships, and health.[3] Male Perry program participants were almost twice as likely (57% vs. 30%) to have raised their own children and about 50% less likely to have ever been sentenced to jail or prison (28% vs. 52%); program participants had significantly higher median incomes ($1856 vs. $1308 per month) and were significantly more likely to have savings accounts (76% vs. 50%).[4] At least two other high-quality preschool programs have also demonstrated positive outcomes that are long-term and cost-effective.[5]

To summarize, the inner world of the family both reflects and mediates the larger social situation in which the family is situated. Parents can give their children the tools to escape from poverty and low social class. And family law and policy can aid parents in this vital role.

Today, however, far too many family-assistance programs are put into place without any effort to determine effectiveness. For example, in the United States, divorcing-parent education programs, responsive to the vast trove of social-science evidence on the harmful effects of parental conflict, have proliferated over the past twenty years; at least 46 states now offer parent education, and some mandate attendance.[6]

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[1] George E. Vaillant, *Aging Well: Surprising Guideposts to a Happier Life from the Landmark Harvard Study of Adult Development* (Hachette Book Group, 2002). Quotations are from Chapter 3, but the ebook version I have at hand won't reveal page numbers.

[2] The studies are numerous. They are listed at http://www.nursefamilypartnership.org/Proven-Results/Published-research.

[3] L.J. Schweinhart et al., *The High/Scope Perry Preschool Study Through Age 40: Summary, Conclusions, and Frequently Asked Questions*, HighScope Educational Research Foundation 2005.

[4] *Id.* at 2-3.

[5] *See* L.A. Karoly, J.S. Kilburn &J.S. Cannon, *Early Childhood Interventions: Proven Results, Future Promise* (RAND Corporation 2005).

[6] S.L. Pollet and M. Lombreglia, "A Nationwide Survey of Mandatory Parent Education," [2008] 46 *Family Court Review* 375.

But the rapid spread of divorcing-parent educational programs does *not* rest on any evidence of long-term effectiveness. As the authors of a recent meta-analysis blandly concluded, we still "do not know whether or not the[se programs] . . . are effective."[7] Why don't we know? "[T]he lack of convincing evidence of program effects is due to methodological limitations in the evaluations."[8] Virtually all programs have been established without control groups; many evaluations have relied on very small samples or poor evaluative measures; no evaluations have measured long-term effects.

We can do better than this. Family lawyers and social scientists need to work together to ascertain what tools can best promote optimal family life and to ensure that they are made available to the families who need them.

Marsha Garrison

marsha.garrison@brooklaw.edu

[7] *Id.*
[8] *Id.*

REPORT OF THE SECRETARY-GENERAL:

Report of the Secretary-General

The Executive Committee held its annual meeting in Paris April 25th. At the meeting proposed changes in the by-laws were discussed. Certain changes of the by-laws are required due to our new system for paying membership fees through the website and Paypal. It is therefore suggested that the ISFL be registered as a nonprofit organization in The Netherlands, where our accounts and treasurer are situated. In order to register, our by-laws must conform to Dutch law. The amendments are of formal character and concern, among other things, the termination of membership, yearly meetings of the society, appointment of an auditing commission, and the representation of the society. The by-laws with proposed amendments will be sent out to the members of ISFL for a vote after a final examination by Dutch legal experts on non-profit organizations.

At the meeting it was also noted that our new website and the membership management system were up and running and functioning well. Our dedicated webmaster Professor Patrick Parkinson is continuously working to bring the website to its full capacity. This includes making the website available in several languages and updating the membership list to make sure that all current members have access to the members' only section of the website.

The Executive Council meeting in Paris was preceded by a much appreciated colloquium on compensation and division of property upon separation, held on April 24th in la Cour de Cassation under the auspices of Professor Hugues Fulchiron.

Anna Singer

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REPORT OF THE TREASURER:

Dear colleagues,

This is the final report submitted by Adriaan van derLinden. From now on, reports will be completed by Masha Antoloskoia, m.v.antokolskaia@vu.nl, who will also be making sure you are getting credit for the dues you've paid and issuing notices (though the website) when dues are due.

International Society of Family Law

Treasurer's Report of the year **2014** (in Euros)

In: _____

	Subscriptions	Royalties	Interest	Dividend	Profit
ING/PayPal	14.235.73	0	865,08		
Robeco				310,69	3.167,74
					+
In total:	14.235,73	0	865,08	310,69	3.167,74

Out:

	Bankcharges	Research Costs	Dividend (Tax) Board		Survey	2012 Scholarships Translator By-laws
ING+Paysquare	539,82		2.128,--	10.569,48	9.153,31	662,55
Paypal/Digirati	409,76	3.559,84				
Robeco			46,60			
+						
In total:	949,58	3.559,84	46,60	2.128,-- 10.569,48	9.153,31	662,55

Balance ISFL 2014

In:		Out:	
Subscriptions	14.235,73	Bankcharges	949,58
		Research costs	3.559,84
Interest	865,08		
Dividend	310,69	Dividend (TAX)	46,60
Profit	3.167,74		
		Board	2.128,--
		Survey	10.569,48
		Scholarships	9.153,31
		Translator	662,55
	----------+		----------+
Subsaldo	18.579,24		27.069,36
Result (negative)	**8.490,12**		
			----------+
Total	27.069,36		27.069,36
	========		========

Total account January 1, 2014		**Total account December 31, 2014**	
saldo ING	€. 66.716,71	saldo ING	€ 46.494,22
saldo Robeco	€. 33.306,34	saldo Robeco	€ 36.706,81
salso PayPal	0	saldo Paypal	€ 8.331,90
	_____+		_____+
	€. 100.023,05		€ 91.532,93

Total January 1, 2014:	**Euro 100.023,05**
Total December 31, 2014:	**Euro 91.532,93**
	_____-
Negative result 2014	**Euro 8.490.12**

Amersfoort, April 23, 2015

Adriaan van der Linden

Dr. Adriaan van der Linden, treasurer

REPORT OF THE WEBMASTER:

We are continuing to develop and improve the website. Please feel free to suggest content, or to send reports on recent developments in your country.

The generic password for members is ISFL2014 (it is not case-sensitive). If you want to change to your personal password, go to Update Member Details and then Update Password.

The website also allows you to find out when your membership expires if you are a current member. If your membership has already expired, it will ask you to renew.

To renew your membership, just log in with your email address. There have been a few problems because the last email address we have is out of date. If you have any difficulties please contact me at patrick.parkinson@sydney.edu.au. I can look up the email address we have for you.

Prof. Patrick Parkinson

University of Sydney

REPORT OF THE NEWSLETTER EDITOR:

I (and the Executive Council with me) welcome comments about the general format of the newsletter. This edition features three brief articles about family law changes in the Czech Republic, India and Brazil for the "What's New?" section. This type of addition would be particularly welcome in the times, like the present, between World Congresses, and we are thrilled that the contribution from India is by

a junior scholar and new member of the Society.

We also include a new feature inspired by the Colloquium Hugues Fulchiron and his team conducted in Paris in April. The team posed a problem in the handling of family property that we've reproduced, and various council members and younger scholars under their supervision have added "answers" from their countries' perspective. We hope it will not only be informative but also useful for comparative family law. We plan to draft and "answer" a question dealing with child custody for the next issue. If you would like to contribute, please send me an email, and I will send you the problem once Jo Miles and I have drafted it.

Many of you kindly send me updates of changes to your email addresses. This is very important, since otherwise not only will you miss the Family Letter, but also other notices that the Board sends out increasingly often from the website. When you get these notices, please do not reply to me but to the address indicated in the notice. The most important place to send changes of address is to Masha Antoloskoia, our Treasurer, though I will forward her your notes about address changes that are sent to me.

The instructions for reaching the membership directory are included below, in Patrick's notes.

Margaret F. Brinig, Editor
The Family Letter
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CONFERENCES AND CALL FOR PAPERS:

REPORTS ON RECENT CONFERENCES

Recife Conference E-Book

Selected Papers from the Recife Conference from Denmark, Belgium, New Zealand, Korea, the USA, Great Britain, the Czech Republic, and Australia are currently available in the member's section of the website. Since they are in ebook format (PDF), any member can download them (and extract any sections desired). We have obtained an ISBN number for the publication so it can be reported to authors' home institutions. It is 978-0-994805-0-5.

WHAT'S NEW?

Czech Family Law: New Civil Code

By Zdeňka Králíčková

It is generally known that Czech Family Law was – as in many other countries of Soviet influence – adapted according to Soviet model (for detail see Haderka in Survey 1996, 2000). As late as 2012, after a long transitory period typical of a great number of disparate amendments of the old codes that had been produced after 1989, a New Civil Code was adopted as the Act No. 89/2012 Coll. It came into effect on the 1st January 2014 (for the English version see http://obcanskyzakonik.justice.cz/anglicky-jazyk/, for French version see http://obcanskyzakonik.justice.cz/francouzsk

y-jazyk/ and for Russian version see http://obcanskyzakonik.justice.cz/rusky-jazyk/).

The New Civil Code continues to respect traditional values of the European Judeo-Christian culture. However, the Civil Code also includes some important novelties that have been present in other (non-communist) European codes for a long time thanks to human rights covenants, the case law of the Constitutional Courts and of the European Court of Human Rights and various academic activities originated especially in the Commission on European Family Law (CEFL).

Regarding some details, marriage may be still concluded only by a man and a woman (registered partnership regulated by a special Act from 2006 is intended only for same-sex people), community of property is still a statutory property regime (however, contracts are now available, but not used much in practice), many provisions quite strongly protect the economically weaker party both in retention of the family dwelling and against domestic violence (which is a novelty, beside police and court bans etc.). Divorce is still based on irretrievable breakdown, while parental responsibility is newly designed according to the CEFL Principles. The maintenance duty is based on a principle of the same living standard and savings for children are possible. Affiliation rules are quite traditional (such as that a mother is a women who delivered a child and there are three legal presumptions for establishing legal fatherhood). Adoption of minors is based on the rule *adoption natura imitatur* according to revised European Convention on Adoption of Minors and beside that, adoption of adults is now possible, which is a reminder of traditions (for details see Králíčková in Survey 2014).

Two decisions in an a Religiously Plural India

Sayali Bapat
Doctor of Juridical Sciences (SJD) Candidate, Emory University School of Law

Developments in Family and Child Law in India

The years 2014 and 2015 have seen some interesting developments in Family and Child Law in India.

Adoption of children by Muslims under the Juvenile Justice (Care and Protection of Children) Act, 2000

The Supreme Court of India on February 19, 2014 decided that Muslims in India may adopt children under the secular Juvenile Justice (Care and Protection of Children) Act, 2000 (Act No. 56 of 2000). This case becomes particularly interesting because most family law in India is not a set of uniform laws governing all Indian citizens equally, but is law that governs according to the personal religious law of the parties involved.

In Shabnam Hashmi v. Union of India [AIR 2014 SC 1281], the petitioner prayed for the Supreme Court to declare that the rights to adopt, and to be adopted are Fundamental Rights under Article 21 (right to protection of life and personal liberty) of the Constitution of India. The petitioner also asked the Court to lay down guidelines enabling persons to adopt children irrespective of the adopter's religious identity, and recommended that the Indian

government enact a law which would elevate the best interest of the child above all other considerations, including religion.

Regarding the second prayer, the Court held that the passage of the Juvenile Justice Act in 2000, the amendment to the Act in 2006, and the Juvenile Justice Rules promulgated in 2007,*"substantially fructified"* the same (*Hashmi* opinion, para 2).

The Juvenile Justice Act is secular legislation that bears upon the rights of children in need of care and protection and provides for their adoption irrespective of religious identity. Prior to this Act, only Hindus could adopt children under the Hindu Adoptions and Maintenance Act, 1956 (Act No. 78 of 1956). Persons belonging to other religions could only be appointed as guardians under the Guardians and Wards Act, 1890 (Act No. 8 of 1890).

In considering the *Hasmi* case, it is important to note that the major schools of Islamic law have generally considered adoption, where a child's identity is fully absorbed into the identity of the adoptive family, to be forbidden. In place of legal adoption, *Sharia* law permits a system of guardianship, known as *kafala*, which entails permanent guardianship and maintenance obligations, but does not involve severance of ties with the biological family, or the creation of legal ties with the family adopting the child.

In lieu of this alternative provided by religious *Sharia* law, The All India Muslim Personal Law Board contended that Islamic Law principles must be kept in mind before declaring a Muslim child available for adoption. However, the Supreme Court stated that the Juvenile Justice Act was merely enabling legislation that did not mandate action by any prospective parent, and left it up to them to choose whether they wanted to adopt according to the provisions of secular law, or follow the dictates of the faith they adhered to. Thus, according to the Court, *"an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which [..] would always continue to govern any person who chooses to so submit himself until such time that the vision of a Uniform Civil Code can be achieved"*(*Hashmi* opinion, para 11). While the Supreme Court focused on the rights of prospective parents to adopt irrespective of religion, it seems to have overlooked the rights of children to be placed with adoptive families in accordance with the tenets of the child's faith.

Regarding the first prayer, the Court refused to declare the rights to adopt and to be adopted as fundamental rights under Part III of the Constitution of India. While this issue has been dealt with in part by the High Courts of Bombay and Kerala in, In the matter of Manuel Theodore D'Souza [2000(2) Bom CR 244] and Philips Alfred Malvin v. Gonsalvis [AIR 1999 Ker 187], respectively, the Court held that the decisions in those cases were to be understood as controlled by their own facts. Both cases were decided prior to the passage of the Juvenile Justice Act. In the *Manuel* case, the High Court of Bombay decided that the right to be adopted by willing parents was part of the fundamental right to life of an abandoned child. The High Court of Kerala in the *Philips* case held that an adoption by a Christian couple was valid, thereby entitling the adopted son to a share in their property. However, the Supreme Court, usually known for its activist stance, decided in *Hasmi* to show restraint and stated that elevating the rights to adopt and to be adopted to the status of Fundamental Rights could only be possible when India decides to enact a Uniform Civil Code to govern family law.

Proposed changes to the rights of a Hindu wife to maintenance under the Hindu Adoptions and Maintenance Act, 1956

In the case of Avtar Singh v. Jasbir Singh [2014(4) RCR (Civil) 882] the Punjab and Haryana High Court stated as obiter dicta, that the Hindu Adoptions and Maintenance Act, 1956 (Act No. 78 of 1956) does not allow the wife of a mentally ill spouse to claim maintenance from her husband's relatives, and should be revised to do so.

Section 18 of the Act allows a Hindu woman to claim maintenance from her husband. Section 19 allows a widowed daughter-in-law to claim maintenance from her father-in-law, provided she is not able to maintain herself from her own earnings or the earnings from property, owned by her, the estate of her husband, her parents or her children.

The issue was forwarded to the Law Commission of India, which, in its report published in January 2015 [Law Commission of India, Report No. 252 Right of the Hindu Wife to Maintenance: A relook at Section 18 of the Hindu Adoptions and Maintenance Act, 1956] has recommended that a Hindu wife of an incapacitated spouse be allowed to claim maintenance from members of her husband's family. Specifically, it has suggested that sub-section 4 be added to Section 18 of the Act, which would read as follows: "*Where the husband is unable to provide for his wife, on account of physical disability, mental disorder, disappearance, renunciation of the world by entering any religious order or other similar reasons, the Hindu wife is entitled to claim maintenance during her lifetime, from members of the joint Hindu family of the husband, except where the husband has received his share in the joint family property"* (Law Commission Report, page 15). This issue is yet to be taken up for consideration by Parliament.

Three Important cases from Brazil

The Brazilian Supreme Court will shortly take up three important cases, dealing with the constitutionality of same-sex marriage, social versus biological parentage, and the inheritance rights of cohabiting versus married persons. We present discussions of each in turn. José Fernando Simão and Thalles Alciati Valim.

The Brazilian Constitutional and Supreme Court, *Supremo Tribunal Federal* (STF), is about to decide, by means of an abstract control of constitutionality (ADI 4.966), the viability of same-sex marriage according to national legislation and jurisprudence. The control of constitutionality will analyse the Resolution n. 175/13, from *Conselho Nacional de Justiça* (CNJ), an administrative organ which is part of the Judiciary, and is charged of the instructions for civil registration.

The present resolution came as a result of the STF's judgment (ADPF 132/RJ e ADI 4277/DF), admitting an expansive interpretation to article 226, § 3rd, from Brazilian Constitution, and permitting the civil union (common-law cohabitation) of people of the same sex. However, in that same article, there is the duty entitled to the State, of facilitating the conversion of the cohabitation into marriage. Therefore, due to this conjuncture, the CNJ permitted civil unions to be converted in marriages or, even, logically, that the couple could directly file for marriage's habilitation.

In Brazil, a country in which the theme is being evolved by the hands of the Judiciary, due to the Legislative inertia – since the Civil Code still dictates the marriage being constituted solely by man and woman, and that there is no law regulating the same-sex marriage –, the judgment of ADI 4.966 may put the debate at rest, considering that the STF's interpretation of the Brazilian Constitution is binding.

Secondly, the Brazilian Supreme Court (STF), will decide, soon, if the affection bond between a child and the person who raised him prevails over the bond between biological parents and their children (RE 841.528-PB). This judgment may put an end to the controversy raised in the Judiciary during the last decade or so.

Three situations defy the Brazilian Judiciary: (i) a man who knows that he is not the biological father but still raises the child as his own; (ii) a man who finds out that he is not the biological father, being deceived by his wife; (iii) and a son who finds out that the person he always considered his biological father is not and decides to seek the paternity from his true biological father.

The recent doctrine and jurisprudence argue that the factual exercise of parental authority must prevail over the biological bond. One of many examples occurs when a stepfather who lived longer with his stepchildren than did the biological father, to the point where they became their father figures, would be acknowledged by Brazilian Law as being capable of establishing filiation and, with it, all of its rights and duties.

The controversy is identified by the collision between fundamental rights recognized in the Brazilian Constitution, which are the rights relating to the personality (CF, art. 1º, § 3º), especially the identity right that biological parents and their children have secured by the recognition of filiation; and the child's right of full development (CF, art. 227, heading – best interest of the child), of having recognized as his parent the person considered as such.

In the third important family law case, the Brazilian Supreme Court (STF) will answer if the situation of inequality of succession rights, concerning spouses and cohabitants, violates Brazil's Constitution. The decision (RE 878.694) will analyze the context created by articles 1.790 and 1.829 of Brazil's Civil Code. Nowadays, these articles regulate differently the succession rights of spouses and cohabitants.

The Minister (title given to Supreme Court judges) in charge of the process, Luis Roberto Barroso, attested that "the debate about the validity of the articles that state distinct succession rights to spouses and cohabitants, distinguishing the family originated by marriage from the one originated by cohabitation, has constitutional nature, especially in light of the principle of equality and of the article 226, § 3º, from the Constitution, according to which 'for the effect of State protection, the cohabitation between man and woman is recognized as a familial entity, being the Law's duty to facilitate its conversion to marriage'" (free translation).

If the unconstitutionality of the classification is recognized, the cohabiting partner of the deceased will have the same succession rights that he would if he or she were married. Being so, there will be no limits to his share, as it has for the time being, according to article 1.790, from the Brazilian Civil Code, which won't be applicable anymore.

A HYPOTHETICAL CASE AND ANSWERS FROM COUNCIL MEMBERS:

Problem drafted by Clara Delmas and Aurélian Moliere:
PECUNIARY COMPENSATION AFTER SEPARATION

Wording of the practical case.

Patricia, 35 years old, and James, 38 years old, met in 1993 during a "speed dating" event organised by a bar. It was love at first sight, so they immediately moved together in the flat (estimated € 120 000) that James had bought when he was an executive in an online selling society. At this time, he perceived good revenues. Since 1990, he has not worked anymore, and the society that used to employ him bankrupted. Patricia is also owner of an apartment (estimated € 90 000), which she rents out since she moved in with James. In order to increase the rent, James did some renovations in the apartment (the latter is now valued € 100 000), financing the materials and equipment necessary (amount of € 4 000).

Bored of being employed, Patricia decided to get into her own commercial activity. This is a good time to do this as she just sold her flat for € 100 000. With a part of these funds, she bought a trendy vehicle with a potential to generate profit: a fully equipped food truck (estimated € 30 000). James, still unemployed, helps her in the development of her food service commerce by dealing with accountancy and restocking.

First hypothesis:

Patricia's activity has become more and more time-consuming and James feels progressively abandoned. He starts looking for attention via an online discussion website where he meets Elsa, a young single woman who is 28 years old. Crazy in love with this woman, and perturbed by his sense of abandonment, he gathers together Patricia's things, put them on the landing, and changes the locks of the apartment. Then, by a phone call, he informs her of the situation and the end of their love story.

Second hypothesis:

After seven years of cohabitation, the couple decided to marry in 2000. They opted for a matrimonial convention with a separation of property regime because of the risks of debt that Patricia's commercial activity involved.

After one year of marriage, the couple couldn't stand the urban life anymore. Patricia decided to reinvest a part of the funds remaining from the selling of her apartment in the purchase, with James, who just found a new job, of a splendid cottage (estimated € 420 000). The deed, executed in 2005, mentioned that the property was acquired by the two spouses and financed as follows: a contribution from Patricia (of € 126 000, that is to say 30% of the purchase price), a contribution from James, who just sold his apartment (of € 168 000, that is to say 40% of the purchase price); the last € 126 000 to be paid by way of a 10 years loan, with instalments repaid by James and Patricia in an egalitarian way. Everything seems perfect for the couple until 2011. During that year, Patricia was the victim of a serious accident. Badly harmed at her back, she cannot keep standing for hours and is obligated to cease her activity. Anyway, her business was declining and had begun to be

in deficit. The suppliers are claiming the amount of € 15 000 of unpaid bills. With no income, and in debt, she cannot pay the instalments of the loan contracted with James. The latter, understanding, agrees to pay the full amount what remains; they would settle this as soon as Patricia's situation gets better. As she can't stand being inactive, she starts looking for a job that she could practice without putting a strain on her back. The attempts resulted in successive failures, and tensions start to grow within the couple, who split in the first months of 2015 when Patricia decided to leave. She moved to the home of a friend who agreed to accommodate her temporarily. There is no chance of reconciliation and divorce seems unavoidable. On top of this, her father just died, letting her a sum of money of € 40 000.

***Situation by the time of the divorce*.**

Patricia's estate:

Assets:

- No incomes;
- A saving account with € 40 000;
- A car estimated € 5 000;

Debts:

- € 8 000 of professional debts.

James' estate:

Assets:

- An annual income of € 38 400;
- A saving account with € 60 000;
- A car estimated € 15 000;

Debts:

- € 2 000 for the maturities of the loan secured in order to buy the car.

House bought by the couple: evaluated € 440 000.

Loan secured for the acquisition of the house: the amount has been repaid as follow:

- € 126 000 have been initially borrowed, that is € 134 000 with interests;
- Patricia repaid € 40 200;
- James repaid € 93 800.

Responses from ISFL Executive Council Members:

BRAZIL

José Fernando Simão, University of São Paolo
Thalles Ricardo Valim, University of São Paolo

First Hypothesis

In Brazil, the simple fact that two people live together sharing efforts with the idea of constituting a family is what we call an "união estável", something similar to the

"common-law cohabitation". This de facto union is regulated by our Civil Code (arts.1.723-1.727). In this specific case, the regime is the one established by the Law, that is, the regime of partial community property (Civil Code, art. 1.725).

By this regime, only the goods and the real estate acquired by the couple during the union is shared in case of separation, with a few exceptions determined by the law (Civil Code, art. 1.659). In the studied case, since both apartments were acquired before the union, they remain separate property, not to be shared during the separation (Civil Code, art. 1.659, I).

However, the law clearly states that the improvements made in the private property of each partner must be shared between them in case of separation. Since James has contracted a debt of 4.000,00 euros just to increase the value of Patricia's apartment, not just the debt but also the increase of value in the apartment belong to both partners. Since the increase of value estimated in 10.000,00 euros, each partner is due half of that amount, as well as is half of the debt contracted by James.

In this regime of partial community property, the real subrogation protects the private property of each partner from being shared (Civil Code, art. 1.659, in fine). Being so, the food truck bought by Patricia with part of the money gained from the sale of her apartment, as well as what remained of that sale, belong solely to her, not considering the 10.000,00 euros that has to be shared.

There is still the question of the improper behaviour of the partners during the union that may cause patrimonial consequences. According to what was told, James felt abandoned by Patricia, who dedicated more and more of her time to her profession. However, it happens that in our law the legal duty of mutual assistance, however imposed by the law, has no sanction whatsoever, leading to the conclusion that Patricia's behaviour can't affect the separation of property of the partners.

On the other hand, James' behaviour, showing infidelity to his partner and, not just that, but casting her out of her usual residence all of a sudden constitutes a violation of the principle of good faith, specifically mentioned by our law. This violation constitutes an abuse of rights, thus is illicit by our law (Civil Code, art. 187), since James contradicted an expected pattern of behaviour shown during a significant amount of time. It is what we call a venire contra factum proprium (from Latin). In doing so, Patricia can demand civil reparation for the damages caused by James' attitude.

Finally, due to the fact that James was unemployed and, in the meantime, was helping Patricia in her affairs, he can demand spousal support (alimony). This will depend on Patricia's capability of providing it and James' necessity for it (Civil Code, art. 1.695).

Therefore, we come to the conclusion that the increase of value in Patricia's apartment, as well as James' debt must be equally shared by the former partners. There is also the possibility of Patricia demanding reparation of damages caused by James' wrongful act and the possibility of James receiving alimony from Patricia.

Second hypothesis

In the second hypothesis, we have to consider two different periods to verify the patrimonial aspects of James and Patricia's divorce. A first period, running between 1993 and 2000, was the period during which James and Patricia had a common law marriage. During this period, the conclusion will be the same as the one we reached in

the first hypothesis, that is, the division of the 4.000,00 euros in debt and of the 10.000,00 euros in improvements.

The second period begins in 2000, with Patricia and James' wedding, since the two had contracted a prenuptial agreement stating the regime of separation of property as the one regulating their marriage. In this regime, the spouses don't share any assets with each other (Civil Code, arts. 1.687-1.688).

In 2005, the couple decided to buy a cottage valued in 420.000,00 euros. By the regime of separation of property, the couple constitutes, therefore, a condominium in which Patricia paid 30% of the value while James paid 40% of the value. The remaining 30% were financed by both, each one being responsible for half of the loan.

However, in 2011, Patricia suffered an accident and couldn't keep up with her business. She ended up contracting a professional debt in the amount of 15.000,00 euros and asked James to pay what was still left on the loan. Till this moment Patricia had paid 30% of the total amount financed. James, thus, ended up paying 70% of the loan contracted by the couple. The condominium established between Patricia and James, therefore, was divided, by the end of the loan, in two parts, with James' composed of 61% of the property and Patricia's 39%.

In 2015, the couple divorced and Patricia received 40.000,00 euros of his father's inheritance. By the regime of separation of property nothing of what is inherited can be shared at the end of the union, with this amount constituting a private property belonging solely to the heir (Civil Code, art. 1.687).

There is still the remaining property of the couple. Both James and Patricia's incomes are not to be shared. In the hypothesis of one of them depending on the other to survive, the spouse capable of providing sustenance will have to pay alimony to the other. However, in this hypothesis, both James and Patricia have a stable profession and can live independently.

The 60.000,00 euros that are deposited in a bank account in James' name are his and cannot, therefore, be reached by Patricia due to the regime chosen by the couple.

Each one of the spouses has a car. James has one valued in 15.000,00 euros while Patricia has another valued in 5.000,00 euros. One has to distinguish three different moments to decide if the cars will or not be shared. Firstly, the moment before the year of 1993, during which the couple didn't have any relationship. In the event of being the cars acquired prior to 1993, they would be private property of each one and, therefore, would not be shared. In the event that the cars were acquired during the period of 1993 till 2000, they would be presumed as being common property of the couple and, thus, would be shared. Finally, if the cars were bought after their marriage, by the regime of separation of property the cars would be private and wouldn't be shared. We'll assume the latter as our premise.

There is, still, the debts of each spouse. James contracted a debt calculated in the amount of 2.000,00 euros for the financing of his car. Since the car was solely his, the debt acquired in its purchase need not also be shared with Patricia. The same goes for the debt contracted by Patricia in her profession.

To sum up, then, in this second hypothesis, besides what was due to each spouse in the first hypothesis, there is still the quota that each one of them has in the condominium of the cottage, with James the owner of 61% of it and Patricia of 31 %. The incomes, cars and debts are of each one exclusively and, thus, cannot be shared.

PECUNIARY COMPENSATION AFTER SEPARATION IN FRENCH LAW

First hypothesis:

1. The renovation of Patricia's apartment by James.

   French law does not provide any specific provision regarding cohabitation breakdown. It is possible to resort to unjust enrichment that allows compensation for the impoverishment of one person, that impoverishment having caused the increase in wealth of another person, without any justification. French jurisdictions are very strict regarding those conditions. The difficulty exists regarding the lack of cause.

In our present case, Patricia could retort that her impoverishment is explained by the donative intent that James manifested by carrying out voluntarily the renovation of the apartment.

2. The help brought by James to Patricia in her professional activity.

   This is another quasi-contract that could be solicited: the de facto company. Three conditions are required: the existence of contributions, the intent to participate in the loss and benefits, and the intent of being associated (*affectio societatis*). The applications often fail because of the last condition, the French Cour de Cassation refusing to assimilate the intent of being economically associated and the intent of being emotionally associated.

3. The harshness of the breakdown.

   Cohabitation breakdown is free; compensation cannot therefore be admitted because of the breakdown by itself. Nonetheless, the Cour de Cassation has admitted that when there are circumstances capable of establishing the existence of a fault, punitive damages can be granted to the forsaken cohabitant (art. 1382 of the French Civil code).

In our present case, the circumstances bring up misconduct from James that might justify compensation.

Second hypothesis:

1. The purchase of the cottage in joint ownership. The property does not depend on the financing. Without any precision in the title deed, the good bought by two persons is jointly and equally owned. However, James has contributed more to the financing of the cottage. Can he obtain compensation? Not necessarily, because the spouses are obligated to contribute towards the expenses of the marriage proportionally to their respective abilities (art. 214 of the French Civil code). Yet, James has a better economic situation than Patricia. Then, it is normal that he contributes more. Indeed, he could ask for compensation only if he can prove that he has provided an excessive contribution.

2. Compensation of the disparity created by the dissolution. The patrimonial situation of each spouse reveals an evident disparity, to the detriment of Patricia. Thus, she can claim for a compensatory allowance (art. 270 of the French Civil code). In principle, this allowance is deposited in the form of a lump sum, but it could also be a lifetime annuity if the creditor is not able to sustain himself/herself because of his/her age or health.

In our present case, the question of payment by annuity can arise because Patricia is now 57 years old and has health problems that can jeopardize her job search. In fact, it is not certain whether she could find a new source of income.

Clara Delmas and Aurélian Moliere

GERMANY

Hypothesis 1:

Compensation claim of James:

1. Compensation for saved expenditures

Moving to James apartment, Patricia saved expenditures for housing during that time. The question is whether James can claim compensation in this regard. Lacking specific statutes that regulate compensation after the dissolution of an informal partnership, the case must be solved by applying the principles developed in case law. In principle, the Federal Supreme Court denies compensation claims after separation. Compensation based on legal grounds such as civil law partnership, unjust enrichment or frustration of contract may only be claimed if the partner's contributions appreciably exceed regular contributions made in the course of everyday life. Thus, for example, regular contributions to the living expenses, the rent for the common apartment or usual repair measures remain uncompensated. The provision of a flat does not appreciably exceed regular contributions made in the course of everyday life. Therefore James cannot claim compensation for saved expenditures in this regard.

2. Compensation for the renovation of Patricia's apartment

Possibly James can claim compensation for the renovation work and financial contributions he made in order to finance the necessary materials and equipment. Substantial financial contributions or work may be compensated if certain conditions are fulfilled. In the present case compensation based on the ground of frustration of contract (§ 313 German Civil Code) comes into consideration. Therefore James must have made the contributions based on the expectation that the informal relationship would last. However, it will only be granted if upholding the contract would be unreasonable. As neither the work performance nor the contribution of 4.000 € are "substantial contributions," no compensation can be claimed.

3. Compensation for the work performances supporting the food business

For the accounting and restocking work James may possibly claim compensation based on civil partnership law. Therefore James and Patricia must have concluded an implied partnership agreement by acting in pursuit of a goal that exceeds the object of merely maintaining their informal partnership. In the past the Court has granted compensation based on a civil law partnership for the support provided for the establishment and the operation of a business. Thus, if James' contributions appreciably exceeded regular contributions made in the course of everyday life, he may claim compensation for the accounting and restocking work.

Mirjam Zschoche, LL.M.

Research Assistant to Professor Nina Dethloff, Director of the Institute for German, European and International Family Law, University of Bonn

GREECE

On the First hypothesis:

Since no contact of cohabitation has been concluded between Patricia and James, James could only bring an action against Patricia on the basis of unjust enrichment (articles 904 ff.CC), claiming the increase of the value of Patricia's apartment that can be attributed to his contribution (i.e. renovation works).

On the Second hypothesis

1. Patricia can bring a claim for maintenance against James. According Greek Civil Code, a claim of one of the former spouses to maintenance presupposes on the one hand the claiming spouse's inability to secure his own maintenance, even if he/she were to spend his/her principal, and on the other hand the ability of the other former spouse to provide such maintenance In addition to those general preconditions, the former spouse entitled to maintenance must also be unable to exercise a suitable profession on account of age, health, or the need to care for a minor child, or on account of the inability to find stable work or the need for professional training (Art 1442 CC).There is the case of Patricia.
2. A basic principle of the Greek Civil Law is that each spouse's assets are separate and autonomous (Art. 1397 CC). The one limitation to the separateness and autonomy of the couple's assets is the claim to participate in the increments following the dissolution or annulment of the marriage.

By "claim to participate in the increments of the assets of the other spouse," we mean that each spouse, after the dissolution or annulment of the marriage, is entitled to claim from the other spouse part of the assets accumulated during marriage, provided of course that he/she is able to prove that this increase of assets is also due to his/her own contribution (Art. 1400, 1 and 2 CC). What each spouse acquired from gift, inheritance, legacy, or the proceeds from the disposal of such acquisitions is not considered an increase of assets during marriage (Art. 1400, 3 CC)

However, because it is difficult to prove the contribution of the one spouse to the assets of the other (there are included all manners of contributing), the Greek Civil Code establishes a rebuttable presumption by which such contribution is limited to one third (⅓) of the increase.

On this basis, James could have a claim against Patricia, if her property increased during the marriage. This, however, does not seem to be the case. Furthermore, Patricia would also have a claim against James for the increase of his property during the marriage. However given the facts of the case, it seems probable that James would manage to overturn the presumption that Patricia contributed (to 1/3) to the increase of his property.

Prof. Penelope Agallopoulou

SOUTH AFRICA

First hypothesis:

In South African law there is no comprehensive law of cohabitation. Cohabitees must regulate the proprietary consequences of their relationship by themselves (e.g., by contract). If they do not do so, the position is that each cohabitee retains property that he or she brought into the relationship, and owns all property that he or she purchases during the relationship. Property acquired jointly is shared. The principles of unjustified enrichment may apply (for example in respect of the improvements to the property owned by Patricia). Generally speaking, the common home is the sole property of the cohabitee in whose name it is registered; the other cohabitee has no right to live there either during the existence of the relationship or after its termination. Patricia will therefore have no claim in this regard.

A solution that may however apply is the universal partnership, which may be entered into either expressly or tacitly.[9] In the latter case, the conduct of the parties is decisive. Three requirements must be met for such a partnership to exist: (i) each of the parties must contribute something; (ii) it must be for their joint benefit; and (iii) the object should be to make a profit. If these requirements are complied with, a court could find that a universal partnership of *all* property[10] was entered into, and the court could divide this property (i) in accordance with any agreement by the partners; (ii) if no agreement can be reached, according to their respective contributions; or (iii) if the contributions were equal, or if the extent of their contributions cannot be determined, equally.[11]

Second hypothesis:[12]

In South Africa, spouses must enter into an antenuptial (or pre-nuptial) contract in order to marry with complete separation of property. In this contract, they must also expressly exclude the accrual system (a type of deferred community of gains),[13] otherwise the accrual system automatically applies to their marriage.[14] The terms of the antenuptial contract may be relevant to determine the proprietary consequences of divorce (for example in respect of marriage settlements, etc.).

In this hypothetical scenario, it is assumed that the accrual system does *not* apply. In such a marriage (i.e. with complete separation), the general rule is that there is no sharing of property at divorce. Each spouse retains his or her pre- and post-martial assets and is solely responsible for his or her debts (unless they relate to household necessities, in which case spouses are jointly and severally liable). At divorce, the parties may deviate from these rules by entering into a

[9] See *Butters v Mncora* 2012 (4) SA 1 (SCA).

[10] Over and above the universal partnership of all property (*both present and future, whether from commercial undertakings or otherwise*), South Africa also recognises a universal partnership of everything acquired during the partnership from every kind of *commercial undertaking*. The latter form may be relevant to the second hypothesis discussed below.

[11] For a general discussion, see Bradley Smith "The dissolution of a life or domestic partnership" (ch 10) in Jacqueline Heaton (ed) *The law of divorce and dissolution of life partnerships in South Africa* (2014, Juta).

[12] For a general discussion, see Jacqueline Heaton "The proprietary consequences of divorce" (pp 98-107) in Jacqueline Heaton (ed) *The law of divorce and dissolution of life partnerships in South Africa* (2014, Juta).

[13] The accrual system's functioning is set out in the Matrimonial Property Act 88 of 1984.

[14] Section 2 of the Matrimonial Property Act 88 of 1984.

settlement agreement (or consent paper) that regulates the patrimonial consequences of their divorce.[15]

If they do not enter into a settlement agreement, one of the spouses will have to pay out the other's share of the cottage, as it is co-owned by them. In this case it will be assumed that James will be the one who wishes to become sole owner of the cottage. As the title deed stipulates the proportion of their co-ownership (in this case, James holds a 55% share and Patricia a 45% share),[16] he will have to pay to Patricia 45% of € 440 000 (the value of the cottage). He will have a contractual claim against her for € 25 000 (her share of the mortgage loan which he paid on her behalf).

There is the further possibility of the court being requested to grant a forfeiture of patrimonial benefits order, one that is regulated by section 9 of the Divorce Act 70 of 1979. This would have to be specifically pleaded by either spouse, and must comply with the requirements of the Act.[17]

Prof BS Smith
University of the Free State

SOUTH KOREA

First hypothesis:

Article 839-2 of the Korean Civil Code provides a kind of equitable division, prescribing that a divorcing party can file an order for division of all the properties acquired by either party during their marriage. The case law extends it to a separating party of cohabitation, even though it was originally designed to apply only to divorce. Consequently, James can file a division order, if Patricia's business has some net value, save for her truck, to be divided: Patricia's truck and James' flat are not marital properties because they are either a property acquired before the couple formed cohabitation or a substitution therefor. James' contribution to Patricia's business is considered as a factor to raise fraction due him under the division.

Second hypothesis:

A divorcing party can file an equitable division, article 839-2 of the Korean Civil Code. All the marital assets, i.e. properties acquired during the marriage, except those properties donated or bequeathed, by either party and marital debts, i.e. debts incurred to acquire or maintain marital assets or support the couple's household are considered in assessing the value of marital property

[15] It is possible for spouses married out of community of property to enter into a universal partnership of property acquired only from commercial undertakings (see footnote 2 and Heaton [supra note 4 at 99, 100]). If such a partnership exists, this will of course influence the proprietary consequences of their divorce. This possibility does not however appear likely on the facts provided in the second hypothesis.

[16] James's share is the 40% deposit on the cottage plus 15% (his half of the mortgage loan) and Patricia's is her 30% deposit plus 15% (her half of the mortgage loan).

[17] Section 9(1) of the Divorce Act states that: "When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited."

to be divided. The value of marital property in this case is € 518,000 (= house € 440,000 + Patricia's car € 5,000 + James' saving account € 60,000 + James' car € 15,000 – James' debt incurred to buy his car € 2,000). Patricia's saving account and her business debt are excluded in assessing process because they are not 'marital'. Each party's contribution to marital property including their house and their matrimonial or non-matrimonial agreements are, along with the period of their marriage, considered in deciding the division proportions. Much relies on the reasonable discretion of judge, however.

Prof. Dr. Jinsu Yune, Prof. Dr, Dongjin Lee, Seoul National University

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RECENT PUBLICATIONS OF NOTE BY ISFL MEMBERS:

(Please send any submissions for future newsletters to
Ursula Bassett, ucbasset@yahoo.com).

1. Family Law in General: History; Theories; Overviews

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PARKINSON, Patrick, "Children's 'Wishes and Feelings' in Relocation Disputes", Sydney Law School Research Paper No. 14/100, November 2014

NOTE: The Newsletter will publish notices of recent publications dealing with family law topics if the following information—Name of author, title of article or chapter, title of book or journal in which it is published, the volume and pages, the year of publication (and if the title of the article, chapter and/or book or journal is not in English a translation of the same into English - so that the entry can be placed in the appropriate category)—is sent to Prof. Ursula Basset, ucbasset@yahoo.com.

OTHER PUBLICATION NOTES:

DETLOFF, Nina. "BOELE-WOELKI/DETHLOFF/GEPHART (EDS.), FAMILY LAW AND CULTURE IN EUROPE – DEVELOPMENTS, CHALLENGES AND OPPORTUNITIES, EUROPEAN FAMILY SERIES, VOL. 35, INTERSENTIA 2014"

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